

FILED APR 18 2011
Shirley E. Farver
Deputy

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. 3

**ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER**

Pending before the Court is Plaintiffs' Motion for Temporary Restraining Order.

Defendants Montana Department of Transportation and Jim Lynch (MDT) and Defendant-Intervenor Imperial Oil Resources Ventures Limited (Imperial Oil) have filed separate briefs in opposition to the Motion. A hearing was held in the matter on Friday, April 15, 2011. The Court has reviewed the record including the testimony and affidavits submitted on the issue of the temporary restraining order together with the written and oral arguments of the parties. The Court rules as follows.

The subject matter of this case is the Kearsarge Module Transport Project (KMTP). 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. More broadly, the KMTP modules would be 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 (TVM) from Lolo Pass to Lolo Hot Springs, a distance of approximately seven (7) miles. The movement of the TVM pertains to requirements of the state of Idaho. The TVM was to have traveled the Montana leg between April 14 and 15, but encountered delays in Idaho.

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 permits, which have already been issued. As part of MDT's approval process for the KMTP the Department conducted an environmental assessment (EA) pursuant to the Montana Environmental Policy Act (MEPA). Completion of the EA occurred in April 2010 and a finding of no significant impact (FONSI) decision was issued in February 2011.

Plaintiffs ultimately seek to permanently enjoin the MDT from permitting the KMTP, including the construction work necessary to accommodate the loads. They also seek to enjoin the entry of the TVM into Montana. Plaintiffs' complaint seeks issuance of a preliminary injunction which would prevent activity on the project during the pendency of the action. Plaintiffs currently seek a temporary restraining order to prevent any activity on the project including the movement of the TVM into Montana until a hearing may be held on the merits of the preliminary injunction.

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Pursuant to section 27-19-314, MCA, “[w]here an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.” “The purpose of a temporary restraining order is to preserve the status quo until a hearing can be held to determine whether a [preliminary injunction] should be granted.” *Boyer v. Karagacin*, 178 Mont 26, 32, 582 P.2d 1173, 1177 (1978).

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Plaintiffs argue they will be irreparably harmed if their Motion for Temporary Restraining Order is not granted. In particular, Plaintiffs are concerned about alleged environmental impacts that will occur to aquatic resources if the KMTP is not restrained pending the resolution of the preliminary injunction motion. MDT and Imperial Oil argue Plaintiffs have failed to show they will be irreparably harmed by any KMTP activity that may occur pending resolution of the preliminary injunction motion. Imperial Oil is concerned about how a temporary restraining order will impact their project schedule and ability to conduct construction during the summer months. *See Aff. Kenneth L. Johnson* ¶ 13 (Apr. 15, 2011). The Court is mindful of this concern and, as such, is scheduling a hearing on Plaintiffs’ Motion for Preliminary Injunction as soon as is practicably possible given the Court’s schedule and the parties need to adequately prepare.

Plaintiffs submitted the testimony and affidavits of Peter Nielsen who is the Environmental Health Supervisor for the Missoula City-County Health Department. Nielsen’s testimony and affidavits demonstrate a likelihood of irreparable harm to aquatic resources if ground disturbing and

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turnout related construction are not restrained. Lolo Creek, which is paralleled by a portion of Highway 12, is listed by the Montana Department of Environmental Quality as impaired pursuant to Section 303 of the Clean Water Act (CWA). *Aff. Peter Nielsen* ¶¶ 5, 6 (Mar. 24, 2011). In addition, eighteen (18) streams in the Blackfoot Watershed in Missoula County are also listed as impaired. *Id.* at ¶ 8j (Mar. 24, 2011). Road sanding and sediment are primary causes of impairment to Lolo Creek. *Aff. Peter Nielsen* ¶ 4f (Apr. 15, 2011). According to Nielsen, his field investigation reveals many of the proposed turnouts are not as large as stated in the EA and that construction would involve significantly more filling, cutting, paving, and vegetation clearing than characterized in the EA and travel plan. *Id.* at ¶ 4b. Nielsen states that construction prior to proper assessment and mitigation measures will cause irreparable harm. *Id.* at ¶ 4g.

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

However, Plaintiffs have not demonstrated that all KMTP related construction is likely to cause them irreparable harm. Specifically, Plaintiffs have failed to show how modification of existing traffic signals is likely to cause irreparable harm. Testimony of MDT chief engineer Dwane Kailey indicated that traffic signals tend to be located in developed urban areas. Kailey further testified that restraining signal modification work would impact a separate project to reduce congestion in Missoula County. Therefore, a temporary restraining order relating to signal modification work is denied.

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Plaintiffs have also failed to establish that transport of the TVM will likely cause irreparable harm. Nielsen testified that placement of additional traction sand to facilitate transport of the TVM will result in increased sedimentation to Lolo Creek. Kailey testified that no additional sanding or deicing would occur to facilitate transport of the TVM. Plaintiffs presented no evidence to refute Kailey's testimony. Kailey also testified that the TVM is subject to, and will meet, the ten (10) minute rule as required by the previously issued 32-J permit. No evidence was presented to suggest that any construction is necessary or would take place to facilitate transport of the TVM. Plaintiffs have failed to demonstrate how they will be irreparably harmed by the transport of the TVM approximately seven miles from the Montana-Idaho border to Lolo Hot Springs utilizing existing highway infrastructure. The Plaintiffs have also failed to establish the need to enjoin snow removal from turnouts within the TVM transport route. Therefore, a temporary restraining order relating to the TVM is denied.

Plaintiffs have failed to show how issuance of any additional permits per se is likely to cause irreparable harm. Imperial Oil has already received all necessary permits relating to turnout, utility, and traffic modification construction. *Aff. Kenneth L. Johnson ¶¶ 6, 7, 8 (Apr. 15, 2011)*. Before the TVM can be transported beyond Lolo Hot Springs and before any additional KMTP modules can be transported in Montana certain construction work must be performed. *Id.* at ¶ 4. From the record it appears the only permits which remain to be issued are 32-J transport permits. The Court is restraining some of the construction that is necessary to transport any KMTP modules. Thus, the Court finds it unnecessary to restrain the issuance of permits which, as a practical matter, cannot be used by Imperial Oil until resolution of the preliminary injunction motion.

Plaintiffs have failed to show they are likely to suffer irreparable harm unless the Court orders MDT to revoke already issued permits. The Court is temporarily restraining any ground

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disturbing and turnout related construction. Thus, as a practical matter, encroachment permits and permits relating to the burying of utilities cannot be utilized pending resolution of the preliminary injunction motion. The Court will not revoke the already issued 32-J permit or any permits relating to traffic signal modifications since Plaintiffs have failed to show they will be irreparably harmed by the actions which the permits authorize.

Therefore pending resolution of Plaintiffs' preliminary injunction motion MDT and Imperial Oil, independently or through its contractors, are enjoined and restrained from:

- 1) Engaging in any activity relating to the burying of utility lines; and
- 2) Engaging in any activity relating to improvement or construction of turnouts, other than snow removal related to the TVM.

Defendant-Intervenor's request for a bond is granted as required by section 27-19-306, MCA. This requirement applies to the non-governmental plaintiffs only, as provided by section 25-1-402, MCA. Bond shall be in the amount of \$50,000.

It is further ordered that a hearing on Plaintiffs' Motion for Preliminary Injunction is set to commence on Monday, May 16, 2011, at 9:00 a.m. in the Missoula County Courthouse.

DATED this 18th day of April, 2011.



Ray J. Dayton
District Court Judge

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