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FILED SEP 15 2011

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MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

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

vs.

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
)
) Dept. No. 3
) Hon. Ray J. Dayton
)

) PLAINTIFFS' BRIEF
) OPPOSING IMPERIAL OIL'S
) APPLICATION TO DISSOLVE
) OR MODIFY PRELIMINARY
) INJUNCTION
)

I. INTRODUCTION

On July 19, 2011, the Court enjoined Defendant Montana Department of Transportation (MDT) from issuing 32-J permits to Imperial Oil for the Kearl Module Transportation Project (KMTP), or issuing any permits that would allow any activity approved by MDT in the KMTP EA or FONSI. Memorandum and Order (July 19, 2011), at 12. The Court ruled that Plaintiffs had satisfied two of the requirements for obtaining injunctive relief: that Plaintiffs are likely to prevail on the merits, § 27-19-201(1), MCA, and that ongoing activity by the Defendants could render the judgment ineffectual, § 27-19-201(3), MCA.

Intervenor Imperial Oil now seeks to dissolve the injunction or, alternatively, to modify it. It claims that the scope of the injunction is “unprecedented,” stating, “There is no reported case in Montana of an injunction of such breadth and scope with respect to the use of public highways.” Imperial Brief at 3. Given that the impacts of Imperial’s proposal are equally unprecedented, this is unsurprising. The Court’s decision issuing preliminary injunctive relief is consistent with Montana law, and fully grounded in the facts of this case. The Court should therefore deny Imperial’s motion.

II. ARGUMENT

A. Legal Standards

An injunction order may be granted under § 27-19-201, MCA, in the following instances:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

The Court appropriately found that Plaintiffs satisfied subsections (1) and (3), but rejected Plaintiffs' argument that they would be irreparably harmed.

Imperial seeks to dissolve or modify the injunction pursuant to §§ 27-19-401 and -404, MCA. The latter provision provides: "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.” (Emphasis added.) Although the Montana Supreme Court has not squarely addressed the standard for dissolution or modification of an injunction, the general rule appears to be that in dissolving or modifying an injunction, the Court must exercise the same discretion that it must use in granting injunctive relief in the first case. 42 Am. Jur. 2d Injunctions, § 325.

In *Shammel v. Canyon Resources Corp.*, for example, the Court clarified:

In light of the high degree of discretion vested in district courts to maintain the status quo through injunctive relief, we determine that the more deferential ‘manifest abuse of discretion’ is the appropriate standard for reviewing the granting of a preliminary or permanent injunction. A ‘manifest’ abuse of discretion is one that is obvious, evident or unmistakable.
Black's Law Dictionary, 6th Ed.

2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912 (emphasis added.)

Given the plain language of the statute stating that the Court must determine that there “are not sufficient grounds for the injunction order,” and given the deference that is given to District Courts under *Shammel*, the Court’s original decision to enjoin MDT’s permitting was manifestly correct.

B. The Court Was Correct in Concluding that Plaintiffs Will Prevail on the Merits.

Imperial argues that Plaintiffs raised new issues under MEPA that had not previously been addressed by the agency, and that the Court then

erroneously relied on these issues in issuing its decision. Imperial's assertion is incorrect; all three issues focused on by the Court were raised, or addressed in testimony, and were therefore properly relied upon in the Court's ruling.

1. MDT Failed to Follow MEPA in its Evaluation of the Turnouts.

In its Order Partially Granting Plaintiffs' Motion for Preliminary Injunction, the Court properly determined that MDT violated MEPA by failing to identify or evaluate the potential consequences of removing or not removing the turnouts:

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. . . . Whether the turnouts are left in place will necessarily effect whether the route will accommodate future loads of similar size. Thus, determining growth-inducing or inhibiting effects as well as any precedential effects resulting from turnout construction appears largely dependent on whether the turnouts remain in place.

. . . . 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.

Memorandum and Order at 6-7 (emphasis added).

In reaching this decision, the Court was following well-established MEPA and NEPA precedent. It was also acting in response to arguments Plaintiffs have made since the inception of this case, and which were supported by testimony of MDT personnel at the hearing. Plaintiffs' Brief in Support of Motion for Preliminary Injunction at 36. By defendant MDT's own admission, the KMTP modifications will lead to the reasonably foreseeable future use of the KMTP route for similar projects, and make such projects more feasible by "improv[ing] safety and reduc[ing] delays for future transportation of oversize materials and freight in comparison to transports that occurred prior to the improvements by Imperial." KMTP FONSI, p. 14, Response to Comment K, and see also p.9, Response to Comment C2 (Hearing Exhibit B); KMTP EA, p.16, section 3.2. (Hearing Exhibit A). Plaintiffs alleged that by failing to take a hard look at the environmental impacts of undertaking highway modifications necessary to facilitate the transport of the Kearsarge modules, by failing to determine the significance of impacts pursuant to ARM 18.2.238, MDT failed to comply with MEPA. See *generally* Plaintiffs' Consolidated Reply Brief in Support of Motion for Preliminary Injunction.

Rather than arguing that MDT undertook a sufficient examination of the impacts of the KMTP turn-out modifications, Imperial argues simply that MDT was absolved of its MEPA responsibility to assess such impacts because no party knows the actual scope of the project due to the unresolved contingency that MDT may ask Imperial to remove a turnout. Imperial Brief at 10 (“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.”) Imperial attacks the Court’s preliminary injunction order because the Court identified the fact, as described through in-court testimony, that no determination has been made about this contingency. Indeed, the Court ruled that without a clear understanding of what is involved in a project, no assessment of impacts of such a project is possible, and therefore cannot and does not satisfy the legal requirements of MEPA. Imperial essentially argues that since Plaintiffs did not use the specific language used by the Court in pointing out the logical inconsistency in MDT’s position, MDT was not on notice of this issue and it is not, therefore, proper grounds for an injunction.

In fact, Plaintiffs’ motion for preliminary injunction, brief in support, and reply brief clearly set forth Plaintiffs’ claims and raised substantial

questions regarding the MEPA sufficiency of the KMTP EA, “[w]hether this is a permanent corridor or only used for this one transportation project.”

Plaintiffs’ Brief in Support of Motion for Preliminary Injunction at 36.

Furthermore, the KMTP administrative record, as produced by MDT to Plaintiffs’ attorneys, demonstrates that MDT was cognizant of these issues during preparation of the KMTP EA.¹ As Plaintiffs highlighted in Exhibit 31 to their preliminary injunction brief, MDT Environmental Services personnel asked, “Should we consider asking Exxon to evaluate BOTH leaving the turnouts in place and removing the turnouts as separate alternatives to show those pros and cons to the public.” Exh. 31 to Plaintiffs’ PI Brief (1/28/2010 email of Heidi Bruner). MDT Environmental Services Bureau Chief Tom Martin replied:

On the one hand, it doesn’t matter so much from a natural environmental standpoint whether the turnouts are left in place or taken out – as long as that is properly analyzed and disclosed in the e-doc. I highly doubt the impacts will be significant. A single e-doc will suffice, even if it is in the Department’s best interests to leave the turnouts in place. Again, it goes to analysis and disclosure of the impacts. The last draft e-doc states they will be left in place.

On the other hand, leaving the turnouts in place does promote more of a permanent high-wide route. This coupled with utility and sign/light pole adjustments creates features that have been designed to allow high-wide loads – one of very few in the state. This has not been analyzed or disclosed in the last draft e-doc. It needs to be.

¹ See “Foundational Affidavit of Robert Gentry” filed together with this brief.

Id. (1/29/2010 email of Tom Martin (emphasis added)).²

Contrary to this clear advice of MDT's own Environmental Services staff, the KMTP EA did not analyze or disclose potential impacts of either leaving the turnouts in place or removing them. Perhaps this is because, as casually stated by Mr. Martin, "I think it will be difficult to do so. It could be a weakness that savvy litigators look to if an e-doc challenge is pursued." *Id.*

In support of its argument, Imperial relies upon a Memorandum of Agreement ("MOA") executed between MDT and Imperial in December 2010 as providing MDT with "complete discretion" to require removal of turnouts "at any time prior to completion of the KMTP," concluding that "until this contingency passes, there are no permanent turnouts and there is no permanent high-wide corridor." Imperial Brief at 10; *see also* Exhibit A to Foundational Affidavit of Stephen R. Brown. This MOA, executed seven months **after** the close of public comments on the KMTP EA, sets forth the contractual provisions upon which Imperial relies for its argument that MDT

² Plaintiffs submitted this same email as Exhibit 31 to their Brief in Support of Motion for Preliminary Injunction. Br. at 33-34. Therein, contrary to Imperial's assertions now, Plaintiffs raised the argument that MDT had failed to consider all impacts, including permanency of the route and potential future uses. Br. at 31, 33-36.

has no responsibility to analyze indirect or growth inducing impacts of turnout construction or removal.

In Article 1.J of the MOA, Imperial Oil agreed, "Upon completion of the KMTP . . . to remove any turnouts/signal pole/sign structure modifications per direction from MDT." To pay for potential future removal costs and for "potential environmental rehabilitation and remediation," Imperial also agreed to post a surety bond in the amount of \$2 million.

MOA, Article 1.K. No analysis estimating the cost of removing turnouts or other modifications upon which this bond amount is based is included in the administrative record.

Contrary to Imperial's assertion, MDT's discretion to request removal of modifications at Imperial's expense is severely limited by the MOA. In fact, MDT may request removal of the turnouts only "if MDT design standards and/or guidelines are not met, or if other permitting requirements relating to the MODIFICATIONS are not met." MOA, Article 1.M.iii. Given that MDT asserts that "all new turnouts would conform to MDT Standard Design Specifications and Procedures," it appears MDT will have little or no discretion to request removal under the MOA. FONSI, at 14, Response to Common Comment J. Moreover, utility modifications will not be removed as "all modifications will be permanent." EA, at 9, section 2.2.1.4.

More importantly, the MOA does not control MDT's discretion to evaluate environmental impacts of the KMTP; MEPA does. As noted by MDT's Thomas Martin, leaving the turnouts in place has different environmental consequences than removing them. In both instances, there are potential impacts to the human and natural environment, and MEPA requires MDT to identify and assess those impacts. In failing to do so, MDT violated MEPA. The MOA does not and cannot change that.

Plaintiffs acknowledge that MDT retains discretion to issue or deny 32-J permits for future projects; however, the existence of established modifications to Montana highways will make approval of future projects much easier. As explained by MDT employee Hal Fossum:

If we put an interstate where there was a foot path, that enables a more expansive trade reach and also enables a broader extent of settlement. In this case, under the category of induced effects, the applicants could consider such questions as: 1. Will the proposed improvements (e.g. turnouts) create improved conditions that will affect local development and settlement patterns? 2. Will the proposed improvements enable continuing use of this route as a specialized high-wide corridor?

Exhibit 1 to Foundational Affidavit of Robert Gentry (3/17/2010 email of Hal Fossum).

The administrative record provides no evidence that any turnouts will be removed after the KMTP, and provides ample evidence that it is the

intent of MDT to retain the modifications permanently. In spite of this, the potential impacts of leaving the turnouts were not identified or assessed in the EA, and they are unlikely to be evaluated for future loads, when the construction has already been completed. MDT thus violated MEPA by failing to consider the significance of impacts of the KMTP under MEPA and ARM 18.2.238, and by failing to consider the growth-inducing and precedential effects of approving construction efforts without requiring removal of those turnouts.

The MOA does not change this fundamental failure of the KMTP EA; it simply clarifies that the agency may or may not decide to leave the turnouts. Imperial argues that because MDT may require removal, or may not, it is absolved from the responsibility of examining the environmental impacts of either of these contingencies. This argument is inconsistent with basic MEPA and NEPA law. By failing to identify and assess the potential impacts of leaving the turnouts or not, MDT failed to examine the environmental impacts of the KMTP, it failed to consider and disclose reasonable alternatives, and it failed in the initial scoping of the project, as the actual scope of the project remains unknown to this date.

These patent violations of MEPA demonstrate that MDT failed to take the required "hard look" at the environmental impacts of the KMTP project.

The Court's ruling on this issue was supported by the pleadings, the record, and the evidence at the hearing. Imperial's contentions otherwise lack merit.

2. MDT Did Not Evaluate a Reasonable Range of Alternatives.

MDT evaluated only two alternatives in the EA: the proposed action, and the "no action" alternative. As the Court noted, "The EA states that the Interstate Route was eliminated because MDT concluded existing overpasses and the lack of bypass ramps made passage of the modules infeasible." Memorandum and Order at 8. In its discussion of the U.S. interstate route, the MDT draft EA stated:

This alternative would have followed the interstate highway system as much as practicable. This alternative was suggested by many during the consultation process because of the four-lane configuration, which would not impede oncoming traffic and have minimum or no impact on following traffic. This alternative 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.

Draft EA, at 14-15.

The Court, in addressing this issue, stated:

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 the Interstate Route was an infeasible alternative.

Memorandum and Order, at 8 (emphasis added).

As Imperial concedes, an EA must contain a “description and analysis of reasonable alternatives to the proposed action whenever alternatives are reasonably available and prudent to consider.” A.R.M. 18.2.239(3)(f). The Court’s ruling in this regard is consistent with case law construing NEPA.³ Federal courts applying NEPA do not allow an agency to define the project’s objectives “so narrowly as to preclude a reasonable consideration of alternatives.” *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002). In *Davis*, the Tenth Circuit held that the U.S. Department of Transportation violated NEPA in preparing an EA for a highway project when it defined the project goals such that the proposed action was the only feasible alternative. *Id.* at 1119.

Without a reasonable range of alternatives, the issues are not sharply defined and there is no clear basis for choice by either the agency or the public. *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1065

³ Because MEPA is modeled after NEPA, the Montana Supreme Court finds federal case law persuasive. *Ravalli County Fish and Game Ass’n. v. Montana Dept. of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362 (1995).

(9th Cir. 1998). A failure to consider a range of alternatives is arbitrary and capricious. See, e.g., *Davis*, 302 F.3d 1104; *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 (9th Cir. 1999); *Morrison*, 153 F.3d at 1065; *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 670 (7th Cir. 1997) (by failing to consider this "entire category of reasonable alternatives," BLM "ruined" its EIS); *Env'tl. Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972) (insufficient discussion and inadequate range of alternatives rendered EIS inadequate); *Natural Res. Defense Council, Inc. v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (alternatives are the linchpin of the EIS; EIS invalid because of inadequate alternatives discussion).

Imperial cites *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982), for the proposition that an agency need not consider an alternative "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Imperial Brief at 14. Imperial argues that "the high cost of rebuilding an overpass and acquiring rights-of-way is part of MDT's institutional knowledge, and MDT's decision that rebuilding 25 overpasses was unreasonable, compared to turnout construction within existing right-of-way, was not arbitrary and capricious." *Id.* at 16.

MEPA does not force outcomes; it forces transparent assessment and comparison of alternatives and their consequences. Imperial's contention

that MDT relied on its institutional memory simply validates Plaintiffs' argument that MDT violated MEPA by failing to analyze a reasonable range of alternatives⁴: MDT did not share its "institutional knowledge" with the public nor give the public an opportunity to meaningfully participate in the assessment of the various alternatives. Instead, according to Imperial's narrative, MDT was not required to identify or assess the interstate alternative because it already knew that it would not be cost-effective. If MDT is allowed to make such assessments by relying on its "institutional knowledge," the fundamental policies of MEPA are wholly undermined. If MDT had such knowledge, it was required by MEPA to share that with the public.

Further underscoring the agency's failure to evaluate reasonable alternatives is the fact that Imperial has begun to use the interstate route for some modules (see "Imperial and Exxon Pursuing Additional Routes for Kearl Modules; Reducing Size", Business Wire, available at <http://www.businesswire.com/news/home/20110808006>

⁴ This argument was raised at the outset of the litigation and thus Imperial and MDT have been on notice of such issues since Plaintiffs filed their complaint. Complaint at 11-13.

344/en/Imperial-ExxonMobil-Pursuing-Additional-Routes-Kearl-Modules; and "Exxon Mobil, Imperial Oil Seek New Route Through Washington for Megaloads", Missoulian, available at http://missoulian.com/news/state-and-regional/article_678ebce-c204-11e0-b49b-001cc4c03286.html), and is in fact proposing here that it be able to use the interstate route from Missoula going east, in the event the Court decides not to dissolve the injunction. In its brief, "Imperial submits that a reasonable modified preliminary injunction can be crafted that is less expensive in scope (to Imperial)." Imperial Brief at 21. Imperial then describes this new alternative in some detail on p. 23 of its brief. (See also Third Affidavit of Ken Johnson, ¶¶ 4 & 5.) Thus, an interstate route is hardly "remote and speculative".⁵ Yet such alternatives as reconfiguring modules or modifying the interstate route were never analyzed, supporting Plaintiffs' claim and the Court's conclusion that MDT did not analyze a reasonable

⁵ *Cf. California v. Block*, discussed supra. In fact, the Davis court held invalid the agency's conclusion that a mass transit alternative was too speculative or impractical, in part because, although the alternative was not a "sure thing," it was "apparently under active consideration ... by a number of jurisdictions involved." 302 F.3d at 1122; see also *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1170 (10th Cir. 2002)(rejecting agency's conclusion that regional transit alternatives urged by plaintiffs were too remote or speculative to consider, in part because the choices at issue were not ones "that may be made in the future, but are being made.")

range of alternatives. The Court did not manifestly abuse its discretion in determining that MDT failed to evaluate a reasonable range of alternatives.

3. MDT Failed to Take A “Hard Look” by Relying on Tetra Tech to Analyze Impacts and Comments.

Imperial argues that Plaintiffs did not raise the issue of Tetra Tech's preparation of the EA in their preliminary injunction opening brief, and that MDT and Imperial were therefore not on notice that this would be an issue. MDT also cites several places in the record where MDT and Imperial's consultant, Tetra Tech, were in consultation with each other on various issues, and cites to cases for the proposition that MEPA or NEPA documents may be prepared by third parties.

It is axiomatic that agencies must take a “hard look” when evaluating projects under MEPA or NEPA. *Ravalli County Fish and Game Ass'n. v. Montana Dept. of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1367 (1995). Moreover, it is axiomatic that agencies must follow their own statutes and regulations. See *Burnt Fork Citizens Coalition v. Ravalli County*, 287 Mont. 43, 51, 951 P.2d 1020 (1997); *Kadillak v. Anaconda Company*, 184 Mont. 127, 139, 602 P.2d 147 (1979). Plaintiffs noted the agency's legal duty to take a hard look in their Complaint. Complaint ¶¶ 19, 43, 47, 57. In particular, Plaintiffs alleged that MDT's failure to take a hard

look is “arbitrary and capricious and contrary to MEPA and its implementing regulations.” *Id.* ¶ 47. Plaintiffs sought to enjoin MDT from issuing permits “until such time as MDT complies with MEPA, the Constitution, and statutes and regulations governing issuance of such permits.” *Id.* at Prayer for Relief, ¶ 4; see also Plaintiffs’ Brief in Support of Preliminary Injunction at 10.

Finally, Plaintiffs clearly argued MDT’s duty to take a hard look in their Reply Brief in Support of the Preliminary Injunction. Plaintiffs’ Reply Brief at 5-7 (section with heading, “MDT Did Not Take a Hard Look at KMTP” expounds in detail on the agency’s obligations under MEPA and its implementing regulations).

The EA shows that it was “prepared by” Tetra Tech, Imperial Oil’s consulting firm. EA cover page; p. 69 list of “preparers.” In their Proposed Findings of Fact and Conclusions of Law, Plaintiffs pointed out the additional information that came in during the hearing that underscored Tetra Tech’s and Imperial’s roles in preparing the environmental review, and the hands-off approach taken by MDT. See Plaintiffs’ Proposed Findings, ¶¶ 5-7.

Imperial attempts to downplay the hearing record, calling it “Thunstrom’s (MDT witness’s) one sentence of testimony.” Imperial Brief at

19. However, as the Court recognized, Thunstrom's testimony on this issue was far more than one sentence, and he was not the only witness to address this issue. Moreover, the documents cited by Imperial on page 18 of its brief were all generated between November 2009 and July 2010, well prior to the February 7, 2011 decision. These documented requests for additional information do not contradict Thunstrom's testimony that MDT did not review the environmental information prior to making a decision. The fact that Imperial was involved with MDT in finalizing the response to comments in the final EA and preparing the FONSI underscores MDT's lack of independent assessment of the EA and FONSI. Indeed, Dwayne Kailey's testimony demonstrated that Imperial was "in the room" when the EA was finalized and the FONSI being prepared:

A. This document doesn't clarify was there clearly one response by Imperial Oil and there was not. Imperial Oil worked very closely with MDT staff to draft those responses. There was no single comment to all these comments from the public by Imperial Oil. It was worked on very closely between Imperial Oil staff and MDT staff. So I couldn't just give him Imperial Oil's comments. I had to have given him either Imperial Oil's comments and MDT's comments or the comments as a whole. There was no single Imperial Oil comment.

Q. You're saying that MDT's staff assisted Imperial Oil in creating Imperial Oil's comments?

A. We worked together on the response to all the comments in the document. Yes, we did.

Hearing Transcript, at 707-708.

An agency cannot take the requisite “hard look” when the preparation of the document that will determine whether the permit will be issued is farmed out to the developer or its consultant, and the developer is “working very closely” with MDT on the decision documents. While Plaintiffs believe that the MDT regulations can be construed to prohibit such an arrangement, at a minimum, the regulations require MDT perform its own independent evaluation of the project and to ensure an arms-length relationship between the agency, the applicant, and the consulting firm preparing the environmental review document. See Plaintiffs’ Proposed Conclusions of Law ¶¶ 14; A.R.M. 18.2.256. In any event, the facts of this case demonstrate that MDT failed to take a “hard look.” That failure included the inadequate review in the EA, the agency’s failure to perform an EIS, and the fact that MDT farmed out the preparation of the EA to the applicant’s consultant. The Court did not manifestly abuse its discretion in concluding the same.

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C. The Injunction Was Appropriately Granted Under § 27-19-201 (3), MCA.

In its brief, Imperial challenges only the Court's holding under § 27-19-201(2), MCA. However, the Court also held that an injunction was warranted under § 27-19-201(3), MCA. The Court reasoned:

If MDT continues issuing permits which facilitate completion of the KMTP, Plaintiffs will lack an adequate remedy should the Court ultimately find in their favor.

The Court finds, MDT's continued issuance of permits relating to KMTP would tend to render any potential future judgment by this Court in favor of Plaintiffs ineffectual. Therefore, Plaintiffs are entitled to a preliminary injunction under section 27-19-201 (3), MCA.

Memorandum and Order at 11.

Imperial has not raised any reason why the injunction should not remain in place under this provision even if the Court finds it overstepped in granting the injunction under § 27-19-201(2), MCA.⁶

⁶ Imperial's only attempt to address the Court's conclusion on this basis is their claim that Plaintiffs did not cite subsection (3) in their brief in support of their preliminary injunction motion. Imp. Br. at 4, fn1. However, Plaintiffs did cite this subsection, and the Court was within its discretion to grant the injunction based upon the less effectual remedy that would remain without such preliminary relief. Pltffs. PI Br. at 7, 8-9 (citing subsection (3); noting that without preliminary injunction, construction and transport could already take place); PI Reply Br. at 5-6 (citing subsection (3) and explaining likelihood of less effectual remedy if project goes forward before merits resolved).

Moreover, the Court's holding in this regard is consistent with the purposes of MEPA, and the ultimate relief that Plaintiffs seek.

Such a conclusion is supported by the Montana Supreme Court's holding in *Four Rivers Seed Company v. Circle K Farms, Inc.*, where a preliminary injunction was necessary because monetary damages would be ineffectual to remedy the claims and potential harm to reputation. 2000 MT 360, ¶¶ 16-18, 303 Mont. 342, 16 P.3d 342.

Because monetary damages are similarly ineffectual to remedy Plaintiffs' claims, and Plaintiffs ultimately seek a permanent injunction until MDT fully complies with MEPA and other applicable laws, a preliminary injunction is necessary to protect a fully effective remedy. This is further supported by MEPA's purpose to ensure MDT and the public is informed of potential impacts of the project **before** the project goes forward. See *Ravalli County Fish & Game Assn.*, 273 Mont. at 380, 903 P.2d at 1368 (MEPA requires agencies to adequately determine significance of impacts "in the first instance"); and *Friends of the Clearwater v. Dombeck*, 222 F.3d 552 (9th Cir. 2000) (NEPA's purpose is to "ensure that the agency will not act on incomplete information only to regret its decision after it is too late to correct"). This purpose, and the remedy of ensuring the purpose is fulfilled,

necessitate a preliminary injunction so that the project is not completed before MDT and the public are made fully aware of the potential impacts.

The Court did not manifestly abuse its discretion in concluding the preliminary injunction was warranted in order to fully protect the effectiveness of Plaintiffs' requested relief.

D. Imperial's "Modified Injunction" Alternative Has Never Been Reviewed Under MEPA or Otherwise.

Imperial argues that if the injunction is not dissolved, it then must be modified. Section 27-19-404, MCA states that an injunction may be modified if "it satisfactorily appears that the extent of the injunction order is too great." Imperial believes a "reasonable modified preliminary injunction can be crafted" that will cost less to Imperial. Imperial's proposal appears to involve transporting modules over Highway 12 from Lolo Pass to Missoula, and then using the interstate route. Unfortunately, neither Imperial or MDT has provided enough details on this alternative for the Court to be able to make a reasoned decision whether it should be allowed, even if the Court were to decide that the "extent of the injunction order is too great." In reference to the proposal outlined on p. 23 of Imperial's brief, a number of questions arise:

- Does this mean that Imperial will only transport disassembled modules along Highway 12 to the Interstate, and no longer pursue modification and use of the remainder of the KMTP route?
- Does Imperial need new 32-J or other permits for this activity?
- Will this new proposal be subject to MEPA?
- Has MDT begun a decision-making process for this proposal?
- Will this proposal still require turnout construction and/or traffic stops and delays?
- What is the transportation plan associated with the proposal?

Without the answers to these and similar questions, Plaintiffs do not see how the Court could approve this proposed modification.

Moreover, Imperial has not demonstrated that “the extent of the injunction order is too great.” Just because Imperial’s decision to reconfigure its modules and propose new routes may be costing Imperial additional money does not, alone, justify lifting the injunction.⁷

Imperial’s business costs do not trump the need to maintain the status quo and protect Plaintiffs’ ability to obtain an adequate remedy at the

⁷ Plaintiffs note that Johnson’s testimony at the preliminary injunction hearing also addressed the fact that Imperial made decisions to transport modules to the Port of Lewiston and take other actions in furtherance of its proposal, **before** highway modifications were completed in Montana and **before** receiving **any** permits or approval for the transport in either Idaho or Montana. Hearing Transcript at 458-59.

resolution of the case, and the cases Imperial relies on do not stand for such a proposition. For example, in *Sandrock v. DeTienne*, a landlord and business tenant dispute, the Montana Supreme Court noted the duty of courts to “minimize the injury or damage” to parties in a controversy. 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123. Instead, the Court upheld a preliminary injunction based on its assessment of what constituted the status quo in that case. *Id.* at ¶¶ 16, 19.

In *Porter v. K & S Partnership*, the Court considered harm to the enjoined party from lost rental income, where the status quo would have allowed collection of that income to continue, but the preliminary injunction **altered** that status quo. 192 Mont. 175, 181-82, 627 P.2d 836, 839-40 (1981). The Montana Supreme Court initially confirmed the definition of “status quo” as “...the last actual, peaceable, noncontested condition which preceded the pending controversy...” *Id.* at 192 Mont. 175, 181; 627 P.2d 836, 839 (citations omitted). The Supreme Court then held the district court erred in granting the preliminary injunction because the prima facie case had been rebutted, the status quo would not be preserved, **and** the costs to all parties would not be minimized. *Id.* at 182, 840. The costs consideration

in *Porter* thus did not trump the need to preserve the status quo, but minimizing costs was aligned with preserving the status quo.⁸

Here, on the other hand, the status quo – the last “peaceable, noncontested condition” – is the condition protected by the Court’s preliminary injunction, i.e., no new permits for transport of unprecedented size and numbers of modules as proposed by Imperial. The Court appropriately identified the condition that would maintain the status quo until the merits of the case are resolved, and appropriately considered the impacts to the parties. The Court did not manifestly abuse its discretion in doing so, and Imperial’s business costs should not trump preservation of the status quo.

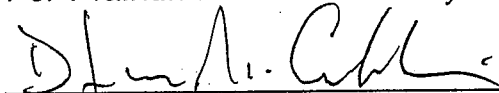
III. CONCLUSION

In spite of Imperial’s arguments to the contrary, the Court properly enjoined MDT on two independent bases. The preliminary injunction should not be dissolved or modified.

⁸ Further, in *Cole v. St. James Healthcare*, while the court considered the injury to both parties (though not in terms of monetary cost), it also ensured the preliminary injunction “preserved the status quo.” 2008 MT 453, ¶ 25, 348 Mont. 68, 199 P.3d 810.

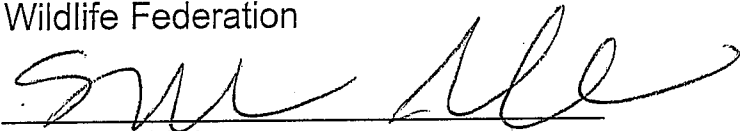
RESPECTFULLY SUBMITTED this 19th day of September, 2011.

For Plaintiff Missoula County



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For Plaintiffs Montana Environmental
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Wildlife Federation



Summer Nelson

CERTIFICATE OF SERVICE

I certify that on the 15th day of September, 2011, a true and correct copy of Plaintiffs' Brief in Response to Imperial Oil's Application to Dissolve or Modify the Preliminary Injunction was sent to the following via email and U.S. first-class mail, postage prepaid:

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