Friends of the Wild Swan, et al. v. Department of Natural Resources and Conservation, et al.
CDV 95-314, 1st Judicial District
Judge Honzel
Decided 1995

The plaintiff sought to enjoin the timber management program on state trust lands pending preparation and adoption of a programmatic review of the program and adoption of forest management rules.

The court refused to mandate the preparation of the MEPA document by a certain date, and refused to enjoin the program pending the MEPA document.

The injunction bond required by the 1995 version of section 77-1-110, MCA, only applied to decisions by the DNRC, not by the Land Board.

MEPA Issue Litigated: Can a court order a date certain for the completion of a MEPA analysis (a programmatic EIS)?

Court Decision: No

Should the agency be permanently enjoined from conducting further timber sales pending the completion of a MEPA analysis (a programmatic EIS)?

Court Decision: No

MEMORANDUM AND ORDER

Friends of the Wild Swan v. DNRC
Decided Dec. 13, 1995
Honorable Judge Honzel
First Judicial District

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

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FRIENDS OF THE WILD SWAN, INC., and)
ALLIANCE FOR THE WILD ROCKIES, INC.,) Cause No. CDV-95-314
)
Plaintiffs,)
)
vs.)
)
MONTANA DEPARTMENT OF NATURAL)
RESOURCES AND CONSERVATION, and)
MONTANA BOARD OF LAND COMMISSIONERS,) MEMORANDUM AND ORDER
)
Defendants.)
)
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Before the Court are Defendants' motions to dismiss and for summary judgment. The motions were heard September 13, 1995. At the conclusion of the hearing, the parties were granted additional time to file supplemental briefs. Those have been submitted and the matter is ready for decision.

BACKGROUND

Plaintiff Friends of the Wild Swan (FOWS) is a public interest organization whose goal is to protect and preserve the native biodiversity of the Swan Lake, Montana, area and the Northern Rockies. Plaintiff Alliance for the Wild Rockies is another public interest organization whose goals are similar to those of FOWS. Prior to July 1, 1995, the Department of State Lands was the state agency responsible for the harvest and sale of timber on state forest lands. On July 1, 1995, the Department of State Lands ceased to exist and its functions as they relate to this case were transferred to the Department of Natural Resources and Conservation. Chapter 418, Laws 1995. In these proceedings, the agency will be referred to as the Department.

In 1989, FOWS brought suit against the Department and the Montana Wood Products Association, alleging various

deficiencies in the 1978 Swan River State Forest Plan and Environmental Impact Statement (EIS). Friends of the Wild Swan vs. Department of State Lands, Flathead County Cause No. DV-89-07(A).

The Department conceded that the 1978 EIS was woefully inadequate and committed itself to produce a statewide programmatic EIS in accordance with the rules adopted pursuant to the Montana Environmental Policy Act (MEPA). Because the Department committed to revamping the management standards and guidelines for all state lands, Judge Keller denied FOWS' requested relief. Specifically, Judge Keller refused to assume that the Department would fail to properly comply with its MEPA obligations and, therefore, he concluded that mandamus was not proper under the circumstances of that case.

Since 1989, the Department has been in the process of preparing a programmatic EIS examining statewide cumulative impacts, as it agreed to do in the 1989 litigation. However, as of March 13, 1995, the date the original complaint was filed in this action, a draft programmatic EIS had not been released. Meanwhile, the Department has continued to conduct statewide timber harvests on state "school trust" lands in order to raise money for the beneficiaries of the trust lands.

FOWS and the Alliance for the Wild Rockies filed this lawsuit seeking a declaratory judgment that the Department was in violation of MEPA for failing to issue the draft EIS; for an order requiring the Department to complete a final EIS on its statewide timber harvest program by a certain date; and for a permanent injunction against the sale or harvest of old growth timber until the Department completes the statewide EIS.

On May 9, 1995, Defendants filed their motion to dismiss and their motion for summary judgment, claiming that Plaintiffs' complaint is barred on a number of procedural and substantive grounds. In the motion for summary judgment, the Department represented that a draft EIS would be distributed on June 19, 1995. As represented by the Department, the draft EIS was issued on June 19. Defendants contend that the Court lacks the power to force any timetable upon the Department for completion of the final EIS; that the Department is statutorily permitted to continue its program of selling timber while awaiting the statewide EIS as long as it complies with MEPA regulations; and that Plaintiffs' attempt to prohibit any sale without proof of MEPA violations is simply premature.

In their motion to dismiss, Defendants challenge the standing of Plaintiffs to bring an action against them based on language found in the complaint. In addition, they assert that

the issues outlined in the complaint have previously been litigated and therefore the Court is barred from relitigating them under the principles of collateral estoppel and res judicata.

STANDARD FOR SUMMARY JUDGMENT

The Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. Wagner v. Glasgow Livestock Sale Co., 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only issue when the record discloses an absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Minnie v. City of Roundup, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Kober v. Stewart, 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." Reaves v. Reinbold, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978).

I. Completion of the Statewide Programmatic EIS

In their complaint, Plaintiffs ask the Court to compel the Department to issue a draft statewide programmatic EIS and to set a date by which time the final EIS must be completed. Since the Department issued a draft EIS on June 19, 1995, that portion of Plaintiffs' request is moot. Plaintiffs contend, however, that the Court should mandate a completion date for the final EIS within a reasonable time.

In support of this unusual remedy, Plaintiffs point out that the Department previously represented that a draft EIS would be issued in 1994, but that the draft was not issued until June 19, 1995. Further, Plaintiffs argue the Court has the power to

require the Department to issue the final EIS within a reasonable time.

Neither party has cited, nor has the Court found, any Montana case law discussing this particular issue. Defendants, however, have cited Coate v. Omholt, 203 Mont. 488, 662 P.2d 591 (1983), for the proposition that the Court lacks the jurisdiction under Article III, section 1 of the Montana Constitution to force the Department to adopt a final version of the EIS within any time frame. Although that case involved the judiciary, the Court finds it to be persuasive on this issue.

In Coate, the legislature enacted two statutes requiring supreme court justices and district court judges to render opinions within a certain time period or be subject to financial penalties. A district court judge challenged the statutes, arguing that, among other things, the statute violated the separation of powers doctrine of the Montana Constitution. The district court found the statutes to be unconstitutional and the state auditor appealed.

On appeal, the supreme court agreed with the district court and held that the statutes were unconstitutional. Id. at 492, 662 P.2d at 593-94. The court found that the imposition of time limits on judges would be an unconstitutional interference with judicial functions. Id. at 496, 662 P.2d at 595. Citing cases from many jurisdictions, the court used the separation of powers doctrine to conclude that the judicial branch of government must be able to decide when it shall hear or determine any cause of action within its jurisdiction. Id. at 495, 662 P.2d at 595 (citing Shario v. State, 138 N.E. 63 (Ohio 1922)).

Article III, section 1 of the Montana Constitution, generally known as the separation of powers doctrine, provides:

> The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Under the doctrine, each branch is independent and co-equal and is immune from the control of the other two branches of government in the absence of express constitutional authority to the contrary. State ex rel. Morales v. City Comm'n, 174 Mont. 237, 240, 570 P.2d 887, 889 (1977).

After fully considering the arguments of counsel, and based on the record before it, the Court agrees with Defendants that the separation of powers doctrine precludes the Court from ordering the Department to complete the EIS by a specific date. MEPA and the rules adopted pursuant to MEPA clearly give the Department the discretion to determine when an EIS is complete. ARM 26.2.650-653 sets forth the procedures the Department must follow before a final EIS can be issued. Absent extenuating circumstances, the Court does not have the jurisdiction to interfere with the Department's discretion in preparing the final EIS. Here, the fact that the Department may have taken an extra long period of time in preparing the draft EIS is not a sufficient reason for the Court to set a deadline for the final EIS. This does not mean that the Department's discretion is absolute or that the Court could never intervene regardless of the circumstances. The Court only holds that the facts of this case do not warrant intervention by the Court.

II. Injunctive Relief

In their complaint, Plaintiffs have also requested a permanent injunction prohibiting Defendants from making further timber sales until the final EIS is completed. Plaintiffs, however, have not asked for a preliminary injunction. The Court has determined it should not set a deadline for the Department to issue a final EIS. Likewise, it would not be appropriate for the Court to issue an injunction prohibiting all sales until the final EIS is issued.

ARM 26.2.657(6) states:

> (6) While work on a programmatic review is in progress, the agency may not take major state actions covered by the program in that interim period unless such action:
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> (a) is part of an ongoing program;
> (b) is justified independently of the program; or
>
> (c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program if it tends to determine subsequent development or foreclose reasonable alternatives.

The subsections are in the disjunctive. Therefore, findings that satisfy one subsection are sufficient. Stark v. Borner, 226

Mont. 356, 359, 735 P.2d 314, 317 (1987). Here, it is not disputed that the state has an ongoing program for the harvest and sale of timber on state forest lands. Furthermore, Plaintiffs have not pointed to a particular pending sale which will prejudice the ultimate decision. Plaintiffs can, of course, challenge a particular sale or harvest if necessary. In this regard, ARM 26.2.657(7) provides that "[a]ctions taken under subsection (6) must be accompanied by an EA or an EIS, if required." In the Court's view, this provides Plaintiffs with an adequate remedy.

Plaintiffs further claim that Judge McKittrick's decision in Friends of the Wild Swan v. Montana Dep't of State Lands and Champion Int'l Corp., Flathead County Cause No. DV-93-361-B, generally known as the Middle Soup case, bolsters their claim for an injunction. In that case, FOWS challenged the Middle Soup timber sale and the Department's investigation of the sale. Judge McKittrick did issue a preliminary injunction, but only for the specific timber sale. He did not enjoin all sales pending the completion of the programmatic EIS. The facts of the Middle Soup case justified a preliminary injunction. Those facts are not present here.

III. Motion to Dismiss

Because of the Court's resolution of the summary judgment issues, it is not necessary to address the motion to dismiss.

ORDER

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED.

DATED this 13th day of December, 1995.

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District Court Judge