Concerned Citizens of Pony v. Department of Health and Environmental Sciences
ADV 90-144, 1st Judicial District
Judge McCarter
Decided 1990

MEPA Issue Litigated: Should the agency have conducted a MEPA analysis (an EIS)?

Court Decision: No

DECISION AND ORDER

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

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CONCERNED CITIZENS OF PONY, INC., Plaintiff, -vs- MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, Defendants.	Cause No. ADV 90-144 DECISION AND ORDER

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On March 1, 1990, the Court issued an alternative writ of mandate directing the Department of Health and Environmental Sciences (DHES) to revoke the Chicago Mining Company's (CMC) Montana Ground Water Pollution Control System permit, require CMC to resubmit an application for the permit, and commence the preparation of an Environmental Impact Statement on the issuance of the permit, or appear to show cause why such a writ of mandate should not issue. On March 6, 1990, DHES filed a motion to quash the alternative writ as an inappropriate remedy. Oral

argument was heard on March 12, 1990, and briefs were filed. The matter is now submitted for decision.

DISCUSSION

This action arises out of mining activities of the CMC near the small community of Pony in the Tobacco Root Mountains of Madison County. CMC proposed to operate a custom flotation and cyanide vat leach mill for the recovery of precious ores from mines in southwestern Montana. On July 17, 1989, CMC applied for a Montana Ground Water Pollution Control System permit (permit) from DHES, which began an Environmental Analysis (EA). The EA concluded that an Environmental Impact Statement (EIS) was not necessary. Public response was invited and an amended EA was subsequently issued. The permit was issued on January 8, 1990. The Plaintiff, the Concerned Citizens of Pony, Inc., has sued for a writ of mandamus alleging several inadequacies in the EA and permit process, and asking that the Court void the permit, order DHES to require CMC to reapply for the permit and process it in compliance with the Water Quality Act, and perform an EIS before issuing another permit. The sole issue presently before the Court is whether a writ of mandamus is the proper remedy.

In general, a writ of mandate or mandamus will lie only to compel a government agency or officer to perform an act that is ministerial in nature. A ministerial act is one that has no room for discretion, official or otherwise, the performance

being required by direct and positive command of the law. 52 Am.Jur.2d, Mandamus, section 80. It is an act that an official or agent is required to perform given a certain state of facts in a prescribed manner without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. To this end, there must be a clear legal duty to perform the act sought. State ex rel. Swart v. Casne, 172 Mont. 302, 309, 564 P.2d 983, 987 (1977); State ex rel. Browman v. Wood, 168 Mont. 341, 344-45, 543 P.2d 184, 187 (1975); Kadillak v. Anaconda Co., 184 Mont. 127, 143, 602 P.2d 147, 156 (1979). Thus, mandamus will not lie to control discretionary action. North Fork Preservation Association v. Department of State Lands, 46 St.Rep. 1409, 1422, 778 P.2d 862, 872 (1989); Cain v. Department of Health and Environmental Sciences, 177 Mont. 448, 451, 582 P.2d 332, 334 (1978); Burgess v. Softich, 167 Mont. 70, 73, 535 P.2d 178, 179 (1975).

Nor will mandamus lie to correct or undo action already taken. Marbut v. Secretary of State, 231 Mont. 131, 134, 752 P.2d 148, 150 (1988); State ex rel. Popham v. Hamilton City Council, 185 Mont. 26, 29, 604 P.2d 312, 314 (1979); State v. Babcock, 147 Mont 46, 50, 409 P.2d 808, 810 (1966). It may only be used to compel performance of a clear legal duty.

THE WATER QUALITY ACT

The Plaintiff has alleged that in issuing the permit, DHES has violated a clear legal duty mandated by the Water Quality

Act, Title 75, Chapter 5, MCA. The clear legal duty, as asserted by the Plaintiff, stems from the stated purpose of the Act, as well as the substance of the rules promulgated pursuant to the Act.

The stated policy and primary purpose of the Act is to provide a comprehensive program and additional and cumulative remedies to prevent, abate, and control the pollution of state waters. Sections 75-5-101(2), 75-5-102(1), MCA. This is a general statement and does not prescribe any clear legal duty upon which mandamus may lie. It simply does not provide a ministerial act for an official or agency to perform. The Plaintiff has referred to various rules promulgated under the Act as establishing clear legal duties that DHES failed to perform during the permit process. Specifically, Plaintiff has referred to ARM 16.20.1013, which requires that the permit application must contain certain information "as deemed necessary by the department." [Emphasis added.] The quoted language certainly leaves the content of the permit application (as it relates to this regulation) up to the discretion of DHES. Plaintiff further contends that one may read the above regulation together with other regulations and determine that a clear legal duty exists. ARM 16.20.1014 states that "[n]o application will be processed by the department until all of the requested information is supplied and the application is complete." This, Plaintiff argues, requires that DHES gather

adequate information in advance of the issuance of the permit to determine if it is in compliance with the water quality standards. While Plaintiff's argument has some merit, the Court cannot see how this regulation can form the basis for a writ ordering an EIS. The language itself suggests that the completeness of the application turns on whether the applicant has supplied all the requested information. Since it is the department that decides what information is necessary, and not the statute or regulation that declares what information is required, the function is discretionary rather than ministerial, and not within the scope of mandamus.

The Plaintiff has asserted that Montana law does indeed authorize mandamus actions to control discretion. Plaintiff's assertion is in error. The case law provides that only when an act is such an abuse of discretion as to amount to no exercise of discretion at all, will mandamus lie to compel proper exercise of discretionary powers. Jeppson v. Department of State Lands, 205 Mont. 282, 290, 667 P.2d 428, 431 (1983). In this regard, the Plaintiff has the burden of making a clear showing that such an abuse of discretion was committed by the agency. Id. at 290, 667 P.2d at 431. The Plaintiff has not met this burden.

Specifically, with regard to the allegations pertaining to the Water Quality Act, the only paragraph in the complaint which contains an allegation appropriate for mandamus is paragraph 45.

That paragraph alleges that DHES failed to include in the permit the statement that discharges of pollutants more frequently than or in excess of levels authorized in the permit would be a violation of the permit. This statement is required to be included in a permit, pursuant to ARM 16.20.1015(2), which provides that "[a]ll issued MGWPCS permits must contain general conditions including . . . discharge of pollutants to state groundwaters more frequently than or at a level in excess of that identified and authorized by an MGWPCS permit is a violation of the conditions of the permit." [Emphasis added.] This regulation clearly demands that such a statement be included, and since there is a clear legal duty for DHES to include this statement, mandamus will lie to compel it to include the statement in CMC's permit, either by insertion in the present permit, or by reissuance of a new permit. It must be noted that the inclusion of this statement is not conditioned upon any information in the permit application or evaluation of the application itself, (and thus does not involve the exercise of discretion on the part of DHES). It thus does not require CMC to resubmit an application, nor does it require any additional evaluation, investigation, or consideration by DHES for CMC to retain its permit.

The remaining paragraphs in the Water Quality portion of the complaint address only discretionary action of the department.

THE MONTANA ENVIRONMENTAL POLICY ACT

The Plaintiff has alleged in its complaint that DHES violated the Montana Constitution, Article II, Section 3, and Article IX, Section 1, as well as the Montana Environmental Policy Act (MEPA). As stated in the complaint, the two constitutional provisions guarantee the right to a clean and healthful environment, and require the legislature to provide adequate remedies for the protection of the environment. These provisions prescribe no ministerial or clear legal duty for DHES to perform, and thus do not provide any basis for mandamus.

With regard to its allegations concerning MEPA, the Plaintiff has alleged that DHES violated a clear legal duty by failing to conduct an EIS before issuing the permit to CMC. The basis of these allegations rests on Section 75-1-201(1)(b)(iii), MCA, and regulations promulgated by the department pursuant to the statute. That subsection provides in pertinent part:

> [A]ll agencies of the state . . . shall . . . include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:
> (A) the environmental impact of the proposed action;
> (B) any adverse environmental effects which cannot be avoided should the proposal be implemented;
> (C) alternatives to the proposed action;
> (D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

> (E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. [Emphasis added.]

The department has promulgated various regulations to guide it in determining whether such actions referred to in the above-quoted statute significantly affect the environment, a requisite for ordering the preparation of an EIS. ARM 16.2.626 requires the department to prepare an EIS when the EA indicates one is necessary, or when the proposed action is a major action of state government that significantly affects the environment. ARM 16.2.627 requires the agency to consider enumerated criteria in determining whether proposed action would create a significant impact. ARM 16.2.628 requires the agency to prepare an EA. The rule further gives the agency discretion to include in the EA, various considerations listed therein. ARM 16.2.629 provides for public review of EA's, and requires the agency to consider substantive comments received from the public in response to the EA. The department has also promulgated a series of regulations governing the preparation and issuance of an EIS. See ARM 16.2.630 to .646.

The present complaint alleges that DHES failed to perform its duty to address various criteria that, if addressed, would have led to a conclusion that an EIS was necessary. As the language of the above-cited statutes and regulations demonstrates, the determination of whether an EIS is necessary

depends on the discretion of the department. The department is indeed required by ARM 16.2.627 to consider various criteria in determining whether the proposed action will have significant impact on the environment. And if such criteria were not considered by the department, a writ of mandamus would lie to compel it to do so. It should be noted that the regulations provide that even in the event the department determines that the proposed action will have significant impact on the environment, the department is not automatically required to order an EIS; the department may, as an alternative, avoid the preparation of an EIS whenever the proposed action may "be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies." ARM 16.2.626(c)(4). This alternative measure is one within the discretion of the department.

The complaint states that various criteria were not addressed in the initial EA. Para 22. It should be noted that the EA is not required to contain the criteria considered pursuant to ARM 16.2.627; and neither is it required to contain the considerations enumerated in ARM 16.2.628. The former rule requires only that the agency consider the enumerated criteria in determining the existence of significant environmental impact. The latter rule leaves much to the discretion of the agency: "The agency shall prepare the evaluations and present

the information described in section (3) as applicable and in a level of detail appropriate to the following considerations." ARM 16.2.628 (emphasis added). This clearly is a discretionary exercise. See North Fork Preservation Association v. Department of State Lands, 46 St.Rep. at 1422, 778 P.2d at 872, where the Department of State Lands' decision to forego an EIS was held to be an exercise of discretion; the Supreme Court further stated: "[W]e have previously held that the Department must exercise its discretion in all phases of its management of state lands." Id. Nevertheless, in response to the public's criticism of the initial EA, an amended EA was issued, addressing those areas previously omitted. See para. 25. Thus, the remaining challenge is that the department failed to adequately address the areas of concern. The degree of intensity or thoroughness with which the agency addresses such criteria is a matter within the discretion of the agency; it is not spelled out in the kind of formula that might make the department's exercise a ministerial one. The regulations require that the agency consider the criteria. The complaint itself, as well as the testimony presented in the hearing, establish that the criteria were, in fact, considered. The complaint presents no conduct that this Court can compel the agency to do through a mandamus writ.

In summary, the role of DHES in determining whether an EIS is necessary is primarily discretionary. One of the regulations

requires it to consider enumerated criteria in determining whether the proposed action will create a significant environmental impact. Even if the department were to conclude that the action will create a significant impact, it still retains discretion to forego an EIS by imposing certain controls or conditions. The Plaintiff is challenging the adequacy of the department's consideration of the criteria. Mandamus is not an appropriate remedy for such a challenge.

THE KADILLAK CASE

Notwithstanding the long standing rule that mandamus will not lie to correct or undo action already taken, the Plaintiff cites Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147 (1979) for the proposition that mandamus will lie to invalidate a permit and compel the department to proceed with a new permit process and conduct an EIS. In that case, Anaconda Co. filed with the Department of State Lands an application for a permit for mining activities in an area of Silver Bow County. The department subsequently ordered an EIS under MEPA to be conducted. The person doing the EIS submitted a memo to his superior at the department indicating that the application did not meet various legal requirements. New and additional data was submitted and incorporated into the EIS, which was mailed out before department personnel had the opportunity to check the new material. The department approved the new permit. A complaint was filed by two residents of the area in which the

mining activity was located against the Anaconda Co. requesting revocation of the permit and an injunction against continued activity by the Anaconda Co. on the basis of irregularities in the issuance of the permit.

At the time of the application for the permit, the Hard Rock Mining Act required that within sixty days of receipt of the completed application and reclamation plan "the board shall either issue an operating permit to the applicant or return any incomplete or inadequate application to the applicant along with a description of the deficiencies. Failure of the board to so act within that period shall constitute approval of the application and the permit shall be issued promptly thereafter." Section 82-4-337(1)(a), MCA. The Supreme Court found that the reclamation plan was inadequate as a matter of law and that the permit was issued in violation of the Hard Rock Mining Act. It further granted mandamus to compel the department to return the inadequate application to the applicant in accordance with the Section 82-4-337 (1)(a), MCA.

Kadillak is distinguishable from the present case in two important respects. First, the Supreme Court's invalidation of an existing permit did not occur within the purview of a mandamus action. The Complaint was filed against the mining company, and it was couched in terms of an injunction and declaratory judgment action. Second, the Supreme Court issued the mandamus for the sole purpose to compel the agency to

perform a clear legal duty: to return to the applicant the inadequate application. The present case is not a lawsuit against the mining company to declare its permit invalid and enjoin it from further mining activity. It is exclusively a complaint for mandamus against the Department of Health. The only clear legal duty articulated in the complaint that can be enforced against the department in this mandamus action is the requirement of ARM 16.20.1015, that the permit include specific language set forth in that regulation.

ORDER

For the foregoing reasons, the Defendant's motion to quash the writ of mandamus is GRANTED as to all of the complaint except as to paragraph 45. With respect to paragraph 45, the motion to quash is DENIED.

DATED this 30 day of March, 1990.

Dorothy McCarter
DISTRICT COURT JUDGE

pc: David K. W. Wilson, Jr.
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