STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL WILDLIFE FEDERATION, YELLOW DOG WATERSHED PRESERVE, INC., KEWEENAW BAY INDIAN COMMUNITY, and HURON MOUNTAIN CLUB, Plaintiffs-Appellants,	UNPUBLISHED March 22, 2011
v	No. 293779 Ingham Circuit Court
DEPARTMENT OF NATURAL RESOURCES, and KENNECOTT EAGLE MINERALS COMPANY, Defendants-Appellees.	LC No. 08-000263-AA

Before: MARKEY, P.J., and STEPHENS and WILDER, JJ.

PER CURIAM.

Plaintiffs National Wildlife Federation, Yellow Dog Watershed Preserve, Inc., Keweenaw Bay Indian Community, and Huron Mountain Club appeal as of right an order granting defendants Department of Natural Resources (DNR) and Kennecott Eagle Minerals Company (Kennecott) summary disposition under MCR 2.116(C)(4). We affirm.

I.

This case arises from the DNR's decision to grant Kennecott's application to lease a 120-acre parcel of state-owned land. Kennecott had proposed to develop an underground mine in Marquette County to produce ores of nickel, copper, and other metals. The mine entrance and most of the surface facilities for the mine would be situated on the state-owned land. The DNR and the Michigan Department of Environmental Quality (MDEQ) conducted independent reviews of the lease application and coordinated a public notice and comment process. Ultimately, Kennecott obtained mining, groundwater discharge, and air use permits necessary for the project from the MDEQ. The director of the DNR then approved the lease.

As a result of the DNR's approval of the lease, plaintiffs filed a "Claim of Appeal and Complaint" in the circuit court. Plaintiffs asserted that the circuit court had jurisdiction pursuant to MCL 600.631 and MCL 324.1701. In Count I, plaintiffs appealed the DNR's decision to enter into the lease and argued that the lease violated the DNR's duties under MCL 324.502 and

MCL 324.503. In Count II, plaintiffs alleged that construction, operation, and maintenance of the proposed mine on the leased land would pollute, impair, or destroy air, water, or other natural resources in violation of the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. In Count III, plaintiffs stated that the DNR is a trustee of state land and resources. Plaintiffs alleged:

> 48. By entering into the Surface Lease, DNR violated the Public Trust by diverting the Leased Lands to uses incompatible with the Public Trust, including allowing Eagle Rock to be used as a portal for the mine, contrary to the rights and practices of the Community concerning Eagle Rock.
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> 49. By entering into the Surface Lease, DNR breached its fiduciary duties because of DNR's inherent conflict of interest in seeking to maximize compensation from the Mineral Leases while simultaneously acting as trustee of the Public Trust.

Plaintiffs urged the circuit court to enjoin conduct pursuant to the lease, declare the lease void, and find the conduct proposed in the lease would pollute, impair, or otherwise destroy the air, water, or other natural resources.

In separate orders, the circuit court dismissed Count I, finding that the DNR's decision to enter into the lease was authorized by law[1] and must be affirmed, [2] and also dismissed Count II under MCR 2.116(C)(6) because plaintiffs had concurrently filed a petition for a contested case in the State Office of Administrative Hearings and Rules arguing that the mining would pollute, impair, or destroy air, water, or other natural resources in violation of the MEPA. The circuit court also dismissed Count III under MCR 2.116(C)(4). Relying on MCL 600.631 and *Krohn v City of Saginaw*, 175 Mich App 193; 437 NW2d 260 (1988), the circuit court concluded that plaintiffs' challenge to the DNR's decision to enter into the lease, on the basis of the common law public trust doctrine, was subject to the circuit court's appellate jurisdiction. Because

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[1] Const 1963, art 6, § 28 provides:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. *This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law*; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Emphasis added.]

[2] At the same time, the circuit court dismissed Count III, finding that plaintiffs had abandoned the claim under the public trust doctrine, but later granted plaintiffs' motion for reconsideration of that dismissal and found that the claim had not been abandoned.

plaintiffs did not seek appellate review, but instead filed a complaint alleging an original cause of action, the circuit court concluded that it lacked subject matter jurisdiction to hear the challenge. Plaintiffs' now appeal the order dismissing Count III only.

II.

A motion for summary disposition brought under MCR 2.116(C)(4) tests the trial court's subject matter jurisdiction. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). This Court reviews decisions regarding subject matter jurisdiction de novo. *L & L Wine & Liquor Corp v Mich Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007). In reviewing whether a court has subject matter jurisdiction to hear a matter, a court must review pleadings, depositions, affidavits, admissions, and documentary evidence. *Id.*

> Generally, three potential avenues of review exist by which an aggrieved party may challenge an administrative body's decision: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the Administrative Procedures Act (APA), MCL 24.201 et seq.; MSA 3.560(101) et seq., or (3) an appeal pursuant to § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631, and Const 1963, art 6, § 28, in conjunction with MCR 7.104(A). [*Hopkins v Mich Parole Bd*, 237 Mich App 629, 637-638; 604 NW2d 686 (1999).]

MCL 600.631 provides, in relevant part:

> An appeal *shall* lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court . . . which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. [Emphasis added.]

In *Krohn*, 175 Mich App at 195, the plaintiffs contested a decision of a planning commission, which granted a variance to the owners of an adjoining property, by filing a five-count complaint in the circuit court. The circuit court dismissed the action as untimely because it was filed more than 21 days after entry of the planning commission's final decision. *Id*. On appeal, this Court affirmed the circuit court's finding that the plaintiffs had failed to timely pursue an appeal to the circuit court within the 21-day period afforded by MCR 7.101(B)(1), and held that the circuit court lacked subject matter jurisdiction to hear Count I. *Id.* at 195-197. In response to the plaintiffs' argument that Counts II through V of the complaint were separate causes of actions, not appeals falling under the 21-day rule, this Court concluded:

> Count III of plaintiffs' complaint alleged that their state and federal due process rights were violated and that their property had been taken without just compensation as protected by the state constitution. Count IV of the complaint alleged that the planning commission action allowed an unpermitted illegal use of the subject site and constituted a nuisance per se. Lastly, count V of the

> complaint asked for a declaration of the parties' rights with reference to the intended construction. With respect to each of these counts, we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Since plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Id.* at 198; see also *Mich Bear Hunters Ass'n v Mich Natural Resources Comm*, 277 Mich App 512, 526; 746 NW2d 320 (2008).[3]]

In light of MCL 600.631 and *Krohn*, a litigant may not choose to bypass the appeal procedure and proceed with separate litigation challenging an administrative decision under other theories. Plaintiffs' claim on the basis of the public trust doctrine asserts alleged defects in the result reached by the DNR, and is not a separate cause of action.[4] Therefore, the circuit court properly granted summary disposition in favor of the DNR and Kennecott.

We are not persuaded by plaintiffs' claim that defendants waived the question of subject matter jurisdiction. Subject matter jurisdiction cannot be waived. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001), and in any event, statements by defendants or the circuit court that plaintiffs fashioned Count III as an original cause of action do not amount to an abandonment or intentional relinquishment of the right to challenge the court's jurisdiction to hear Count III. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 471; 761 NW2d 846 (2008).

We are also not persuaded by plaintiffs' claim that a decision by the DNR could never be effectively challenged on appeal on the basis of the public trust doctrine because it is a fact-intensive claim that should be tried as an original action. MCR 7.210(A)(2) provides:

> Appeal From Tribunal or Agency. In an appeal from an administrative tribunal or agency, the record includes all documents, files, pleadings, testimony, and opinions and orders of the tribunal, agency, or officer (or a certified copy), except those summarized or omitted in whole or in part by stipulation of the parties.

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[3] We note that plaintiffs' reliance on *Sun Communities v Leroy Twp*, 241 Mich App 665; 617 NW2d 42 (2000) is misplaced because it involves claims based on decisions that are legislative, as opposed to administrative, in nature.

[4] Moreover, during oral argument, plaintiffs acknowledged that, during the public notice and comment process, not only were they fully able to challenge the lease application as unlawful and violative of the public trust doctrine, they did in fact assert a public trust doctrine challenge. Thus, it is clear that plaintiffs were afforded due process by having the opportunity to challenge the lease application in a proper forum.

> Testimony not transcribed when the certified record is sent for consideration of an application for leave to appeal, and not omitted by stipulation of the parties, must be filed and sent to the court as promptly as possible.

As the circuit court found:

> The DNR undertook extensive review of the surface use lease application and mining and reclamation plan in a multi-stage process that lasted nearly two years. This process included a review of those documents by DNR field staff to determine the project's potential impact on the State's natural resources and on recreation, and to determine if the mining and reclamation plan met the requirements of the previously issued metallic mineral leases. The DNR field staff then compiled an application review package recommending approval of the surface use lease application and forwarded the package to an internal DNR Land Exchange Review Committee for review. This committee ultimately also recommended that the lease be approved, pending approval of all of the other required permits and on the condition that Kennecott construct an approved alternate snowmobile trail to replace the existing one that currently runs along the road that will be used for transportation to and from the mine. In addition, although not required by law to do so, the DNR provided numerous opportunities for public comment on the surface use lease application and the mining and reclamation plan, by coordinating with, and participating in, the MDEQ's public participation process in connection with the permit applications.

The circuit court record therefore included documentation of these proceedings and evidence of plaintiffs' detailed objections to the lease and permits. MCR 7.210(A)(2). Plaintiffs have failed to establish why the circuit court could not have relied on this record, if plaintiffs had filed an appeal on public trust grounds, to determine whether the DNR's decision was authorized by law or violated the public trust doctrine.

In light of our conclusion that the trial court properly granted summary disposition of Count III under MCR 2.116(C)(4), we decline to address plaintiffs' argument that the public trust doctrine applies to the land leased by the DNR.

Affirmed. No costs may be taxed, a public question being involved.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens