

VOLUME NO. 40

OPINION NO. 20

ADMINISTRATIVE PROCEDURE - Statutes directing a public agency to perform an act by a specified date are generally directory and not jurisdictional;

NATURAL RESOURCES - Authority of department to enact regulations under Lakeshores Protection Act limited only by adoption of regulations by local governing body; MONTANA CODE ANNOTATED - Sections 75-7-201, 75-7-207, 75-7-209.

HELD: The Department of Natural Resources and Conservation has power under section 75-7-209, MCA, to adopt regulations for the issuance or denial of permits for work in lakes. The only limitation on this power is the adoption of regulations by a local governing body as provided in section 75-7-207, MCA.

2 September 1983

Leo Berry, Director  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena MT 59620

Dear Mr. Berry:

You have requested my opinion on the following question:

Whether the Department of Natural Resources and Conservation has the power under section 75-7-209, MCA, to adopt regulations for the issuance or denial of permits for work in lakes?

Section 75-7-207, MCA, provides: "Before January 1, 1976, every governing body having jurisdiction over an area containing a lake shall adopt regulations ... for the issuance or denial of permits for work in lakes."

Section 75-7-209, MCA, provides that upon petition of landowners abutting a lake "the department of natural resources and conservation may adopt regulations under 75-7-207 and 75-7-208 for the particular lake. The department may then exercise the powers conferred upon a local governing body by this part until the governing body adopts the necessary regulations." This section was adopted by the 1975 Montana Legislature and became

effective on the date of its final approval, May 1, 1975. 1975 Mont. Laws, ch. 527, § 4.

The specific issue is whether the grant of power to the department to act in the stead of the local governing body expired on January 1, 1976, the date by which all governing bodies were supposed to have adopted their own regulations. I find no such limitation.

While it is true that the Legislature directed local governing bodies to adopt their own regulations by January 1, 1976, I do not find that the Legislature specifically limited the department's power to act to that date. In fact, it is a common legislative scheme to provide a state agency power to regulate some activity with the proviso that local government may undertake the regulation if it acts affirmatively to do so. The fact that the Legislature specified a date by which local governing bodies should act may serve as the basis for an action in mandate to compel them to do so, but does not of itself limit the power of the department to act beyond that date.

In the factual situation which has given rise to this question, the local governing body has apparently failed to act and the landowners of Seeley Lake have petitioned the department to proceed under the authority of section 75-7-209, MCA. It is not unreasonable to assume that the Legislature was in contemplation of precisely this occurrence.

In discussing whether statutory time provisions are to be construed as mandatory or directory, Sutherland, Statutory Construction § 57.19 states at 444:

For the reason that individuals or the public should not be made to suffer from the dereliction of public offices, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory.

Montana cases cited for this statement are Chicago, M., St. P. & P. R. Co. v. Fallon County, 95 Mont. 568, 28 P.2d 462 (1934), and State v. Zimmerman, 105 Mont. 464, 73 P.2d 548 (1937). A recent Montana district court case (Carey, et al. v. Montana Dept. of Natural Resources and Conservation, First Judicial District,

Cause No. 43556, decided June 27, 1979), held that the statutory requirement for the department to hold a hearing on an application under the Water Use Act within 60 days was directory and not jurisdictional.

In matters of statutory construction section 1-2-101, MCA, instructs that "[w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." It is my view that the power of the department to regulate lakeshore resources was not impliedly repealed by the directive to local governing bodies to adopt regulations by January 1, 1976, and is only limited by the actual adoption of local government regulations as expressly provided in the Act.

To hold otherwise would mean that local governing bodies who failed to enact regulations would frustrate the purposes of the Act. That result seems inconsistent with the policy stated in section 75-7-201, MCA:

The legislature finds and declares that the natural lakes of Montana are high in scenic and resource values and that the conservation and protection of these lakes is important to the continued value of lakeshore property as well as to the state's residents and visitors who use and enjoy the lakes.

That section continues:

The legislature further declares that local governments should play the primary public roles in establishing policies to conserve and protect lakes.... [Emphasis added.]

Thus there is no exclusive reservation of power for local governing bodies to act.

While the Lakeshores Protection Act is not a model of legislative draftsmanship, it seems clear upon a review of the Act as a whole and its stated policy that the Legislature wanted reasonable governmental regulations for lakeshore protection. It vested that authority primarily in the hands of local government but provided, in the event of their failure to act, that the State could do so.

THEREFORE, IT IS MY OPINION:

The Department of Natural Resources and Conservation has power under section 75-7-209, MCA, to adopt regulations for the issuance or denial of permits for work in lakes. The only limitation on this power is the adoption of regulations by a local governing body as provided in section 75-7-207, MCA.

Very truly yours,

MIKE GREELY  
Attorney General