

Kilpatrick v. Department of Fish, Wildlife and Parks, et al.
BDV 93-637, 1st Judicial District
Judge Sherlock
Decided 1993

MEPA Issue Litigated: Does MEPA supplement a state agency's permitting /licensing authority?

Court Decision: Yes

ORDER

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LEGAL UNIT
FISH WILDLIFE & PARKS

KIT LAHTI

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RUSSELL KILPATRICK and PEGGY)
KILPATRICK, doing business as)
GREAT BEAR ADVENTURE, INC.,)

Plaintiffs,) Cause No. BDV-93-637

- v -)

ORDER

DAN VINCENT, Region One)
Supervisor, and MONTANA)
DEPARTMENT OF FISH, WILDLIFE)
AND PARKS,)

Defendants.

This matter was heard on July 7, 8, and 9, 1993, before Jeffrey Sherlock,
District Court Judge. Plaintiffs, Russell and Peggy Kilpatrick, doing business as Great
Bear Adventure, Inc., were present and represented by counsel Noel K. Larrivee.
Defendants, Dan Vincent and the Montana Department of Fish, Wildlife and Parks,
were represented by counsel Beate Galda and E. Wayne Phillips.

1 The issue before the Court is Plaintiffs' complaint for declaratory
2 judgment and application for a writ of injunction.

3 Plaintiffs own and operate the Great Bear Adventure Park (the Park)
4 located between Coram and West Glacier, Montana. The Park houses eight black
5 bears on eight acres. Visitors pay a fee to drive through the Park and observe the
6 bears. The goal of the Park is to educate the public by observing bears in their natural
7 environment.
8

9 Defendant Department of Fish, Wildlife and Parks (FWP) is a state
10 agency and Defendant Dan Vincent is the FWP Region One Supervisor located in
11 Kalispell, Montana.

12 On May 13, 1991, Plaintiffs submitted an application for a roadside zoo
13 or menagerie permit to the FWP, seeking approval to open the bear park. On
14 May 31, 1991, Plaintiffs also applied for a game farm permit. Both parties agree that
15 Plaintiffs' proposed business falls neither precisely under the game farm statutes nor
16 under the roadside zoo/menagerie statutes, but it most closely resembles a zoo.
17

18 The FWP began preparing an environmental assessment (EA) in May
19 of 1991 to consider the environmental impacts of issuing a permit for the Plaintiffs'
20 park. The FWP has never previously conducted an EA or an environmental impact
21 statement when issuing permits such as the ones applied for by Plaintiffs. Dan Vincent
22 and Ed Kelly, the local Warden Captain for FWP, were informed by the state office
23
24

1 of FWP that they should have been complying with the requirements of the Montana
2 Environmental Policy Act (MEPA), Sections 75-1-101 through 75-1-324, MCA, by
3 conducting EAs prior to issuing the types of permits here in question. The FWP now
4 requires MEPA compliance for all game farm license and zoo/menagerie permit
5 applications.
6

7 John Babcock, the local game warden, inspected the proposed facility on
8 June 4, 1991, and recommended that the game farm permit be approved. Ed Kelly
9 later denied the application.

10 During the first two weeks of June 1991, Plaintiffs and FWP personnel
11 discussed the nature of the facility, concerns raised during the EA process, and possible
12 measures to address those concerns raised. On June 12, 1991, a public meeting on the
13 draft EA was held and included discussion of eleven proposed stipulations to mitigate
14 impacts of the Park on the environment. Plaintiffs were present at this public meeting,
15 but apparently did not directly object to the proposed stipulations.
16

17 Although Plaintiffs challenge generally the authority of the FWP to
18 attach such stipulations to permits, two of the stipulations are specifically at issue in
19 this case. These conditions are that the Park be limited to only one specie of bear
20 (black bear) and that all the Park's bears be neutered.
21

22 On June 14, 1991, Plaintiffs met with FWP personnel to discuss approval
23 of the zoo/menagerie permit. Because Plaintiffs had already purchased several bears
24

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1 and wished to move them on to the property, the FWP issued a "temporary" game
2 farm license. This temporary license was issued so that Plaintiffs could have the bears
3 at the Park while the process of the EA was completed. The parties agree that there
4 is no provision in the statutes or regulations regarding the issuance of "temporary"
5 licenses.
6

7 The temporary license was conditioned on the eleven stipulations
8 contained in the EA. Plaintiff Russell Kilpatrick, under advice of his attorney, signed
9 the stipulations contained in the temporary license. He testified, however, that he felt
10 compelled to sign the stipulations because he was under time constraints of moving the
11 bears onto the property and opening the Park to the public. The Park opened for
12 business on June 29, 1991.
13

14 On July 2, 1991, the then attorney for Plaintiffs met with FWP personnel
15 to discuss and negotiate the stipulations as proposed in the EA. After some changes
16 were made, including allowing Plaintiffs to keep the new born cubs and requiring
17 neutering of only the female bears, Plaintiffs' attorney took the stipulations to his client
18 and returned them signed by Russell Kilpatrick. Plaintiff Russell Kilpatrick testified
19 that he felt obligated to sign the letter containing the stipulations or run the risk that
20 the permit would be revoked.
21

22 The FWP issued a roadside zoo/menagerie permit to Plaintiffs on
23 July 9, 1991, which included the stipulations as revised in negotiations with Plaintiffs'
24

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1 attorney and signed by Plaintiff. Plaintiffs' zoo/menagerie permit has been renewed
2 each year since 1991. The game farm license has also been renewed each year,
3 although originally it was to have been only temporary. Both permits continue to
4 include the same list of stipulations mentioned above.

5
6 In October 1992, Plaintiffs advised Defendant Dan Vincent of their
7 desire to add a coastal brown bear to their park. On March 23, 1993, Dan Vincent
8 sent Plaintiffs a certified letter denying Plaintiffs' request for a brown bear and advising
9 Plaintiffs that they had to sterilize their female bears within thirty days or their
10 zoo/menagerie permit would be revoked. On April 30, 1993, Plaintiffs filed this action
11 for declaratory judgment and injunctive relief, challenging the authority of the FWP
12 to attach stipulations and conditions to the permits it issues.
13

14 At the hearing, it was uncontested that since the Park opened there has
15 been no instance of a bear escaping from the Park, nor has there been any attempt
16 by a wild bear to gain access to the Park.

17 The FWP admitted that, at the time the Park opened, no other zoo or
18 menagerie possessing a permit was required to neuter any of its animals, nor was any
19 zoo or menagerie limited to only one specie of animal. Both parties, however, admit
20 that there is no other facility in Montana similar to Plaintiffs' drive-through bear park.
21

22 Neither the game farm statutes (Section 87-4-406 through 87-4-424,
23 MCA), the zoo/menagerie statutes (Section 87-4-801 through 87-4-808, MCA), nor the
24

1 regulations promulgated under the statutes specifically address the ability of the FWP
2 to attach conditions of any kind to these permits.

3 Witnesses Kate Kendall, Chris Servheen, Jim Cross, and Mike Madel
4 testified as to the concerns involved in issuing the permits for the Park. These
5 concerns include the escape of captive bears, entry of wild bears, genetic pollution of
6 the native grizzly population, and disease transmittal to native grizzlies. The FWP is
7 especially concerned about the introduction of a coastal brown bear into Plaintiffs'
8 facility, because of possible gene pool contamination of the native grizzly, which is a
9 threatened species under the Endangered Species Act. Coastal brown bears can
10 interbreed with native grizzlies, which would result in genetic pollution of the grizzly
11 population.
12

13
14 These witnesses also testified that wild bears would be attracted to the
15 Plaintiffs' Park for several reasons, especially by detecting the scent of female bears
16 in estrus. Bears are highly mobile, with a average home range of 250 to 500 square
17 miles, thus it is possible that the Park could have an impact on bears all through
18 Glacier National Park and surrounding areas.

19
20 Mike Madel specifically testified that the fence enclosing the Park is
21 adequate to keep black bears inside but is not adequate to keep wild black bears or
22 grizzly outside.

23 Other concerns voiced by these witnesses included the possibility that
24

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1 visitors to the Park may develop misperceptions regarding wild bears after seeing
2 captive bears in the Park, and the difficulty of placing excess black bears once the Park
3 reaches its capacity.

4 All of the above concerns were also expressed in the EA issued by the
5 FWP and were considered when developing the list of stipulations to mitigate the
6 impact of the Park on the environment.
7

8 Sections 75-1-101 through 75-1-324, MCA, set out the general policy of
9 environmental protection in Montana and contain the legislative authorization and
10 directive to state agencies to conduct environmental impact statements in any planning
11 and decision-making that may impact the environment. The specific procedures for
12 carrying out the policy requirements of MEPA are contained in the administrative
13 rules promulgated under the statute.
14

15 ARM 16.2.626 provides

16 (2) An EA may serve any of the following purposes:

17 (a) to ensure that the agency uses the natural and social sciences
18 and the environmental design arts in planning and decision-making. An
19 EA may be used independently or in conjunction with other agency
planning and decision-making procedures;

20 (b) to assist in the evaluation of reasonable alternatives and the
21 development of conditions, stipulations or modifications to be made a
22 part of a proposed action;

23 (c) to determine the need to prepare an EIS through an initial
24 evaluation and determination of significance of impacts associated with
a proposed action;

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1 (d) to ensure the fullest appropriate opportunity for public
2 review and comment on proposed actions, including alternatives and
3 planned mitigation, where the residual impacts do not warrant the
4 preparation of and EIS; (Emphasis added)

5 The administrative rules define an "action" as

6 a project, program or activity directly undertaken by the agency; a
7 project or activity supported through a contract, grant, subsidy, loan or
8 other form of funding assistance from the agency, either singly or in
9 combination with one or more other state agencies; or a project or
10 activity involving the issuance of a lease, permit, license, certificate, or
11 other entitlement for use or permission to act by the agency, either
12 singly or in combination with other state agencies. (Emphasis added).

13 ARM 16.2.625(1).

14 The Court finds that the issuance of either a game farm license or a
15 roadside zoo/menagerie permit constitutes an "action" by the FWP as defined in ARM
16 16.2.625(1). The FWP acted entirely within its authority in conducting an EA before
17 issuing permits to Plaintiffs, regardless of the fact that the FWP had neglected to
18 conduct EAs for other permits issued prior to the Plaintiffs'.

19 Clearly the regulations under MEPA provide that part of the purpose
20 of an EA is to develop conditions and stipulations to mitigate the potential impact of
21 an action on the environment. The FWP was well within the bounds of its authority
22 to impose the eleven stipulations listed in the EA and attached to Plaintiffs' permits.
23 The text of the EA and the testimony at the hearing provide evidence of the FWP's
24 concerns regarding the environmental effect of Plaintiffs' bear park and are a sound
25 basis for the imposition of the stipulations on the permits.

ORDER

1 The Court concludes that the stipulations attached to Plaintiffs' permits
2 are valid and enforceable as reasonable measures taken to mitigate potential adverse
3 effects on the environment.

4 Plaintiffs place much emphasis on the fact that no other zoo or
5 menagerie in Montana has had similar conditions placed on it. The Court does not
6 find this to be an effective argument. The FWP provided testimony that several
7 facilities that have applied for permits since 1991 have had similar conditions imposed
8 on them. Additionally, the parties agree that there is no other facility in Montana that
9 operates in the same manner as Plaintiffs' drive-through park. A unique entity often
10 cannot be treated in the same manner as other entities.

11 The FWP also argues that Plaintiffs are estopped from challenging the
12 validity of the stipulations. The Court agrees. The evidence shows that Plaintiffs were
13 represented by counsel when they initially signed the list of conditions back in June of
14 1991. Plaintiffs' attorney even negotiated with the FWP to modify several of the
15 conditions at the time. Although Plaintiff Russell Kilpatrick testified that he felt
16 pressured to sign the list of conditions, he acted under advice of his attorney.
17

18 The Court also notes that Plaintiffs did not challenge the authority of the
19 FWP to impose the stipulations at the time they were presented, but rather waited
20 almost two years before filing this action. The Court will not allow Plaintiffs to agree
21 to the conditions, ignore the conditions for two years, and then challenge their validity
22

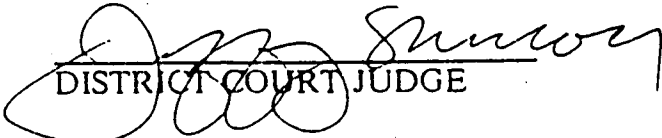
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1 when Plaintiffs realize that FWP actually means to enforce them. The Court finds that
2 Plaintiffs are estopped from challenging the authority of FWP to attach the stipulations
3 to the permits.

4 Therefore, IT IS HEREBY ORDERED, ADJUDGED, AND
5 DECREED that:

- 6
- 7 1. The stipulations attached to the zoo/menagerie permit and game farm
 - 8 license are valid and enforceable by the Department of Fish, Wildlife and Parks;
 - 9 2. Plaintiffs' request for a writ of injunction is denied; and
 - 10 3. Each party is responsible for their own costs of suit.

11 DATED this 11 day of August, 1993.

12
13 
14 DISTRICT COURT JUDGE

15 pc: Beate Galda
16 E. Wayne Phillips
17 Noel K. Larrivee

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25 kilpatrick.ord