

NANCY SWEENEY
CLERK DISTRICT COURT
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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

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<p>CAMERON SPRINGS, LLC, Petitioner, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; and RICHARD OPPER, its Director, Respondents.</p>	<p>Cause No. BDV-2008-325 ORDER</p>
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Hearing in this matter was held on April 21, 2008 on Petitioner's request for a writ of mandate.

Stipulated Facts

At the hearing, the parties stipulated the facts are true and correct:

1. On October 19, 2007, Petitioner Cameron Springs, LLC, began the application process to obtain a permit to operate a gravel pit immediately south of Interstate 90 in Belgrade, Montana. In compliance with Department of Environmental Quality (Department) requirements, Petitioner submitted an open-cut permit application

1 form and by December 2007 had submitted all the documents required by Section 82-
2 4-432(1) and (2), MCA.

3 2. On January 30, 2008, the Department sent an e-mail to Jesse
4 Chase, one of the principals of Cameron Springs acknowledging receipt of the
5 application materials and information and stating that Petitioner's application was
6 "acceptable." However, the Department's e-mail also stated that the permit for the
7 gravel pit would not be issued until the Department completed an environmental
8 assessment (EA). The Department's e-mail also stated that, based on the analysis in
9 the EA, the Department may also require mitigation of specific impacts that could
10 require changing portions of the plan of operations or other application materials, and
11 that a decision on the application would be rendered once the process was complete.

12 3. Although more than sixty days have passed since the Department
13 acknowledged receipt of an "acceptable application" from Petitioner, the Department
14 still has been unable to issue the permit or to begin the EA because the Department has
15 insufficient personnel and resources. It is impossible for the Department to complete
16 an EA for this site within sixty days.

17 4. The proposed location of Petitioner's gravel pit is near two other
18 gravel businesses which have been in operation for many years. Despite the long
19 history of gravel businesses in this immediate area, a request for an emergency zoning
20 district has recently been submitted to the Gallatin County Commission by individuals
21 opposed to Petitioner's application and other opencut mining permit applications for
22 the area.

23 5. If the zoning district is enacted as requested before the
24 Department issues an opencut mining permit to Petitioner, it is possible that
25 Petitioner's proposed operation will be subject to additional restrictions and may even

1 be zoned out of existence before it can begin.

2 **Standard of Review**

3 Pursuant to § 27-26-102, MCA, a two-part standard applies to the
4 issuance of a writ of mandate. Franchi [v. County of Jefferson, 274
5 Mont. 272] 908 P.2d [210,] 212; State ex rel. Chisholm v. District Court
6 (1986), 224 Mont. 441, 443, 731 P.2d 324, 325. First, the writ is
7 available when the party requesting it is entitled to the performance of a
8 clear legal duty by the party against whom the writ is sought. Becky [v.
9 Butte-Silver Bow Sch. Dist. No. 1, 274 Mont. 131], 906 P.2d [193,] 195.
10 Second, if there is a clear legal duty, the district court must grant the writ
11 if there is no plain, speedy, and adequate remedy available in the
12 ordinary course of law. Franchi, 908 P.2d at 212; State ex rel. Cobbs v.
13 Montana Dep't of Social and Rehabilitative Servs. (Mont. 1995), 906
14 P.2d 204, 206, 52, St.Rep. 1166, 1167; § 27-26-102(2), MCA. In
15 Chisholm, we clarified the inquiry: "A negative answer to the first
16 question bars the issuance of the writ, and, irrespective of the answer to
17 that question, an affirmative answer to the second, divests the court of
18 authority to issue it." Chisholm, 731 P.2d at 325.

19 Common Cause v. Argenbright, 276 Mont. 382, 390, 917 P.2d 425, 430 (1996).

20 **Discussion**

21 Petitioner suggests that Montana statutes require the issuance of the writ
22 of mandate. The Department, on the other hand, suggests that this Court exercise its
23 discretion and not issue the writ of mandate and allow the Department to go through
24 the EA procedure to see what conditions might need to be placed on the proposed
25 mine.

26 This Court agrees with Petitioner. First, the Court concludes that
27 Petitioner is entitled to the performance of a clear legal duty by the Department.
28 Section 82-4-432(4)(a), MCA, provides that the Department shall, within thirty days,
29 review the application, inspect the proposed site, and notify applicant whether or not
30 the department believes that the application is acceptable. Section 82-4-432(4)(c),
31 MCA, allows an extension of the thirty-day review period. Here, no extension of the
32 review was sought.

1 The operative statute here is Section 82-4-432(4)(d), MCA, which
2 provides: "If the application is acceptable, the department shall issue a permit to the
3 operator that entitles the operator to engage in the opencut operation on the land
4 described in the application." (Emphasis added.) The Montana Supreme Court was
5 faced with a similar situation in 1979. Kadillak v. Anaconda Co., 184 Mont. 127, 602
6 P.2d 147 (1979). In Kadillak, the court was faced with an application under the Hard
7 Rock Mining Act which required action on an application within sixty days of its
8 receipt. The Montana Supreme Court noted that when a statutory time limit precludes
9 the statutory duty of preparing an environmental impact statement (EIS), the EIS must
10 yield. Kadillak, at 136, 602 P.2d at 153.

11 Also in Kadillak, the supreme court noted that the requirement for
12 environmental impact statements is contained in Section 75-1-201, MCA, which
13 provides, in part: "The legislature authorizes and directs that, to the fullest extent
14 possible . . ." (Emphasis added.) Clearly, the legislature, pursuant to Section 75-1-
15 201, MCA, contemplated some sort of environmental review of an application such as
16 the one involved here.

17 The Department points to A.R.M. 17.4.607(3)(c) as requiring
18 governmental agencies to prepare an EA whenever statutory requirements do not allow
19 sufficient time for the agency to prepare an EIS. This administrative rule certainly
20 makes sense. However, an administrative rule cannot overturn the clear direction of
21 the legislature. Section 75-1-201, MCA, as noted above, suggests that an
22 environmental review of some type take place "to the fullest extent possible." Here,
23 due to a variety of reasons, neither an EA nor an EIS can be prepared in time for the
24 Department to comply with its statutory mandate under Section 82-4-432, MCA.

25 The Kadillak court noted that it is a maxim of statutory construction that

1 a specific statute will control the general. Kadillak, at 136, 602 P.2d at 153. Here,
2 Section 82-4-432, MCA, with its specific statutory requirement controls over the
3 general requirement of an EA, or an EIS as contained in Title 75, MCA.

4 Although the Department found the application acceptable on January
5 30, 2008, no further action seems to have been taken. Indeed, the Department has not
6 even begun the EA. In its responsive brief, the Department informs the Court that
7 would take at least three months to complete the EA. (Resp't's Br., at 6, ll. 13-14.)

8 The Court in no way wishes to be critical of the Department. The Court
9 recognizes that the Department is overworked and understaffed. In addition, it is faced
10 with statutory deadlines that appear not to be realistic in that they would not allow the
11 Department to conduct an EA within a reasonable time. The Court further realizes that
12 the proposed gravel pit is in a residential area and involves a number of complex
13 issues. However, the Court does not find any authority for these practical difficulties
14 to override the Department's statutory obligation to issue a permit once it is found an
15 application to be acceptable.

16 Having determined that there is a clear legal duty to issue the permit, the
17 Court must determine whether the Petitioner has a plain, speedy, and adequate remedy
18 available in the ordinary course of law.

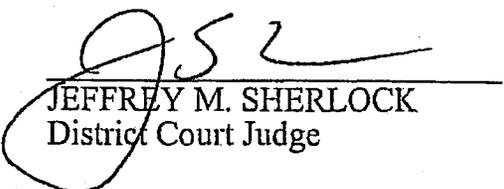
19 Here, it would appear that the remedy available to the Petitioner is to
20 wait several months for the Department to conduct an EA. The Department, as noted
21 above, has indicated that the EA could take up to four months. Further, the
22 Department has not even begun the EA as of the date of the hearing. On or about
23 May 6 or 7, 2008, the Gallatin County Commissioners may well issue zoning
24 regulations that would prohibit Petitioner's proposed use of the land in question. If
25 that should occur, it is clear that the Petitioner will not have a speedy or adequate

1 remedy at all.

2 Again, the Court is not faulting the Department, and the Court is quite
3 sympathetic to the Department's plight. It appears that the burgeoning growth of
4 Montana has put unusual demands on the Department. Further, it would appear that
5 Section 82-4-432, MCA, which has not be controversial in the past and has been
6 adequate for its heretofore intended purposes, is now conceivably outdated as the
7 timelines contained in the statute do not allow the Department to do an adequate job of
8 reviewing applications for opencut mining permits.

9 Based on the above, it is hereby ORDERED, ADJUDGED, AND
10 DECREED that the Department of Environmental Quality forthwith issue a permit
11 allowing operation of the Cameron Springs gravel pit as requested in the application
12 submitted and found acceptable by the Department.

13 DATED this 23 day of April 2008.

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16 JEFFREY M. SHERLOCK
District Court Judge

17 pcs: Frank C. Crowley/James L. Shuler
18 Jane B. Amdahl

19 T/JMS/cameron spring v deq order.wpd
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