Wallace v. Department of Fish, Wildlife, and Parks, et al.
DV 93-356, 21st Judicial District
Judge Langton
Decided 1994

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

Court Decision: Yes

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

HON. JEFFREY H. LANGTON
District Judge
Twenty-First Judicial District
Ravalli County Courthouse Box 5012
Hamilton, Montana 59840
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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY
* * * * * * * * * * *

LEN WALLACE and PAMELA WALLACE, d/b/a BIG VELVET RANCH, Applicants,	)	
vs.	)	Cause No. DV-93-356
THE MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS and PATRICK J. GRAHAM, DIRECTOR, Respondents.	)	

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FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

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The above-entitled matter, having come before the Court for non-jury trial on December 14, 1993, with Ward Swanser, Esq., appearing as attorney for Applicants Len Wallace and Pamela Wallace, d/b/a as Big Velvet Ranch, and Beate Galda, Esq., appearing as attorney for Respondents, the Montana Department of Fish, Wildlife and Parks and Patrick J. Graham, Director, and the Court, having received and considered

the testimony and evidence submitted and deeming itself fully advised, now makes and enters the following Findings of Fact.

At the commencement of trial counsel stipulated to the following facts:

STIPULATED FACTS

1. That Applicants Len Wallace and Pamela Wallace, hereafter "Wallaces", have a game ranch at Darby, Montana, located in Ravalli County.

2. The Montana Department of Fish, Wildlife and Parks, hereafter "Department", initially issued a game farm license to the Wallaces for their game ranch.

3. The Department has granted several expansion applications to the Wallaces' original license.

4. The Department has recently approved an expansion of 1,800 acres to the original game farm application.

5. The Department has the duty of issuing game farm licenses.

6. The Wallaces are responsible parties, as the term is defined under Montana law pertaining to issuance of game farm licenses.

7. The Wallaces applied to expand their game farm by including an additional 2,600 acres by filing an application dated March 15, 1993, which the Department admits it received on March 22, 1993.

8. The Department did not approve nor deny the application within sixty (60) days from the date of its submittal.

9. The Department accepted the application in its form as submitted.

10. House Bill 338, which became effective on April 12, 1993, changed the law concerning the issuance of game farm licenses.

11. House Bill 338 was not made retroactive.

Based upon the evidence offered by the Applicants and the Respondents at the time of the trial on this matter, the Court finds as follows:

FINDINGS OF FACT

1. Wallaces moved to Montana from California and acquired a 5,000-acre ranch near Rye Creek in Ravalli County, Montana, in 1991. In late 1991 Wallaces began to explore game farming as a way to enhance the income potential of their property. "Game farms" are enclosed land areas upon which privately owned game animals of species indigenous to Montana are kept for purposes of obtaining, rearing in captivity, keeping or selling game farm animals or parts thereof, as authorized by Title 87, Part 4, Montana Code Annotated. § 87-4-406, M.C.A.

2. The 1983 Legislature enacted the basic regulatory scheme for game farming with passage of Chapter 570, Laws of Montana, 1983. Under that law no one may operate a game farm in Montana without first obtaining a game farm license from the Department of Fish, Wildlife and Parks. § 87-4-407(1), M.C.A.

3. In the Spring of 1992 Wallaces submitted an application for a game farm of approximately 160 acres of their ranch, which was approved and a license issued.

4. In September of 1992 the Wallaces applied for expansions totalling about 104 acres, which were also approved.

5. In November of 1992 the Department determined that it had been lax in its duty to apply the requirements of the Montana Environmental Policy Act (MEPA) (Title 75, Chapter 1, Montana Code Annotated) to game farms. Thereafter, it became Department policy to require Environmental Assessments (E.A.'s) to game farm applications. This was undoubtedly prompted by the fact that, by law, wild game animals must be enclosed from game farms and/or destroyed prior to the introduction of game farm animals and the land covered by the game farm license must then be fenced in such a manner as to contain the privately owned game farm animals and exclude wild game animals. § 87-4-410, M.C.A.

6. On or about December 24, 1992, the Wallaces applied for an 1,800-acre expansion of their game farm. An Environmental Assessment was prepared, and a public input hearing was conducted. Mr. Wallace stated at the hearing that he had no further

plans to expand the game farm. The 1,800-acre expansion was approved by the Department on April 20, 1993.

7. Fencing for the 1,800-acre expansion was recently completed, and approximately 300 wild deer and elk were driven off the property or destroyed, as required by statute. The Wallaces now have a similar number of privately owned elk, including calves, on the property.

8. On March 5, 1993, the Department received a 5-acre expansion application from the Wallaces. Wallaces later dropped this application by merging it into a new application.

9. On March 15, 1993, the Wallaces completed yet another expansion application to add another 2,600 acres to the game farm. This application was received by the Department about March 22, 1993.

10. Prior to the submission of the 2,600-acre expansion application, the Wallaces were aware of pending legislation (House Bill 338) which contained extensive revisions of the game farm laws. (Plaintiffs' Exhibit 12a)

11. Under the 1983 legislation, especially prior to a November 1992 policy change, the process of becoming licensed was "essentially automatic" for qualified applicants, although the Department did have statutory authority to deny an application.

12. Section 76-4-409, M.C.A., as of the date of submission of the 2,600-acre application, provided that within sixty (60) days of acceptance of an application the Department shall notify the applicant of its decision to approve or deny the application. In this case, that meant by close of business on May 21, 1993.

13. Regional warden Captain Randy Smith accepted the 2,600-acre application and promptly commenced preliminary work on an Environmental Assessment. There is no dispute that the 2,600-acre application was complete nor that the Wallaces were fully qualified applicants as of March 22, 1993.

14. On April 12, 1993, the Legislature passed, and the Governor approved, House Bill 338 (Chapter 315, Montana Session Laws 1993) containing the general

revisions of the game farm laws. The Bill was made effective on passage and approval, Ch. 315, § 18, L.1993. Among the significant provisions are the following:

A. The Department was granted 120 days to act on a completed application.

B. The Department was given specific authority to require an environmental impact statement, and if so, to extend the time to act on an application by an additional 180 days.

C. Section 87-4-426, M.C.A., was enacted setting forth specific criteria for the denial or conditional approval of game farm licenses. These allow the Department to deny or conditionally approve if one or more specific potential impacts are ascribed to the physical location of the game farm. Among these impacts are "substantial loss or destruction of critical season game animal habitat" or "blockage or disruption of major traditional season migration corridors or major travel routes". § 87-4-426(3)(a) and (b), M.C.A.

15. On April 30, 1993, warden Captain Smith notified Department legal counsel of the pending 2,600-acre expansion application. Counsel expressed her opinion that the new legislation applied to the pending application, and Captain Smith followed her advice.

16. On May 7, 1993, Captain Smith informed Mr. Wallace of the foregoing decision in a telephone conversation and advised that an Environmental Impact Statement might be required, since the Department was concerned as a result of the Environmental Assessment on the 1,800-acre application that the pending application would result in substantial loss, if not elimination, of critical winter game animal habitat in that area and blockage or disruption of a game animal migration corridor. However, due to the Wallaces' need to use several small unlicensed pens for the elk he had already purchased and the uncertainty over 2,600-acre application, the Department agreed on May 19, 1993, to allow the Wallaces to proceed with a separate application for 100 acres of the

2,600 acres adjacent to existing, licensed areas, to be considered under an Environmental Assessment. The 100-acre area was ultimately licensed on September 18, 1993.

17. The Department did not notify the Wallaces of any further action on the pending application for the remaining 2,500 acres until they sent a letter to the Wallaces dated July 6, 1993, informing them that an Environmental Impact Statement would be required to proceed and requesting a deposit of $25,000 for that purpose, pursuant to MEPA and § 12.2.451, A.R.M. This letter was sent 106 days after receipt of the 2,600-acre application.

18. The Wallaces have not paid that sum.

19. On August 6, 1993, Wallaces' legal counsel made formal demand that the Wallaces be issued a license on the 2,500-acre application, based upon the law in effect on the date it was submitted. This was formally denied by the Department on August 20, 1993.

20. Wallaces have not proven that they have made any substantial change in position or incurred any irrevocable contractual commitments in reliance on expected approval of the 2,500-acre application.

21. Wallaces have not proven that the Department has not applied the 1993 amendments to § 87-4-409, M.C.A., inconsistently to other applications still pending as of the effective date of the new legislation.

22. Wallaces have not shown that the Department acted in bad faith. In fact, the Department did act to ameliorate the effect of the new legislation on the Wallaces, as witnessed by the procedure with respect to the final 100-acre approval. Regardless of the legal merits of the Department's position, it has acted in a good faith manner to implement the 1993 amendments in a logical fashion, adopted in the absence of any expressed legislative intent as to whether the amendments were to be applied to existing applications.

CONCLUSIONS OF LAW

1. House Bill 338 was made effective upon passage and approval on April 12, 1993.

2. The Bill is not a retroactive law, since it was not expressly so declared. § 1-2-109, M.C.A. The test as to whether a law is retroactive is whether a statute:

a. takes away or impairs vested rights acquired under existing laws; or

b. creates a new obligation in respect to transactions already past; or

c. imposes a new duty in respect to transactions already past; or

d. attaches a new disability in respect to transactions already past.

Butte & Superior Mining Co. v. McIntyre, 71 Mont. 254, 263, ____ P. ____ (1924). *Weiss By and Through Weiss v. State*, 219 Mont. 447, ___ P.2d ___ (1986).

3. The issue here is whether the law has been improperly **applied** retroactively by the Department, and for that purpose the Court will employ the same test.

4. The general rule is that "a change in the law pending an application for a permit or license is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the permit or license should be granted". 51 Am.Jur.2d, Licenses & Permits, § 46. Annotation, Change in Law Pending Application for Permit or License, 169 A.L.R. 584 (1947).

5. Here the Wallaces' argument is that because they were qualified applicants who had submitted a completed application under the old law and because the procedure under the old law had generally led to automatic approval under the Department's then existing policies, then, in effect, they acquired a vested right to the license. The Court does not agree. The 1983 statutes clearly gave the Department the authority to deny a

license application. The Department was apparently uncomfortable with the exercise of the authority due to the lack of statutory criteria for denial, but it, nevertheless, existed; and no applicant could be assured of license approval under the old law until the Department acted. Under these circumstances, it would be improper to hold that the mere submission of the 2,600-acre license application conferred upon the Wallaces the immediate, fixed, and consummated right to approval of the application.

6. Nor does the Court consider the mere submission of a license application a "transaction" of the sort which irrevocably altered the legal relationship between the Department and the Wallaces in the absence of certain exceptions. Exceptions which have been recongized by the Courts may be categorized as follows:

a. Where the administrative body unreasonably delays action on an application until after a change has become effective;

b. Where the administrative body arbitrarily fails to perform a ministerial duty to issue a license promptly on an application that conforms to the law at the time of filing;

c. Where the applicant has reasonably made substantial changes in position or has incurred irrevocable contractual commitments in reliance on existing law and policy;

d. Where new legislation or regulations were not pending in some form at the time of the application.

51 Am.Jur.2d, Licenses & Permits, § 46. Annotation, Retroactive Effect of Zoning Regulation in Absence of Saving Clause, on Pending Application for Building Permit, 50 A.L.R.3d 596 (1973). *San Diego County* v. *McClurken*, 37 Cal.2d 683, 234 P.2d 972 (1951). *Snake River Venture* v. *Bd. of Co. Commissions of Teton Co.*, 616 P.2d 744 (Wyo., 1980). *Boise City* v. *Blaser*, 98 Idaho 789, 572 P.2d 892 (1977).

7. In this case the new legislation became effective twenty-one (21) days after the Department's receipt of Wallaces' application. The Department, under the old law,

had sixty (60) days to examine and act upon the application. The Department, therefore, did not unreasonably delay action on the application prior to enactment of the new amendments; and it clearly had no ministerial duty to grant or deny the application prior to May 21, 1993, under the old law.

8. The Wallaces have not shown that they have made any substantial changes in position or have incurred irrevocable contractual commitments in reliance on the old law and Department policies promulgated thereunder. Even if they had, any such changes or commitments would have been unreasonable, if not foolish, until the application was approved, since Wallaces acknowledged, prior to their application, that they recognized the Department's authority to deny them a license. (Plaintiffs' Exhibit 12a)

9. The Wallaces were well aware of, and concerned about, pending House Bill 338 and were aware of many of the substantive provisions of that Bill, including the potential denial criteria and Environmental Impact Statement option at least as early as February 10, 1993, over a month before submission of their 2,600-acre application. (Plaintiffs' Exhibit 12a)

10. The Wallaces have not proven that the principals of equitable estoppel have any application to this case.

11. The remedy of mandamus is unavailable to compel performance of a discretionary act absent an abuse of discretion and, on the facts of this case, there has been no abuse of discretion, and both under prior law and existing law the issuance of a game farm license is a discretionary act.

12. The Montana Constitution requires the Legislature to "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". Montana Constitution, Article IX, Section 1. Pursuant to that mandate, the Legislature enacted the Montana Environmental Policy Act (MEPA) (Title 75, Chapter 1, M.C.A.) which requires, to the fullest extent possible, that all state

actions that may impact the natural environment be thoroughly considered prior to action. The actions of the 1993 Legislature to revise the game farm laws to fully implement MEPA requirements, and the Department's decision to apply the new requirement to the Wallaces' pending application and any other such pending applications, are proper and necessary actions to implement the actions of the Legislature and, ultimately, to enforce the mandate of the people as expressed in the state's Constitution.

JUDGMENT

This cause having been submitted to the Court upon the Applicants' Application for Writ of Mandamus and the Respondent's Answer thereto, and the Court, having duly considered the pleadings and briefs and the testimony, exhibits, and arguments produced at the trial of this action, concludes that the Applicants are not entitled to the relief sought.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Writ of Mandamus heretofore issued on the 27th day of October, 1993, be and hereby is quashed, vacated, and set aside, and that the decision of the Respondents to apply the provisions of Chapter 570, Laws of Montana 1993, to the Applicants' pending application for expansion of their game farm is hereby AFFIRMED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of this Court transmit a certified copy of this Judgment to Mr. Patrick J. Graham, Director of the Montana Department of Fish, Wildlife and Parks forthwith.

DATED this 10th day of January, 1994.

DISTRICT JUDGE

cc: Ward Swanser, Esq.
Beate Galda, Esq.
Patrick J. Graham, Director

STATE OF MONTANA } ss.
COUNTY OF RAVALLI }
I, DEBBIE HARMON, Clerk of the District Court of the Twenty-First Judicial District of the State of Montana, in and for the County of Ravalli, do hereby certify this instrument to be a full, true and correct copy of the original as the same appears in the file and records of this office.
WITNESS MY HAND and the Seal of this Court. this 10th day of January 1994
DEBBIE HARMON, Clerk, By Cindy Lawyer Deputy