

Stephen R. Brown
Brian J. Smith
Elena J. Zlatnik
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595
srbrown@garlington.com; ejzlatnik@garlington.com

Attorneys for Imperial Oil Resources Ventures Limited

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULACOUNTY

COUNTY OF MISSOULA, NATIONAL
WILDLIFE FEDERATION, MONTANA
ENVIRONMENTAL INFORMATION
CENTER, MONTANA CHAPTER OF
THE SIERRA CLUB,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
TRANSPORTATION, an agency of the
State of Montana, and JIM LYNCH, in
his capacity as Director of Montana
Department of Transportation,

Defendants,

IMPERIAL OIL RESOURCES
VENTURES LIMITED,

Defendant-Intervenor.

Cause No. DV-11-424

Hon. Ray J. Dayton

**IMPERIAL OIL'S
APPLICATION TO DISSOLVE
OR MODIFY PRELIMINARY
INJUNCTION**

Pursuant to Mont. Code Ann. § 27-19-401, Defendant-Intervenor Imperial Oil Resources Ventures Limited (“Imperial”) files this application to dissolve, or in

the alternative, to modify the preliminary injunction in this case. The existing administrative record indicates that the grounds cited by the Court in its July 19, 2011 Order are not sufficient to maintain the injunction. Continuing the injunction in its current form is inconsistent with the Court's duty to minimize harm to all parties. As this matter arises under the Montana Environmental Policy Act ("MEPA"), Imperial also requests an expedited hearing and briefing schedule, pursuant to Mont. Code Ann. § 75-1-201(6)(b) ("Any action or proceeding under subsection (6)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law").

Pursuant to Local Rule 3.G.2, the other parties have been contacted concerning this application. Defendant Montana Department of Transportation ("MDT") does not oppose the application. Plaintiffs County of Missoula, National Wildlife Federation, Montana Environmental Information Center and Montana Chapter of The Sierra Club do oppose it.

BACKGROUND

On July 19, 2011, this Court issued its "Memorandum and Order Partially Granting Plaintiffs' Motion for Preliminary Injunction." The Court's order enjoined issuance of any new 32-J permits by MDT for the route identified in the Kearl Module Transportation Project's ("KMTP") environmental assessment ("EA"). In its order, the Court concluded that Plaintiffs had established a prima

facie case that three aspects of the KMTP EA were inadequate. Memo. & Or. Partially Granting Pls.' Mot. Prelim. Inj. 6-9 (July 19, 2011) ("PI Or." or "Order"). The injunction does not apply to permits issued by MDT prior to the date the Plaintiffs filed suit.

The injunction is unprecedented because it halts MDT from allowing use of public highways of commerce by a commercial user until the injunction is dissolved, modified, or the case is resolved on the merits. There is no reported case in Montana of an injunction of such breadth and scope with respect to the use of public highways. As detailed below, the injunction already has resulted in millions of dollars in costs to Imperial.

The Court cited three grounds to preliminarily enjoin MDT from issuing further permits: (1) the Court faulted the EA for failing to analyze whether the turnouts constructed by Imperial will be permanent and, if not, whether ultimate removal will have environmental impacts (PI Or. 6-7); (2) the Court raised concerns about the lack of an analysis of an interstate route in comparison to the proposed KMTP route (PI Or. 7-8); and (3) the Court believed that Plaintiffs had established that MDT relied too heavily on the analysis of Tetra Tech, an environmental firm that was retained to assist in the environmental planning of the KMTP. PI Or. 8-9. The Court thus concluded that Plaintiffs had established a prima facie case for a violation of MEPA and, therefore, an injunction should issue

under Mont. Code Ann. § 27-19-201(1).¹

As the applicants, Plaintiffs frame the scope of the preliminary injunction issues. Mont. Code Ann. § 27-19-201(1) (2009) (injunction may be issued “when it appears that the applicant is entitled *to the relief demanded*”) (emphasis added). After they moved for an injunction, Plaintiffs introduced additional information through affidavit and deposition testimony. This additional, extra-record evidence formed the basis of considerable testimony at the May show cause hearing. The Court excluded Plaintiffs’ proffered extra record evidence in its Memorandum and Order Regarding Pending Evidentiary Motions, dated July 19, 2011. The Court also found that the Plaintiffs had failed to demonstrate great or irreparable harm. Therefore, for purposes of addressing the injunction, the issues are limited only to the terms first outlined in Plaintiffs’ opening brief as those issues relate to MDT’s compliance with MEPA.

After the injunction hearing, the parties submitted proposed findings.

Plaintiffs raised certain issues in their proposed findings not raised in their motion

¹ In addition to Mont. Code Ann. § 27-19-201(1), the Court also found that Plaintiffs were entitled to a preliminary injunction under Mont. Code Ann. § 27-19-201(3). However, Plaintiffs did not cite subsection (3) in their motion as a basis for relief. Pls.’ Br. Support Mot. Prelim. Inj. 2 (Apr. 7, 2011) (“Pls.’ Br.”). In their brief supporting the motion, Plaintiffs discussed subsections (1) and (2), but did not provide any discussion as to why an injunction was proper under subsection (3). Thus, because Plaintiffs did not provide an argument as to why subsection (3) was implicated, subsection (3) does not provide a viable basis for maintaining the injunction.

and briefing. These new issues were the primary bases the Court relied on in its Order concerning the likelihood that the Plaintiffs will show the EA inadequate. Because the Plaintiffs did not previously raise and fully brief these issues, Imperial and MDT were not on notice that these issues would be relevant to the hearing. Plaintiffs, therefore, did not carry their burden to show, by the requisite clear and convincing evidence legal standard, any violation of MEPA as to the core allegations that formed the basis for the injunction. Absent any meaningful evidence by Plaintiffs prior to the hearing, the burden to respond never shifted to the Defendants on these issues. On a voluminous record review case, notice of issues of contention is critical so that record evidence can be identified for an accurate picture for the Court. Nonetheless, now that the Court has noted these issues in its Order, the existing record shows that MDT addressed the issues to the extent required by law. Therefore, Plaintiffs have failed to carry their burden to make a prima facie case, by clear and convincing evidence, that the EA was inadequate. Montana law requires that the injunction be dissolved or, in the alternative, modified.

ANALYSIS

A. Legal Standard

Mont. Code Ann. § 27-19-404, in tandem with § 27-19-401, defines when an injunction must be dissolved or modified:

If upon the hearing it satisfactorily appears that there are not sufficient grounds for the injunction order, the order *must* be dissolved; or if it satisfactorily appears that the extent of the injunction order is too great, the order *must* be modified.

Mont. Code Ann. § 27-19-404 (2009) (emphasis added).

The Montana Supreme Court has not analyzed this statute. However, the statute's plain terms state that a Court has no discretion but to dissolve or modify an injunction if there are insufficient grounds for it to remain in place as issued. Thus, the statute requires relief if documents in the administrative record demonstrate that there are insufficient grounds to support the injunction on the grounds identified by the Court.

The legal standards in MEPA guide this analysis because the Court granted the injunction under Mont. Code Ann. § 27-19-201(1).² Under MEPA, Plaintiffs bear the burden to establish a violation by clear and convincing evidence. Mont. Code Ann. § 75-1-201(3)(a) (2009) (“A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.”).

² An injunction also may be issued when it “appears that the commission or continuance of some act during the litigation would produce great or irreparable injury to the applicant.” Mont. Code Ann. § 27-19-201(2) (2009). The Court properly found that the Plaintiffs were not entitled to relief under this provision of the injunction statute.

As set forth below, evidence in the existing administrative record responds to each of the issues identified by the Court. This evidence was not highlighted previously because Plaintiffs did not cite these issues in their motion or brief, certainly not by clear and convincing evidence. Given the extraordinary nature of an injunction remedy, the Court may properly revisit the record, especially since no specific findings of fact or conclusions of law were made by the Court. *Trogli v. Bartoletti*, 152 Mont. 365, 370, 451 P.2d 106, 109 (1969) (“injunctions are extraordinary remedies granted with caution and in the exercise of sound judicial discretion”); *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 298 (1995) (emphasis added) (injunction must “minimize harm to *all* parties pending a full trial on the merits”); Mont. R. Civ. P. 52(a); *Snavely v. St. John ex rel. Est. of Snavely*, 2006 MT 175, ¶ 10, 333 Mont. 16, 140 P.3d 492 (failure of court to make findings of fact and conclusions of law is grounds to vacate injunction).

B. Issue 1: Permanency of KMTP Turnouts

In its order, the Court raised a concern about the permanency of turnouts, stating:

Plaintiffs presented evidence that the EA does not adequately consider the final plans for the KMTP. In particular, MDT has not yet decided which turnouts, if any, will be left in place. EA § 3.6.2.2; FONSI page 23. Dwane Kailey (Kailey) is the chief operations officer, the chief engineer, and the highways administrator for MDT. Kailey testified that the final decision on whether to

remove turnouts will be made in the future based on the benefit to the public. This evidence raises two issues.

First, the KMTP EA does not appear to consider what environmental impacts, if any, would occur should turnouts be removed. There also does not appear to be any evaluation of the benefits or consequences that would weigh in favor or against removal of turnouts.

Second, it is unclear how MDT could adequately consider the significance of impacts related to turnout construction without making an initial determination as to whether turnouts will remain in place. The turnouts are being constructed and modified to make transport of the KMTP high-wide loads feasible. Whether the turnouts are left in place will necessarily effect whether the route will accommodate future loads of similar size. Thus, determining the growth-inducing or inhibiting effects as well as any precedential effects resulting from turnout construction appears largely dependent on whether the turnouts will remain in place.

It seems that in order to determine the significance of impacts one must first determine the scope of the project, i.e. whether turnouts being constructed to facilitate transport of KMTP high-wide loads are permanent or temporary. It is unclear to the Court at this time how MDT could fully evaluate the significance of impacts associated with the KMTP without making an initial decision regarding the permanency of turnouts.

PI Or. 6-7.

The Court's Order suggests that MDT was required to make a threshold decision whether the turnouts would be permanent, and then evaluate the environmental impacts from there. Plaintiffs did not raise this issue. Instead,

throughout this litigation Plaintiffs consistently have asserted that the KMTP would create a “permanent high-wide corridor.” *See* Finding of No Significant Impact (“FONSI”) App. D at 373-374, 388, 552 (Feb. 7, 2010); Pls’ Br. 13-14, 28, 30-36. Plaintiffs do not allege a MEPA violation based on an MDT failure to analyze whether turnouts will be removed after the KMTP is complete. Thus, the initial basis cited by the Court is not one raised by the Plaintiffs, and as such, is not proper grounds for an injunction.

Though Plaintiffs repeatedly raised the specter of a “permanent high and wide corridor,” they did not brief this issue as an alleged MEPA violation. Perhaps because Plaintiffs did not raise this issue, the Court was not directed to portions of the administrative record that specifically and repeatedly address the lack of permanence. On December 16, 2010, after the close of the record and before the issuance of the FONSI, Imperial and MDT entered into a Memorandum of Agreement (“MOA”). *Aff. Tom Martin* Certifying Admin. Rec. ¶ 3.m.v. (May 11, 2011) (“*Aff. Martin*”); *Foundational Aff. Stephen R. Brown* ¶ 3, Ex. C., (Aug. 22, 2011) (“*Aff. Brown*”). The MOA specifically states that “prior to the completion of the Project,” MDT will “[i]dentify and provide reasonable advance notification of those turnouts/signal pole/sign structure modifications that must be removed.” MOA Article II.F; *see also* FONSI 15 (“MDT will identify those locations where turnouts will be removed and where turnouts will remain in place”). Under the

plain terms of the MOA, and confirmed in the FONSI, MDT retained complete discretion to require Imperial to remove turnouts if MDT deemed it appropriate. This means that the improvements being made by Imperial within the MDT right-of-way are not permanent because the possibility exists that at any time prior to completion of the KMTP, MDT may require that some of the turnouts be removed. Until this contingency passes, there are no *permanent* turnouts and there is no *permanent* high-wide corridor.

MDT also addressed concerns about the permanency of a high-wide corridor in several responses to common comments in the FONSI. The response to common comment K specifically addresses the permanency issue and references the MOA and the surety bond that Imperial posted to ensure that funding exists to remove turnouts if MDT deems it appropriate:

Common Comment K: Some commenters expressed concern that the project sets a precedent for future hauling of large loads or establishes a high wide corridor through the state of Montana.

Response to Comment K: [*]** Some individuals have commented that the proposed KMTP route will be used by Imperial to haul similar size freight in the future. In order to meet Montana's "10-minute Rule," Imperial's transportation plan requires the existence of each new and existing turnout along the KMTP route. *Imperial Oil has signed a Memorandum of Agreement with MDT that requires Imperial Oil to remove turnouts at MDT's request, and it has posted a surety bond to ensure sufficient funds for the removal of turnouts.* MDT will

assess the removal of turnouts along the KMTP route based upon a variety of factors such as safety and maintenance. Turnout removal will reduce the functionality of this route for loads with similar size and weight. As always, MDT retains the discretion under Montana law to reject or condition future permit requests for oversized loads.

FONSI 14-15(emphasis added).

As this response indicates, each time a person plans to transport oversized loads over this or any other route in Montana, the transporter must apply for and obtain a permit from MDT. Regardless of whether the turnouts remain, the requirements for issuance of permits prevent creation of a special “oversized route.” Therefore, there can be no irreversible precedential effect. MDT’s MEPA rules require MDT to consider “any precedent that would be set as a result of an impact of the proposed action *that would commit the department to future actions with significant impacts or a decision in principle about such future actions.*”

Admin. R. Mont. 18.2.238(f) (emphasis added). As MDT indicated in its response to comments, the existence of a highway does not commit MDT to issuing oversized permits to any particular applicants. Permits will continue to be required. MDT has performed the environmental analysis commensurate with its action on permit applications.

Plaintiffs may disagree with MDT’s conclusions as to the permanency of turnouts, but mere dislike does not establish that the issue was not duly considered

by MDT, which is all that MEPA requires. *Ravalli County Fish & Game Assn., Inc. v. Mont. Dept. of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995) (MEPA “does not demand that an agency make particular substantive decisions”). Thus, it is not accurate to conclude that MDT failed to consider the issue of whether the KMTP route would become a permanent high-wide corridor in light of comments specifically stating that turnouts may not be permanent.

The Court also indicated that the EA is deficient because it does not consider the future environmental impacts of turnout removal if in fact some turnouts are removed. PI Or. 6. Plaintiffs also did not raise the issues of the environmental impacts of removing turnouts, or the cost-benefit analysis of turnout removal, as stated in the Court’s Order. Therefore, the second concern as to turnouts raised in the Order is not a basis to issue an injunction, as Imperial never was on notice that these were issues of concern to Plaintiffs nor, in fact, do they appear to be of concern to Plaintiffs. *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-765 (2004); *Alliance for The Wild Rockies v. Tidwell*, 623 F. Supp. 2d 1198 (D. Mont. 2009).

C. Issue 2: Whether Construction Costs for the Interstate Alternative Made That a Reasonable Alternative

The Court’s Order on this issue states:

As it currently exists, the KMTP route cannot facilitate transport of the modules. In order to make transport of

the modules feasible along the KMTP route significant construction work is required. The EA states that 75 turnouts must be constructed or modified, utility lines must be raised and buried at 572 locations, and traffic signals and road signs must be modified. The EA contains no analysis of whether construction at a similar cost could make the Interstate Route a feasible alternative. Without such an analysis, it is unclear to the Court at this time how MDT concluded that the Interstate Route was an infeasible alternative.

PI Or. 8.

Section 2.3.2 of the EA identifies use of the interstate highway system as an alternative that was considered but eliminated. The EA explained that “[t]his alternative route was investigated and rejected since about 25 existing overpasses are too low and do not have by-pass ramps or feasible detours to allow passage of the modules.” KMTP EA 14-15 (Apr. 8, 2010). MDT provided further explanation in the FONSI:

Common Comment D2: The analysis should have included detailed study of other routes through Montana, such as the interstate system.

Response to Comment D2: MDT considered and rejected use of I-90 and I-15 as infeasible because approximately 25 existing overpasses are too low and have no by-pass ramps or feasible detours to allow passage of the modules. Please refer to Section 2.3 of the EA and Response to Common Comment D1.

FONSI 10.

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MDT's MEPA rules do not require that an agency consider every conceivable alternative in an EA. Rather, the rules require that an EA contain "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider." Admin. R. Mont. 18.2.239(3)(f). The rules also state that an agency "is required to consider only alternatives that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated." Admin. R. Mont. 18.2.236(2)(b). When an EA or an EIS explains why an alternative is not reasonable, the statutory obligation is met. *N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (upholding agency explanation of decision for rejecting alternative); *State of Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (NEPA does not require agency to consider an alternative "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative") (internal quotation and citation omitted). Furthermore, unlike an EIS, MEPA does not require that an EA contain a detailed explanation as to why an alternative was eliminated.

In rejecting any alternatives, the agency must only include "brief discussions of the need for the proposal, of alternatives required by [42 U.S.C. § 4332(2)(E)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b) (2000).

Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246 (9th Cir. 2005).

Plaintiffs bear the burden to show by clear and convincing evidence that it was not reasonable for MDT to eliminate the interstate alternative without more detailed review. Plaintiffs only vaguely raised the issue in their preliminary injunction brief, when Plaintiffs argued that the EA was inadequate because it did not explain what construction might make the impassable freeway obstacles “passable.” Pl. Br. at 29-30. The issue then appeared in Plaintiffs’ Proposed Findings at Paragraph 58, when Plaintiffs stated:

The EA devotes many pages to a detailed description of extensive construction necessary to make the Montana route feasible, yet there is no discussion of whether similar construction measures would also make alternative routes feasible or, importantly, whether the modules could be reduced in size. Without such a discussion, MDT cannot claim it considered reasonable alternatives before rejecting them.

Pls.’ Proposed Findings Fact, Conclusions Law & Or. Granting Prelim. Inj. 28:¶ 58 (June 2011) (“Pls.’ Findings Fact”).

The Court adopted Plaintiffs’ proposed findings by concluding that “the EA contains no analysis of whether construction at a similar cost could make the Interstate Route a feasible alternative. Without such an analysis, it is unclear to the Court at this time how MDT concluded that the Interstate Route was an infeasible

alternative.” PI Or. 8. The Court must have, therefore, concluded that MDT’s conclusion that the route was infeasible was arbitrary and capricious.

This issue must be evaluated under the rule that the *Plaintiffs* have the burden of proving by clear and convincing evidence that the rejected interstate alternative was “reasonable.” Admin. R. Mont. 18.2.239(3)(f). Even a cursory review of the evidence shows that MDT acted properly in eliminating the interstate alternative. In its response to comments, MDT stated that there are 25 overpasses that are too low and do not have sufficient on and off ramps to allow passage of these loads. FONSI 10 at Response cmt. D2. The administrative record contains documents that show MDT was presented with evidence as to the unique problems presented at each of these locations. Aff. Martin ¶ 3.m.iii; Aff. Brown ¶ 11-12 (referencing detailed presentation made to MDT with illustrations of overpass barriers). The high cost of rebuilding an overpass and acquiring right-of-way is part of MDT’s institutional knowledge, and MDT’s decision that rebuilding 25 overpasses was unreasonable, compared to the turnout construction within existing right-of-way, was not arbitrary and capricious. An alternative must only be included if it is reasonable. MDT’s conclusion that halting traffic on the interstate in 25 places, purchasing or condemning additional rights-of-way from private landowners, obtaining federal permits, and spending the cost necessary to make the necessary physical improvements was not a reasonable alternative. It was not

arbitrary and capricious for MDT to consider the interstate route unreasonable and to eliminate it as an alternative. Issuing an injunction on this basis is improper.

D. Issue 3: Whether MDT Took a Hard Look By Relying On Tetra Tech's Wetland Analysis

The Court's third concern about the EA does not come directly from some perceived deficiency in the EA, but rather from testimony that the Court interpreted to mean that MDT had not taken an independent – and, therefore, hard – look at certain impacts of the KMTP. The Order states:

MDT did not prepare the KMTP EA either independently or through its contractors. Rather, the KMTP EA was prepared by a private consulting firm called Tetra Tech. Tetra Tech was hired to prepare the EA by Imperial Oil through its contractor Fluor. Thus, Imperial Oil as the proponent of the KMTP prepared the EA through its contractors. Testimony from MDT Environmental Services employee Eric Thunstrom was that MDT did not independently assess wetlands or floodplain information along the route because it was the responsibility of Imperial Oil's consulting firm.

Plaintiffs argue that under Admin. R. Mont. 18.2.256 and 18.2.239 MDT cannot delegate preparation of an EA to the project sponsor. These regulations do not appear to explicitly preclude MDT from delegating preparation of an EA to the project sponsor. However, Imperial Oil's preparation of the EA in conjunction with testimony that MDT did not independently assess certain environmental impacts raises a substantial question as to whether MDT took the requisite "hard look" at the potential environmental impacts of the KMTP.

PI Or. 8-9.

Contrary to this statement, the record demonstrates that MDT and Tetra Tech worked very closely in analyzing the wetlands issue, which indicates that Mr. Thunstrom's testimony at the hearing is being taken out of context. Examples of the extensive interaction between Tetra Tech and others and MDT concerning these issues include:

- November 25, 2009 – MDT letter to Imperial recommending that site visits be conducted by a qualified wetland professional to determine if wetlands are present in the impact areas.
- January 4, 2010 – MDT letter commenting on the wetland analysis contained in the first version of an “environmental review” document submitted by Imperial’s consultants. Paragraph 17 of Attachment 1 to this document discusses water resources, including several wetland comments. This document is contained in Exhibit J to the KMTP administrative record.
- February 18, 2010 – Letter from U.S. Army Corps of Engineers to Tetra Tech authorizing two soil bore test holes to be located in a wetland area. This document is contained in Exhibit M-8 to the KMTP administrative record.
- Document prepared by Tetra Tech responding to issues raised by MDT’s January 4, 2010 comments. This document references MDT comments about wetlands or floodplains. This document is contained in Exhibit K to the KMTP administrative record.
- April 26, 2010 – Letter from MDT to Imperial providing MDT staff review of encroachment permits. Attachment 1 includes detailed comments, including “MDT requests that all sites are field reviewed for wetlands by a person trained in performing wetland delineations prior to any ground disturbing activities.” This document is contained in Exhibit J to the KMTP administrative record.

- June 3, 2010 – Letter from U.S. Army Corps of Engineers to MDT (D. Kailey) identifying a single site in Powell County as “the only project area that may include work in wetlands.” This document is contained in Exhibit M-8 to the KMTP administrative record.
- July 16, 2010 – “Turnout Wetland Identification and Mitigation Report” prepared by Tetra Tech submitted to MDT. This document is contained in Exhibit M-8 to the KMTP administrative record.

Aff. Martin ¶ 3; *See* Aff. Brown ¶¶ 4-10 (enclosing copies of referenced documents).

Plaintiffs did not raise this issue in their preliminary injunction opening brief. The reply brief discusses “hard look” but never discusses contractor review. Pls.’ Consol. Reply Br. Support Mot. Prelim. Inj. 7-9 (May 12, 2011) (“Pls.’ Reply”). The issue made its first real appearance in Plaintiffs’ proposed Findings of Fact on pages 6 and 33-35, but without any citation to any case that ever has reached the conclusion that use of a contractor to perform environmental analysis is problematic. Therefore, Imperial and MDT were not on notice that this would be an issue, nor given a proper opportunity to identify for the Court the extensive consultation that occurred between MDT and Tetra Tech regarding wetlands resources, Thunstrom’s one sentence of testimony notwithstanding.

Further, as the Court’s Order states, there is nothing in Montana’s statutes or regulations that prohibit an agency from relying on the assistance of a project sponsor in compiling the environmental documents. In fact, this is standard

practice. *See generally Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) (upholding agency reliance on material prepared or submitted by other parties); *Friends of Endangered Species, Inc. v. Jantzen*, 589 F. Supp. 113, 119 (N.D. Cal. 1984) *aff'd*, 760 F. 2d 796 (9th Cir. 1985) (“plaintiff must show the agency actually disregarded its role by failing to review adequately the study it commissioned”); *Westside Property Owners v. Schlesinger*, 415 F. Supp. 1298, 1301-1302 (D. Ariz. 1976) *aff'd*, 597 F.2d 1214 (9th Cir. 1979) (agency may delegate preparation of NEPA documents); *Assns. Working for Aurora’s Residential Env’tl. v. Colo. Dept. of Transp.*, 153 F.3d 1122 (10th Cir. 1998) (no conflict of interest for private firm preparing NEPA documents).

It would be an abuse of discretion to conclude that MDT had not taken a hard look at these water resources issues in light of the extensive back and forth between the agency and Tetra Tech, and the injunction is not supportable on this ground.

E. If the Injunction Is Not Dissolved, It Should Be Modified.

Even if the Court does not wholly dissolve the injunction, the issues the Court identified can be addressed by modifying the injunction to reduce its scope while the case proceeds to resolution on the merits. As an alternative to dissolving the injunction, Imperial requests that it be modified.

Modification of the injunction is within the Court’s discretion because an injunction is an equitable remedy and courts in equity have “great flexibility in fashioning appropriate relief.” *LeFeber v. Johnson*, 2009 MT 188, ¶ 22, 351 Mont. 75, 209 P.3d 254 (internal quotation and citation omitted); *Blaine Bank of Mont. v. Haugen*, 260 Mont. 29, 35, 858 P.2d 14, 18 (1993). If an injunction no longer is warranted, a court “has not only the power but the duty to modify or annul its injunction as equity demands.” *Santa Rita Oil Co. v. State Bd. of Equalization*, 112 Mont. 359, 116 P.2d 1012, 1017 (1941). This principle is embodied in Mont. Code Ann. § 27-19-401, which states that, at a minimum, an injunction “must” be modified if grounds for it no longer exist.

Imperial submits that a reasonable modified preliminary injunction can be crafted that is less expansive in scope. Imperial’s proposal to MDT that is the subject of the EA requests 32-J permits to transport oversized loads on a specific route from the Idaho border on U.S. Highway 12 to the Port of Sweetgrass on the Canadian border. Simultaneous with the permitting work in Montana, Imperial has a parallel permit process underway in Idaho to authorize module transport on Highway 12 from Lewiston to Lolo Pass. Although litigation also has been filed in Idaho, to date all permit actions of the Idaho Transportation Department (“ITD”)

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have been upheld.³ A decision is now before the Director of the ITD which, if favorable, would lead to Imperial receiving permits to use the Idaho portion of this route for the modules.

Imperial's witness Ken Johnson testified at the preliminary injunction hearing that the temporary restraining order in this case forced Imperial to incur significant time and expense to begin disassembling and reconfiguring 33 modules in Lewiston so they conform to height restrictions on the Interstate highway system. Transcr. Proceedings: Johnson Test. 446:16-20 (May 16-18, 2011). Since the injunction was issued, this process has continued. Because the disassembled modules now are smaller, these 33 modules now consist of approximately 65 transport loads. Originally, Imperial projected the work to disassemble and reconfigure the modules to cost more than \$500,000 per module. Transcr. Proceedings: Johnson Test. 446:24-448:4. Since the date of the hearing, Imperial now has completed the disassembly of 33 modules at the Port of Lewiston, Idaho and the actual cost of the disassembly work has been greater than \$500,000 per module. Third Aff. Kenneth L. Johnson ¶ 3 (Aug. 22, 2011) ("3d Aff. Johnson"). In addition to the direct cost of reconfiguring the modules to meet interstate

³ On June 27, 2011, an administrative hearing officer in Idaho recommended that ITD issue oversized load permits to Imperial to use U.S. Highway 12 to the Montana border on Lolo Pass. The hearing officer rejected a motion to reconsider his decision. Pursuant to Mont. R. Evid. 202, this Court may take judicial notice of the Idaho ruling.

highway height restrictions, delay in delivering the modules to their destination in Canada has required the implementation of reassembly plans and revised construction plans that are also increasing costs to the overall project and with further delay could result in costs to Imperial that significantly exceed the module reconfiguration costs. 3d Aff. Johnson ¶ 7.

Because the 33 modules in Lewiston now have been modified to create approximately 65 transport loads, they can be transported on the interstate highway system. Imperial now has 115 remaining modules (in addition to the Lewiston modules) that require transportation and when reconfigured will comprise approximately 250 transport loads that can be transported on the interstate highway system. The link between Interstate 90 and Lolo Pass is U.S. Highway 12 to Lolo and a segment of Highway 93 from Lolo to Missoula.⁴ Thus, while the case is being resolved on the merits, the project could proceed under a modified injunction that allows this segment of the route to be used, but leaves the injunction in place as to the remainder of the original KMTP route. This modification allows Imperial to partially mitigate its losses, while at the same time addressing the Court's concerns. No high-wide corridor would be established on the KMTP route because

⁴ Imperial also will transport some of the reconfigured loads on other routes, but because of the limits imposed on the number of transport loads that can occur at any one time, and the increased number of total loads, the Highway 12 route to Interstate 90 remains a critical component even while the litigation remains ongoing.

the injunction would only be partially lifted. Likewise, the concerns about evaluation of the cost of modifying overpass bypasses also would be addressed since the overpass clearance limits do not pose an impassable barrier to these modified modules. Because the Court already has determined that the Plaintiffs are not harmed as to the use of the entire route, logically Plaintiffs also cannot claim to be harmed by use of only a segment of the route. Thus, modifying the injunction in this fashion addresses all of the Court's concerns.

Imperial believes that MDT ultimately will prevail on the merits of this case, which will cause the injunction to be dissolved in its entirety. Imperial recognizes that additional briefing and argument will be necessary before that decision can be made. If ultimately MDT and Imperial prevail, MDT can issue permits as originally proposed by Imperial. If they do not prevail, the Court will retain equitable discretion to continue some or all of the injunction until any MEPA violations are resolved. In the meantime, the equities of this case can be appropriately balanced through a modified injunction that mitigates the harm currently being suffered.

F. Continuing the Injunction is Inconsistent With the Court's Duty to Minimize Injury to All Parties in the Case

In its Preliminary Injunction Order, the Court recognized that it has a "duty to minimize the injury or damage to *all parties* in the case." PI Or. 4, citing

Sandrock v. DeTienne, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123 (emphasis added). In applying this standard, the Supreme Court has held it is appropriate to consider the cost to the party to which the injunction applies. *Porter v. K & S Partn.*, 192 Mont. 175, 627 P.2d 836 (1981); *Cole v. St. James Healthcare*, 2008 MT 453, ¶ 25, 348 Mont. 68, 199 P.3d 810 (considering cost and injury to enjoined party before upholding injunction).

As part of its decision on the preliminary injunction, the Court considered whether the Plaintiffs had shown harm and concluded that they had not. PI Or. 11 (“it does not appear that MDT’s issuance of oversize 32-J permits related to the KMTP will produce a great or irreparable injury to Plaintiffs.”). Although it articulated the obligation to consider harm to each party, the Court did not evaluate harm to Imperial. Evidence of harm exists in the record. For example, the first affidavit of Ken Johnson, dated April 15, 2011, describes the significant costs and scheduling implications that Imperial will suffer if the “currently completed modules are not delivered within the schedule set out for the KMTP for 2011.” Aff. K. Johnson ¶ 13 (May 10, 2011) (“2d Aff. Johnson”). This affidavit is un rebutted and not subject to any motion to strike. Mr. Johnson provided further testimony as to harm to Imperial at the preliminary injunction hearing, which also was un rebutted. Transcr. Proceedings 454:5-21. Mr. Johnson has elaborated on this harm in his current affidavit. 3d Aff. Johnson. Given the Court’s obligation to

minimize harm to all parties, Imperial submits that this harm provides further support to modify or dissolve the injunction.

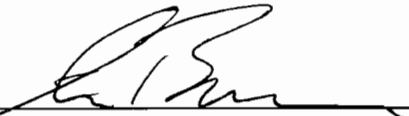
CONCLUSION

Plaintiffs attempted to use the preliminary injunction hearing to move the goal posts from where they existed in their initial motion. Imperial attempted to respond to the core issues but was drawn into responding to evidence that the Court eventually, properly, struck. Having concluded that certain issues received short shrift in the EA, the Court identified those issues as the grounds for its injunction. Imperial respectfully submits that this application shows that the issues identified by the Court as the grounds for its injunction were considered properly in the EA, as required by law and administrative rule, and, therefore, the injunction should be dissolved or modified as outlined in this application.

DATED this 23 day of August, 2011.

Attorneys for Imperial Oil Resources Ventures
Limited:

GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595

By 
Stephen R. Brown

CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Imperial Oil Resources Ventures Limited, hereby certify that on this 23rd day of August, 2011, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
_____ 1-10 Mail
_____ Overnight Delivery
_____ Fax
_____ 1-10 E-mail

1. Fred Van Valkenburg
Missoula County Attorney
D. James McCubbin, Deputy
200 W. Broadway
Missoula, MT 59802
jmccubbin@co.missoula.mt.us

Attorneys for Missoula County

3. Robert Gentry
Robert Gentry Law, PLLC
114 W. Pine
Missoula, MT 59802
Robert@robertgentrylaw.com

Attorneys for Montana Environmental
Information Center and Sierra Club

5. Summer Nelson
Summer Nelson Law Office, PLLC
114 W. Pine
Missoula, MT 59802
summer@summernelsonlaw.com

Attorneys for Montana Environmental
Information Center and Sierra Club

2. Thomas France
National Wildlife Federation
240 North Higgins, Suite 2
Missoula, MT 59802
france@nwf.org

Attorneys for National Wildlife
Federation

4. Matthew K. Bishop
Western Environmental Law Center
P.O. Box 7435
Missoula, MT 59807-7435
bishop@westernlaw.org

Attorneys for Montana Environmental
Information Center and Sierra Club

6. David K.W. Wilson
Morrison, Motl & Sherwood
401 North Last Chance Gulch
Helena, MT 59601
kwilson@mmslawgroup.com

Attorneys for Montana Environmental
Information Center and Sierra Club

7. David L. Ohler
Valerie Wilson
Legal Services
MT Department of Transportation
2701 Prospect Avenue
P.O. Box 201001
Helena, MT 59620-1001
dohler@mt.gov; valwilson@mt.gov

Attorneys for Montana Department of
Transportation and Jim Lynch

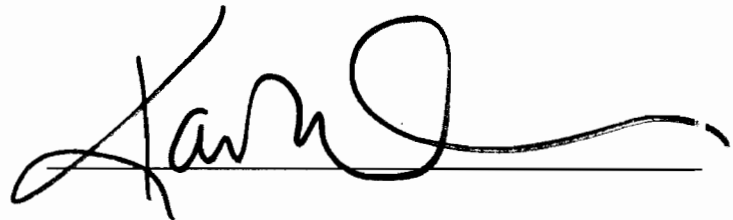
8. Honorable Ray J. Dayton
800 S. Main St.
Anaconda, MT 59711
rdayton@mt.gov

9. Ranald McDonald, Managing Attorney
John Harrison, Staff Attorney
Tribal Legal Department
Confederated Salish and Kootenai
Tribes of the Flathead Reservation
P.O. Box 278
Pablo, MT 59855
ranaldm@cskt.org
johnh@cskt.org

Attorneys for Amicus Curiae
Confederated Salish and Kootenai
Tribes of the Flathead Reservation

10. Ryan W. Sudbury
Sudbury Law Office, PLLC
P.O. Box 8366
Missoula, MT 59807-8366
sudburylawoffice@gmail.com

Attorneys for Amicus Curiae Nez
Perce Tribe

A handwritten signature in black ink, appearing to read "Ranald", is written over a horizontal line. The signature is stylized and cursive.