

MEIC and Citizens for a Better Flathead v. Department of Natural Resources and  
Conservation and Board of Land Commissioners  
Cause BDV 2000-396, 1st Judicial District  
Judge Sherlock  
Decided 2001

MEPA Issue Litigated: Should the state agency have conducted a MEPA analysis (an  
EIS)?

Court Decision:Yes

## COMPLAINT

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8 MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

9  
10 MONTANA ENVIRONMENTAL  
11 INFORMATION CENTER INC.,  
12 CITIZENS FOR A BETTER FLATHEAD  
13 INC.

14 PLAINTIFFS,

15 vs.

16 MONTANA DEPARTMENT OF  
17 NATURAL RESOURCES AND  
18 CONSERVATION, MONTANA BOARD  
19 OF LAND COMMISSIONERS,

20 DEFENDANTS.

Cause No. \_\_\_\_\_

**COMPLAINT**

21 **I. INTRODUCTION**

22 This matter arises out of the failure of the Department of Natural Resources and  
23 Conservation (the Department) and the Montana Board of Land Commissioners (the Board) to  
24 comply with the Montana Environmental Policy Act (MEPA) after establishing a plan to develop  
25 a section of state school trust land near Kalispell. In 1998, the Department began preparation of  
26 a master development plan (denoted the Neighborhood Plan) that provides for commercial  
27 establishments, industrial uses, residential development, professional offices and recreational  
28

1 uses for the entire section of land. The Department and the Board committed to preparing a  
2 MEPA analysis on the entire proposed development at a public meeting of the Board on  
3 September 20, 1999. Now the Department has reneged on that commitment, and intends to  
4 prepare MEPA analysis only as individual portions of the development are leased.

5 The Department's piecemeal approach violates MEPA. Comprehensive environmental  
6 review is required on the entire proposed development. The Department's Neighborhood Plan is  
7 set forth with ample specificity to allow for such an analysis. The environmental impacts of  
8 commercial and residential development of land previously devoted to agricultural use, direct,  
9 indirect and cumulative, may be significant; the change in use from agricultural to commercial  
10 and residential for Section 36 will affect traffic, noise and air pollution, open space, and  
11 commercial and residential growth patterns throughout the greater Kalispell area. The  
12 development of Section 36 is likely to have significant social and economic consequences for the  
13 greater Kalispell area. Those consequences had yet to be analyzed and disclosed to the public  
14 before the project was approved in its present form. In addition, the Department has not  
15 considered alternatives to the Neighborhood Plan. Viable alternative uses for Section 36 exist  
16 and must be analyzed through MEPA now, before irreversible commitments of land are made by  
17 leasing individual tracts. The Department and the Board must be held to their commitment to  
18 comply with MEPA on the entire Section before leasing individual tracts. Until the Department  
19 and the Board comply with the law, development of the land must be enjoined.

## 20 II. JURISDICTION, PARTIES AND VENUE

21 1. Jurisdiction is based on the Montana Declaratory Injunction Act, 27-8-101, Montana  
22 Injunction Statutes, 27-19-101, and the Montana Environmental Policy Act 75-1-101 *et seq.*,  
23 M.C.A. (1999). Venue is proper in this district because the defendants are a state agency and  
24 state board respectively, both located in Helena, Montana.

25 2. Plaintiff Montana Environmental Information Center Inc. is a Montana non-profit  
26 public benefit corporation pursuant to 35-2-101, *et seq.*, with over 4,000 members nation-wide,  
27 and at all times pertinent hereto has had its principal office in Lewis and Clark County, Montana.

1 Plaintiff Citizens for a Better Flathead is a Montana non-profit corporation founded in 1992.  
2 The organization has over 1,000 members and is dedicated to promoting sustainable  
3 development and economic diversity through comprehensive, citizen-driven planning and to  
4 protecting the ecological and cultural values of the Flathead Valley. This action is brought on  
5 each Plaintiff organizations' own behalf and on behalf of its members. Members of both  
6 organizations reside in the greater Kalispell area, including the area affected by the proposed  
7 action. Members also live and work in the greater Kalispell area and use and enjoy the area  
8 because of its aesthetic qualities and lifestyle opportunities and have an interest in preserving  
9 them. Plaintiffs and their members are actively involved in land-use planning issues in the  
10 greater Kalispell area and throughout the state. Plaintiffs and their members are actively  
11 involved in issues pertaining to state school trust lands. Plaintiffs and their members are thus  
12 directly and adversely affected by the proposed action of the Department, and will sustain actual  
13 injury if the proposed action is carried forth without adequate environmental review and  
14 disclosure. The Plaintiffs and their members have a further interest in participating in  
15 governmental decisions, in disseminating relevant information about those decisions to the  
16 general public and in insuring that all laws and procedures are complied with. Those interests  
17 are directly and adversely affected by the failures of the Defendants as alleged herein.

18 3. Defendant Montana Department of Natural Resources and Conservation (the  
19 Department), formerly the Department of State Lands is the state agency charged with the  
20 responsibility for administering school trust lands held in trust by the State of Montana under the  
21 general direction of the Board of Land Commissioners. The Department is responsible for  
22 managing the state lands at issue in this lawsuit and for MEPA compliance for all state land  
23 activities.

24 4. Defendant Montana Board of Land Commissioners (the Board) is a Board  
25 composed of the Governor, Attorney General, Secretary of State, State Auditor, and  
26 Superintendent of Public Instruction. The Board has general authority for the management of  
27 state lands and approves all leases and other uses of state lands, including those that pertain to the  
28

1 state land at issue in this lawsuit.

### 2 III. GENERAL ALLEGATIONS

3 5 The State of Montana owns approximately 5.2 million acres of land granted by  
4 the federal government at the time of statehood. These lands, referred to as the state school trust  
5 lands, are to be managed "in trust for the support of education and for the attainment of other  
6 worthy objects helpful to the well being of the people of this state." § 77-1-202, M.C.A. (1999).  
7 In addition, state lands must be managed for the "highest and best use" and must be developed in  
8 such a fashion that benefits the economy of the local community as well as the state as a whole  
9 77-1-601 M.C.A. (1999).

10 6. Among the state lands managed by the Department is Section 36 located in Township  
11 29 N. Range 22 West, Flathead County, Montana (hereafter referred to as Section 36). This  
12 section of state trust lands is located on the north edge of the city of Kalispell. It is bounded  
13 on the east by U.S. Highway 93, the major north/south arterial through Kalispell and Flathead  
14 County, on the south by Four Mile drive, on the west by Stillwater Road, and on the north by  
15 West Reserve Drive. Plans for a major future potential arterial, the Kalispell by-pass, indicate  
16 the by-pass may cross portions of Section 36.

17 7. Section 36, with the exception of a portion that is currently leased for an athletic  
18 field, and a small portion also used for a Department office, is currently used for agricultural  
19 purposes. This land is open space and is not currently the subject of any commercial or  
20 residential development.

21 8. In the spring of 1997, the Board and the Department entered into a lease of a  
22 portion of Section 36 for a recreational athletic complex. The Department at that time prepared a  
23 checklist Environmental Assessment addressing the impacts of leasing those particular acres for  
24 an athletic complex. No further MEPA documentation was prepared. The checklist EA  
25 approved by the Department on or about March 17, 1997, constitutes the only MEPA document  
26 that the Department has prepared and approved to date for Section 36.

27 9. In May, 1998, the Department hired a consultant to initiate a planning process for  
28

1 the development of Section 36 for commercial, business and residential purposes. This type of  
2 development was determined to be appropriate because Kalispell had grown substantially over  
3 the last decade, and Section 36 was largely surrounded by urban/suburban development. As part  
4 of that process several public meetings were held in Kalispell during the summer and fall of  
5 1998.

6 10. On behalf of the Department, on February 8, 1999, Montana Planning Consultants  
7 of Kalispell, Montana completed a document entitled "DNRC Neighborhood Plan Section 36  
8 Kalispell, Montana as a proposed amendment to the Kalispell City County Master Plan". This  
9 document is referred to as the "Neighborhood Plan" in this complaint. The plan was presented  
10 on April 20, 1999.

11 11. The Neighborhood Plan sets out the range of permissible uses for Section 36. The  
12 Neighborhood Plan recognizes the need for a "land use plan for the property." The Neighborhood  
13 Plan recognizes that the type of development allowed for Section 36 will affect growth and  
14 transportation in the greater Kalispell area.

15 12. The Neighborhood Plan established a number of specific parameters that control  
16 and dictate appropriate types of development on the entire section. The purpose of the  
17 Neighborhood Plan was to develop a plan for a compatible mix of land uses within Section 36  
18 and with that of the entire surrounding area, and to identify an integrated internal transportation  
19 system to link the land use pods and minimize approaches onto public roads. In addition, the  
20 Neighborhood Plan also stated that the entire land use plan for Section 36 is guided by these  
21 Neighborhood Goals and the Policies of the four distinct land use pods.

22 13. In the Neighborhood Plan, the Department outlined four different zones of  
23 development within Section 36 that it labeled land use "pods". The four pods are: 1. Mixed  
24 Commercial (to provide commercial uses at an urban scale density); 2. Mixed professional (to  
25 develop office orientated commercial at a "suburban" density); 3. Mixed residential (residential  
26 and other compatible uses); 4. Sports field (athletic field complex). Of the four pods, number 4  
27 is the only one that has been developed to date. For each pod the range of potential uses and  
28

1 development parameters are explicitly specified in the Neighborhood Plan.

2 14. In addition, the Neighborhood Plan provides for overall implementation with a set  
3 of policies that apply to the entire plan. The Neighborhood Plan included a map which clearly  
4 defined the permissible uses for all of Section 36. The map was attached to the Neighborhood  
5 Plan and incorporated by reference therein. The Neighborhood Plan does not present or analyze  
6 alternative land uses or scenarios for development of Section 36, nor does it analyze the  
7 consequences of taking no action with respect to Section 36.

8 15. At the September 20, 1999, meeting of the Board, the Neighborhood Plan and the  
9 development of Section 36 were discussed as an agenda item. The Department requested the  
10 Board's approval to proceed with the adoption of local zoning ordinance and development of a  
11 Memorandum of Understanding (MOU) with Flathead County and the city of Kalispell with  
12 respect to the development of Section 36

13 16. At that same meeting, Clive Rooney, an employee and representative of the  
14 Department, stated on the record that "MEPA requirements will be completed first as an  
15 umbrella document to the entire plan and then specific to any state action." At that same meeting  
16 Governor Racicot asked if the Department intends to have full scale MEPA analysis of the entire  
17 development, not just on a lease by lease basis before it proceeds. In response to that question,  
18 Mr. Rooney said "It is the Department's intention to do MEPA analysis on the entirety of the  
19 project which will be conducted before the MOU signed." Mr. Rooney further stated that the  
20 plan is to "go forward with the intention that this is the plan for the section and analyze those  
21 impacts."

22 17. At that same meeting, Governor Racicot made a motion to direct the Department  
23 with the preparation and drafting of a MOU that lays out a broad framework to address the issues  
24 of a master plan, zoning, sub-division review, MEPA and the simultaneous dispensing of any  
25 further movement until such time that MOU has been approved by the local governments. The  
26 Board approved the motion unanimously.

27 18. On or about April 19, 2000, the Department, Flathead County and the City of  
28



1 Kalispell entered into a MOU regarding the development of Section 36. The MOU stated that  
2 the Department had prepared a neighborhood plan which was adopted as an amendment to the  
3 city county master plan by the Board of Commissioner of Flathead County on May 20, 1999 and  
4 by the city of Kalispell on June 7, 1999. The MOU further stated that the Department seeks to  
5 permit development of Section 36 in accordance with the Neighborhood Plan.

6 19. Upon Motion by Governor Racicot, the Board unanimously approved the MOU  
7 at its regular meeting on May 15, 2000. At that meeting Mr. Rooney stated that the Department  
8 had changed its position and would not do MEPA on the entire project.

9 20. At the time of the signing and approval of the MOU, neither the Department nor  
10 the Board had prepared any MEPA document examining the direct, indirect and cumulative  
11 impacts of leasing Section 36 for residential, industrial and commercial development as set forth  
12 in the Neighborhood Plan. The Department did not examine alternatives to the proposed  
13 Neighborhood Plan and the MOU, nor did the Department examine a no action alternative of not  
14 leasing all of part of Section 36 for development.

15 21. The decision made by the Department to change the use of Section 36 from  
16 agricultural to leased residential and commercial development, followed by the preparation and  
17 approval of the Neighborhood Plan that clearly specifies the range of permitted activities within  
18 various pods of Section 36, and then the signing of a Memorandum of Understanding between  
19 the Department, Flathead County and city of Kalispell, agreeing to certain terms and conditions  
20 required by the city of Kalispell and Flathead County for the development of Section 36, together  
21 constitute state action within the meaning of the Montana Environmental Policy Act and  
22 implementing regulations.

23 22. The development of Section 36 as delineated by the Neighborhood Plan will have  
24 environmental and socio-economic impacts. Those consequences include, but are not limited to,  
25 the following: changes in land use, changes in development and transportation patterns in areas  
26 adjacent to and surrounding Section 36, growth-inducing impacts in the greater Kalispell area,  
27 increases in noise and air pollution, economic and social impacts to other portions of Kalispell  
28

1 and Flathead County, including the downtown business district of Kalispell in terms of  
2 development and existing businesses, impacts to wildlife that use the land, loss of open space,  
3 and other direct or indirect and cumulative impacts.

4 23. Despite the representation by the Land Board and the Governor of Montana that a  
5 MEPA review would be conducted on the entire Section 36, no such review under MEPA has  
6 been conducted. The Department and the Board do not intend to conduct a MEPA review of the  
7 entire development for Section 36.

8 24. The Department and the Board have now represented that they will prepare  
9 MEPA review only on individual lease developments at the time the individual leases are  
10 proposed. The Department and the Board refuse to carry forth the commitment made by  
11 members of the Board to prepare an appropriate MEPA document addressing the impacts of  
12 developing Section 36 as set forth in the Neighborhood Plan.

13 25. On June 7, 2000 the Department released a document entitled "Commercial and  
14 Industrial Development Opportunities." The document solicits proposals for leasing 60 acres  
15 within the Mixed Commercial POD of the approved Neighborhood Plan for Section 36. The  
16 document sets specific requirements for the applications and sets deadlines for submitting  
17 proposals.

18 26. Plaintiffs have no complete remedy at law. If the Department proceeds with  
19 leasing without preparation of an appropriate MEPA document addressing the overall impacts of  
20 developing Section 36 as alleged herein, Plaintiffs are entitled to preliminary and/or permanent  
21 injunctive relief under 27-19-101 et seq. for the violations and harm alleged herein.

22 **COUNT ONE - MEPA - FAILURE TO PREPARE EIS**

23 27. Plaintiffs reallege all previous paragraphs as if set forth in full.

24 28. The Montana Environmental Policy Act (MEPA) requires that state agencies  
25 prepare a "detailed statement" (known as an Environmental Impact Statement or EIS) for actions  
26 that significantly affect the human environment. 75-1-201 M.C.A. (1991). MEPA implements  
27 and supports the constitutional provision for maintenance of a clean and healthful environment.

1 Article IX, Section 1, Mont. Const. (1972).

2 29. In its detailed statement, the state agency must address:

3 (A) the environmental impacts of the proposed action;

4 (B) adverse affects that cannot be avoided;

5 (C) alternatives to the proposed action;

6 (D) the relationship between local short term uses and the maintenance and  
7 enhancement of the long-term productivity; and

8 (E) irreversible commitments of resources if the project is implemented.

9 M.C.A. 75-1-201 (1)(b)(iii) (1999).

10 30. In addition, the Department has adopted regulations that dictate how the Department  
11 will comply with MEPA. 36.2.521 A.R.M. These regulations are binding upon the Department.

12  
13 31. The development and approval of the Neighborhood Plan and the development and  
14 approval of the Memorandum of Understanding covering all of Section 36 by the Defendants  
15 constitutes state action within the meaning of MEPA and applicable regulations. It constitutes a  
16 project, program or activity undertaken by the agency. 36.2.522 (1). Such state action is not  
17 categorically exempt from MEPA. The Defendants therefore must prepare an Environmental  
18 Assessment or Environmental Impact Statement that addresses the significance of the  
19 environmental and socio-economic consequences of such action. A.R.M. 36.2.524

20 32. The Department's actions in developing and approving the Neighborhood Plan  
21 and entering into the Memorandum of Understanding that commit to the development of Section  
22 36 as specified in the Neighborhood Plan will have environmental and socio-economic  
23 consequences as defined by MEPA and its implementing regulations and alleged herein. These  
24 consequences can be discerned and analyzed based on the information contained in the  
25 Neighborhood Plan and MOU and the location of section 36. currently undeveloped, given  
26 current land-use patterns, transportation systems and residential and commercial development in  
27 the greater Kalispell area.

1 33. To date the Defendants have neither prepared an Environmental Assessment nor  
2 an Environmental Impact Statement addressing the environmental impacts of implementing the  
3 Neighborhood Plan and MOU on Section 36. The Department has acted unlawfully, without  
4 observing procedures required by law, in an arbitrary and capricious manner, all in violation of  
5 MEPA and the Department's implementing regulations.

6 **COUNT II - MEPA - FAILURE TO EVALUATE ALTERNATIVES**

7 34. Plaintiffs reallege all previous paragraphs as if set forth in full.

8 35. MEPA requires that the Department consider alternatives to the proposed action.  
9 75-1-201 M.C.A. (1999). The Department's MEPA regulations also require that the  
10 Department consider alternatives during the MEPA process. An alternative is defined as an  
11 alternative approach that would appreciably accomplish the same objectives. For agency  
12 initiated actions, an alternative under MEPA includes a different program or series of actions that  
13 would accomplish other objectives or a different use of resources. A.R.M. 36-2.522 (2) (a).

14 36. The Department did not consider any alternatives to the Neighborhood Plan or the  
15 MOU prior to its adoption in an appropriate MEPA document. Reasonable alternatives include,  
16 but are not limited to, different types and mixes of development with Section 36 overall, different  
17 types and mixes of development within the four pods of development, including leaving Section  
18 36 for open space, or some other lesser program for development and designating space to  
19 promote inter-governmental cooperation for sound economic development of a business park and  
20 technology center with potential joint cooperation between the city, county, community college  
21 and the Department.

22 37. MEPA requires that the Department consider a "no action" alternative. A.R.M.  
23 36.2.522 (2) (a) (iii). At the time the Department prepared the Neighborhood Plan and entered  
24 into the MOU it had not considered a no action alternative such as maintaining the land as  
25 currently leased for agricultural use.

26 38. The Department is also required to consider the relationship between local short-  
27 term uses and the maintenance and enhancement of long-term productivity. The Department did  
28

1 not consider reasonable alternatives that include, but are not limited to long and short term  
 2 economic investment strategies, and cooperative inter-governmental actions to promote  
 3 economic development as well as the sustainability of potential development scenarios.

4 39. The failure of the Department and the Board to evaluate alternatives to the  
 5 Neighborhood Plan and to consider a no action alternative through a proper MEPA document is  
 6 unlawful, does not adhere to required procedures, and is arbitrary and capricious in violation of  
 7 MEPA.

8 **WHEREFORE PLAINTIFF PRAYS FOR RELIEF AS FOLLOWS:**

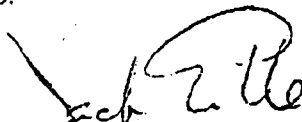
9 1. For a declaratory judgment declaring that the Defendants have failed to comply  
 10 with MEPA and its implementing regulations by failing to prepare an EIS or other appropriate  
 11 MEPA document for the reasons set forth herein;

12 2. For an order remanding the matter to the Department and the Board for  
 13 preparation of an appropriate MEPA document addressing the matters at issue herein and  
 14 allowing for public participation in that document;

15 3. For an order permanently enjoining the Defendants from proceeding with the  
 16 awarding of a lease or otherwise allowing development on Section 36 or implementation of the  
 17 Neighborhood Plan until such time as the Department prepares an environmental review  
 18 document that complies with the Montana Environmental Policy Act and its regulations.

19 4. For costs, attorney fees and any and all other such relief as the court deems just  
 20 and proper.

21 DATED this 26 day of June 2000.

22  
 23   
 24 JACK R. TUHOLSKE  
 25 Attorney at Law P.C.  
 26 Attorney for the Plaintiffs

STATE'S BRIEF IN SUPPORT OF STATE'S MOTION FOR SUMMARY JUDGMENT

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**RECEIVED**

OCT 30 2000

**ENVIRONMENTAL  
QUALITY COUNCIL**

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY  
\*\*\*\*\*

MONTANA ENVIRONMENTAL	)	
INFORMATION CENTER, INC.,	)	Cause No. CDV-2000-396
CITIZENS FOR A BETTER	)	
FLATHEAD, INC.,	)	STATE'S BRIEF IN SUPPORT OF
	)	STATE'S MOTION FOR
Plaintiffs,	)	SUMMARY JUDGMENT
	)	
-vs-	)	
	)	
MONTANA DEPARTMENT OF	)	
NATURAL RESOURCES AND	)	
CONSERVATION, and MONTANA	)	
BOARD OF LAND COMMISSIONERS,	)	
	)	
Defendants.	)	

INTRODUCTION

The Defendants, the Montana Department of Natural Resources & Conservation, and the State Board of Land Commissioners have moved the Court for summary judgment in their favor pursuant to Rule 56, M.R.Civ.P. The Plaintiffs, MEIC, Inc. and Citizens for a Better Flathead, Inc. (hereinafter referred to as "MEIC and CFBF", respectively) disagree with fundamental land management policies of the State Land Board. Those policies seek to develop various urban parcels of state trust lands so as to obtain a prudent financial return on those lands for the beneficiaries of the trust, as is required by the Montana Constitution.

*Wrong  
not the  
issue*

The State Board of Land Commissioners has directed that DNRC prepare a programmatic EIS on trust land development state-wide while DNRC simultaneously also prepares site-specific MEPA documents on any authorization for use of individual tracts. (See, Plaintiff's exhibit 4, May 15, 2000 minutes of the State Land at pages 4, 5, and 10.) MEIC and CFBF disagree with these fundamental policies and ignore the constitutional mandate to recover the full market value of the use of state trust lands. Art. X, Section 11, 1972 Montana Constitution. The Montana Supreme Court recently held in Montrust v. State ex rel. Board of Land Commissioners, 1999 MT 263, 989 P.2d 800 (Nov. 2, 1999) that it was unconstitutional for the state to allow land to sit idle indefinitely because such action is inconsistent with the constitutional mandate that full market value be obtained for school trust lands. Id., 989 P.2d at 810.

*land has  
sat idle -  
quote  
Hawaii Court*

**THE COURT MAY ONLY REVIEW THE ADMINISTRATIVE RECORD**

The environmental Plaintiffs have requested that the Court review various evidentiary documents in the resolution of this case. In any case alleging a violation of MEPA, the Court is restricted to a review of the administrative record in existence at the moment in time for which a MEPA document is requested. The Court may only view what the administrative agency had seen and considered prior to its decision to prepare or not prepare a MEPA document. MEPA requires that:

- (b) When new, material, and significant evidence is presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The district court shall review the agency's findings and decision to



determine whether they are supported by substantial, credible evidence within the administrative record under review.

The Affidavit of Mayre Flowers is not probative of any fact in issue here. Similarly, it is hard to imagine how Exhibit No. 7 is relevant here where it was not prepared by state government and post-dates the MOU at issue by nine days. Exhibit No. 7 is rank hearsay, irrelevant, unauthenticated, and inadmissible as evidence. The court should not consider it in reviewing the Plaintiff's motion for summary judgment. Because Exhibit No. 7 is immaterial and insignificant, the Court pursuant to Section 75-1-201(3)(b), MCA, must not consider it. Similarly, there is no authentication of Exhibit No. 8 and it is inadmissible as well.

*check this  
no record  
no decision*

The Plaintiffs have submitted Exhibit No. 1 as an example of the neighborhood plan dated February 8, 1999, which is irrelevant. It is not the plan adopted by the City or County. The State Defendants have submitted a true and correct copy of the neighborhood plan dated April 20, 1999 attached to the Affidavit of David Greer.

### ARGUMENT

The Plaintiffs erroneously assert that MEPA requires an environmental review at a specific geographic level or scope whenever they demand it. MEPA is a totally procedural statute and it does not mandate any particular agency policy, nor does it require any specific geographic scope of review. Ravalli County Fish and Game Ass'n v. DSL, 273 Mont. 371, 903 P.2d 1362 (1995); Friends of the Wild Swan v. DSL, Cause No. DV 89-074(A), 11<sup>th</sup> Judicial District Court (commonly referred to as the Swan "A" case.) The present case brought by MEIC and CFBF wrongly attempts to engraft the

requirements of MEPA to the agency's policies in an attempt to thwart the State Land Board's directions concerning land development on a specific parcel of land.

The Plaintiffs have erroneously contended that the April 19, 2000 Memorandum of Understanding between the State Board of Land Commissioners, Flathead County and the City of Kalispell is a direct authorization for use of land. It is not. (See Affidavit of David Greer at paragraph 5 and Exhibit 1) The neighborhood plan itself does not change or require any change in any current use of Section 36, since the permissible uses stated in the neighborhood plan include agricultural uses, equestrian facilities, the growing of crops, sports fields and recreational facilities, which are consistent with the current use of the land for agricultural purposes and sports fields. (See, pages 10 and 12 of the neighborhood plan wherein it states that "agricultural uses and activities are acceptable; and Appendix Exhibit A - 1 wherein it provides that "gardens and horticultural facilities" are acceptable uses.) Accordingly, the neighborhood plan and the MOU do not, and cannot, trigger the preparation of an environmental review document under the Montana Environmental Policy Act.

*wrong*

*"Plan is authorization for using land."*

The environmental challengers have also erroneously contended that the State of Montana has an obligation to prepare a MEPA document when participating in neighborhood planning, which is a wholly local decision-making process. MEPA only applies to agencies of state government. Section 75-1-201(1)(b) provides that "all agencies of the state, except the legislative and except as provided in subsection (2) . . ." shall comply with MEPA. MEPA does not apply to city or county governments. When the executive branch of state government is merely a participant, like other citizens, in other governmental processes which it cannot control, MEPA cannot fulfill its

*then why did DSL + Board approve it*

*"This is a local decision"*

fundamental purpose: to inform the public and the decision maker. There is simply no need to prepare an analytical document where the executive branch of state government has no decision to make, and all decision-making authority lies with local government.

The Plaintiffs argue that further MEPA analysis is inherently good because it requires government to carefully consider the consequences of all its actions. They reason that public policy mandates that every governmental policy be subjected to the cleansing effects of MEPA review. The Plaintiffs ignore that the State Land Board has committed to the preparation of a programmatic EIS on the development of state lands as well as a site-specific MEPA document to examine all the impacts to Section 36 of any change of use stemming from any future lease proposals on that tract. See, Plaintiff's Exhibit No. 4, the May 15, 2000 minutes of the State Land Board at page 10 wherein Governor Racicot stated:

*Programmatic  
won't be  
done for yr.*

... Ms Hedges is alleging there ought to be a programmatic EIS but by alleging there is no MEPA compliance is a conclusion not supported by the facts. The fact of the matter is that MEPA analysis would not just be on a lease-by-lease basis, when the state has a proposal it will do MEPA analysis on that specific proposal plus any other potential proposals in that section that could be conceived of at the time. Governor Racicot said the allegation that there is not going to be or hasn't been any MEPA analysis to direct the Department is only because there hasn't been any triggering event to require it.

*Supports our  
assertion*

The Board then unanimously approved the MOU between the City, the County, and the State.

*What's this if not  
a triggering  
event?*

Quite simply, the Plaintiffs have nothing to complain about. A programmatic MEPA document is being prepared and further MEPA review will be prepared on a site-specific basis which will take into account all the concerns of the Plaintiffs prior to the approval of or issue of any development lease upon Section 36. MEPA should not be

...the State takes direct action to authorize another party to make use of state  
...serves no purpose in any other context.

...view of the Plaintiffs' arguments quickly reveals that the Plaintiffs are urging  
...opt a legal interpretation that would make administrative MEPA analysis  
...e and application. Extending the Plaintiff's arguments to their logical

...government would have to prepare a MEPA document every time it  
...ative branch, filed or defended litigation with the judicial branch, or  
...er to a city manager concerning its use of state lands.

...IC and CFBC fail to acknowledge several fundamental legal principles  
...gering of any MEPA review in the present case. First, MEPA

...prepared where a state action (such as the neighborhood plan) cannot  
...y change in the existing land uses on the disputed state land.

...the status quo of the existing land uses, the MOU and the  
...not trigger any need for a review under MEPA. Second, no MEPA

...d where they fit within the MEPA exemption granted to the  
...nt by Section 77-1-121, MCA. Third, the agency retains the full

...e the reasonable size of any MEPA analysis area. Judge Keller  
...n "A" case, ); Friends of the Wild Swan v. DSL. Cause No.

...l District Court, that the agency could reasonably prepare site-  
...hile it engaged in the preparation of a state-wide

...management procedures on state forested lands. In the  
...sed to require the preparation of an EIS strictly at the level

*decisions*

*But the MOU binds the state to city + Co. zoning.*

*...other authorization for use of state land.*

*That's what we're asking for.*

of the Swan River State Forest, even though demanded by the environmental Plaintiffs in that case.

Likewise, Judge Honzel, in Friends of the Wild Swan v. DSL, CDV 95-314, Mont. 1<sup>st</sup> Judic. Distr. Ct. (December 13, 1995) held that the Department could produce a programmatic EIS while preparing site specific review documents because the agency's MEPA rule on the preparation of programmatic documents [now codified as ARM 36.2 537(6)] specifically allowed it to do so because the rule possessed conjunctive terms. Judge Honzel thus held that the Department's entire timber program could not be halted pending preparation of a programmatic EIS, as long as one was in preparation.

*not arguing that State can't prepare an EIS or a programmatic*

*irrelevant*

The Plaintiffs are making the same flawed argument here. Nonetheless, the Court cannot direct the agency to analyze actions at the level the environmental challengers wish it to be done because such an order violates the separation of powers doctrine under Article III, Section 1 of the 1972 Montana Constitution. The Court should not attempt to control the future actions of the agency in the absence of a clearly expressed legal duty. In interpreting a statute, a court "is not to enact, but [only] to expound, the law....". Clark v. Olson, 96 Mont. 417, 432, 31 P.2d 283, 288 (1934). Accordingly, the Court should not halt any development of state lands, since the State is preparing a programmatic EIS.

*violates sep of powers?*

*- which won't be done for years.*

In this action, the environmental Plaintiffs have the burden pursuant to 75-1-201(3), MCA, to prove by clear and convincing evidence that the Department's decision not to produce a MEPA document was either arbitrary, capricious, or unlawful.

**MEPA HAS NOT BEEN TRIGGERED HERE.**

The primary question to be resolved by this Court is whether the requirements of MEPA have been triggered by any past action authorizing the use of land by the State Board of Land Commissioners or the DNRC with respect to Section 36 within Township 29 North, Range 22, in Flathead County, Montana. MEPA is triggered by three requirements. First, there must be state action authorizing the use of land. Second, that action must be major. Third, it must be shown that the major state action may result in a physical impact to the land resulting in a possible significant impact or degradation of some part of the human environment. Metropolitan Edison, 460 U.S. 534 at 772-773 (1983) Ravalli County Fish and Game Ass'n v. DSL 903 P.2d 1362, 273 Mont. 371 (1995); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9<sup>th</sup> Cir., 1998)

The Department's MEPA rule, ARM 36.2.522(1), defines an "action" as:

... a project, program or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

MEPA is a procedural, not a substantive statute. It does not require any particular policy choice. Ravalli County Fish and Game Ass'n v. DSL.

There is no agency action if there is no final agency action. ARM 36.2.521 requires DNRC to conform to its MEPA rules "... prior to reaching a final decision on proposed actions covered by MEPA". DNRC and the Board of Land Commissioners have not reached a final decision concerning the fate of Section 36 in Kalispell because no decision has been made to change the existing uses of this parcel.

*Man clearly makes them be controlled by local govt.*

MEIC and CFBF must admit that no ir retrievable commitment of resources has been made by the Board or the Department with respect to Section 36. The Department has requested proposals for uses of Section 36 which are consistent with the Neighborhood plan. However, prior to the issuance of any approval for land use, the Department will prepare the appropriate MEPA document reviewing that use. The Court must presume that the agency will comply with its MEPA duties in the future. North Fork Preservation Ass'n v. DSL, 238 Mont. 451 at \_\_\_, 778 P.2d 862 at 869 (1989), citing Conner v. Burford, 836 F.2d 1521 at 1528 (9th Cir 1988).

The Ninth Circuit U.S. Court of Appeals has held in Western Radio Services v. Glickman, 123 F.3d 1189 (9<sup>th</sup> Cir., 1997) that there is no final agency action unless: 1) there is a consummation of the agency's decision-making process; and, 2) rights or other obligations have been determined; and 3) legal consequences will flow from those determinations of rights and obligations. Similarly, the Ninth Circuit Court has held in ONRC v. BLM, 150 F.3d 1132 (9<sup>th</sup> Cir., 1998) that a refusal to comply with an environmental challenger's request for a moratorium is insufficient to constitute agency action. NEPA review is triggered by actions physically affecting the environment. In Northcoast Environmental Center v. Glickman, 136 F.3d 660, 669 (9<sup>th</sup> Cir., 1998) The Ninth Circuit held that mere preliminary research and development efforts do not trigger EIS requirements under NEPA or constitute an agency action under the APA. There is simply no need for a NEPA document where the proposed agency action would not change the status quo. National Wildlife Federation v. Espy, 45 F.3d 1337, 1343 (9<sup>th</sup> Cir., 1995) citing, Upper Snake River v. Hodel, 921 F.2d 232, 235 (9<sup>th</sup> Cir., 1990)

In Ravalli County Fish and Game Ass'n the Montana Supreme Court observed that there is no need for a MEPA document where the status quo on the ground is maintained. Id. at 903 P.2d 1366. Similarly, the preparation of a mere planning document does not trigger the need for a NEPA document. See, Ohio Forestry Ass'n Inc. v. Sierra Club, 523 U.S. 726 (1998). In Kleppe v. Sierra Club, 427 U.S. 390 (1976) the U.S. Supreme Court held that no regional EIS needed for coal mining in the absence of actual proposal because NEPA only speaks in terms of proposed actions, not less imminent actions. Under Kleppe an agency need not prepare a NEPA document unless the agency's plan ripen into a specific proposal for action or into a specific action of known dimensions. In the present case no specific action of known dimensions exists for the State to analyze. What physical actions can the Plaintiffs point to in the present case which require immediate analysis? There are none and MEPA is not triggered by ghostly hypothetical events or the worst imaginings of the environmental community.

strongest argument

The contemplation of an administrative agency of some future course of action is insufficient to trigger MEPA until the agency actually proposes to carry out an action that may physically impact the environment. The Ninth Circuit U.S. Court of Appeals has held that the mere contemplation of the construction of three dams does not require the preparation of a NEPA document. Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1498 (9<sup>th</sup> Cir., 1987)

Similarly, the designation of critical habitat under the Endangered Species Act does not trigger NEPA. Douglas County v. Babbitt, 48 F.3d 1495 (9<sup>th</sup> Cir., 1995) Continuous activity with only a change in ownership or management doesn't trigger NEPA. City & County of San Francisco v. U.S., 615 F.2d 498 (9<sup>th</sup> Cir., 1980) Moreover,



when local zoning regulations and planning procedures are followed in site location decisions by a governmental agency, there is a presumption that there will be no significant impact under NEPA. Maryland – National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 at 1036 (D.C. Cir., 1973); Town of Groton v. Laird, 353 F.Supp. 344 (D.Conn., 1972) In the present case, any activity upon Section 36 will be in compliance with the neighborhood plan and all zoning requirements. Under Maryland – National Capital Park & Planning Commission the Court must presume if the state activity is in compliance with local zoning and planning procedures, no significant impact will occur. If no significant impact can be presumed, MEPA cannot possibly be triggered.

Admission  
It's  
binding

Although it has been suggested that NEPA be implemented at the earliest possible stage, the Ninth Circuit U.S. Court of Appeals has stated that an agency should “defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project’s environmental consequences. California v. Block, 690 F.2d 753, 761 (9<sup>th</sup> Cir., 1982)

\* This Court should not allow MEPA to be employed as a tool for chronic faultfinding by any dissident political group. There is no need to prepare a MEPA document to consider hypothetical future actions whose effects cannot be reasonably ascertained, whose implementation is remote and speculative, and which will be analyzed to the fullest extent in the future.

### MEPA EXEMPTIONS

The Court must recognize and apply Section 77-1-121, MCA to the facts in the present case. Section 77-1-121, MCA, provides that if the Board and Department do not act – MEPA is not triggered. Even though the neighborhood plan may list a wide variety of activities that may take place upon Section 36, it also – undeniably – allows the current uses of an agriculture and sports fields. MEPA is not triggered because there is no physical change occurring on the ground. See, Affidavit of David Greer. There is no irreversible or irretrievable commitment of resources. If the Board and the Department choose not to act, MEPA is not triggered. The statute specifically provides that:

(1) The department and board are required to comply with the provisions of Title 75, chapter 1, parts 1 and 2 [MEPA], when implementing provisions within Title 77 **only if the department is actively proposing to issue a sale, exchange, right-of-way, easement, placement of improvement, lease, license, permit, or other authorization for use of state lands or is acting in response to an application for an authorization.**

*Not  
exclusive -  
timber  
sales.*

(2) Except for rulemaking and as provided in subsection (1), the department and board are otherwise exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77, including but not limited to the issuance of lease renewals. The department and board do not have an obligation to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within Title 77 if the department or board choose not to take any action, even though either may have the authority to take an action.

*Not a  
lease  
renewal*

(emphasis added.)

MEIC and CFBF cannot point to any facts in the present case which show that the Board or the Department are proposing to issue: "... a sale, exchange, right-of-way, easement, placement of improvement, lease, license, permit, or other authorization for use of state lands..." Accordingly, MEPA is not triggered because the State Defendants are exempt from any other application of MEPA to their activities.

*this is ridiculous*

The Department and the Board have merely participated in the planning process conducted by the Kalispell City - County planning board to update its Kalispell City - County master plan. The State's participation consisted of holding public informational meetings, attending meetings of the City Council, the City - County planning board, the Flathead County Board of Commissioners, and submitting a proposed amendment to the master plan. The planning process developed a neighborhood plan which restricts, but does not authorize, the types of permissible uses occurring upon Section 36. The Board did not have the ability to dictate to the City or County what the neighborhood plan would be. *yes! + does* The Plaintiffs have had the same opportunity to participate in the planning process. Their proposals were not adopted by the City - County planning board and they are utilizing this lawsuit to circumvent democratic political processes. They represent a minority radical viewpoint that was unacceptable to the City - County planning board. *?? mud slinging* The inability of an agency to influence a local process does not trigger MEPA. Accord, Sierra Club v. Babbitt, 65 F.3d 1502 (9<sup>th</sup> Cir., ) (Inability to influence ROW construction does not trigger NEPA.)

The complaint of the Plaintiffs is analogous to the complaint in Heartwood, Inc. v. USFS, 73 F.Supp. 2d 962 (S.D. Ill., 1999). In Heartwood, the Plaintiff contended that the development of the agency's categorical exclusions to NEPA triggered the need for an EIS to examine the impacts to the local forest. The District Court disagreed, stating that:

Categorical exclusions are not actions themselves, nor are they proposals for actions, nor do they implement NEPA policy . . . It stretches the court's credulity to imagine how a list of categories could implicate an EA or an EIS . . . Any EA or EIS would surely be subject to challenge for being too speculative, vague or undetailed".

### CONCLUSION

The Court should grant summary judgment to the State Defendants in the above-captioned matter, and dismiss the Complaint of the Plaintiffs because MEPA is not triggered until the State Board of Land Commissioners or the Department actively propose to issue a lease or license for use of Section 36. Until that occurs, Section 77-1-121, MCA, provides that the Board and the Department are exempt from the obligation to prepare any MEPA document analyzing the impacts from either the April 20, 2000 neighborhood plan or the April 19, 2000 MOU with the City of Kalispell and Flathead County.

DATED this 16<sup>th</sup> day of October, 2000.

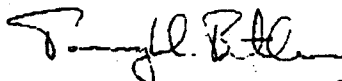


Tommy H. Butler  
Special Assistant Attorney General

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing STATE'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT was served by mail, postage prepaid, upon the following on this 16<sup>th</sup> day of October, 2000:

Mr. Jack R. Tuholke  
Attorney at Law, P.C.  
P.O. Box 7458  
Missoula, MT 59807



Tommy H. Butler

ORDER

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>MONTANA ENVIRONMENTAL INFORMATION CENTER INC., CITIZENS FOR A BETTER FLATHEAD, INC.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, MONTANA BOARD OF LAND COMMISSIONERS,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: right;">Cause No. BDV 2000-396</p> <p style="text-align: center;"><b>ORDER</b></p>
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Before the Court are the parties' cross-motions for summary judgment. In addition, on December 11, 2000, this Court preliminarily enjoined Defendants from requesting annexation by the city of Kalispell of the following land owned by the State of Montana: Southeast 1/4 of Section 36, Township 29 North, Range 22 West, Flathead County, Montana. This Order will address both the preliminary injunction and the parties' cross-motions for summary judgment.

1 **Background**

2 Plaintiffs, Montana Environmental Information Center, Inc. (MEIC), and Citizens  
 3 for a Better Flathead (CFBF) are non-profit corporations involved in, among other things,  
 4 promoting sustainable development and economic diversity in Flathead County, Montana.  
 5 Defendant Montana Department of Natural Resource and Conservation (the Department) is the  
 6 state agency responsible for administering school trust lands held by the state of Montana under  
 7 the general direction of Defendant Board of Land Commissioners (the Board). The Board has  
 8 general authority for the management of state lands and approves all leases and other uses of state  
 9 lands.

10 At issue in this case is the proposed development of certain state trust land located  
 11 on the north edge of the city of Kalispell, namely Section 36 located in Township 29 N. Range  
 12 22 West, Flathead County, Montana (Section 36). More specifically, this case involves Plaintiffs'  
 13 claims that Defendants have violated the Montana Environmental Policy Act (MEPA) by failing  
 14 to conduct an analysis of the environmental impacts associated with the overall development of  
 15 Section 36.

16 Currently, the majority of Section 36 is open space land primarily used for  
 17 agricultural purposes. However, Section 36 is largely surrounded by urban and suburban  
 18 development due to the substantial and rapid growth of the city of Kalispell over the last decade.  
 19 Defendants, therefore, have proposed to develop Section 36 in order to minimize leap frog  
 20 development beyond this property to less desirable locations. A brief review of Defendants'  
 21 efforts in this regard follows.

22 In 1997, the Department entered into a lease of a portion of Section 36 for a  
 23 recreational athletic complex. The Department at that time prepared a "checklist Environmental  
 24 Assessment" addressing the various impacts of leasing those acres for an athletic complex.  
 25 Subsequently, in May 1998, the Department hired a consultant to initiate a planning process for

1 further and more significant commercial, business and residential development of Section 36.  
2 As part of this process, the Department held several public meetings in Kalispell during the  
3 summer and fall of 1998.

4 On February 8, 1999, the Department's consultant drafted a document entitled  
5 "DNRC Neighborhood Plan - Section 36 - Kalispell, Montana; A proposed amendment to the:  
6 Kalispell City-County Master Plan" (the Neighborhood Plan). Among other things, the  
7 Neighborhood Plan guides the future use and development of Section 36 by setting out the range  
8 of permissible uses and establishing a number of specific development parameters. The plan does  
9 not, however, contemplate or analyze the environmental consequences of its development  
10 parameters. Nor does the plan analyze alternative land use scenarios or the consequences of  
11 taking no action on Section 36. In short, the plan does not offer any environmental analysis under  
12 MEPA. The Neighborhood Plan was presented to the Flathead County Planning Board on  
13 April 20, 1999.

14 At the September 20, 1999, meeting of the Board, the Neighborhood Plan and the  
15 general development of Section 36 were discussed. The Department requested the Board's  
16 approval to proceed with the adoption of local zoning ordinances and to draft a Memorandum of  
17 Understanding (MOU) with Flathead County and the city of Kalispell with respect to the  
18 development of Section 36. At that meeting the Department indicated that a full scale MEPA  
19 analysis would be completed on the overall Section 36 development project and that further  
20 MEPA review would be conducted specific to any subsequent state action. The Department also  
21 represented that its intention would be to do MEPA analysis on the entirety of the project prior  
22 to signing any MOU, rather than just on a lease-by-lease basis. Before the close of the meeting,  
23 the Board approved the Department's request.

24 On April 19, 2000, the Department, Flathead County, and the city of Kalispell  
25 entered into a MOU regarding the development of Section 36. The MOU stated that the



1 Department had prepared a Neighborhood Plan which had been adopted as an amendment to the  
2 City-County Master Plan by the Board of Commissioners of Flathead County on May 20, 1999,  
3 and the city of Kalispell on June 7, 1999. The MOU further stated that the Department sought  
4 to permit development of Section 36 in accordance with the Neighborhood Plan.

5 On May 15, 2000, the Board met and unanimously approved the MOU. At that  
6 meeting, however, the Department indicated that it would not do a MEPA review on the entire  
7 Section 36 development project, but would complete a statewide programmatic environmental  
8 impact statement for all state land development projects.

9 Since the approval of the MOU and Neighborhood Plan, the Department has  
10 prepared a document entitled "Special Lease Proposal - Accepting Offers - Commercial and  
11 Industrial Development Opportunities" (Special Lease Proposal) and the city of Kalispell has  
12 issued a plan to extend utilities to Section 36 (Utility Extension Project). The Special Lease  
13 Proposal outlines the limitations, requirements and deadlines for lease proposals to be submitted  
14 to the Department for the Development of Section 36. It also states that development of Section  
15 36 is guided by the Neighborhood Plan and MOU, and that MEPA review will be conducted on  
16 each selected lease proposal and various alternatives which achieve the same objectives as the  
17 selected lease proposal. The Utility Extension Project states that the Neighborhood Plan is the  
18 controlling proposal for the development of Section 36, and addresses the infrastructure needs  
19 of Section 36 in accordance with the Neighborhood Plan.

20 The Court heard oral argument on the parties' cross-motions for summary  
21 judgment on November 28, 2000. At that hearing, however, Plaintiffs were not aware of the  
22 circumstances necessitating their December 5, 2000, application for a temporary restraining  
23 order/preliminary injunction. After considering the parties' briefs regarding the injunction, this  
24 Court issued an order enjoining the Defendants from requesting such annexation and stated that  
25 a more detailed order would follow in explanation. As promised, this effort constitutes the more

1 detailed order.

2 **Preliminary Injunction**

3 Plaintiffs' application for a preliminary injunction came on the heels of learning  
 4 that the Department was on the verge of submitting a formal request to the city of Kalispell for  
 5 annexation and zoning of Section 36 in accordance with the Neighborhood Plan. Plaintiffs  
 6 argued that Defendants' annexation request should be enjoined pending the resolution of the  
 7 parties' cross-motions for summary judgment. Plaintiffs asserted that, if the annexation request  
 8 were granted, any future court-ordered MEPA analysis would be rendered meaningless in terms  
 9 of assessing alternatives to the Neighborhood Plan, primarily because the annexation would  
 10 statutorily mandate a series of events that would compromise any future, unbiased consideration  
 11 of the best uses for Section 36. Plaintiffs therefore urged the Court to issue an injunction to  
 12 preserve the status quo and protect the effectiveness of any possible future judgment for Plaintiffs  
 13 in this action.

14 Defendants, on the other hand, argued that the annexation request is a lawful  
 15 activity falling within the sole discretion of the Department which does not affect Plaintiffs' legal  
 16 rights. Defendants further argued that Plaintiffs' right to compel production of a MEPA document  
 17 does not arise until the State issues a lease, and that annexation does not affect the status quo of  
 18 the land.

19 Under Section 27-19-201, MCA, an injunction may be granted when it appears  
 20 that the applicant is entitled to the relief demanded and the relief, or any part of it, consists in  
 21 restraining the commission or continuance of the act complained of, either for a limited period  
 22 or perpetually, or when it appears that the commission or continuance of some act would produce  
 23 a great or irreparable injury to the applicant, or when it appears that the adverse party is doing,  
 24 or threatens or is about to do some act in violation of the applicant's rights, respecting the subject  
 25 matter of the action, and tending to render the judgment ineffectual.

1           If a party can establish a prima facie case for any of the subsections of Section 27-  
 2 19-201, MCA, then a preliminary injunction should issue to preserve the status quo. Porter v. K  
 3 & S Partnership, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). "Status quo" has been defined  
 4 as the last actual, peaceable, noncontested condition which preceded the pending controversy."  
 5 Sweet Grass Farms, Ltd. v. Bd. of County Comm'rs of Sweet Grass County, 2000 Mont. 147, 2  
 6 P.3d 825, 828 (2000) (citations omitted).

7           In this case, the injunction was granted because Plaintiffs successfully presented  
 8 a prima facie case that Defendants' initiation of formal annexation would tend to render any  
 9 judgment in their favor (regarding preparation of appropriate MEPA documents) ineffectual.

10           Pursuant to the relevant statutes, the annexation process is initiated by filing a  
 11 formal request for annexation. Section 7-2-4403, MCA (1999). Upon receiving the request, "the  
 12 governing body of the municipality shall pass a resolution reciting its intention to annex the land  
 13 and setting a time and place for a public hearing thereon." Section 7-2-4404, MCA (1999)  
 14 (emphasis added). The municipality is then required to make a commitment of services for the  
 15 proposed uses of the annexed land consistent with the annexation proposal. Section 7-2-4506,  
 16 MCA (1999). Finally, the municipality is required to "make plans for the extension of services  
 17 to the area proposed to be annexed and shall . . . prepare a report setting forth its plans to provide  
 18 services to such area." Section 7-2-4731, MCA (1999). The plan for services must be in place  
 19 prior to the public hearing and must set forth such things as the general land use pattern in the  
 20 areas to be annexed, present and proposed boundaries and streets, major trunk water mains, sewer  
 21 interceptors and outfalls and other utility lines, as well as the municipality's plans for providing  
 22 these services.

23           The Court considered the arguments of the parties, and in light of the annexation  
 24 statutes, felt an injunction was necessary to preserve the status quo in this action. It appeared to  
 25 the Court that once annexation is initiated, the aforementioned statutes seem to mandate action

1 on behalf of the city of Kalispell that would have fatal consequences for Plaintiffs' MEPA  
2 violation claims. This is primarily due to the fact that according to Defendants, the annexation  
3 will "allow the city to formulate and impose zoning restrictions" (Second Rooney Aff. ¶ 2) and  
4 that such zoning restrictions would be based upon Defendants' Neighborhood Plan. Once those  
5 zoning restrictions are in place, they effectively create a blueprint for the future development of  
6 Section 36. Such a blueprint would foreclose meaningful considerations of alternatives to the  
7 zoning, and thus to the entire development scheme under the Neighborhood Plan.

8           The Neighborhood Plan sits squarely in the center of the controversy in this case.  
9 It would be disingenuous to allow Defendants to initiate the annexation and zoning of Section 36  
10 prior to this Court making a determination on the merits of Plaintiffs' MEPA violation claims.  
11 As stated above, the annexation would tend to make the Neighborhood Plan the *master* plan for  
12 the overall development of Section 36. This would tend to render any judgment in Plaintiffs'  
13 favor regarding preparation of appropriate MEPA documents ineffectual, since, as Plaintiffs point  
14 out, the Neighborhood Plan would "become virtually a foregone conclusion because every other  
15 alternative will conflict with the zoning and commitment of services that are part of the  
16 annexation process." (Pl. Br. Supp. Temp. Restr. Order and Prelim. Inj., at 2, ll. 15-16.)

17           Because of this, the injunction was granted in order to maintain the parties' last  
18 actual, peaceable, noncontested condition which preceded the controversy. To rule otherwise  
19 would have significantly frustrated Defendants' efforts to comply with an order mandating MEPA  
20 review of both the overall development of Section 36 and alternatives to the Neighborhood Plan.  
21 For reasons to be discussed more fully below, the Court found it necessary to preserve  
22 Defendants' ability to comply with just such an order.

### 23 **Cross-Motions for Summary Judgment**

24           The question here is whether the Department was required to comply with MEPA  
25 when it prepared and approved the Neighborhood Plan for the development of Section 36.

1 Defendants argue that the Neighborhood Plan simply does not trigger MEPA review and that the  
2 Department is exempt from MEPA requirements in this case because the plan cannot cause or  
3 result in any change in the existing land uses of Section 36. Plaintiffs contend that MEPA  
4 requires that the Department consider the potentially significant environmental effects of the  
5 decision to expand the allowable uses of Section 36 prior to approving the land use plan.  
6 Plaintiffs further contend that MEPA requires that the Department evaluate alternatives to the  
7 proposed land use plan.

8           The Court must review the agency action to see if it was arbitrary, capricious, or  
9 unlawful. North Fork Pres. Ass'n v. Dep't of State Lands, 238 Mont. 451, 459, 778 P.2d 862, 867  
10 (1989). To determine if the agency action is lawful, the Court must determine whether the agency  
11 violated any statutes or regulations that were applicable to it. In order to determine if the decision  
12 is arbitrary or capricious, the Court must determine whether the decision was based on a  
13 consideration of the relevant factors and whether there has been a clear error of judgment. In such  
14 an analysis, the Court is not to decide if the agency reached the correct decision by substituting  
15 its judgment for that of the administrative agency. *Id.* at 465, 778 P.2d at 871.

16           Sections 75-1-101 through 75-1-324, MCA, set out the general policy of  
17 environmental protection in Montana and contain the legislative authorization and directive to  
18 state agencies to prepare environmental impact statements (EIS) in any planning and  
19 decision-making that may impact the environment. The specific procedures for carrying out the  
20 policy requirements of MEPA are contained in the administrative rules promulgated under the  
21 statute.

22           According to those rules, MEPA is triggered, and the Department is required to  
23 prepare an EIS, when there is major state action authorizing the use of land and it is shown that  
24 the action may significantly effect the quality of the human environment. ARM 36.2.523(1)(b).  
25 The Department's administrative rules define an "action" as, among other things, a project,

1 program or activity directly undertaken by the agency; or a project or activity involving the  
2 issuance of a lease, or other entitlement for use or permission to act by the agency. ARM  
3 36.2.522(1)

4 Here, the parties apparently agree that the Neighborhood Plan constitutes "action"  
5 by the Department as defined in ARM 36.2.522(1). (See State's Br. Supp. State's Mot. Summ.  
6 J., at 6.) Therefore, the next line of inquiry concerns whether the Neighborhood Plan may have  
7 a significant effect on the quality of the human environment. Plaintiffs need not show that  
8 significant effects *will* occur, rather, they must raise "substantial questions whether a project may  
9 have a significant effect." Ravalli County Fish and Game Ass'n v. Mont. Dep't of State Lands,  
10 273 Mont. 371, 379, 903 P.2d 1362, 1368 (1995).

11 The Neighborhood Plan authorizes a significant change in the permissible uses of  
12 Section 36 because it allows residential and commercial development on open space land  
13 previously used for agricultural purposes. Although the Neighborhood Plan is just a plan, the  
14 record before the Court indicates that it is, in effect, a document which constitutes a binding  
15 decision that will control all subsequent development on Section 36. The Neighborhood Plan  
16 provides substantial details about the new uses allowed on Section 36 and precludes other types  
17 of development which are inconsistent with the plan. It also effectively negates the possibility  
18 of preserving the acreage as open space land.

19 Based on the foregoing changes in land use, it is reasonable to conclude that  
20 numerous potential impacts could result from implementing the Neighborhood Plan for Section  
21 36. Indeed, the city of Kalispell recognized such inherent impacts when it prepared the Utility  
22 Extension Project for Section 36 in accordance with the Neighborhood Plan. Loss of hundreds  
23 of acres of farmland, changes in demographics, housing issues, local employment and income,  
24 and energy consumption, to name a few, were listed in the Utility Extension Project among those  
25 potential impacts. The Neighborhood Plan provides for the development of open space,

1 agricultural land into commercial and residential property. Such a significant change in use will  
2 have a significant effect on the quality of the human environment. Clearly, the Neighborhood  
3 Plan is a proposal which effectively controls the future development of Section 36. As such, it  
4 constitutes an action that has potentially significant environmental consequences.

5 Although Defendants suggest that MEPA is not triggered in this case pursuant to  
6 Section 77-1-121, MCA, the clear language of that statute suggests otherwise:

7 **77-1-121. Environmental review -- exemption.** (1) The department and  
8 board are required to comply with the provisions of [MEPA] when implementing  
9 provisions within Title 77 only if the department is actively proposing to issue a  
10 sale, exchange, right-of-way, easement, placement of improvement, lease, license,  
11 permit, or other authorization for use of state lands or is acting in response to an  
12 application for an authorization.

13 (Emphasis added.)

14 The Neighborhood Plan and MOU represent a proposal for action which clearly  
15 falls within the meaning of an "other authorization for use of state lands." The Department has  
16 approved the Neighborhood Plan and MOU, and, because they will likely cause significant  
17 environmental impacts, a MEPA analysis is required. See Section 75-1-201(1)(b)(iii), MCA  
18 (1999).

19 One of the purposes an EIS serves is to develop conditions and stipulations to  
20 mitigate the potential impact of an action on the environment. Here, were the Department to  
21 proceed by analyzing development proposals on a lease-by-lease basis, it would ignore the  
22 fundamental importance of the effects of potential development of Section 36 as a whole. The  
23 Department violated MEPA as well as its own implementing regulations when it failed to conduct  
24 the required MEPA analysis to determine the significance of, impacts of, and alternatives to the  
25 proposed development of Section 36 according to the Neighborhood Plan.

The Court must note that this is somewhat baffling considering the Department's  
initial willingness to commit to just such a course of action. Plaintiffs' Exhibit 3, a copy of the

1 minutes from the September 20, 1999, meeting of the Board, reveals the following:

2 Governor Racicot asked if the Department intends to have full scale MEPA  
3 analysis of the entire development not just on the lease by lease basis before it  
proceeds.

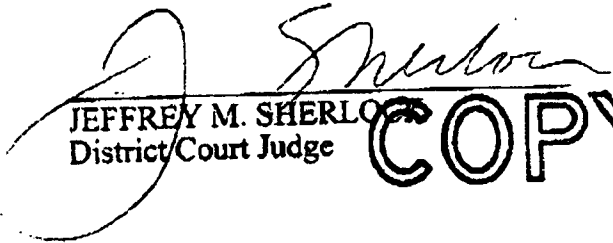
4 Mr. Rooney said it is the Department's intention to do MEPA analysis on the  
5 entirety of the project which will be conducted before the MOU is signed. He  
said the plan is to go forward with the intention that this is the plan for the section  
6 and analyze those impacts.

7 Initially, it appears that the Department recognized its duty to perform an EIS in  
8 order to comply with MEPA. Though the Department's position on this matter has changed, the  
9 requirement that an EIS be prepared remains. The Department must "determine the significance  
10 of impacts associated with a proposed action." ARM 36.2.524. In addition, the Department is  
11 required to provide a detailed statement on alternatives to the proposed action; and to study,  
12 develop, and describe appropriate alternatives in any proposal that involves unresolved conflicts  
13 concerning alternative uses of available resources. Section 75-1-201,(1)(b)(iv)(C) and (1)(b)(v),  
14 MCA (1999).

15 For the forgoing reasons, Plaintiff's motion for summary judgment is granted, and  
16 the Department is directed to conduct an appropriate MEPA review.

17 DATED this 5 day of January 2001.

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JEFFREY M. SHERLOCK  
District Court Judge

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21 pc. Jack R. Tuholske  
Tommy H. Butler/Michael J. Mortimer

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## FINAL JUDGMENT

Section 36  
KALISPELL

# Document

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*Mt. Environmental Info. Center v. Mt. Dept. of Natural Resources*

*Decided April 13, 2001*

*Judge Sherlock*

*First Judicial District*

*Docket No. BDV 2000-396*

*2001 ML 1129 (1st Jud. Dist.)*

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

MONTANA ENVIRONMENTAL  
INFORMATION CENTER, INC., CITIZENS  
FOR A BETTER FLATHEAD, INC.,  
Plaintiffs,

v.

MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION,  
MONTANA BOARD OF LAND COMMISSIONERS,  
Defendants.

Cause No. BDV 2000-396  
FINAL JUDGMENT

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¶1 IT IS HEREBY ORDERED that based on the Court's Order of January 5, 2001, granting Plaintiffs' motion for summary judgment, that judgment is hereby entered in favor of Plaintiffs. Defendants are hereby ordered to prepare the appropriate Montana Environmental Protection Act review in conformity with the requirements of the Court's Order and applicable laws and regulations, and are hereby enjoined from proceeding with taking steps to facilitate the annexation, leasing or authorization of ground disturbing activities with the state lands at issue in this lawsuit, Section 36 located in 29 N. Range 22 West, Flathead County, Montana, until such time as Defendants prepare the appropriate Montana Environmental Protection Act review.

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DATED this 13<sup>th</sup> day of April, 2001.  
JEFFREY M. SHERLOCK  
District Court Judge

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/usr/local/plweb/public-dbs/srp/sdc/d01/d01bdv2000396.htm

## NEWS ARTICLES



## Lawsuit challenges land development plan

JUNE 28, 2000 12:00 AM • ASSOCIATED PRESS

### State must first prepare environmental study, suit says

HELENA - Two organizations asked for a court order Tuesday barring the state Land Board and Department of Natural Resources and Conservation from developing a piece of state land near Kalispell without first preparing an environmental study.

The lawsuit said the agency will violate state law if it proceeds to lease some of the property for commercial or residential use without analyzing the environmental, social and economic consequences of the action and considering alternatives to development.

The complaint was filed in District Court here by the Montana Environmental Information Center and Citizens for a Better Flathead.

The state's plan for conducting an environmental analysis of individual leases of the land as they arise is inadequate to meet requirements of the Montana Environmental Protection Act, or MEPA, the suit said.

"Comprehensive environmental review is required on the entire proposed development," it said.

A department spokesman said the proposed analysis process complies with the law and no study of the overall development plan is necessary before leasing begins.

"We're committed to site-specific review before we change any land use up there," said Tom Butler, attorney for the agency. "Gosh, where is the inadequacy of that?"

"The appropriate MEPA review will occur at each stage that either the board or department proposes a new use on that tract," he said.

Anne Hedges of the Environmental Information Center said the suit has far-reaching implications beyond how this project is handled. The outcome of this case may dictate how future development of state property is handled, she said.

"This is very precedent-setting," she said. "The state is just getting into the arena of developing state land near urban areas, and we want to get into a pattern of making sure these developments are adequately analyzed before changing their use to commercial, industrial and residential."

At the center of the dispute is a square-mile section of state land at the northern edge of Kalispell. Most of the property is used for agriculture, but a portion already has a ballfield complex.

The state wants to develop the land for businesses, commercial offices and residences. In May, the Land Board approved a memorandum of understanding with Flathead County and Kalispell on how the land should be developed.

Earlier this month, the state began soliciting proposals for leasing the first 60 commercial acres.

The suit said the planned changes for the land will affect traffic, noise and air pollution, available open space, and existing residential and commercial property in the Kalispell area.

"Those consequences had yet to be analyzed and disclosed to the public before the project was approved in its present form," the suit said.

That must be done before an irreversible commitment of land is made by leasing individual tracts, it argued.

The complaint said the state has reneged on a promise to do a comprehensive environmental study prior to any development.

A department official at a Land Board meeting last September promised the agency would conduct an environmental study on the overall project, not on a piecemeal basis, the suit said.

It quoted Clive Rooney, chief of the Special Use Management Bureau, as saying: "It is the department's intention to do a MEPA analysis on the entirety of the project which will be conducted before the MOU (memorandum of understanding) is signed."

Butler declined to comment on that statement, saying he had not had a chance to check the minutes of the board meeting.

"The department believes that there is no valid legal foundation for the suit and that the department and the board have complied with all local planning requirements," he said. "There has been full public participation in this process. We believe the department and the board are in full compliance with MEPA."

The suit asks for an order requiring the state to prepare an environmental review of the entire development plan and a prohibition on any leasing until that is completed.



## Judge rules DNRC plans for state land are illegal



JANUARY 09, 2001 12:00 AM • ASSOCIATED PRESS

HELENA - The state Department of Natural Resources and Conservation broke the law when it created a plan for developing a tract of state land near Kalispell without first studying the environmental effects of the project, a judge has ruled.

In his order issued Friday, District Judge Jeffrey Sherlock of Helena told the agency to prepare an environmental impact statement on its proposed uses of the property and to study the effects of possible

alternatives to the development.

The decision was a victory for environmentalists who sued the state over its handling of the project.

Anne Hedges of the Montana Environmental Information Center said Monday the ruling sets a precedent for extensive government review of environmental repercussions of development on state land.

"The state will have to look at its proposals in a more comprehensive manner and make sure it protects the values and interests of the communities it's developing in," she said.

Tommy Butler, chief attorney for the department, said the agency has not decided if it will appeal Sherlock's ruling to the Montana Supreme Court.

The order was a disappointment because "we thought we were correctly proceeding with our MEPA (Montana Environmental Policy Act) review," he said. "We will have to re-evaluate how to comply with MEPA in this instance before proceeding."

Butler questioned Hedges' conclusion that the ruling sets a precedent for all future state land development. At the same time, he acknowledged that the court has said that anytime the department is involved in plans affecting state land, the requirement for environmental study may apply.

At the center of the dispute is a square-mile section of state land at the northern edge of Kalispell. Most of the property is used for agriculture, but a portion currently has a ballfield complex.

The state wants to develop the land for businesses, commercial offices and residences. Last May, the Land Board approved a memorandum of understanding with Flathead County and Kalispell on how the land should be developed.

In June, the state began soliciting proposals for leasing the first 60 commercial acres. The suit was filed that month by Hedges' organization and Citizens for a Better Flathead.

Last month, Sherlock issued an order blocking the state from asking the city to annex the property.

The suit said the state's "neighborhood plan" for the land should not have been developed without an environmental study. The state argued that the plan does not actually change any land use, so such a study is not required.

Sherlock disagreed, saying the law mandates a detailed environmental study whenever a proposed state action affecting land use may have significant effect on the environment. That is exactly what's happening in this case, he said.

The development plan "authorizes a significant change in the permissible uses of Section 36 because it allows residential and commercial development on open space land previously used for agricultural purposes," Sherlock wrote.

"Such a significant change in use will have a significant effect on the quality of the human environment," he said.

The department violated the environmental policy act and its own regulations when it failed to conduct the required analysis, Sherlock added.

Sherlock called that "somewhat baffling," because the department said in September 1999 it planned to do just such an environmental study and then changed its position eight months later.