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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 BRIEF IN
SUPPORT OF ITS MOTION TO
DISMISS**

INTRODUCTION

Defendant-Intervenor Imperial Oil Resources Ventures Limited (“Imperial”) files this brief in support of its motion to dismiss under Mont. R. Civ. P. 12(b)(6). As explained below, Plaintiffs County of Missoula (“Missoula County”), National Wildlife Federation (“NWF”), Montana Environmental Information Center (“MEIC”) and the Montana Chapter of The Sierra Club (“Sierra Club”) (collectively, “Plaintiffs”) do not have standing to assert their claims. Their Complaint should be dismissed as it fails to state claims upon which relief can be granted.

STANDARD FOR A MOTION TO DISMISS

When considering a motion to dismiss filed under Rule 12(b)(6), the Court must construe all allegations in the Complaint as true and view them in the light most favorable to the plaintiff. *Lozeau v. Geico Indem. Co.*, 2009 MT 136, ¶ 8, 350 Mont. 320, 207 P.3d 316. A plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell A. Corp. v. Twombly*, 550 U.S. 544, 547, 570 (2007).

Generally, a court must consider only the Complaint in ruling on a motion to dismiss under Rule 12(b)(6). A district court does have “the discretion to include or exclude matters presented to it that are outside of the pleadings when considering a motion to dismiss,” and generally, if it chooses to look beyond the

pleadings, it treats the motion as one for summary judgment under Mont. R. Civ. P. 56. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 16, 337 Mont. 339, 160 P.3d 552 (citing cases, including *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316). However, in *Farmers Coop. Assn. v. Amsden, LLC.*, 2007 MT 287, 339 Mont. 452, 171 P.3d 684, where the district court had considered pleadings from another closely related case when ruling on a motion to dismiss, the Montana Supreme Court elaborated the general rule as stated in *Plouffe* and *Meagher*. The Court noted:

The policy behind converting a motion to dismiss into a motion for summary judgment when a court considers outside information, is to notify the parties of the additional evidence considered, allow ample opportunity for the parties to prepare information countering the additional evidence, and avoid surprise. *See Plouffe*, ¶ 15. These concerns do not exist in the present case. The parties were not surprised by the information and there was no need for further time to consider the issues presented.

Farmers Coop., ¶ 23. The Court held that the district court had correctly reviewed matters outside the pleadings before deciding to dismiss the pending action.

Farmers Coop., ¶ 24.

The same reasoning applies here. Some of the Plaintiffs submitted affidavits to support their allegations of standing. The bare allegations of the Complaint are insufficient to sustain standing for these Plaintiffs. This Court may review the

affidavits to consider whether they bolster the allegations of standing made in the Complaint. These affidavits were submitted by the Plaintiffs so they obviously cannot claim to be surprised by their content.

**ARGUMENT:
PLAINTIFFS DO NOT HAVE STANDING AND THEREFORE CANNOT
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

A. A Plaintiff Must Have Standing to Maintain An Action

A court's authority to hear a case is limited by several justiciability doctrines, including ripeness and standing. A court will not issue an advisory opinion that decides a case that is not a real, extant controversy. *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881. The Supreme Court of Montana has concluded that though the constitutional language is different between the federal and Montana constitutions, the restrictions of the jurisdiction of Montana courts to "cases at law and in equity" should be interpreted in the same manner as Article III of the U.S. Constitution. Mont. Const. art. VII, § 4; *Armstrong v. State*, 1999 MT 261, ¶¶ 6-13, 296 Mont. 361, 989 P.2d 364; *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 2010 MT 26, 355 Mont. 142, 226 P.3d 567.

A plaintiff must suffer a personal injury that creates standing to pursue an action on his or her own behalf.

At the threshold of every case, especially those where a statutory or constitutional violation is claimed to have occurred, is the requirement that the plaintiff allege "*such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . .*"

At a minimum, the constitutional aspect of standing requires a plaintiff to show that he has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation. . . .

Olson v. Dept. of Revenue, 223 Mont. 464, 469-470, 726 P.2d 1162, 1166 (1986) (internal citations omitted; emphasis added). This injury must be “distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party.” *Fleenor v. Darby Sch. Dist.*, 2006 MT 31, ¶ 9, 331 Mont. 124, 128 P.3d 1048.

The U.S. Supreme Court articulated the three requirements for standing in

Lujan v. Defenders of Wildlife:

[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561(1992) (internal citations and markings omitted). “Allegations of possible future injury do not satisfy the requirements of Art[icle] III.” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

In addition, “standing is not dispensed in gross” *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996). Each plaintiff must have standing to participate in this suit, and each Plaintiff must have standing on each of its independent claims in order to be entitled to relief. “A plaintiff must demonstrate standing ‘for each claim he seeks to press’ and for ‘each form of relief sought.’” *Or. v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

To assert a procedural injury, as Plaintiffs do with their Montana Environmental Policy Act (“MEPA”) claims, a plaintiff must allege that “(1) [MDT] violated certain procedural rules; (2) these rules protect [the Plaintiffs’] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.” *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 969-970 (9th Cir. 2003). In an environmental case, a plaintiff meets the concrete interest requirement if “a ‘geographic nexus’ [exists] between the individual asserting the claim and the location suffering an environmental impact.” *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (citation omitted).

Finally, in order for an association, rather than an individual, to establish standing, it must rely on one of two theories. Either the association has suffered injuries to its own interests, independent of any harm to its members, and therefore may sue on its own behalf (*Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)) or, it sues on behalf of its members who have been injured themselves. *U.S. v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 683-690 (1973). This latter theory requires that the individuals would have standing to sue in their own right, and that the interests the association seeks to protect are “germane to the organization’s purpose.” *Hunt v. Washington State Apple Advert. Commn.*, 432 U.S. 333, 343 (1977). Under either theory of associational standing, “an organization’s abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury” standing requirement. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976); *see also Schmier v. U.S. Court of Appeals for the 9th Cir.*, 279 F.3d 817, 823 (9th Cir. 2002) (“A mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization adversely affected or aggrieved.” (Internal quotation markings and citation omitted.))

Based on the record before the Court, no Plaintiff has standing on all the claims it asserts, for different reasons.

Since [the standing requirements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561. The allegations of standing in the Complaint, without more, are insufficient for the Court to assume standing on behalf of these organizations. On a motion to dismiss, the facts must be construed in favor of the plaintiffs. However, if it is plain from the Complaint and the documents filed by the Plaintiffs that they do not have standing, the Complaint must be dismissed. “If a plaintiff lacks standing, a court can grant no relief because a justiciable controversy does not exist.” *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 14, 340 Mont. 56, 59-60, 172 P.3d 1232, 1235 (internal citation omitted). The Complaint should be dismissed for failure to state a claim upon which relief can be granted.

B. Plaintiffs’ Assertions of Standing

The standing allegations in the Complaint are found in Paragraphs 9 through 13. Missoula County is concerned about the “potential impacts to the people and environment of Missoula County.” Compl. ¶ 9 (Apr. 1, 2011). NWF claims its members “visit and use the areas that the KMTP impacts,” and NWF is “deeply concerned with the exploration of the Alberta tar sands.” The interests of NWF’s

members will be adversely affected by the KMTP and “expansion of tar sand petroleum production.” Compl. ¶ 10. MEIC has members who “visit and use the areas that the KMTP impacts” and are concerned about “economic, environmental, and community impacts along the proposed route.” Compl. ¶ 11. The Montana Chapter of the Sierra Club has members who use the areas that the Kearl Module Transportation Project (“KMTP”) will allegedly impact and is involved because “expanding development of the tar sands in Alberta” has adverse effects on “resident communities, wild places, and the planet.” Compl. ¶ 12. All Plaintiffs allege they submitted comments to MDT on the KMTP Environmental Assessment (“EA”). Compl. ¶ 13.

In further support of their claims of standing, some of the Plaintiffs provided standing affidavits as part of their motion for preliminary injunction. These affidavits, discussed in detail below, further re-allege harms to Plaintiffs’ recreational, aesthetic, and other values. *See* Standing Aff. James D. Jensen (Mar. 28, 2011); Aff. John F. Wolverton (Mar. 15, 2011) (these affidavits are filed as exhibits to Pls.’ Mot. Prelim. Inj.).

C. Oil Sands Development Does Not Provide Standing For These Plaintiffs

On their face, concerns about the Alberta oil sands are not sufficient to create standing in any of these Plaintiffs. As explained above, any injury complained of must be “fairly traceable to the challenged action of the defendant,

and not the result of the independent action of some third party not before the court,” and “will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 560-561 (internal quotations, markings and citations omitted). There is no conceivable scenario under which Plaintiffs can demonstrate these elements of standing.

Global climate change is not “fairly traceable” to MDT’s issuance of encroachment and 32-J permits. And no matter what relief this Court chose to give in this case, the oil sands are being developed and will continue to develop under the oversight of Canadian regulatory authorities. Under basic principles of comity, this Court lacks any authority to limit any activity in Canada. “There is no redressability, and thus no standing, where . . . any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict.” *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (internal quotations and citations omitted). No Plaintiff can ground its standing in this matter on concerns related to oil sands development in Canada.

D. Plaintiffs Do Not Have Standing Based On Other Alleged Harms

Because Plaintiffs cannot base standing in this Court on concerns about activities taking place in a foreign country, Plaintiffs must look closer to home for standing, then, identifying some probable harm attributable to actions of MDT that this Court could address. (In addition, based on concessions made in Plaintiffs’

recent motion to amend their TRO, Plaintiffs apparently only are concerned about actions of MDT, not Imperial.) The vague allegations of the Complaint are supposedly bolstered by the affidavits of certain individuals, submitted in support of Plaintiffs' motion for preliminary injunction. Scrutiny of these affidavits, however, demonstrates that Plaintiffs do not have standing. In addition, Missoula County and NWF failed to file anything to support the insufficient allegations of the Complaint and, therefore, should be dismissed.

1. Sierra Club

The Sierra Club, as an organization, seeks to establish its associational standing under the test on page 7 above by submitting the Affidavit of John Wolverton, a member of the Sierra Club. Aff. Wolverton ¶ 1. He frequently visits several Montana backwoods areas, and “[i]t is important to [him] that these unique and pristine areas remain visually appealing and as undisturbed as possible.” Aff. Wolverton ¶ 6. Mr. Wolverton is concerned about global warming and its impact on Montana. Aff. Wolverton ¶¶ 7-9. He is further concerned about the construction in “wild, scenic and remote areas” and the transportation of equipment through those areas. Aff. Wolverton ¶¶ 9-10. He also has other concerns, such as seeing the loads, emergency travel, access to recreation, and effects on tourism, Montana’s economy and Montana’s roads. Aff. Wolverton ¶¶ 10-11.

Mr. Wolverton's Affidavit does not support standing for the Sierra Club to assert damages related to the economy, tourism, wear and tear on Montana's roads and emergency access. These issues are not "germane to the organization's purpose" of the Sierra Club. *Hunt*, 432 U.S. at 343. Nor does Mr. Wolverton assert that these issues are core concerns of the Sierra Club. Further, impacts to tourism, Montana's roads and emergency access are not injuries that he or the Sierra Club specifically will suffer, but rather, are potential injuries to the public at large, which are not proper or sufficient to create standing.

In fact, Wolverton's only assertions of injury that could fairly accrue to the Sierra Club and its purpose are recreational and participatory. (He tangentially asserts injury to his recreation in certain areas that are remote or not potentially related to the KMTP, such as the Scapegoat Wilderness. *Aff. Wolverton* ¶ 5. The KMTP route will use existing Montana highways, none of which travel through the Scapegoat or any other remote or pristine wilderness areas.) Wolverton alleges an aesthetic injury, but given that the KMTP will only involve construction and transport on existing federal and state highways, his assertion that these areas must remain pristine rings hollow. His recreational injuries appear most injured by vague claims of global climate change concerns, which, as explained above, is not a problem that could be remedied by this Court and MDT.

Therefore, Mr. Wolverton and the Sierra Club appear to have standing solely on their constitutional claims for a right to participate. However, these claims are insurmountably time-barred, as the Sierra Club did not submit its claims regarding lack of participation within 30 days of learning that their rights had allegedly been violated. Mont. Code Ann. § 2-3-114 (2009). Therefore, though John Wolverton may have alleged facts that support the Sierra Club's allegation of standing on its participation claims, because this particular grounds for standing is time-barred, the Sierra Club should still be dismissed from this lawsuit.

2. Missoula County

There are several fatal flaws in Missoula County's assertion of standing in this matter. First, Missoula County has not shown any harm to it, as opposed to the public at large, which is not sufficient for standing. In the absence of a specific statutory or constitutional provision, one governmental subdivision may not sue another for damages. *Dist. No. 55 v. Musselshell County*, 245 Mont. 525, 529, 802 P.2d 1252, 1255 (1990). There is no similar blanket prohibition on a governmental entity suing another governmental entity in Montana for injunctive relief.

However, the basic standing requirements still apply. The County must demonstrate an injury to it, not to the public at large. In the Montana cases in which a political subdivision has had standing to sue another governmental entity, the harm alleged was clearly a harm to the governmental entity itself, not a "harm"

of “potential impacts to the people and environment” of the county. Compl. 9. *See Rosebud County v. Dept. of Revenue of State*, 257 Mont. 306, 849 P.2d 177 (1993) (county had standing to sue where Department of Revenue rule would affect county’s tax revenue). A county does not have standing under a general theory of protecting the safety and well being of its residents. Courts consistently have held that counties and municipalities, as derivatives of the state and not sovereigns, are not vested with the power to protect those general interests under the theory of *parens patriae*. *See City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979); *U.S. v. City of Pittsburg, Cal.*, 661 F.2d 783, 786–87 (9th Cir. 1981). Counties may “sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants,” but only states and the federal government may sue as *parens patriae*. *In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973).

Missoula County has not asserted or alleged, through the Complaint or any affidavit, any harm to its own proprietary interests as a result of the KMTP. Missoula County cannot assert potential harms to the highways used by the KMTP within Missoula County, as those are state or federal highways, not county roads. Greg Robertson, director of public works for Missoula County, testified in deposition that Missoula County does not have maintenance responsibility for these highways. Depo. Gregory H. Robertson 9:6-13 (May 5, 2011). Nor can

Missoula County assert harms related to waterways within Missoula County, as those are the waters of the State and the people, not the County. Mont. Const. art. IX, § 3(3). Missoula County has not even attempted to identify an injury to its own interests, as opposed to those of either the people or the State. It does not have standing.

In addition, Missoula County, as a political subdivision and not an individual, does not have the individual constitutional guarantees found in article II, ¶¶ 8 and 9 of the Montana Constitution. The Committee Comments to the adoption of these sections make clear that the concern was “citizen participation in the decision-making processes of government” and “the deliberative and political capabilities of the citizenry.” Further, the provisions were intended to invigorate democracy by “establish[ing] full citizen access” Mont. Const. Conv., Bill of Rights Comm. Proposal Vol. II at 630-631 (1972). These constitutional rights are the fundamental rights of *individuals*, not of the governmental entities against whose potential distortion of democracy the provisions militate.

In presenting this proposed Declaration of Rights, the committee notes that the guidelines and protections for the exercise of liberty in a free society come *not from government but from the people who create that government*.

It is that spirit which has motivated this committee to insure for Montana's future, through this bill of rights, a more responsible government that is Constitutionally

commanded never to forget that *government is created solely for the welfare of the people* so that the people can more fully enjoy the heritage of American liberty within the structure of that government.

Mont. Const. Conv., Bill of Rights Comm. Proposal, Vol. II at 619 (emphasis added). The delegates intended the Declaration of Rights “to stand on its own footing and . . . provide individuals with fundamental rights and protections far broader than those available through the federal system” in order “to meet the changing circumstances of contemporary life.” *Dorwart v. Caraway*, 2002 MT 240, ¶ 94, 312 Mont. 1, 58 P.3d 128 (Nelson, J. & Trieweiler, T. specially concurring) (citation omitted). The Constitutional rights asserted in the Complaint belong to individuals. Missoula County does not have standing on Count Four of the Complaint.

Finally, in any event, Missoula County expressly asserts standing only for areas within Missoula County. Compl. ¶ 9. Therefore, any relief granted Missoula County on its claims must rest on some argument that the impacts to Missoula County are so severe that they justify shutting down the use of State-controlled highways that traverse multiple counties. Missoula County has no authority to assert injury to the six other Montana Counties through which the KMTP will pass. Because the relief Missoula County seeks necessarily affects road use in other counties, the effects of its claims far exceed its jurisdiction, thereby precluding its

standing to bring this claim.

3. MEIC

James D. Jensen filed an Affidavit on behalf of MEIC. *See* Aff. Jensen. Mr. Jensen claims to recreate frequently on the Blackfoot River and states that his recreational experiences and his economic well-being have already been damaged by global warming. Aff. Jensen ¶¶ 4-6. The bulk of Mr. Jensen's Affidavit addresses global climate change and energy efficiency issues. He does, however, assert that "MEIC's concerns include additional potential undisclosed impacts to streams from extra de-icing, grit, turnout construction, etc. and the potential of an accident, including but not limited to, a load ending up in a river or tributary." Aff. Jansen ¶ 10. These are the only environmental concerns asserted by MEIC that can fairly be attributed to the KMTP. MEIC does not, as required by associational standing, allege a geographic nexus between these particular concerns and any particular location along the several hundred mile route of existing highways related to the KMTP. Nor are these any actual impacts that will be suffered by MEIC's members, but rather "potential undisclosed" impacts. To allege standing, MEIC must identify a concrete harm to its members. This vague collection of asserted "potential undisclosed impacts" is not sufficient.

Finally, MEIC's claim regarding its participation in this lawsuit is time-barred. Mont. Code Ann. § 2-3-114. MEIC does not have standing to assert its

MEPA claims and is barred from asserting its participation claims. Therefore, it should be dismissed from this law suit.

4. NWF

NWF did not submit any affidavit in support of its standing. NWF has not sufficiently supported its bare allegations of standing in the Complaint and, therefore, should be dismissed from this action.

CONCLUSION

Plaintiffs Missoula County, NWF, MEIC and the Sierra Club assert a range of claims, but scrutiny of their sparse assertions of standing demonstrates that no Plaintiff has standing to pursue its claims. Therefore, Defendant-Intervenor Imperial respectfully requests that this Court dismiss the Complaint.

DATED this 9th day of May, 2011.

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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:

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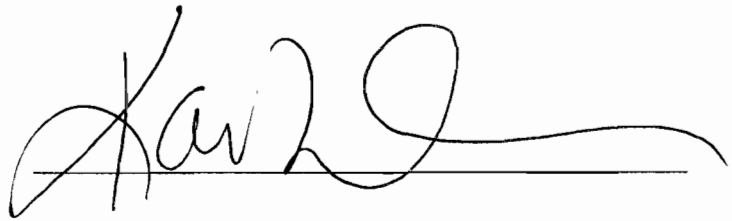
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A handwritten signature in black ink, appearing to read "Ranald McDonald", is written over a horizontal line. The signature is stylized and cursive.