

Stephen R. Brown
Brian J. Smith
Elena J. Zlatnik
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595
srbrown@garlington.com; bjsmith@garlington.com;
ejzlatnik@garlington.com

Attorneys for Imperial Oil Resources Ventures Limited

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

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

**DEFENDANT-INTERVENOR
IMPERIAL OIL'S RESPONSE IN
OPPOSITION TO PLAINTIFFS'
EXPEDITED MOTION TO
MODIFY TEMPORARY
RESTRAINING ORDER**

Defendant-Intervenor Imperial Oil Resources Ventures Limited (“Imperial”) files this brief in opposition to the Non-profit Organization Plaintiffs’ Expedited Motion to Modify Temporary Restraining Order.

At the outset, Imperial notes that the Plaintiffs have failed to comply with Local Rule 3.G. which requires a prefatory statement in each motion submitted to the Court certifying that the other parties have been contacted concerning the motion and whether those parties object.

INTRODUCTION

Almost three weeks ago, the Plaintiffs asked this Court for a temporary restraining order (“TRO”), with the unprecedented effect of halting all work necessary to meet conditions set by the Montana Department of Transportation (“MDT”) to allow for the transport of cargo on existing public highways across Montana. Plaintiffs based their TRO request entirely on the harms they claimed would follow any construction related to the Kearsarge Module Transportation Project (“KMTP”). For purposes of the TRO, the Court accepted the testimony of Peter Nielsen at the TRO hearing as meeting the standard of demonstrating “likelihood of irreparable harm to aquatic resources if ground disturbing and turnout related construction are not restrained.” Or. Granting in Part & Denying in Part Pls.’ Mot. Temp. Restraining Or. 3-4 (Apr. 18, 2011) (“Or.”). Further, the Court decided that

Plaintiffs have shown a sufficient likelihood of irreparable harm from ground disturbing construction to warrant imposition of a temporary restraining order. Therefore, MDT and Imperial Oil, independently or through its contractors, are hereby temporarily enjoined and restrained from engaging in any activity relating to the burying of utility lines and engaging in any activity relating to improvement or construction of turnouts for the KMTP.

Or. 4.

In response to Plaintiffs' TRO request, Imperial requested that the Court impose a bond pursuant to the clear mandate of Mont. Code Ann. §§ 27-19-306(2)(a-b), which requires a bond when an injunction prevents some industrial activity. In response to Imperial's request, the Court ordered the Plaintiffs (other than Missoula County) to post a bond of \$50,000. The Court's order took effect immediately.

Three weeks later, having failed to comply with the Court-ordered obligation, and without asking the Court to stay the obligation in the interim, the Plaintiffs return to the Court to ask for the TRO to be modified based on the novel argument that they really did not intend to stop Imperial from performing construction work; rather they simply intended to enjoin MDT from issuing the permits or authorizations necessary for construction work to proceed. They take this new position despite explicitly requesting that all construction or activities related to KMTP be enjoined. Non-Profit Organization Pls.' Expedited Mot.

Modify Temporary Restraining Or. & Br. Support 5 (Apr. 27, 2011) (“Pls.’ Mot. Modify”).

If the Plaintiffs did not intend to enjoin any individual other than MDT, they had ample time to seek relief as soon as the Court’s order stopped the activities of the other entities restrained by the Court. However, instead of complying with the Court’s order, they have enjoyed the benefit of the TRO without recognizing its burdens. After this lengthy delay, without posting their bond (and without complying with the procedural requirements of the Fourth Judicial District), they now ask to modify the TRO based on a hair-splitting argument, while in the meantime continuing to flout their Court-ordered obligation. This Court should not grant their request to waive the bond, and instead order that the bond be put in place immediately, as the Court required weeks ago.

ARGUMENT

A. Plaintiffs Intended to Prevent Industrial Activity and Therefore Are Subject to the Bond Requirement

Under the Montana injunction statute, the Court does not have discretion to waive the written undertaking necessary when construction is enjoined.

(a) If a party seeks an injunction or restraining order against an industrial operation or activity, *the judge shall require* a written undertaking to be filed by the applicant.
[....]

(b) As used in subsection (2)(a), “industrial operation or activity” includes but is not limited to construction, mining, timber, and grazing operations.

Mont. Code Ann. §§ 27-19-306(2)(a-b) (2009) (emphasis added). While a waiver may be possible in some situations, the statute does not allow any possibility of a waiver for parties seeking to enjoin anything that falls within the definition of “industrial operation or activity.”

Plaintiffs do not argue that the work necessary to relocate utilities, improve or construct turnouts and other related activity is not “construction” that falls within the definition of “industrial operation or activity.” Nor can they, because they have taken the position throughout the proceedings leading up to this litigation that the work will result in an “industrial corridor.” (Plaintiffs never offer an explanation as to exactly what an industrial corridor might be, but presumably they agree that any highway route where construction occurs by definition becomes an “industrial corridor” simply by virtue of the necessity of construction work.)¹

Plaintiffs attempt to escape from the mandatory bonding requirement by arguing that they only seek to enjoin governmental action, not any industrial

¹ Plaintiffs also have raised no argument as to the amount of the bond, presumably conceding that the financial harm of the delays caused by the TRO is at least \$50,000.00. Instead, Plaintiffs make a facial challenge that no bond should be required at all, notwithstanding the mandatory nature of the statute.

activity or operation. Pls.' Mot. Modify 3. However, Plaintiffs' request explicitly asked for construction to be halted. Even if the Court modified the TRO to remove Imperial's name, the effect of the TRO was intended to, and unequivocally does, halt construction. Montana law is clear that if an injunction stops construction, the bond is required.

In support of their argument that their injunction does not stop construction, Plaintiffs cite *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 35, 319 Mont. 132, 82 P.3d 912. *Shammel* is easily distinguishable. As the court stated there, “[t]he injunction at issue does not restrain Canyon from engaging in an industrial operation or activity. Rather, it requires sequestration of sale proceeds.” *Shammel*, ¶ 36. The plaintiffs there were concerned that, without an injunction, Canyon Resources would dissipate the money that would be part of the plaintiffs' relief. Therefore, the Court enjoined that dissipation.

Here, the issue falls squarely within the advice of the *Shammel* Court:

The District Court denied Canyon's request for undertaking interpreting the statute as follows:

The legislature's intent was those injunctions which stopped an activity of mining, of timber, or other activity, as defined, grazing operation, as defined in that statute, that that was their goal, that if these things are stopped in process by an injunction you get this undertaking to cover the wages of those poor folks who get stopped who can't earn a living when the injunction is granted,

that they were dealing with very precise injunctions that were aimed against timber and mining that were ongoing active enterprises with employed people who will be stopped because of [the] injunction.

This is not the instance here. We are not stopping an ongoing operation. We are requiring the company to retain Montana assets for the eventual outcome of this case. . . .

Shammel, ¶ 35. Plaintiffs here sought the TRO on their claim that the construction would cause them damage, not that paper shuffling at MDT would cause them damage. They asked the Court to enjoin construction; otherwise their request for a TRO would have been meaningless.

Plaintiffs did not put on any evidence specifically attributable to the issuance of permits; it is the activity conducted under the permits that would cause the damages Plaintiffs fear. Plaintiffs specifically asked for the Court to enjoin all ground-disturbing construction, and the Court granted that request. Plaintiffs ask the Court, in the spirit of *Shammel*, to look to the “real activity” being enjoined. Pls.’ Mot. Modify 5. The real activity being enjoined is construction, not paper signing, document review, or approval of schedules, which are the only remaining MDT actions before Imperial can commence its construction.

B. Plaintiffs Do Not Qualify for the “In the Interests of Justice” Exception.

Even though Plaintiffs fail to provide a clear argument about how they avoid

the risk of a mandatory bond by asking for the extraordinary relief of shutting down construction work necessary to allow for safe, lawful use of Montana highways, Plaintiffs ask the Court to exercise discretion simply because they have rebranded their injunction request. Rather than cite any relevant Montana law, Plaintiffs follow what has now become a familiar pattern of citing to Federal law without any clear logical basis for doing so. In this case, Plaintiffs ask the Court to ignore the Montana injunction statute and instead follow federal cases (many of which are nearly 40 years old) that have reduced or waived bonding. The mandatory bonding provisions of Montana's statute were added to the statute in 1995 by the Montana legislature. There is no Montana case or statute that authorizes the Court to look to federal law to interpret the statutory prescription, nor is there a need to, as the Montana statute is clear and simple. The Court should not be swayed by these federal cases because they interpret different statutes in different situations and are not binding. This is a Montana case in a Montana court. Plaintiffs cite no Montana case or statute to support the relief they seek.

C. Plaintiffs' Failure to Comply with Local Rule 3.G(3) is Not Trivial

Plaintiffs filed this case in the Montana Fourth Judicial District Court and thereby voluntarily subjected themselves to the local rules of this Court. Rule 3.G plainly states:

In a prefatory statement in each motion submitted to the Court, the moving party shall certify that the other parties have been contacted concerning the motion, and whether the other parties object to the motion.

Rule 3.G(2).

Even though this rule is mandatory, Plaintiffs failed to include any certification that they contacted the other parties.² While Plaintiffs might have presumed that an objection would be the response, Plaintiffs' failure to make this contact eliminated any opportunity to work out a private arrangement concerning the bond requirement. Plaintiffs' failure to make contact also made their motion the first notice to Defendants that Plaintiffs had done nothing to comply with the Court's order, despite having several weeks to do so. Montana district courts are busy. Rules like local rule 3.G(2) help in some small measure to alleviate pressures on scarce judicial resources by encouraging parties to at least talk to each other before they file additional motions in Court. In addition to all the other reasons why this motion should be denied, the Court also should consider Plaintiffs' failure to follow the mandatory rules of this District.

CONCLUSION

Imperial respectfully requests that the Court perceive Plaintiffs' motion as what it is, an attempt to circumvent a mandatory obligation imposed by an

² Plaintiffs have continued to ignore this rule in more recent filings, such as the motion filed late last week to strike certain affidavits.

unambiguous statute. The Court lacks discretion to lift the bonding requirement, because Plaintiffs have sought and received a TRO that halts construction.

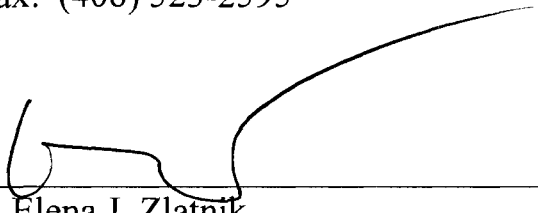
Imperial respectfully requests that the Court deny Plaintiffs' motion.

DATED this 9th day of May, 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



Elena J. Zlatnik

CERTIFICATE OF SERVICE

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Imperial Oil Resources Ventures Limited, hereby certify that on this 9th day of May, 2011, a copy of the foregoing document was served on the following persons by the following means:

_____ Hand Delivery
_____ 1-9 Mail
_____ Overnight Delivery
_____ Fax
_____ 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
2. Thomas France
National Wildlife Federation
240 North Higgins, Suite 2
Missoula, MT 59802
france@nwf.org

Attorneys for National Wildlife Federation
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
4. Sarah K. McMillan
Western Environmental Law Center
P.O. Box 7435
Missoula, MT 59807-7435
mcmillan@westernlaw.org

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
6. 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

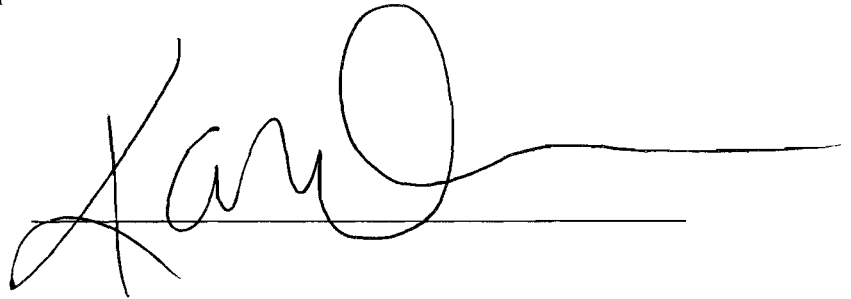
7. Honorable Ray J. Dayton
800 S. Main St.
Anaconda, MT 59711
rdayton@mt.gov

Transportation and Jim Lynch
8. Ryan W. Sudbury
Sudbury Law Office, PLLC
405 S. 1st St. W.
Missoula, MT 59801
sudburylawoffice@gmail.com

Attorneys for Amicus Curiae
Applicant Nez Perce Tribe

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@cstk.org
johnh@cstk.org

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

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