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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
 A PRELIMINARY
 INJUNCTION**

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 a Preliminary Injunction.

I. INTRODUCTION

On April 7, 2011, Plaintiffs filed a Motion for Preliminary Injunction, 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”). Plaintiffs argued that they were likely to prevail on the merits of their case because MDT made several significant errors in its Environmental Assessment of the KMTP. As a result of MDT’s errors, Plaintiffs argue they will be irreparably harmed if this Court does not issue an injunction.

The Amicus Tribes support the arguments made by Plaintiffs in their Motion for Preliminary Injunction. While Plaintiffs address many of the problems contained in the Environmental Assessment 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 route travels through the Nez Perce Reservation and other lands of great importance to both the NPT and CSKT. Specifically, the Amicus Tribes believe the KMTP failed to properly assess risks and impacts to the Amicus Tribes and their members from the construction and operation of the KMTP. A proper environmental review that thoroughly assesses the impacts of the KMTP would likely prevent some of the needless damages

that have been caused by the “trial by error” planning approach regarding transport of the Imperial Oil “test load.” Because Plaintiffs are likely to succeed on the merits, and because of the irreparable harms that will result without a preliminary injunction, this Court should grant Plaintiffs’ Motion for Preliminary Injunction.

II. ARGUMENT

As the Montana Supreme Court stated in *North Fork Pres. v. Dept. of State Lands*, the test for whether an agency decision violates the Montana Environmental Policy Act (“MEPA”), MCA § 75-1-201, *et seq.*, 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 Assessment (“EA”) in this case. Specifically, MDT failed to: (1) rationally explain why the many environmental 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 the Preliminary Injunction Because MDT's Decision Not to Assess the Impacts of the KMTP in an Environmental Impact Statement is 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." *KMTP FONSI*. This determination is totally arbitrary, and not justified based on the facts in the record. 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 Fish and Game*, 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 Preliminary Injunction. 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 sustenance and livelihood.

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. In the *North Fork* decision, 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. They will be able to simply apply for and receive 32-J permits. 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.*

In this case, MDT expressly declined to review the significance of environmental impacts of a permanent high and wide corridor. See, KMTP 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 action MEPA was intended to avoid. See *e.g.* MCA § 75-1-102; 75-1-103.

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 compartmentalizing this project and shifting the focus to 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. 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, as well as the 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 transportation heavy industrial equipment. Even basic Tribal government operations may likely be impaired. Therefore, MDT's decision to not complete an EIS at this stage of development is unlawful.

Administrative Rules of Montana ("ARM") § 18.2.237.

2. This Court Should Grant the Preliminary Injunction 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 in Violation of MEPA.

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 v. BLM*, 606 F.3d at 1070. This fact 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 unreasonably narrow purpose and need statement, which was specifically tailored to 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 other Montana highways that may be more appropriate for this type of transportation project.

This scenario 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 Kaiser Eagle Mountain mine to build a landfill close to the 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.* As a result, 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 that may be 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 has 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).

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 to granting the application, or a no action alternative, which MDT concluded did not meet the narrowly drawn “purpose and need” for the project. KMTP 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.

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. KMTP 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 Fish and Game Ass'n*, 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. 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 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 also 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. KMTP 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 (impacts discussed below).

Last, the KMTP completely failed to assess the impacts to global warming and climate change, as a result of the tar sands development, on fish and wildlife species relied upon by tribal members. While MDT may

view these impacts as unrelated to the project, the Eight Circuit recently held a federal EIS invalid for failing to consider the effects on global warming, climate change, and environmental quality from the increased consumption of coal due to a proposed rail line to be used to transport coal from the Powder River Basin in Wyoming. *Mid-States Coal Progress v. Surface Transportation Board*, 345 F.3d 320 (8th Cir. 2003). The transportation corridor contemplated in the KMTP EA is exactly the same as the new rail line, and thus MDT must discuss the effects resulting from the increased consumption of tar sands oil. Unfortunately, the KMTP EA failed to even remotely mention the environmental effects resulting from the development of the tar sands, or the increased consumption of oil allowed by the completion of this haul route. These increases have the potential to adversely affect fish and wildlife resources that are significantly important to the Amicus Tribes.

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: the Clearwater River Casino near Lewiston, and the Itse Ye Ye Casino in Kamiah. 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. Following this incident, the test module was parked for over a week in a turnout adjacent to Highway 12 while Imperial Oil and the Idaho Transportation Department assessed what had gone wrong. In the late afternoon of Wednesday, April 20 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 Tribes' casinos and hotels rely in large part on U.S. Highway 12 and 200 for access. Many customers and tourists visiting the Nez Perce businesses travel from Montana on Highway 12. Filling two-lane highways (and their shoulders and turnouts) with oil processing equipment bound for Canada has impacts on this important tribal commerce. Yet there is no discussion of these impacts from the KMTP activities.

III. CONCLUSION

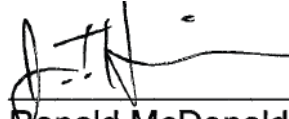
Because the above-described procedural violations will result in concrete harm to Plaintiffs and Amicus Tribes, the Court should GRANT Plaintiffs' Motion for Preliminary Injunction.

Dated: This 3rd day of May, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was emailed and mailed, first class, this 3rd day of May, 2011, to:

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