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MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUTY

COUNTY OF MISSOULA, NATIONAL)
WILDLIFE FEDERATION, MONTANA)
ENVIRONMENTAL INFORMATION)
CENTER, MONTANA CHAPTER)
OF THE 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.)

Civ No. DV-11-424

Dept. No. 3

**TRIBES' MEMORANDUM
IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

The Nez Perce Tribe ("NPT") and the Confederated Salish and

Kootenai Tribes ("CSKT") (hereinafter together referred to "Amicus Tribes")

respectfully submit this brief in support of Plaintiffs' Motion for Summary Judgment.

I. INTRODUCTION

On November 14, 2011, Plaintiffs filed a Motion for Summary Judgment, as well as a Brief in Support. In these papers, Plaintiffs highlighted several errors made by the Montana Department of Transportation's ("MDT") in the Environmental Assessment of the proposed Kearsarge Module Transportation Project ("KMTP"). These arguments are similar to the arguments presented by the Plaintiffs and the Amicus Tribes in the filings supporting Plaintiff's Motion for Preliminary Injunction; where both parties argued that Plaintiffs' would likely succeed on the merits of their claims. Because none of the underlying legal issues were resolved in this Court's preliminary injunction decisions, the Amicus Tribes reassert that MDT violated the Montana Environmental Policy Act ("MEPA"), M.C.A. §§ 75-1-101, *et seq.*, on a number of grounds, and support Plaintiffs' Motion for Summary Judgment. While Plaintiffs address many of the problems contained in the Environmental Assessment ("EA") for the KMTP, the Amicus Tribes have a unique perspective regarding the KMTP's flawed analysis. This perspective is drawn from the fact that the KMTP, and associated construction activities, impact the Nez Perce Reservation and other lands of great importance to both the NPT and CSKT.

The Amicus Tribes assert that the KMTP failed to properly assess the environmental and social risks and impacts to the Amicus Tribes and their members from the construction and operation of the KMTP. Specifically, MDT's decision not to prepare an Environmental Impact Statement ("EIS"), to disclose and thoroughly assess the potential impacts from the KMTP,

was arbitrary and capricious. Even assuming MDT was correct in simply conducting an EA, MDT unlawfully failed to properly consider reasonable alternatives, and failed to disclose and assess various impacts resulting from direct, secondary and cumulative effects of the KMTP. Because of these many violations of MEPA, this Court should grant Plaintiffs' Motion for Summary Judgment.

II. STANDARD OF REVIEW

Summary judgment is designed "to promote judicial economy by eliminating unnecessary trials." *Peschel v. Jones*, 232 Mont. 516, 760 P.2d 51 (1988). A party is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Montana Rules of Civil Procedure ("MRCP") Rule 56(c). Under Rule 56(c), the party moving for summary judgment has the initial burden of establishing the absence of any genuine issue of material fact. *Rumph v. Edwards*, 183 Mont. 359, 365; 600 P.2d 163, 167 (1979). To satisfy this burden, the moving party must show that it is "quite clear what the truth is, and exclude and real doubt as to the existence of any genuine issue of material fact." *Id.* Where the court is asked to review a decision of an administrative agency and the review is limited to the administrative record, as is the case here, there are no triable issues of fact, and summary judgment is the appropriate avenue to resolve the case. See *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1472 (9th Cir.1994).

III. ARGUMENT

As the Montana Supreme Court stated in *North Fork Pres. v. Dept. of State Lands*, the test for whether an agency decision violates MEPA is

“whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully.” 778 P. 2d 862, 867 (1989). The *North Fork* Court further clarified that this test is really broken “down into two basic parts:” whether the agency action could be held unlawful, and whether it could be held arbitrary or capricious. *Id.* In the present case, MDT’s action with respect to the KMTP is both unlawful, and arbitrary and capricious.

In determining whether an agency action is arbitrary and capricious or unlawful under MEPA and its implementing rules, Montana Courts may look to federal caselaw under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, as persuasive precedent. See *Ravalli County Fish and Game Ass’n v. Montana Dept. of State Lands*, 903 P.2d 1362, 1367 (Mont. S. Ct. 1995).

Decisions from both MEPA and NEPA cases highlight MDT’s failure to properly conduct its environmental review in this case. Specifically, MDT failed to: (1) rationally explain why the many environmental and social effects of the KMTP are not significant; (2) properly designate the purpose and need for the KMTP, which unlawfully narrowed the scope of alternatives considered; and (3) adequately consider and disclose direct, secondary and cumulative impacts to the Amicus Tribes and their Members resulting from the project.

1. This Court Should Grant Plaintiffs’ Motion for Summary Judgment Because MDT’s Decision Not to Assess the Impacts of the KMTP in an Environmental Impact Statement is Unlawful and Arbitrary and Capricious.

MDT issued a Finding of No Significant Impact (“FONSI”) for the KMTP, stating that the KMTP “will have no significant impact on the human environment.” *FONSI*. This determination is arbitrary, and not justified

based on the facts in the record. In fact, the record shows that there are a number of potentially significant direct, secondary and cumulative impacts that will result from the project. Therefore, MDT should have conducted its assessment in an EIS

In order to show an EIS is necessary Plaintiffs must simply raise substantial questions about the significant impacts of a project, as the Montana Supreme Court has held “a determination that significant effects on the human environment will in fact occur is not essential.” *Ravalli County*, 903 P.2d at 1369 (quoting, *Foundation for North Am. Wild Sheep v. U.S. Dep’t of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982)). The Montana Supreme Court went on to state that “[i]f substantial questions are raised whether a project may have a significant effect upon the environment, an EIS must be prepared.” *Id.*

Plaintiffs have outlined several substantial questions about significant impacts to citizens of Missoula County, and members of the environmental organizations, in their comments on the KMTP and in their Motion for Summary Judgment. In addition, the direct, secondary and cumulative impacts to Amicus Tribes and their members discussed below are significant and substantial. It is unreasonable to dismiss as insignificant, for example, blocking Tribal members’ access to and return from treaty hunting, fishing and gathering sites, particularly as many Tribal members rely on the goods obtained on these trips for subsistence, cultural and economic purposes. Moreover, the potential destruction or disturbance of Tribal cultural sites and graves, the restriction of Tribal members’ access to emergency services for up to an hour, and the adverse impact to Tribal businesses and government operations that rely on Highway 12 and

regional tourism are all significant issues that were not adequately addressed in the EA and should have been addressed in an EIS.

Further, as discussed by Plaintiffs, the KMTP route is likely to become a full-time high and wide corridor. MDT completely failed to address this issue, even though MDT's decision on the KMTP will allow full-field development of this route as a high and wide corridor. As stated by the Montana Supreme Court: "MEPA requires that an agency take procedural steps to review 'projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment' in order to make informed decisions." *Ravalli County*, 903 P.2d at 1367 (quoting Section 75-1-201(1)(b)(iii), MCA). MDT is either willfully attempting to hide the fact that this route will become a high and wide corridor in order to avoid a programmatic review of such an action, or burying its proverbial head in the sand and ignoring the potential widespread use of this corridor for the Alberta tar sands projects, as well as other industrial projects relying on overseas heavy manufacturing. Either way, the lack of analysis concerning the creation of a permanent high and wide corridor along the KMTP route is completely antithetical to MEPA's requirement that state agencies make "informed decisions." *Id.*

Moreover, it appears that MDT is attempting to avoid a significance finding on the high and wide corridor issue, which would necessitate the preparation of an EIS, by myopically focusing only on the KMTP and avoiding consideration of reasonably foreseeable future uses. In determining whether an action is significant for the purposes of preparing an EIS under NEPA, an agency must consider "whether the action is related to other actions with individually insignificant but cumulatively

significant impacts... Significance cannot be avoided by... breaking [the action] down into small component parts.” *Sierra Club v. US Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988) (quoting 40 C.F.R. § 1508.27(b)(7)). Yet, in this case, MDT expressly declined to review the significance of environmental impacts of a permanent high and wide corridor, and focused only on the component KMTP project. FONSI, at 9 (stating that since no high and wide loads were under active consideration by the agency at the time of the EA, no assessment was needed). Because MDT turned a blind eye to the long-term effects of a permanent high and wide corridor, stating that future use of the route will be “independently reviewed,” they were able to conclude that “the KMTP will not significantly affect the human environment.” *Id.* This is exactly the type of piecemeal environmental review that is prohibited by MEPA (as well as NEPA). MCA § 75-1-102; 75-1-103; *Sierra Club*, 843 F.2d at 1193.

In *North Fork*, the Montana Supreme Court stated that an EIS is always required at the “go/no go” point of development, or the first stage of a number of successive steps leading to development. 778 P. 2d at 868-69. The Court stated that the “test derived to pinpoint when the ‘go/no go’ point is reached looks for the proposed action that will entail an irretrievable commitment of resources.” *Id.* The KMTP is certainly the “go/no go” point for the decision to make the proposed route a high and wide corridor because future high and wide loads will not require ground-disturbing activities. As a result, they will be able to simply apply for and receive 32-J permits from MDT. Because there is no turning back after the construction activities are complete, the KMTP represents an irretrievable commitment of resources. *Id.* Proceeding without comprehensive environmental review

will ignore the full spectrum of direct, secondary and cumulative effects of the development resulting from this permanent corridor in violation of MEPA. *Id.* Importantly, there are already additional loads proposing to use this route that will not have any environmental review. See e.g., *More Oversized Loads to be Shipped through Montana*, Missoulian, Sept. 1, 2011 <http://missoulian.com/news/local/article_61263252-d451-11e0-827c-001cc4c002e0.html> (last accessed Sept. 16, 2011).

NEPA caselaw is particularly apropos to this issue. The Ninth Circuit has ruled that an agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to "supply a convincing statement of reasons why potential effects are insignificant." *Save the Yaak Committee v. Block*, 840 F. 2d 714, 717 (9th. 1988) (quoting *The Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir.1985)). Indeed, the reasons supplied by the agency are crucial to determining whether the agency took a "hard look" at the environmental impact of the project. *Id.* Yet, MDT failed to provide any reasons why a permanent high and wide corridor will not result in significant impacts. Rather, MDT avoided their responsibility to take a hard look at the environmental and human consequences of a permanent high and wide corridor by arbitrarily breaking the larger action down into component parts (the KMTP), and shifting the focus to potential future reviews of proposed projects using the route.

Federal Courts have routinely ruled that this type of segmentation of related activities to avoid significance violates NEPA. See e.g. *Thomas v. Peterson*, 753 F. 2d 754, 758 (9th Cir. 1985). MDT's segmentation of the impacts of a permanent high and wide corridor to avoid a finding of significance should similarly violate MEPA. Otherwise, MEPA's goal of

ensuring “that environmental attributes are fully considered,” MCA § 75-1-102, will continually be frustrated. MDT would essentially be allowed to play a shell game with the plaintiffs, constantly hiding the significance of impacts from the establishment of a permanent high and wide corridor, by instead focusing on the relative insignificance of each set of loads. This Court should require MDT to consider the significance of the effects on the human environment from the establishment of a high and wide corridor now, before the bureaucratic inertia becomes too great. See e.g. *Save the Yaak*, 840 F. 2d at 718 (stating: “inflexibility may occur if delay in preparing an EIS is allowed: ‘After major investment of both time and money, it is likely that more environmental harm will be tolerated.’”) (quoting *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 471-72 (9th Cir. 1984)).

As discussed further below, there will be dramatic long-term effects resulting from a permanent high and wide corridor along Highway 12 and Highway 200. Tribal members access to and from treaty reserved hunting, fishing and gathering sites will likely be impaired. Their ability to reach emergency services will also likely be impaired, with potentially life-threatening results. Fish and wildlife relied upon by tribal members to meet subsistence, cultural and economic need will be adversely affected by the increased heavy traffic, increased noise, decreased air quality, and increased sedimentation from the use of sand and salt to protect the loads in the winter. Tourism supporting tribal businesses will likely be dramatically impacted, as the pristine character of the Lochsa and Blackfoot Rivers will be marred by the significant and regular transportation heavy industrial equipment. Even basic Tribal government operations may

likely be impaired. Therefore, MDT's decision to not complete an EIS at this "go" stage of development is both unlawful and arbitrary. *North Fork*, 778 P. 2d at 868-69; Administrative Rules of Montana ("ARM") § 18.2.237.

2. This Court Should Grant Plaintiffs' Motion for Summary Judgment Because MDT's Failure to Meet its Mandatory Duties Under MEPA is Unlawful.

a. The KMTP's Purpose and Need Was Unlawfully Narrow, and Resulted in an Inadequate Range of Alternatives.

MDT is required to explain the purpose and need for a project in every EA. ARM § 18.2.239(a)&(b). The agency then uses this purpose and need statement to determine a suite of reasonable alternatives that meets the purpose and need of the project. *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995). However, as stated by the Ninth Circuit:

"An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action". *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998).

Moreover, the agency may not adopt private interests as its own in crafting a purpose and need statement that essentially foreordains approval of the project. *Nat'l Parks and Cons. Assn v. BLM*, 606 F.3d 1059, 1070 (9th Cir. 2010).

The KMTP EA states that the "proposed project is needed to transport specialized processing equipment through Montana to Alberta." *KMTP EA*, at 1. There is no stated Montana or public interest need for this project, beyond "minimizing potential for adverse impacts" from the

movement of the processing equipment. *Id.* This purpose and need statement essentially meets the needs of the project applicant and not those of the agency, the state or its citizens. Despite the Ninth Circuit mandate forbidding agencies from defining their objectives in unreasonably narrow terms, that is exactly what MDT did in this case. See *e.g.*, *Nat'l Parks and Cons. Assn.*, 606 F.3d at 1070. This unreasonableness is highlighted by simple fact that the EA states that the modules must travel through Montana to get to their final destination, when that is not necessarily the case.

As a result of the overly narrow purpose and need statement, which was specifically tailored to meet Imperial Oil's needs, the range of alternatives considered in the EA was unreasonably narrow. MEPA requires MDT to consider "realistic and technologically available" alternatives that would "appreciably accomplish the same objectives or results as the proposed action." ARM § 18.2.239(3)(f). The KMTP EA considered only the proposed project and a no action alternative. There are several reasonable alternatives – all of which would have less impacts to Amicus Tribes and their members – that should have been reviewed, including: an all Canadian route; the traditional route from Houston through Billings; or even modifying the loads or Montana's interstate highways.

Importantly, the permit applicant bears the burden of providing "detailed, clear, and convincing information proving that an alternative with less adverse impact is impracticable." *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004) (internal quotations and citation omitted). Yet, Imperial Oil only provided cursory statements regarding the impracticality of other routes, and provided no information

why the modules could not be manufactured to fit on other routes. This limited investigation does not constitute a hard look at reasonable alternatives, and therefore MDT acted arbitrarily and capriciously in failing to analyze an adequate range of alternatives, or to explain sufficiently why other alternatives would not accomplish the project's purpose and need. See e.g., *Klamath-Siskiyou Wildlands v. U.S. Forest Service*, 373 F.Supp.2d 1069, 1088-89 (2004)(finding Forest Service action arbitrary and capricious where the agency failed to provide any analysis of the cost of other alternatives).

The scenario in this case is similar to that in *Nat'l Parks and Cons. Assn v. BLM*. 606 F.3d 1059. In *Nat'l Parks*, the BLM proposed to conduct a land exchange (and did an environmental assessment) that would have allowed a mining company to build a landfill closer to its mine. The Court found that the purpose and need statement reflected Kaiser's interests almost exclusively, finding that the proposed land exchange allowed Kaiser to build the landfill with the least expense. *Id.* The Ninth Circuit ruled: "the BLM may not circumvent [the proscription against overly narrow purpose and need statements] by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *Id.* at 1070.

In this case, MDT only considered Imperial Oil's private interests, and did not consider alternative routes seen as less favorable by Imperial Oil, but more preferable to the general public and the Tribes. Importantly, the EA was not written by MDT at all. It was drafted by Imperial Oil's contractor, Tetra Tech, making it very unlikely they would consider any alternative deemed unfavorable by Imperial Oil. Indeed, there is no

incentive for Tetra Tech to consider any alternatives involving other routes, as those would simply cost more money and would be seen by their employer as unnecessarily wasteful. However, the practical result of such a process is that MDT foreordained the approval of Imperial Oil's requested project in exactly the manner the Ninth Circuit disapproved of in *Nat'l Parks*. 606 F.3d at 1070. The failure to adequately consider "realistic and technically achievable" alternatives that accomplish the goal of moving the processing equipment to Alberta, but that may not perfectly meet Imperial Oil's private objectives, should be considered equally as unlawful under MEPA. ARM § 18.2.239(3)(f). MDT cannot simply use the company's self-serving description of the "purpose and need for the project" to reject alternatives that would call into question the wisdom of the project, or even call for "total abandonment of the project." *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 785 (9th Cir. 2006).

Moreover, this artificially narrow range of alternatives essentially boils MDT's discussion of alternatives down to a choice between approving the project as proposed by the applicant, and denying the application. Federal courts have routinely found that NEPA prevents federal agencies from effectively reducing the discussion of environmentally sound alternatives to a binary choice between granting and denying an application. See e.g., *Save Our Cumberland Mountains v. Kempthorne*, 453 F. 3d 334, 345 (6th Cir. 2006). Even where an agency deems a proposed action to have minimal environmental consequences, the agency does not have "a free hand to set aside anything other than granting or denying an application as an unreasonable alternative." *Id.* at 346. MDT specifically limited the alternatives considered to: (1) granting the application, or (2) a no action

alternative, which MDT concluded did not meet the narrowly drawn “purpose and need” for the project. FONSI, at 10. Because Montana Courts look to NEPA caselaw for guidance on alternatives analysis, MDT’s failure to properly frame the purpose and need, and outline a set of adequate alternatives should be viewed by this Court as a violation of MEPA. ARM § 18.2.239(3)(f). Any other result turns the assessment of alternatives into a fruitless exercise that does not foster good decision-making or informed public participation in violation of MEPA. *Ravalli County*, 903 P.2d at 1367

b. The KMTP Contained an Inadequate Discussion of Direct, Secondary and Cumulative Impacts to Tribal Members in Violation of MEPA.

MEPA requires MDT to conduct a thorough review of the direct, secondary and cumulative effects of the proposed action on the physical environment and human population. ARM § 18.2.239(d)&(e). The KMTP EA fails to address several direct, secondary and cumulative impacts that the KMTP will have on the environment and the human population. MDT concluded that they did not even have to address direct impacts when they occur in Idaho. FONSI, at 10. Neither MEPA, nor its implementing rules, circumscribe the scope of direct impacts that must be discussed in this fashion. MDT may not have authority to change the KMTP in Idaho, but it must still consider and disclose those effects, as they are directly linked to MDT’s approval of the KMTP (they would not occur without MDT’s issuance of the permits to IO). Both the Montana and Idaho effects are highly significant for the Amicus Tribes and their members. Because of MDT’s failure to consider the impacts described below in the EA, this Court should find that Plaintiffs will likely succeed on the merits, as the KMTP

unlawfully violates MEPA's hard look standard. See, *Ravalli County*, 903 P.2d at 1369 (announcing MEPA's implicit hard look standard).

1. *Impacts on the Exercise of Treaty Reserved Rights*

One of the biggest failures of the KMTP EA is the lack of a discussion concerning the impact of the KMTP on the exercise of the Tribes' treaty-reserved rights. As discussed in the Amicus Tribes' Memorandum in Support of Motion for Leave to Participate as *Amicus Curiae*, at 3-6, members of both the CSKT and the NPT have treaty reserved rights to hunt, fish, gather and pasture horses on certain lands surrounding the proposed transportation route. For many tribal members, these activities serve subsistence, cultural or economic needs. Moreover, Tribal members frequently travel at night to reach or return from the areas where they exercise these rights. As a result, Tribal members may cumulatively encounter several of the KMTP loads while travelling to or returning from these activities. Yet, the KMTP contains no discussion of the effect of numerous delays on the exercise of these vitally important treaty rights. Additionally, serial delays could pose life-threatening consequences in the event a tribal member is injured or suffers a significant health complication (i.e. heart attack, stroke, or diabetic attack) while exercising these rights. At least one person suffering an apparent heart attack has already been delayed on the way to the hospital due to oversized loads on Montana's two-lane highways. See *Megaloads: The Long Night*, Missoula Independent, November 10, 2011 <<http://missoulanews.bigskypress.com/missoula/megaloads/Content?oid=1508790>> (last accessed November 15, 2011). Lastly, because getting to and returning from remote areas along highway 12 or highway 200 may take several hours, and the hunting,

fishing or gathering activities can involve long and arduous activity, Tribal members frequently park to rest or sleep in the highway turnouts. This will no longer be possible if the turnouts are all occupied by massive oil processing equipment. The EA fails to discuss these impacts.

The KMTP similarly failed to assess impacts to the fish and wildlife relied upon by Tribal members in the exercise of their treaty-reserved rights. For example, brake dust and vehicle exhaust from the increased use of diesel-burning heavy equipment along the Clearwater, Lochsa, Clark Fork and Blackfoot Rivers will result in significantly increased discharges of particulate matter, mercury, copper and other heavy metals. Moreover, there will be an increased need to use sand and deicers on the highways along the route. These pollutants, directly and cumulatively, will adversely impact the air and water all along the route.

In *South Fork Band Council of Western Shoshone v. Dept. of Interior*, the Ninth Circuit determined that an EIS conducted by the BLM for the expansion of a gold mine in Nevada was invalid for failure to disclose and analyze impacts on air quality from the transportation of ore to a processing facility. 538 F. 3d 718, 726 (9th Cir. 2009). Similarly, MDOT failed to adequately consider the impacts on air and water quality from transportation of the Kearsarge Modules (and other future loads) on the air and water quality along the haul route. MDT simply stated that these impacts will be minimal or not occur. KMTP EA, at 36, 42.

The KMTP also failed to assess potential impacts to wildlife and bird migration corridors, which may be affected due to the overwhelming presence of the heavy haul equipment. Tribal members rely upon many of the potentially affected species to meet subsistence, cultural or economic

needs. The EA simply concludes, without discussion of the process leading to the conclusion, that no impacts to fish or wildlife are expected. KMTP EA, at 49.

The KMTP additionally failed to adequately discuss the impacts from an accident involving a processing module overturn and blocking the highway, or falling into one of the Rivers bordering the route. The KMTP FONSI simply stated that the risk of an accident is low, so there is no significant impact. FONSI, at 12. This could not be further from the truth. The risk of an accident may be low, but the economic disruption and habitat impacts resulting from an accident – even if unlikely – is quite significant. This is especially true since it would be very difficult to return the load back to the trailer without the use of massive cranes not found in this region. It is quite likely that such an accident could completely block access to many hunting, fishing and gathering sites for a significant amount of time. At best, such an accident would result in several hours of detours to reach cut-off sites, and would virtually eliminate tourism to the affected area.

2. Impacts to Cultural Sites, Trails and Unmarked Graves

The KMTP EA has only a cursory discussion of impacts to cultural sites, trails and unmarked graves from the burying of electric lines, construction of larger highway turnouts to accommodate the high and wide loads, or the actual transport of the modules. The EA concludes that there will be no impact to cultural sites. KMTP EA, at 19. Yet, MDT did no field surveys for existing or potential Tribal cultural sites, instead relying on previously compiled data available to the State Historic Preservation Officer. KMTP EA, at 17; *A Cultural Resource Review for the KMTP in Montana*, Tetra Tech for MDT, at 1. It is unclear how the EA could

determine there would be no effect when MDT failed to conduct any on the ground surveys for potential Tribal cultural sites.

Because the route runs along several trails of cultural and historical significance to the Tribes, for example the *Ne Mee Poo* and Lolo Trails, there is a likelihood that ground-disturbing activities could uncover remains in unmarked graves. The KMTP EA simply states that in the event of the discovery of human remains, the first call will be to the coroner's office. KMTP EA, at 17. There is no mention of the impacts that such a disturbance would have on the tribal members. The adulteration of interred remains is highly culturally offensive to the Tribes. As stated in the Kennewick Man case,

"[w]hen a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest...." *Bonnichsen v. US*, 357 F. 3d 962, at FN 8 (9th Cir. 2004) (quoting *Bonnichsen III*, 217 F.Supp.2d 1116 (D. Or. 2002)).

Despite the significance to the Tribes, this type of direct impact from utility relocation and turnout construction goes unmentioned in the EA.

The EA also fails to discuss potential impacts on trails of cultural and historical significance to the Tribes from the actual transportation of the modules. The EA simply states that module transport "will not affect any historical sites due to the nature of the activity." KMTP EA, at 19. This cursory review of potential impacts does not remotely meet MEPA's hard look standard. The modules are huge. The caravan and support vehicles for each module are numerous. Additionally, the module will be covered and surrounded with flashing lights to ensure safety at night. The KMTP simply states that noise will not be an issue because no noise ordinances will be violated. KMTP EA, at 35-36. This fails to understand that noise

and commotion from this industrial activity may significantly impact the cultural and spiritual activities that take place at the various trails and historical sites of importance to the Tribes. Additionally, the EA fails to discuss the impacts on existing turnout parking frequently used by Tribal members to access historical sites and trails, which will be used to hold the oil processing modules and support vehicles during the daytime.

3. Impacts to Tribal Operations

U.S. Highway 12 connects critical Nez Perce Tribal governmental interests both on and off-reservation. There are several Tribally-owned or managed operations along the route including Dworshak Dam, Tribal Fisheries offices in Orofino, the Tribal medical clinic, police offices, and Community Center in Kamiah, the Kooskia National Fish Hatchery in Kooskia. All of these Tribal facilities stand to be affected by the KMTP because of their reliance on the route for transport of Tribal personnel, materials and equipment necessary for their operation and maintenance.

In addition, the Tribe has two casinos located on the transportation route. On its inaugural journey in the early morning hours of April 12, 2011, the Imperial Oil “test module” knocked out power to approximately 1,300 homes and businesses in the Greer and Weippe communities in Idaho when the module struck power lines. In the late afternoon of Wednesday, April 20, 2011, the Tribe was informed that Imperial Oil had requested Avista Utilities cut power to some Kamiah residents that evening, including the Nez Perce Tribe’s Itse Ye Ye Casino. No previous notice was given by Imperial Oil or the Idaho Transportation Department. When informed of the proposed power outage, the Tribe was forced to begin the process of shutting down its casino operations two hours earlier than normal to

prevent damage to business equipment, protect customers and ensure proper security were in place during the outage. Although the power was ultimately not interrupted based on objections raised by the Tribe and others in the community, the fact remains that poor planning on the part of Imperial Oil led to the unacceptable consequence of the Tribe being forced to take measures to limit its own operations to accommodate the KMTP. This scenario demonstrates the lack of the necessary assessment of direct and secondary impacts on tribal (and non-tribal) resources that will result from the KMTP.

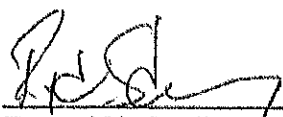
Finally, customers who frequent the Amicus Tribes' casinos and hotels rely in large part on U.S. Highway 12 and 200 for access. Access to the Tribes' casinos and hotels will be severely impacted by the KMTP, yet these impacts go unaddressed in the EA.

III. CONCLUSION


Because the above-described procedural violations will result in concrete harm to Plaintiffs and Amicus Tribes, the Court should GRANT Plaintiffs' Motion for Summary Judgment.

Dated: This 15th day of November, 2011.

Respectfully submitted,



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