

Mott v. Department of State Lands, et al.
CDV 93-1731, 1st Judicial District
Judge Honzel
Decided 1994

MEPA Issue Litigated: Was the MEPA analysis (an EA) adequate?

Court Decision: Yes

MEMORANDUM AND ORDER

Mott v. Dept. of State Lands
Order June 24, 1994
Hon. Thomas C. Honzel

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MARYANNE MOTT,)

Plaintiff,)

- v -) Cause No. CDV-93-1731

MONTANA DEPARTMENT OF) MEMORANDUM AND ORDER
STATE LANDS; and GOVERNOR
MARC RACICOT, STATE)
AUDITOR MARK O'KEEFE,
SUPERINTENDENT OF PUBLIC)
INSTRUCTION NANCY KEENAN,
STATE ATTORNEY GENERAL)
JOSEPH MAZUREK, and
SECRETARY OF STATE MIKE)
COONEY, together as the
MONTANA BOARD OF LAND)
COMMISSIONERS,

)
Defendants.

SEELEY LAKE ELEMENTARY)
SCHOOL DISTRICT, DISTRICT
NO. 34,)

Plaintiff in Intervention,)

- v -)
MARYANNE MOTT, MONTANA)
DEPARTMENT OF STATE LANDS,
and MONTANA BOARD OF LAND)
COMMISSIONERS,

)
Defendants in Intervention.

Before the Court are cross-motions for summary judgment. The motions were heard May 25, 1994, and are ready for decision.

Plaintiff Maryanne Mott (Mott) brought this action pursuant to the Montana Uniform Declaratory Judgments Act, Sections 27-8-101 through -313, MCA; the Montana Environmental Policy Act (MEPA), Sections 75-1-101 through -324, MCA; and the Montana Administrative Procedure Act (MAPA), Sections 2-4-101 through -711, MCA. She seeks judicial review of the decision of the Montana Board of Land Commissioners (the Board) approving the sale of approximately 418,000 board feet of timber on 29 acres of school trust land in the Tom Miner drainage, located in Park County just north of Yellowstone Park.

The lands are administered by the Montana Department of State Lands (DSL). Mott contends that DSL's environmental analysis for the sale, known as the "Tom Miner Timber Sale," does not satisfy the requirements of MEPA. She asks the Court to enjoin the sale until DSL conducts further environmental review.

ISSUE

Although the Complaint sets forth eleven counts, the ultimate issue before the Court is whether the environmental assessment (EA) for the Tom Miner Timber Sale complies with the requirements of MEPA.

DISCUSSION

I.

MAPA provides that "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" Section 2-4-702, MCA. A contested case is defined as "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required to be made after an opportunity for hearing." Section 2-4-102(4), MCA.

Mott contends that she is entitled to judicial review under MAPA.

She cites *Montana Wilderness Association v. Board of Natural Resources and Conservation*, 200 Mont. 11, 648 P.2d 734 (1982) for her position that MAPA applies to this case. Unlike the situation here, however, *Wilderness Association* involved judicial review of an actual contested case before the Board of Natural Resources and Conservation.

Although MEPA guarantees the public's right to participate in environmental decision-making, neither DSL's

environmental review nor the Board's approval of the sale qualifies this as a "contested case." See *North Fork Preservation Association v. Montana Department of State Lands*, 238 Mont. 451, 456-457, 778 P.2d 862, 866 (1989) (DSL approval of operating plan for exploratory oil and gas well held not to be a contested case under MAPA.) Consequently, MAPA's judicial review provisions do not apply here, and the matter will be treated as a request for declaratory relief.

II.

MEPA is a procedural statute designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). (Agencies must take a "hard look" at the environmental consequences of their actions.) Because MEPA is modeled after the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., Montana courts often look to federal NEPA case law to resolve questions arising under MEPA. *Montana Wilderness Association v. Board of Health and Environmental Sciences*, 171 Mont. 477, 493, 559 P.2d 1157, 1165 (1976); *Kadilak v. Anaconda Co.*, 184 Mont. 127, 141, 602 P.2d 147, 153 (1979); *North Fork Preservation Association v. Department of State Lands*, 238 Mont. 451, 458, 778 P.2d 862, 866 (1989).

Under MEPA, state agencies must

(iii) 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 ir retrievable commitments of resources which would be involved in the proposed action should it be implemented; . . .

Section 75-1-201(1)(b)(iii), MCA. This "detailed statement," known as an environmental impact statement (EIS), must be prepared for any major state action which may significantly impact the environment.

An EA is a less exhaustive environmental review prepared for proposed activities which do not rise to the level of "major actions of state government significantly affecting the quality of the human environment," but which nevertheless involve "unresolved conflicts concerning alternative uses of available resources." Section 75-1-201(1)(b)(iv), MCA. If an EA demonstrates that no significant environmental impacts will occur as a result of the proposal, the agency may proceed with the project. If, however, the EA establishes that significant environmental impacts may occur, the agency must then prepare an EIS.

DSL's administrative regulations also allow for the preparation of an EA in cases where an EIS might otherwise be required, but where potential impacts are reduced below the level of significance through the inclusion of mitigation measures. A.R.M. 26.2.643(4). In this case, the Board's approval of the Tom Miner Timber Sale was based upon an EA prepared by DSL. The EA concluded that, provided certain mitigation measures are employed, the sale will not have any significant environmental impacts.

Under MEPA, an agency's decision not to prepare an EIS will be upheld unless the agency acted arbitrarily, capriciously, or unlawfully. *North Fork Preservation Association v. Montana Department of State Lands*, 238 Mont. 451, 458-459, 778 P.2d 862, 867 (1989). This standard breaks down into two basic parts: whether the agency's action could be considered unlawful, or whether it could be considered arbitrary or capricious. *Id.* at 459, 778 P.2d at 867.

Mott contends that DSL's environmental review was both legally insufficient ("unlawful") as well as arbitrary and capricious. The concerns she raises are largely related to the sale's potential impacts on the grizzly bear, which is listed as a threatened species under the federal Endangered Species Act. She argues that DSL failed to consider a number of relevant factors essential to a legally adequate EA. While the issues Mott raises reflect legitimate concerns, it does not appear that any of DSL's acts or omissions in this case rise to

the level of arbitrary, capricious, or unlawful agency action.

For example, Mott argues that DSL violated MEPA by failing to adequately consider Forest Service trail and trailhead development across the state land. She maintains that since DSL was aware of the Forest Service's plans to pursue such a project, it was obliged to consider impacts of the trail in the EA.

A.R.M. 26.2.644(g) requires DSL to consider any potential conflict between a proposed action and any "local, state, or federal laws, requirements, or formal plans," and A.R.M. 26.2.644(1)(c) requires DSL to consider the cumulative impacts of its proposed actions. Cumulative impacts are defined as "the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type." A.R.M. 26.2.642(7). The regulation further states that "[r]elated future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures." *Id.* (Emphasis supplied)

While the record clearly demonstrates the Forest Service's interest in obtaining public access to federal holdings across the state section, its intentions had not become "formal" by the time the Tom Miner Timber Sale was approved, and no such plans were under "concurrent consideration" by DSL through "pre-impact statement studies, separate impact statement evaluation, or permit processing procedures." Consequently, while it may have been prudent to evaluate the potential cumulative impacts of a trailhead and trail across the state section in the EA, DSL's election not to do so was within its discretion and not unlawful. The Court also notes that when and if the trail project becomes a formal proposal, DSL has indicated it will evaluate the environmental impacts of the project at that time and invite public participation as required by MEPA. EA at p. 38.

Mott characterizes a host of other omissions in DSL's environmental review as unlawful. Specifically, she argues that DSL should have evaluated the actual use of the state section by grizzly bears; the public's recreational use of the state section; and secondary impacts of the sale on grizzly bears. She further alleges that DSL violated MEPA by failing to consider grizzly bear protection as a specific management objective; failing to use the "best available data" in evaluating effects on grizzly bears; failing to provide a

"reasoned basis" for rejecting the "no-action" alternative; failing to follow its own standards in evaluating effects on grizzly bears; failing to prepare an EIS; and failing to consider potential development on adjacent lands.

MEPA prescribes the process for evaluating the environmental consequences of proposed actions, but it does not prescribe a required methodology, because the choice of scientific methodology represents "a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S. Ct. 1851, 1860, 104 L. Ed. 2d 377, 394 (1989). It is also well settled that environmental policy acts do not mandate substantive outcomes, but only set forth the required procedure. After having carefully considered Mott's allegations, the Court concludes that the omissions she characterizes as unlawful speak to matters that lie within DSL's discretion, and that while the Tom Miner EA may not have been as comprehensive as Mott would have preferred, it was legally sufficient.

The second part of the Court's review under North Fork is whether the agency acted arbitrarily or capriciously. The Court's review under this standard is also quite limited. When a party challenges an agency's decision not to prepare an EIS as arbitrary or capricious, the court's sole function is to determine if the agency has taken the requisite "hard look" at the environmental consequences of its proposal, and whether the decision was based on a reasoned evaluation of the relevant factors. *Greenpeace Action v. Franklin*, 982 F.2d 1342, 1350 (9th Cir. 1992) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 373-74, 378, 109 S. Ct. at 1859, 1861, 104 L. Ed. 2d 392-93, 395). Once a reviewing court is satisfied that the agency conducted such a review, it must defer to the agency's discretion, even if, as an original matter, the court might find contrary views more persuasive. *Marsh*, 490 U.S. at 378, 109 S. Ct. at 1859, 104 L. Ed. 2d at 393.

Regarding this highly deferential standard, the Montana Supreme Court has stated:

[w]e cannot substitute our judgment for that of the Department by determining whether its decision was "correct." Instead, we must examine the Department's decision to see whether the information set out in the [environmental review documents] was considered, or the decision to forego an EIS was so at odds with that information that it could be characterized as arbitrary or the product of

caprice.

North Fork, 238 Mont. at 465, 778 P.2d at 871. Applying this standard to the facts of this case, the Court concludes that DSL did identify and consider the relevant environmental factors, and that its decision to approve the sale based on the information evaluated in the EA was not arbitrary or capricious.

In terms of both the size of the harvest and the acreage involved, the Tom Miner Timber Sale is a fairly small project. DSL has provided the Court with expert testimony in the form of an affidavit from Dr. Alan Wood, a state wildlife biologist, supporting its conclusion that the sale will not have significant impacts. On the other hand, Mott has not presented the Court with any expert testimony which would tend to cast doubt on this conclusion. While this does not mean that Mott's concerns regarding the grizzly bear are not valid, she has simply failed to provide the Court with sufficient information to conclude that the Board's decision to approve the Tom Miner Timber Sale was arbitrary or capricious.

III.

Intervenor has raised issues relating to Article X, Section 4 of the Montana Constitution and the constitutional trust obligation of the Board and DSL to manage school trust lands for the support of public schools. Since the Court has concluded that DSL complied with MEPA in approving the sale, it is not necessary to address those issues.

IV.

For the foregoing reasons,

IT IS ORDERED:

1. Plaintiff's motion for summary judgment is denied.
2. Defendants' motion for summary judgment is granted.

DATED this _____ day of June, 1994.

DISTRICT COURT JUDGE