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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 MOTION FOR
SUMMARY JUDGMENT AND
BRIEF IN SUPPORT**

Pursuant to Montana Rule of Civil Procedure 56 and the Court’s Scheduling Order dated August 26, 2011, as modified by its Order dated October 11, 2011, Defendant-Intervenor Imperial Oil Resources Ventures Limited (“Imperial”) respectfully moves the Court for summary judgment in favor of Defendant Montana Department of Transportation (“MDT”) on all remaining claims. The motion is supported by the following brief.

INTRODUCTION

Plaintiffs sued MDT alleging it violated the Montana Environmental Policy Act (“MEPA”) and certain transportation statutes when it issued a Finding of No Significant Impact (“FONSI”) for the Kearl Module Transport Project (“KMTP”). The Court previously dismissed one of the Plaintiffs’ claims. Under the standard of review that applies in MEPA cases and the undisputed facts as set out in the administrative record, Defendants are entitled to summary judgment on the remaining claims. Summary judgment also is appropriate because Plaintiff Missoula County has no authority to maintain this lawsuit.

STATEMENT OF UNCONTESTED FACTS

1. The KMTP is a proposal by Imperial to transport process units on Montana highways from Lolo Pass to the Port of Sweetgrass. Kearl Module

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Transportation Project Environmental Assessment § 1.1 (“EA”).¹ These modules were manufactured overseas and shipped to the United States where Imperial planned to transport the modules via highway to Canada for use in an oilfield development project. EA § 1.1.

2. Imperial approached MDT to determine the permitting requirements to use state highways because the modules exceed normal transportation height, width and weight restrictions. Discussions with MDT began in 2009. On August 24, 2009, Imperial submitted an initial Montana Transportation Plan to MDT. AR, Ex. C-1.

3. Due to the size of the modules, Imperial would require a series of permits from MDT for the movement of “large and unusual objects,” as authorized under the MDT rules set out at Admin. R. Mont. 18.8.1101. The rules applicable to these so-called 32-J permits include various provisions, including the requirement that the “permittee shall not delay traffic in excess of 10 minutes.” Admin. R. Mont. 18.8.1101(6).

4. Imperial sought a route through Montana that avoided height restrictions posed by highway overpasses and other overhead barriers. Based upon

¹ The EA is contained in the Administrative Record (“AR”) beginning at Exhibit A1-1.

previous transportation, Imperial designed a feasible route between Lolo Pass and the Port of Sweetgrass using existing highways through Missoula, Powell, Lewis and Clark, Teton, Pondera, Glacier and Toole Counties. AR, Ex. C-1 (Montana Transportation Plan).

5. To ensure that it complied with the 10-minute rule in the 32-J regulations, Imperial proposed to use existing turnouts and to construct several new turnouts along Imperial's proposed KMTP route. Turnouts allow the oversized loads to periodically pull to the side of the road to allow traffic to clear around the modules before resuming their movement. EA § 1.2.

6. Imperial also proposed other work necessary to ensure that existing utility lines and other overhead barriers did not restrict travel. Because these overhead lines are owned by various utility companies, Imperial worked with each company to develop proposals for the necessary changes. EA § 1.4.

7. In order to use the KMTP route, MDT had to issue several types of permits. These included encroachment permits for construction and modification of turnouts in the highway rights-of-way and to modify utility line crossings, and the 32-J permits for the actual transportation of the modules.

8. Over several months in 2009 and early 2010, Imperial met with MDT to understand the permitting requirements and to ensure that the actions it proposed were consistent with MDT's rules. Imperial also held many meetings with local

officials from the various counties to provide information and respond to questions. EA § 4.1 (detailing consultation process); Ex. M3-1 (KMTP Consultation Document).

9. As part of this process, MDT informed Imperial that it would be necessary to prepare an EA for the actions to provide the public with the opportunity for public comment. AR Ex. K8-1.

10. On April 8, 2010, MDT released its EA to the public. The EA addressed the utility and road modifications within existing MDT rights-of-way or easements. After it released the EA, MDT invited public comment with a comment deadline of May 14, 2010. EA, Abstract (Ex. A1-5). MDT also held formal public meetings and hearings at three locations along the KMTP route, in Cut Bank, Lincoln and Missoula.

11. After the comment period closed, MDT spent several months reviewing the comments. Because Imperial was the project sponsor, Imperial assisted MDT in responding to some of the technical comments.

12. On February 7, 2011, MDT issued a FONSI. In the FONSI, MDT provided responses to the comments submitted during the comment period. The FONSI lists all the places the EA was made available for viewing, the officials who received copies of the EA, and the public hearings. FONSI § 2.1.

13. Based upon the review of comments and its obligations under MEPA,

MDT concluded:

The environmental analysis demonstrates that no significant impacts are expected with the KMTP. Therefore, an EA is the appropriate level of environmental analysis and an Environmental Impact Statement is not required.

FONSI § 5.0.

14. After it released the FONSI, prior to the lawsuit being filed, MDT issued permits to modify the utility crossings and construct the new turnouts and turnout modifications. *See e.g.* AR, Ex. E14-1. MDT did not issue any 32-J permits to Imperial for the KMTP route.

15. Plaintiffs filed this lawsuit on April 1, 2011. On May 11, 2011, MDT, through its Environmental Services Bureau Chief Tom Martin, submitted an affidavit certifying the AR.²

16. Several ancillary documents have been prepared in connection with the KMTP. Although not specifically required by any Montana statute or administrative rule, Imperial prepared and submitted to MDT several iterations of a “Montana Transportation Plan.” The stated purpose of the transportation plan is:

[T]o communicate to the Montana Department of Transportation (MDT) the plan for the transport carrier to

² For ease of reference, a Bates stamped version of the AR has been submitted to the Court.

transport equipment modules from the Idaho/Montana State line at Lolo Summit via state and federal roads to the US/Canada border at Sweetgrass, Montana.

Mont. Transp. Plan Rev. K at 5. The Transportation Plan was revised several times based on comments received from MDT. The last version of the KMTP Transportation Plan was issued on August 3, 2010, and incorporated comments that MDT had received during the EA public comment period.

17. Imperial also entered into agreements with various parties. Imperial agreed to cover all of the costs of the “planning, permitting, construction and operation of the project in Montana.” EA § 2.2.1.2. Other agreements with local governments are detailed on Table 31 of the EA. EA § 4.1.4.

PROCEDURAL BACKGROUND

Plaintiffs’ Complaint contains five counts. On June 28, 2011, the Court granted MDT’s motion to dismiss Count Four of the Complaint, which alleged that MDT violated the right to know and right to participate provisions of the Montana Constitution. (Dkt. 114.) The remaining four counts of the original Complaint remain at issue.

The Court has ruled on various motions concerning injunctive relief. On April 18, 2011, the Court partially granted Plaintiffs’ Motion for a Temporary Restraining Order. (Dkt. 18.) Following a show cause hearing on May 16-18, 2011, the Court then granted in part Plaintiffs’ Motion for a Preliminary

Injunction. (Dkt. 119.) Imperial then filed a motion to modify or dissolve the injunction. After another hearing, on October 6, 2011, the Court granted Imperial's application to modify the preliminary injunction. (Dkt. 146.) The October 6 ruling had the effect of lifting the injunction as to MDT's authority to issue permits to Imperial on the KMTP route on U.S. Highways 12 and 93 from Lolo Pass to Interstate 90 in Missoula.

ARGUMENT

A. Standards of Review

1. Summary Judgment

Mont. R. Civ. P. 56 controls the Court's consideration of a motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Est. of Richerson ex rel. Richerson v. Cincinnati Ins. Co.*, 2011 MT 266, ¶ 9, ___ P.3d ___. The purpose of summary judgment is to dispose of claims for which there remain no genuine issues of material fact, thus eliminating the expense and burden of unnecessary trials. *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241. However, because summary judgment is an extreme remedy that does not substitute for a trial on the merits, all reasonable inferences drawn from the evidence are construed in favor of the non-moving party. This standard applies in the case of cross-motions for summary judgment. *Hajenga*, ¶ 18-19.

2. EPA Standards of Review

The standard for judicial review of an agency's action subject to MEPA is "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." *N. Fork Preservation Assn. v. Dept. of State Lands*, 238 Mont. 451, 778 P.2d 862, 867 (1989). As applied by the Montana Supreme Court, this standard results in two inquiries: whether the agency action was unlawful, and whether the action was arbitrary or capricious. *N. Fork*, 778 P.2d at 867; Mont. Code Ann. § 75-1-201(6)(a)(iii) (2011). When applying this standard, MEPA requires that a court uphold the agency's decision unless there is clear and convincing evidence that the agency has failed to comply with MEPA. Mont. Code Ann. § 75-1-201(6)(a)(i) (2011). Clear and convincing evidence is defined as:

[C]lear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure-that is, it must be more than a mere preponderance but not beyond a reasonable doubt.

Wareing v. Schreckengust, 280 Mont. 196, 930 P.2d 37, 43 (1996) (citations omitted). Plaintiffs must meet the standard on all of their MEPA claims.

B. Missoula County's Claims Against MDT Are Precluded

Missoula County's suit against MDT exceeds the County's delegated authority and improperly prioritizes Missoula County over other co-equal counties. The suit attempts to achieve judicially what statutes and the Constitution forbid the County to achieve through its own actions. Therefore, the County's claims should be dismissed.

1. Political Subdivisions Are Part of the State and Have Only Limited Powers Delegated By the State

Missoula County, as a political subdivision of Montana, only has powers delegated to it by Montana's Constitution or statutes. "School districts, municipalities, and counties are political subdivisions of the state. As creations of the state, '[e]xcept as provided by the state, they have no existence, no functions, no rights and no powers.'" *Dist. No. 55 v. Musselshell County*, 245 Mont. 525, 802 P.2d 1252, 1254 (1990) (citation omitted). Generally, suits between governmental entities are barred absent express or implied statutory authority. *Dist. No. 55*, 802 P.2d at 1254-1255. This is a separate issue from the general principles of standing, because it is based on a public entity's delegated power. *Dist. No. 55*, 802 P.2d at 1254. The issue is whether a political subdivision has the legal capacity or authority to sue its parent state. Generally, courts have found no.

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The initial articulation of this doctrine is traced to *Trenton v. New Jersey*, 262 U.S. 182 (1923). *Trenton* addressed the authority of a political subdivision to sue its parent under the federal constitution. The *Trenton* Court found that political subdivisions such as cities and counties are conveniences of their states and, therefore, lack any legal basis for undermining the powers bestowed on them by that state. “A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.” *Trenton*, 262 U.S. at 187. Over time, the motivating principles of the case have been applied in a variety of contexts to support the conclusion that a political subdivision must have specific authority to sue its state. “However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.” *Trenton*, 262 U.S. at 187.

The Montana Supreme Court rarely has considered this issue, and when it has, it has done so on a highly fact-specific basis. In *District No. 55*, the school district sued the county to recover lost operating revenues that resulted from a county miscalculation of a mill levy. The Supreme Court applied the general principles outlined above to conclude that no statutory or constitutional authority exists for one governmental subdivision to sue another for damages and affirmed dismissal of the suit. The Supreme Court went another way in *Rosebud County v. Department of Revenue of State*, determining that Rosebud County had standing to

sue the Montana Department of Revenue (“DOR”) for injunctive and declaratory relief over DOR’s formal rulemaking procedure. *Rosebud* dealt with a new DOR rule imposed on county assessors that resulted in a “substantial loss of market value, taxable value, and revenue” for Rosebud County. *Rosebud County v. Department of Revenue of State*, 257 Mont. 306, 849 P.2d 177, 178 (1993). The case does not apply, however, because the Court analyzed the propriety of the suit entirely under traditional standing principles, without considering whether the lawsuit was *ultra vires* for a political subdivision. A political subdivision’s lack of capacity to sue, unlike the constitutional justiciability doctrines, must be raised by a party; the argument is waived if not. Therefore, if a litigant has not posed the issue to the court, the court need not raise it *sua sponte*. *City of N.Y. v. State*, 86 N.Y.2d 286, 292 (1995). The statute under which Rosebud County sued, the Montana Administrative Procedures Act (“MAPA”), unlike MEPA, specifically identifies a county as a “person” who can take advantage of its cause of action regarding rule-making. Mont. Code Ann. §§ 2-4-102(8), 302, 305 (2011). Therefore, *Rosebud County* is distinguishable on the one fact that courts have generally recognized as decisive – whether there is a statutory or constitutional provision that allows a political subdivision to sue its parent state.

The Supreme Court revisited the issue, sort of, in *Missoula City-County Air Pollution Control Board v. Board of Environmental Review*, 282 Mont. 255, 937

P.2d 463 (1997). Again, the Court analyzed this issue solely as a matter of standing, without considering the County's status as a mere manifestation of state-delegated power. Regardless, the Board, in *Air Pollution Control Board*, had a specific statutory authorization regarding air quality that gave it a duty that does not accrue to Missoula County as to permitting activities on state highways. Mont. Code Ann. § 75-2-301 (2011). As the Court pointed out, the Board's "interest in the effective discharge of the obligations *imposed upon it by law*" created standing. *Air Pollution Control Bd.*, 937 P.2d at 467. The Board was specifically charged, by statute, with protecting Missoula County's air; it, therefore, had standing to enforce that obligation in the courts.

Missoula County has no analogous charge here that authorizes a suit under MEPA. It is not protecting county roads, but rather, some vague "concern" of its commissioners. Nothing in the Complaint alleges that Missoula County has any statutory authority regarding any of the KMTP's "potential impacts to the people and environment of Missoula County." Compl. ¶ 9 (Apr. 1, 2011). As discussed below, Montana's statutes actually forbid the County from regulating in the areas related to the KMTP and, therefore, the County is barred from attempting to do so through litigation.

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2. Missoula County Is Prohibited From Exercising Any Power Over the Subjects That It Seeks to Control Through This Lawsuit

The Court must consider whether Missoula County has any delegated or statutory authority that gives it the right to challenge MDT's decision-making regarding the KMTP. The County is prohibited by statute from exercising any power in the various areas related to the KMTP, including state highways, traffic regulation, and territory outside its geographic boundaries. Missoula County specifically is prohibited from exercising "any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control." Mont. Code Ann. § 7-1-113(1) (2011). "An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency." Mont. Code Ann. § 7-1-113(3) (2011).

a. Missoula County Has No Authority Over Transportation or State Highways

In line with § 7-1-113(3), the Legislature has designated only MDT with the rule-making power regarding state highway construction, repair, and maintenance, and regulation of traffic. Mont. Code Ann. §§ 60-2-201(4), 60-1-102(2), 61-10-155 (2011). Missoula County, therefore, is barred by statute from overriding that regulation. More specifically, the Legislature has forbidden counties from

enacting or enforcing any ordinance, rule or regulation in conflict with the state's determinations regarding traffic regulation. Mont. Code Ann. § 61-8-103 (2011).

b. Missoula County Has No Power Outside of Its Geographic Boundaries

Missoula County also is forbidden by statute “the power to regulate private activity beyond its geographic limits.” Mont. Code Ann. § 7-1-112(2) (2011).

This is, however, exactly what it seeks to do in this lawsuit – to compel MDT to regulate private carriers engaged in commercial activity throughout the state to conform to Missoula County's views. In contrast to prior political subdivision suits the Supreme Court has allowed, Missoula County seeks here to prioritize its own particular concerns over the concerns of other counties and private parties using the state highway system. It is one thing for a county to sue to enforce air quality protections within an airshed contained wholly within that county; it is another altogether to attempt to impose the position of one county on the entire state and private interstate commerce.

Missoula County, against the wishes of the other counties that have appeared in this matter as amicus curiae, seeks to leverage its own geographic territory to curtail the use of public highways across Montana. *See Amicus Curiae Br. Mont. Assn. Oil, Gas, & Coal Counties Support Mot. Defendant-Intervenor Dissolve or Modify Prelim. Inj.* (Sept. 20, 2011). Missoula County lacks delegated power to

determine for the entire state how the state's highways will be used. That authority belongs to MDT, and Missoula County's *ultra vires* attempt, through its lawsuit, to control the rest of the state should be dismissed.

3. Missoula County Has No Authority to Sue *In Parens Patriae* For Its Citizens

Finally, Missoula County lacks authority to sue over the KTMP that can be sourced in *parens patriae*. Courts consistently have held that counties and municipalities, as derivatives of the state, are not vested with the power to protect 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, 786–787 (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) (emphasis added), *aff'd*, 538 F.2d 231 (9th Cir. 1976).

Aside from vague allegations of costs to the County, or losses of revenue, Missoula County has never established in the record that it has a proprietary interest at stake. The County has not asserted or alleged, through the Complaint or testimony, any harm to its own proprietary interests as a result of the KMTP. The 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. Nowhere in the AR is there any evidence that Missoula County has either ownership or maintenance responsibility for state highways. Nor can the County base its suit on 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). The County has not attempted to identify any injury to its own interests, as opposed to those of either the people or the State. Missoula County has no proprietary interest that creates an exception to the doctrine that political subdivisions cannot sue the State.

C. MEPA Claims

1. Count 1: MDT Adequately Considered and Disclosed the KMTP Impacts in the EA

Plaintiffs contend that the KMTP EA failed to consider and disclose the environmental impacts in the EA. The lawfulness of an agency's MEPA decision is determined by evaluating its compliance with its own procedural rules under MEPA. *See N. Fork Preservation Assn.*, 778 P.2d at 867. As to EAs, MDT's MEPA rules state that the EA must include:

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate:

terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

Admin. R. Mont. 18.2.239(3)(d)-(e).

MDT's MEPA rules do not impose a hard and fast standard for what must be contained in each EA. Moreover, contrary to Plaintiffs' claims, the KMTP EA contains the material required by MDT's MEPA rules. Pages 16 through 54 of the EA contain detailed evaluations of a whole host of impacts of both the proposed action and the no action alternative. EA § 3.0.

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There is no place in the AR where any expert or other agency with expertise identified regulatory impacts that were overlooked.

Throughout this case, Plaintiffs have been critical of how MDT performed its analysis. However, Plaintiffs do not dispute that an analysis was performed; Plaintiffs simply do not like the outcome of that analysis. MEPA does not require the Court, nor even allow it, to weigh the merits of criticism of the agency's analysis, as long as the analysis was performed. In light of the "clear and convincing evidence" standard that applies, and the extensive discussion of environmental impacts in the EA, MDT met its procedural obligations required by its rules. Thus, summary judgment is appropriate as to this count.

2. Count 2: The EA Considered a Full Range of Alternatives

MEPA requires that MDT consider a range of alternatives as follows:

any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor.

Mont. Code Ann. § 75-1-201(1)(b)(iv)(I). MDT's MEPA rules follow this limitation by stating that MDT "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 explains why an alternative is not reasonable, the statutory obligation is met. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (upholding agency explanation of decision for rejecting alternative). Furthermore, unlike an EIS, analogous cases under the National Environmental Policy Act (“NEPA”) hold that MEPA does not require that an EA contain a detailed explanation of why an alternative was eliminated. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005).

The EA meets this standard. Section 2.3 describes several alternatives considered but eliminated because they were not reasonable. MEPA does not require a detailed description of why alternatives were rejected. As long as the EA identifies alternatives considered and rejected, it meets the requirements of MEPA and MDT’s rules.

Plaintiffs likely will raise the interstate highway system as an alternative that should have been considered more fully in the EA. However, Plaintiffs must prove by clear and convincing evidence that the rejected interstate alternative was “reasonable.” Admin. R. Mont. 18.2.239(3)(f). The evidence shows that MDT acted properly in eliminating the interstate alternative. In the FONSI, MDT stated that there are 25 overpasses that are too low and do not have sufficient ramps to allow passage of these loads. FONSI at 10 (Response cmt. D2). The AR contains

documents showing that MDT received evidence as to overpass barriers and other problems at each of these locations. AR Ex M1-1-1 (I-90 and I-15 Route Assessment From Missoula to Sweetgrass). In the EA, MDT concurred that the high cost of rebuilding numerous overpasses and acquiring rights-of-way was an unreasonable alternative. EA § 2.3.2 (“This 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”). Under Plaintiffs’ burden of clear and convincing evidence, the lack of any evidence in the record that this alternative was feasible shows that MDT’s decision not to evaluate this alternative in the EA was not arbitrary and capricious.

3. Count 3: MDT Properly Concluded That an EIS Is Not Required

Plaintiffs’ claim that MDT violated MEPA by not preparing an EIS rather than an EA fails for several reasons.

a. MDT’s EIS Rules Conflict With MDT’s 32-J Rules

MEPA requires an agency to prepare a “detailed statement” for “each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana.” Mont. Code Ann. § 75-1-201(1)(B)(iv); Admin. R. Mont. 18.2.237. However, this requirement does not apply when the particular

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permitting rules conflict with the rules governing preparation of an EIS. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979).

MDT's 32-J rules require that MDT act on an application within five working days for loads that are within Class two dimensions. Admin. R. Mont. 18.8.1101(13)(f). MDT's MEPA rules require that an EIS be provided to the governor and the environmental quality counsel with at least 30 days for review and response. Admin. R. Mont. 18.2.246(2). The two deadlines conflict and cannot be reasonably reconciled. Admin. R. Mont. 18.2.255. Under *Kadillak*, an EIS is, therefore, not required in this case.

b. The KMTP Proposal Is More Analogous to Projects Typically Viewed As Categorically Excluded From MEPA

To put Plaintiffs' claims in context, it is helpful to consider how highway projects typically are evaluated under MEPA. MEPA allows a continuum of environmental review that ranges from a categorical exclusion to an EA to a full EIS. Highway permitting decisions are almost always treated as categorically excluded and never rise to the level of even requiring an EA. *See* Defs.' Response Pls.' Mot. Prelim. Inj. 30 (Apr. 25, 2011) ("MDT has previously determined that the approval of utility installations, installation of traffic signals, modernization of an existing highway by adding lanes for parking and traffic improvement projects are categorically excluded"); Admin. R. Mont. 18.2.261.

No Montana cases address the scope of MDT's or any other agency's categorical exclusion authority. However, Montana's Supreme Court has held that in certain circumstances NEPA is relevant for purposes of interpreting MEPA. *See N. Fork*, 778 P.2d 862. No NEPA cases have ruled that actions similar to those proposed by Imperial using existing highways cannot be approved under an agency's categorical exclusion authority. Instead, the relevant NEPA categorical exclusion cases show that the KMTP normally would be approved as a categorical exclusion. There are many NEPA transportation cases in which an agency's determination that a categorical exclusion applies was affirmed by the courts. But there is no reported case that even considers diffuse and minimal modifications such as make up the Imperial proposal, meaning that most of these projects are never disputed. Examples of categorical exclusions include historical bridge modifications, *see River Fields, Inc. v. Peters*, 2009 WL 2222901 (W.D. Ky. July 23, 2009); *Concerned Citizens of Chappaqua v. U.S. Dept. of Transp.*, 579 F. Supp. 2d 427 (S.D.N.Y. 2008); *Citizens for the Scenic Severn River Bridge, Inc. v. Skinner*, 802 F. Supp. 1325 (D. Md. 1991); additional lanes of highway traffic (such as HOV lanes), *Ware v. U.S. Fed. Hwy. Admin.*, 2006 WL 696551 (S.D. Tex.-Houston Mar. 15, 2006) (unpublished); *City of Alexandria, Va. v. Fed. Hwy. Admin.*, 756 F.2d 1014 (4th Cir. 1985); reconstructions of interchanges, *Douglas v. Nev.*, 907 F.2d 154 (9th Cir. 1990) (unpublished); construction of a commuter line

substation, *Riverdale Env'tl. Action Comm. Along the Hudson on R.E.A.C.H. v. Metro. Transp. Auth.*, 638 F. Supp. 99 (S.D.N.Y. 1986).

In all of these cases, an agency approved a project as categorically excluded and the court affirmed that decision. The reasoning of these cases indicates that courts typically would uphold a decision to find similar projects categorically excluded with no obligation to prepare an EA or EIS. Consistent with the views of MDT, when viewed on the continuum of MEPA environmental review, the KMTP proposal falls far closer to the categorical exclusion end of the spectrum than to an EIS. From that perspective, Plaintiffs' argument that an EIS was required is inconsistent with the way MEPA and NEPA historically have been interpreted.

c. The KMTP Proposal Does Not Meet the "Significant" Threshold Necessary to Trigger an EIS Requirement

MDT's MEPA rules require an environmental impact statement if one of two provisions is met:

- (a) whenever an EA indicates that an EIS is necessary; or
- (b) whenever, based on the criteria in ARM 18.2.238, the proposed action is a major action of state government significantly affecting the quality of the human environment.

Admin. R. Mont. 18.2.237(1).

Plaintiffs' Complaint does not identify the regulation they contend that MDT violated, nor does it refer to the AR. However, by referring to potentially

significant impacts, they implicate MDT's regulations that define the term "significant" as

- (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
- (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
- (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
- (e) the importance to the state and to society of each environmental resource or value that would be affected;
- (f) 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; and
- (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

Admin. R. Mont. 18.2.238(1).

This issue also was addressed in the EA. The EA looked at all the environmental effects, considered the comments, and determined that no impact

was significant within the meaning of the rules. Thus, an EIS was not required.

D. Count 5: MDT Made an Appropriate Public Interest Determination

Plaintiffs also claim that MDT violated Mont. Code Ann. § 61-10-121(1)(a), which states in part that a permit for loads in excess of nine feet in width or exceeding certain height or weight limits “must be issued in the public interest.” Plaintiffs cite no case law or legislative history as to how this statute is to be interpreted, nor do they provide a legal theory demonstrating a private right of action under the statute. States are given great deference in the field of highway safety regulation. *Interstate Towing Assn., Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1162 (6th Cir. 1993) (“In no field has the Supreme Court's deference to state regulation been greater than that of highway safety regulation.”); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978). The Montana Supreme Court also has held that the state may not discriminate when it regulates interstate transportation through Montana. *Bd. of R. R. Commrs. v. Aero Mayflower Transit Co.*, 119 Mont. 118, 172 P.2d 452, 459 (1946), *aff'd sub nom. Aero Mayflower Transit Co. v. Bd. of R. R. Commrs. of State of Mont.*, 332 U.S. 495 (1947). In light of these two principles, there is no basis to not defer to MDT’s determination that the public interest has been met, especially when to do so would effectively single out and discriminate against one carrier.

Notwithstanding this lack of any legal support for their claimed cause of action, Plaintiffs' argument ignores the undisputed fact that MDT specifically did consider the public interest with respect to these permits. 32-J permits typically require that travel occur during the daytime. MDT has discretion to allow travel at other times when it is in "the best interests of the traveling public." Admin. R. Mont. 18.8.1101(13)(g). *See generally Guillot v. State Hwy. Commn. of Mont.*, 102 Mont. 149, 56 P.2d 1072, 1076 (1936) ("Where the Legislature sees fit to confer upon a board or commission such broad general powers, the repository of the power is vested with discretion in choosing the means and methods of accomplishing the result expected, and, in the absence of fraud or manifest abuse of that discretion, its determination is conclusive."). As noted in the FONSI, MDT required KMTP travel to occur at night. FONSI, Vol. I at 11 ("to minimize disruption to the traveling public, MDT required Imperial Oil to modify its anticipated travel times to occur at night on most of the route"). Contrary to Plaintiffs' assertions, the public interest was considered.

E. Plaintiffs Are Not Entitled to Costs or Attorney's Fees

Plaintiffs request an award of their costs and attorney's fees associated with this litigation. They are not entitled to such an award. Montana's courts follow the American Rule, "which provides that 'a party in a civil action is generally not entitled to [attorney] fees absent a specific contractual or statutory provision.'"

Montrust v. State, 1999 MT 263, ¶ 62, 296 Mont. 402, 989 P.2d 800 (quoting *Matter of Dearborn Drainage Area (Bean Lake II)*, 240 Mont. 39, 782 P.2d 898, 899 (1989)). In this matter, there is no contract or statute that authorizes an award of fees and costs to Plaintiffs.

CONCLUSION

For these reasons, Imperial respectfully requests that the Court grant summary judgment as to all of the remaining claims in favor of Defendants.

DATED this 14th day of November, 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 14th day of November, 2011, a copy of the foregoing document was served on the following persons by the following means:

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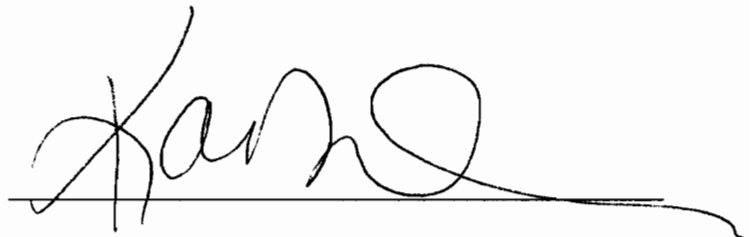
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A handwritten signature in black ink, appearing to read "Ranald", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.