

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

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

Plaintiffs,)

v.)

MONTANA DEPARTMENT OF)
TRANSPORTATION, an agency of the)
State of Montana, and JIM LYNCH, in his)
capacity as Director of Montana Department)
of Transportation,)

Defendants, and)

IMPERIAL OIL RESOURCES VENTURES)
LIMITED,)

Defendant-Intervenor.)

Cause No.: DV-11-424

Dept. No. 3

FILED JUL 19 2011

SHIRLEY E. FAUST, CLERK

By: 

Deputy

MEMORANDUM AND ORDER
PARTIALLY GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

Pending before the Court is Plaintiffs' motion for a preliminary injunction. 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. Amicus Curiae Confederated Salish and Kootenai Tribes of the Flathead Reservation and the Nez Perce Tribe have filed a memorandum in support of the preliminary injunction motion. A hearing was held in the matter on the 16th through 18th days of May, 2011.

At the commencement of the hearing, the Court advised the parties that it was fully aware of the numerous pending motions in limine and motions to strike. These evidentiary motions have been addressed in the Court's *Memorandum and Order Regarding Pending Evidentiary Motions*.

In accordance with this memorandum and order, the Court has considered the record including the testimony and affidavits submitted on the issue of the preliminary injunction together with the written and oral arguments of the parties. The Court now issues its ruling.

BACKGROUND

The subject matter of this case is the Kearl Module Transport Project (KMTP). As part of the project, Imperial Oil proposes to transport approximately 207 oversized loads through Montana from the Montana-Idaho state line at Lolo Pass in Missoula County to the Canadian border at Sweet Grass, Montana. The KMTP modules are being manufactured in South Korea, shipped to the Port of Vancouver, Washington and barged up the Columbia and Snake Rivers to Lewistown, Idaho. The modules' ultimate destination is Alberta, Canada where they would be used in tar sand mining and production.

Some of Imperial Oil's modules exceed legal dimensions, thus requiring 32-J permits from MDT. To date, one (1) 32-J permit has been issued to allow transport of a test validation module from Lolo Pass to Lolo Hot Springs, a distance of approximately seven (7) miles. In order to facilitate the KMTP, construction work must be performed including improvement and construction of various highway turnouts and modification to overhead utility lines and traffic signals. The construction work is subject to MDT encroachment and utility relocation permits. The encroachment permits and some utility relocation permits have already been issued by MDT.

As part of MDT's approval process for the KMTP an environmental assessment (EA) pursuant to the Montana Environmental Policy Act (MEPA) was conducted. The EA was completed on April 8, 2010. A finding of no significant impact (FONSI) decision was issued on February 7, 2011.

Plaintiffs' suit ultimately seeks to permanently enjoin MDT from issuing further permits

relating to the KMTP and to void already issued permits. Plaintiffs currently seek issuance of a preliminary injunction under section 27-19-201, MCA.

PRELIMINARY INJUNCTION LAW

Pursuant to section 27-19-201, MCA, a preliminary injunction may be granted under the following relevant circumstances:

- (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....

Section 27-19-201, MCA, is disjunctive, and a party seeking an injunction must establish a basis for relief under only one subsection. *Pinnacle Gas Resource, Inc. v. Diamond Cross Properties, LLC*, 2009 MT 12, ¶ 23, 349 Mont. 17, 201 P.3d 160 (citing *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 15, 319 Mont. 132, 82 P.3d 912).

“[A]n applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123 (quoting *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981)). A preliminary injunction is issued to maintain the status quo pending a decision on the merits. *Sandrock*, ¶ 16. The status quo is “...the last actual, peaceable, non-contested condition which preceded the pending controversy.” *State of Montana v. BNSF Railway Company*, 2011 MT 108, ¶ 17, 360 Mont. 361 (citing *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d

714; *Sweet Grass Farms, Ltd. v. Board of County Commissioners*, 2000 MT 147, ¶ 28, 300 Mont. 66, 2 P.3d 825).

“An injunction will not issue to restrain an act already committed; it is not an appropriate remedy to procure relief for past injuries.” *BNSF Railway Company*, ¶ 19 (citing *Bouma v. Bynum Irrigation District*, 139 Mont. 360, 364, 364 P.2d 47, 49 (1961); *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 45). In considering a preliminary injunction, courts have a duty to minimize the injury or damage to all parties in the case. *Sandrock*, ¶ 16 (citations omitted). Courts should in no manner determine the resolution of the ultimate issues involved in the case. *Sandrock* ¶ 23 (citations omitted).

DISCUSSION

Plaintiffs’ Motion for Preliminary Injunction asks the Court to enjoin: (1) issuance of encroachment permits for any construction identified in the KMTP EA or FONSI; (2) issuance of any oversize permits to transport oversize loads along the KMTP route; (3) issuance of any “special use” permits to transport oversize loads along the KMTP route, including a test load; and (4) issuance of any permits or other authorizations that would allow any activity identified or approved by the EA or FONSI.

Prior to Plaintiffs filing their motion for preliminary injunction, MDT had already issued the necessary encroachment permits for the KMTP. Therefore, Plaintiffs’ first prayer for injunctive relief will not be considered. See *BNSF Railway Company*, ¶ 19. The Court previously denied enjoining issuance of a special permit for transportation of a test module, and MDT subsequently issued the permit. Therefore, Plaintiffs’ third prayer for relief is no longer at issue.

The issue that remains before the Court is whether MDT should be enjoined from issuing any further permits or other authorizations related to the KMTP. In particular, the issuance of

oversize permits and any further utility relocation permits are at issue. The Court has considered these issues and is granting Plaintiffs a preliminary injunction under sections 27-19-201(1) and (3), MCA. The practical effect of this ruling is that KMTP activity which requires no further permitting or authorization from MDT may legally proceed. However, as issuance of further 32-J permits, and any other permits relating to the KMTP are hereby preliminarily enjoined, construction would be at Imperial Oil's peril as it may ultimately be determined that such further permitting will be permanently enjoined ¹

Preliminary Injunction under § 27-19-201(1), MCA

Plaintiffs allege MDT violated MEPA because the KMTP EA failed to adequately consider impacts of the project and failed to adequately consider reasonable alternatives. Plaintiffs also allege MDT violated MEPA by failing to prepare an environmental impact statement (EIS).

The standard of review of an agency decision under MEPA is "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." *Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995) (quoting *North Fork Preservation Assoc. v. Dept. of State Lands*, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989)). The court's role is to determine whether "... the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *North Fork Preservation Association*, 238 Mont. 451, 465, 778 P.2d 862, 871 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). The court may not substitute its judgment for that of the agency by determining whether the agency decision was "correct." *North Fork Preservation Association*, 238 Mont. at 465, 778 P.2d at 871.

¹ Unlike Plaintiffs motion for a TRO, the preliminary injunction motion does not ask the Court to restrain or enjoin Imperial Oil and the construction of turnouts. The Nongovernmental Plaintiffs have expressly argued in previous briefing that they only seek to enjoin MDT's permitting of the KMTP.

For the reasons set forth below, the Court finds that Plaintiffs have established a prima facie case under MEPA and it appears they are entitled to the relief demanded. *Sandrock*, ¶ 16; Mont. Code Ann. § 27-19-201(1).

a. EA Impacts Analysis and Issuance of the FONSI Decision

The intent of MEPA is to ensure that environmental attributes of state actions are fully considered. Mont. Code Ann. § 75-1-102. MDT is required to determine the significance of impacts of an associated action. Admin. R. Mont. 18.2.238. This determination forms the basis of MDT's decision regarding whether or not to prepare an EIS. *Id.* MDT is required to consider certain criteria in determining the significance of each impact on the quality of the human environment including:

growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts...

any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions....

Id.

Plaintiffs presented evidence that the EA does not adequately consider the final plans for the KMTP. In particular, MDT has not yet decided which turnouts, if any, will be left in place. EA § 3.6.2.2; FONSI page 23. Dwane Kailey (Kailey) is the chief operations officer, the chief engineer, and the highways administrator for MDT. Kailey testified that the final decision on whether to remove turnouts will be made in the future based on the benefit to the public. This evidence raises two issues.

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.

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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. The turnouts are being constructed and modified to make transport of the KMTP high-wide loads feasible. Whether the turnouts are left in place will necessarily effect whether the route will accommodate future loads of similar size. Thus, determining the growth-inducing or inhibiting effects as well as any precedential effects resulting from turnout construction appears largely dependent on whether the turnouts will remain in place.

It seems that in order to determine the significance of impacts one must first determine the scope of the project, i.e. whether turnouts being constructed to facilitate transport of KMTP high-wide loads are permanent or temporary. 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.

b. KMTP Alternatives

An EA must include "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented." Admin. R. Mont. 18.2.239(3)(f). Proposed alternatives must be achievable under current technology and economically feasible "... as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor." Mont. Code Ann. § 75-1-201(1)(b)(iv)(C)(I) (2009).

The EA considered two alternatives in detail: the proposed action and a no action alternative. The alternatives "considered but eliminated" included Canadian highway routes and a U.S. Interstate Highway System Transportation Route (Interstate Route). 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.

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 that the Interstate Route was an infeasible alternative.

c. Preparation of the KMTP EA

MEPA requires that the agency take a "hard look" at the environmental impacts of its proposed action. *See Ravalli County Fish & Game Ass'n*, 273 Mont. at 381, 903 P.2d at 1369.

MDT did not prepare the KMTP EA either independently or through its contractors. Rather, the KMTP EA was prepared by a private consulting firm called Tetra Tech. Tetra Tech was hired to prepare the EA by Imperial Oil through its contractor Fluor. Thus, Imperial Oil as the proponent of the KMTP prepared the EA through its contractors. Testimony from MDT Environmental Services employee Eric Thunstrom was that MDT did not independently assess wetlands or floodplain information along the route because it was the responsibility of Imperial Oil's consulting firm.

Plaintiffs argue that under Admin. R. Mont. 18.2.256 and 18.2.239 MDT cannot delegate preparation of an EA to the project sponsor. These regulations do not appear to explicitly preclude MDT from delegating preparation of an EA to the project sponsor. However, Imperial Oil's preparation of the EA in conjunction with testimony that MDT did not independently assess certain

environmental impacts raises a substantial question as to whether MDT took the requisite "hard look" at the potential environmental impacts of the KMTP.

Preliminary Injunction under § 27-19-201(2), MCA

As previously discussed, the Court cannot restrain issuance of encroachment permits because these permits have already been issued. Therefore, any evidence showing great or irreparable injury as it relates to issuance of the encroachment permits is irrelevant. The relevant inquiry is whether it appears that issuance of 32-J permits or utility relocation permits would produce great or irreparable injury to Plaintiffs during the pending litigation.

The EA specifies that best management practices (BMPs) will be used to control sediment and erosion. BMPs are used to minimize sediment discharge from a construction site. BMPs include physical measures such as straw wattles, silt fences, check dams, blankets, and revegetation. BMPs also include avoidance measures such as not disturbing native vegetation, and avoiding impacts to water resources through project modification. The parties presented conflicting evidence regarding whether BMPs have been properly installed and maintained.

Plaintiffs presented the testimony of Peter Nielsen, along with his affidavit and report documenting his field survey of BMPs along the "10-mile plow." The "10-mile plow" refers to a utility relocation project, in which Missoula Electric Cooperative buried approximately 10 miles of electric utility lines. The 10-mile plow and the portion of the KMTP route along Highway 12 run in close proximity to Lolo Creek, which is an impaired stream under section 303(d) of the Clean Water Act.

Peter Nielsen is the Environmental Health Supervisor for the Missoula City-County Health Department and supervisor of the Missoula Water Quality District. Nielsen's affidavit, report, and testimony tend to show that at least some BMP's along the 10-mile plow were not properly installed

or maintained. However, Nielsen testified that he has no training or experience installing and maintaining BMPs. Nielsen's testimony indicated that he was unable to document any release of a significant discharge of sediment, which would violate the standards established by the Department of Environmental Quality's general storm water permit.

MDT presented the testimony, affidavit, and report of William Craig (Craig). Craig is a hydrologist with Tetra Tech, who drafted and reviewed the water resources section of the KMTP EA. Craig testified that he has experience in developing storm water pollution prevention plans and implementing BMPs associated with storm water permits. Craig conducted a field survey of the 10-mile plow. Craig's field survey and report tended to show that BMP's have been installed and are properly functioning.

Based on the evidence presented to the Court it does not appear that MDT's issuance of KMTP utility relocation permits will produce a great or irreparable injury to Plaintiffs.

Plaintiffs offered evidence and testimony from Greg Robertson to demonstrate that the KMTP project will not comply with the 10 minute rule under Admin. R. Mont. 18.8.1101(6). Robertson's testimony was countered by Ken Johnson (Johnson) who is the project manager for the KMTP. Johnson explained the process used to locate turnout locations and ensure compliance with the 10 minute rule. Plaintiffs did not present any evidence showing how a hypothetical violation of the 10 minute rule would cause irreparable harm or injury to them. Furthermore, MDT has the authority to revoke 32-J permits if Imperial Oil or its contractors violate the 10 minute rule. *See* Admin. R. Mont. 18.8.901.

Sara Boyett (Boyett) is a member the Montana Environmental Information Center (MEIC), who is a Plaintiff in this case. Boyett testified that she lives in Ovando, Montana and that her residence is approximately 300 yards from the Highway 200 portion of the proposed KMTP route.

Boyett attended public meetings relating to the KMTP and submitted comments during the public comment period. Boyett has also submitted two affidavits to the Court. Boyett testified that her residence faces Highway 200 and she is quite certain that light and noise resulting from transport of the KMTP high-wide loads will adversely impact her.

The EA anticipates only low level noise from transportation of the modules. The EA states that transport of the KMTP modules will comply with applicable noise limits set by local ordinances. Plaintiffs did not provide evidence refuting these statements in the EA. Harm to Boyett from light and noise resulting from the transport of the modules appears to be largely speculative.

Based on the evidence presented to the Court it does not appear that MDT's issuance of oversize 32-J permits related to the KMTP will produce a great or irreparable injury to Plaintiffs. Plaintiffs are not entitled to a preliminary injunction under section 27-19-201(2), MCA.

Preliminary Injunction under § 27-19-201(3), MCA

Plaintiffs' have alleged that MDT's decision to approve the KMTP violated MEPA. Plaintiffs ultimately seek to permanently enjoin permitting of the KMTP project. MDT has issued some, but not all permits, needed to complete the project. The Court has previously found that Plaintiffs have established a prima facie case under MEPA and it appears they are entitled to the relief which they ultimately seek. 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 the 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 27-19-101(3), MCA.

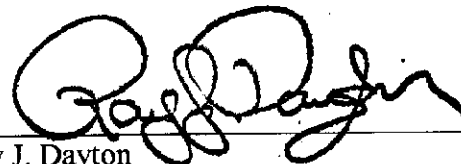
ORDER

Plaintiffs have established they are entitled to a preliminary injunction under section 27-19-201, MCA. MDT is therefore preliminarily enjoined from:

1. issuing any 32-J permits to Imperial Oil or its contractors to transport over-dimension loads over the route identified in the KMTP EA and FONSI;
2. issuing any further permits or other authorizations that would allow any activity identified or approved through the KMTP EA and FONSI.

It is further ordered that the temporary restraining order is dissolved. The bond requirement imposed in the TRO is exonerated.

DATED this 19th day of July, 2011.



Ray J. Dayton
District Court Judge