

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, and)

IMPERIAL OIL RESOURCES VENTURES)
LIMITED,)

Defendant-Intervenor.)

Cause No.: DV-11-424
Dept. No. 3

FILED JUL 19 2011

SHIRLEY E. FAUST, CLERK

By 

Deputy

**MEMORANDUM AND ORDER
DENYING
NONGOVERNMENTAL
PLAINTIFFS' MOTION TO
DECLARE SECTION 27-19-306(2),
MCA, UNCONSTITUTIONAL
AND MODIFY THE TRO
ACCORDINGLY**

Plaintiffs National Wildlife Federation, Montana Environmental Information Center, and Montana Chapter of the Sierra Club (Nongovernmental Plaintiffs) have filed a motion asking the Court to declare section 27-19-306(2), MCA, unconstitutional and modify the TRO accordingly.

The subject matter of this case is the Kearn Module Transport Project (KMTP). As part of the project, Imperial Oil proposes to transport approximately 207 oversized loads through Montana from the Montana-Idaho state line at Lolo Pass in Missoula County to the Canadian border at Sweet Grass, Montana. The KMTP modules are being manufactured in South Korea, shipped to the Port of Vancouver, Washington and barged up the Columbia and Snake Rivers to Lewistown, Idaho.

The modules' ultimate destination is Alberta, Canada where they would be used in tar sand mining and production.

Some of Imperial Oil's modules exceed legal dimensions, thus requiring 32-J permits from MDT. To date, one (1) 32-J permit has been issued to allow transport of a test validation module from Lolo Pass to Lolo Hot Springs, a distance of approximately seven (7) miles. In order to facilitate the KMTP, construction work must be performed including improvement and construction of various highway turnouts and modification to overhead utility lines and traffic signals. The construction work is subject to MDT encroachment and utility relocation permits. As part of MDT's approval process for the KMTP an environmental assessment (EA) pursuant to the Montana Environmental Policy Act (MEPA) was conducted. The EA was completed on April 8, 2010. A finding of no significant impact (FONSI) decision was issued on February 7, 2011.

Plaintiffs filed their complaint on April 1, 2011, alleging that MDT's permitting of the KMTP violated MEPA and statutes and regulations governing the issuance of 32-J permits. Plaintiffs' suit ultimately seeks to permanently enjoin MDT from issuing further permits relating to the KMTP and to void already issued permits. On April 7, 2011, Plaintiffs filed a motion to preliminarily enjoin MDT from issuing permits for the KMTP. On April 13, 2011, Plaintiffs filed a motion for a TRO seeking to restrain MDT and Imperial Oil from taking further action related to the KMTP pending resolution of the preliminary injunction motion.

Plaintiffs' motion for a TRO included a request that the Court restrain Imperial Oil from taking any actions pursuant to permits already issued by MDT and to enjoin any construction or ground disturbing activity related to the KMTP. A hearing was held in the matter and the Court subsequently issued an order partially granting Plaintiffs' motion for a TRO. The TRO restrained and enjoined MDT and Imperial Oil, by and through its contractors, from engaging in activities

related to utility line relocation and turnout construction or improvements. The Court also granted Imperial Oil's request for a bond against the Nongovernmental Plaintiffs pursuant to section 27-19-306(2), MCA.

In response to the Court's imposition of a bond, Nongovernmental Plaintiffs filed an expedited motion to modify the TRO. Nongovernmental Plaintiffs asked the Court to modify the TRO to enjoin only MDT and waive the bond requirement. Notwithstanding that Plaintiffs' motion for a TRO specifically asked that the Court restrain Imperial Oil from acting on any already issued KMTP permits, Nongovernmental Plaintiffs argued that they only sought to enjoin MDT's permitting of the KMTP. Therefore, Nongovernmental Plaintiffs argued, they were not seeking to enjoin "an industrial operation or activity," which triggered the bond requirement under section 27-19-306(2), MCA. On May 12, 2011, the Court denied the Nongovernmental Plaintiffs' motion. Nongovernmental Plaintiffs subsequently filed a notice of written undertaking stating they had set aside the required bond in their own accounts.


On May 26, 2011, Nongovernmental Plaintiffs filed the currently pending motion, which asks the Court to declare section, 27-19-306(2), MCA, unconstitutional and modify the TRO accordingly. Nongovernmental Plaintiffs argue that the Court's conclusion that section 27-19-306(2), MCA, leaves it with no discretion as to whether to require a bond violates their rights to substantive due process, equal protection of the law, rights to petition the government, and access to the court.

The Court's July 19, 2011, order partially granting Plaintiffs' motion for a preliminary injunction dissolved the TRO and exonerated the bond requirement imposed on Nongovernmental Plaintiffs. Unlike Plaintiffs' TRO motion, the preliminary injunction motion did not ask the Court to restrain or enjoin Imperial Oil or the construction of turnouts. Plaintiffs' preliminary injunction

motion asked only that the Court restrain MDT from issuing permits related to the KMTP. The TRO has been dissolved and Nongovernmental Plaintiffs are no longer subject to a bond requirement. The issues raised by the Nongovernmental Plaintiffs' motion are now moot.

Therefore, Nongovernmental Plaintiffs' motion to declare section 27-19-306(2), MCA, unconstitutional and modify the TRO accordingly is DENIED.

DATED this 19th day of July, 2011.



Ray J. Dayton
District Court Judge