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FILED May 16 19 2001
NANCY SWEENEY, Clerk of District Court
By SHELLY CALLIHAN Deputy

MONTANA FIRST JUDICIAL DISTRICT COURT LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, v. MONTANA DEPARTMENT OF NATURAL RESOURCES, and UDELL SHARP, Defendants.	No. CDV-25-2001-309 **PETITION FOR JUDICIAL REVIEW OF A FINAL AGENCY DECISION AND COMPLAINT AND DEMAND FOR DECLARATORY AND INJUNCTIVE RELIEF**

RECEIVED
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LEGISLATIVE ENVIRONMENTAL POLICY OFFICE

I. INTRODUCTION

1. By this Complaint, Plaintiffs Montana Environmental Information Center (MEIC) and Dan Edens (Edens), hereby challenge the Montana Department of Natural Resources (DNRC) decision to issue Udell Sharp a water use permit for the withdrawal of groundwater.

2. Plaintiffs hereby allege that in issuing Water Use Permit No. 41I-100284 to Udell Sharp for the withdrawal of ground water the DNRC violated the Montana Water Use Act (MWUA) § 85-2-101, MCA, et seq., the

Montana Environmental Policy Act (MEPA) § 75-1-101, MCA, et seq., and the Montana Administrative Procedure Act (MAPA), § 2-4-101, MCA, et seq.

II. STANDING, JURISDICTION AND VENUE

3. The preceding paragraphs are hereby realleged as though set forth in full hereunder.

4. Plaintiff MEIC is a non-profit citizen organization based in Helena, Montana. MEIC and its members have been actively and substantially involved in resource and land use issues in the North Helena Valley for many years.

5. On July 31, 2000, Plaintiff MEIC wrote to the Administrator of Defendant DNRC expressing serious concern over the issuance of the Water Use Permit to Udell Sharp. *See* Exhibit 1, July 31, 2000 letter from Jim Jensen to Jack Stultz.

6. Plaintiff Dan Edens is a rancher in the North Helena Valley with senior surface water appropriation rights on Tenmile Creek dating back to 1867. His property lies downstream from Udell Sharp's permitted ground water well.

7. Plaintiff Dan Edens filed objections to the interim water use permit issued to Udell Sharp in approximately October 1997. Plaintiff Edens participated as an objector in a contested case hearing held in this matter. Mr. Edens timely filed exceptions to the Proposal for Decision. A Final Decision in this matter was rendered on April 13th, 2001 and served upon Mr. Edens on April 16, 2001. Mr. Edens has exhausted all administrative remedies.

8. Pursuant to the Montana Administrative Procedure Act § 2-4-702, this Court has jurisdiction over this matter. Plaintiffs have timely filed this petition for judicial review of a final agency decision.

9. Venue in the Montana First Judicial District Court, Lewis and Clark County is proper pursuant to § 25-2-126, MCA, in that this is an action against the State of Montana.

III. STATEMENT OF FACTS

10. The preceding paragraphs are hereby realleged as though set forth in full hereunder.

11. On August 19, 1997, the Montana DNRC issued an Environmental Assessment for the proposed issuance of Water Use Permit Application No. 41I-100284-00 (Permit) to Udell Sharp. The proposed action was for the permitting of a groundwater well authorizing the withdrawal of groundwater to irrigate thirty-nine (39) acres of land in the North Helena Valley. The proposed permit was for withdrawal of groundwater at a rate of 400 gallons per minute (gpm) up to 160 acre feet of water per year from April 1 through September 30 each year to irrigate.

12. The initial Environmental Assessment (EA) was notably deficient, and created substantial concern with other water rights holders in the area, including Plaintiff Edens as well as with MEIC and its members. In response to the deficient EA, MEIC and Edens both expressed their written concerns to the DNRC. Among the deficiencies noted was the failure to address the following;

a) potential effects on other water users in the area;

b) effects, both individually and cumulatively, of the withdrawal on Tenmile Creek;

c) reasonably foreseeable events and impacts of permitting the groundwater withdrawal; and

d) the irreconcilable statements in the EA stating that there would be no "[a]lteration of or interference with the productivity or profitability of the existing land use . . ..," yet also stating that denial of the permit "would result in a loss of income for the owner and the state." *See* Aug. 19, 1997 EA; *see also* Ex. 1, p. 1.

13. In response to the expressed inadequacies of the original EA, the DNRC prepared another EA that was issued on approximately July 24, 2000. While the 2000 EA is somewhat more complete, it too fails to adequately analyze the impacts of the Permit. In particular, the 2000 EA does not adequately address the concerns raised by Plaintiffs in their written comments to the DNRC.

14. A contested case hearing was held in the matter of the issuance of the Permit on March 5, 1999. Plaintiff Edens was represented by an attorney at the hearing. The findings of the hearings examiner and the Proposal for Decision were based on inaccurate information and assumptions. The hearings examiner determined that Applicant Sharp showed by a preponderance of evidence that water was physically available for the appropriation. That finding was based on a single 24-hour test that was itself determined to not be in compliance with the terms of the Interim Permit. *See* August 13, 2001 Final Order, p. 1. The Proposal for Decision was further based on the inadequate EA that was issued in August of 1997. As noted above in ¶ 13, a new EA was prepared in July of 2000.

15. The Final Order, in addition to noting that the Interim Permit guidelines for conducting the aquifer test and measurements were not complied with, also stated that "[i]n this case, Applicant exercised the Interim

Permit to irrigate for an entire irrigation season. None of the nearby well owners, including the objectors to this application, reported that their rights could not be exercised during the period of Interim Permit." To the best of Plaintiffs' knowledge and belief, the Applicant did not irrigate during the term of the Interim Permit. Therefore, the Final Order is premised on inaccurate information.

16. Plaintiff had telephone conversations with hydrologists and hydrogeologists at the United States Geologic Survey (USGS) office regarding the adequacy of the aquifer tests. Plaintiff was repeatedly told that a five-day aquifer test was needed to adequately characterize the aquifer. Plaintiff Edens entered such evidence into the record during the contested case hearing. Still, the DNRC only required the 24 hour test.

17. Tenmile Creek has historically been an intermittent flowing stream. Since subdivision in the North Helena Valley has become more intensive and more and more ground water has been appropriated, Tenmile Creek has suffered less flow.

18. Tenmile Creek was dry at the time the aquifer tests were conducted. Tenmile Creek was determined to be a "losing reach" by the USGS, even though it was only determined to be a losing reach after huge groundwater wells pumping significant amounts of groundwater were permitted upstream to service subdivisions in the Helena Valley. The upstream wells servicing the Tenmile and other subdivisions are in very close proximity to Tenmile Creek.

19. The Permit and well at issue in this case is located only approximately seventy-five (75) feet from Tenmile Creek.

20. In the summer of 2000, many wells in the North Helena Valley were drying up and new deeper wells had to be drilled to accommodate the needs of people with existing water use rights. The Helena Independent Record published many articles on the subject. The problem with groundwater pumping affecting surface waters is a familiar problem throughout Montana, including the upper Tenmile Creek basin in Colorado Gulch.

21. The Final Order recognizes the highly controversial nature of the issuance of the Permit, and further states that "Objector Eden's [sic] exceptions raise an important consideration related to applicant's failure to follow the testing provisions of the Interim Permit.

22. The Montana Water Use Act, § 85-2-903(1)(c)-(f), MCA, recognizes that:

> (c) there is insufficient information characterizing the volume, quality, and flow patterns of the state's ground water;
> (d) ground water information deficiencies are hampering the efforts of citizens and units of government to properly manage, protect, and develop ground water;
> (e) government policies and programs should focus on preventing ground water contamination and supply depletion, but in order for preventive policies and programs to be effective, better ground water information is required; and
> (f) there is a need for better coordination among those numerous units of state, federal and local government with responsibility for ground water management, protection, and development.

IV. ALLEGATIONS

COUNT I—MONTANA WATER USE ACT VIOLATIONS

23. The preceding paragraphs are hereby realleged as though set forth in full hereunder.

24. Defendant DNRC failed to require tests sufficient to adequately characterize the nature of the aquifer and the effects of the Permitees water

withdrawal, especially in view of the well being placed within approximately 75 feet of Tenmile Creek.

25. Defendant Udell Sharp failed to adhere to the Interim Permit guidelines in conducting aquifer tests.

26. Defendant DNRC's determination that the pumping tests demonstrated that there were no adverse effects was incorrect because the tests themselves were inadequate.

27. DNRC's determination that the Applicant demonstrated by a preponderance of evidence that there would be no adverse effects resulting from the ground water withdrawal were clearly contradicted by substantial credible evidence that Plaintiff Edens introduced at the administrative hearing.

27. The decisions and Final Order of Defendant DNRC and actions of Permittee Udell Sharp violate the Montana Water Use Act, § 85-2-311, MCA.

COUNT II—MONTANA ENVIRONMENTAL POLICY ACT VIOLATIONS

28. The preceding paragraphs are hereby realleged as though set forth in full hereunder.

29. Both of the EAs prepared in this case were inadequate and based upon insufficient and/or inaccurate information. The July 2000 EA failed to fully analyze the impacts of all of the groundwater withdrawals in the area. Further, it failed to adequately analyze the effects of the well on Tenmile Creek, especially in view of the well being situated so close to the Creek, and in view of inadequate information regarding the hydrology of the area.

30. The EA is itself based on inaccurate and insufficient information regarding the aquifer tests and exercise of the Interim Permit.

31. The EA failed to adequately analyze the economic impacts on other landowners in the area, and failed to consider the economic, cultural, and overall environmental impacts of the Permit if the land were subdivided.

COUNT III—MONTANA ADMINISTRATIVE PROCEDURE ACT

32. The preceding paragraphs are hereby realleged as though set forth in full hereunder.

33. The decisions of the DNRC in issuing the Permit at issue in this case violate the Montana Administrative Procedure Act, § 2-4-101, MCA, et seq. in that the decisions were arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that Court grant Plaintiff the following relief:

A. Issue a declaratory judgment declaring that Defendants violated the law for each and every violation of the law alleged herein;

B. Order five-day pump tests that adequately characterize the aquifer and effects of the groundwater withdrawal on the aquifer and on Tenmile Creek;

C. Order further and adequate MEPA analysis;

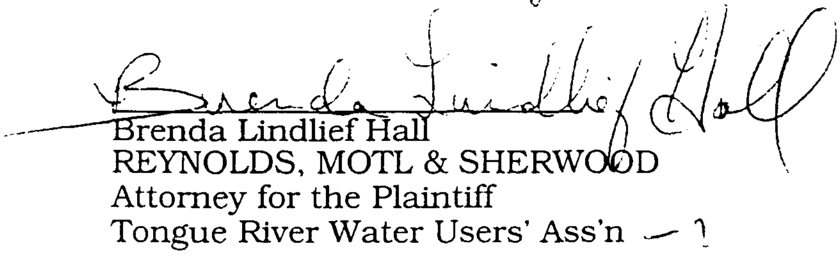
D. Declare that the Permit is void;

E. Declare that DNRC acted arbitrarily and capriciously;

F. Award Plaintiff's costs and attorney's fees and grant such other relief as the Court deems just and proper; and

G. Award such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, this 16th day of May, 2001.



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MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.	))))))))))))	No. CDV–25-2001-309 DNRC Motion to Dismiss

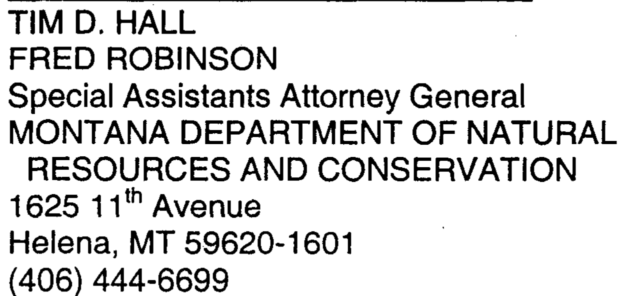
COMES NOW the DNRC Department of Natural Resources and Conservation (DNRC) and moves this Court pursuant to Mont.R.Civ.P. 12 to dismiss Plaintiff Montana Environmental Information Center's (MEIC) petition for judicial review for failure to state a claim upon which relief can be granted. MEIC did not object to the water permit application at issue in this case, did not exhaust its administrative remedies, is not aggrieved by the DNRC's decision, and is therefore not entitled to judicial review pursuant to Mont. Code Ann. § 2-4-702.

Plaintiff MEIC and Plaintiff Edens also both improperly combined an action for injunctive relief, an original district court proceeding, with a petition for judicial review of an administrative Final Order, an appellate proceeding before the

district court on an established record. Therefore, the action for declaratory relief and injunctive relief should be dismissed as to both Plaintiff MEIC and Plaintiff Edens without prejudice.

The DNRC is not moving to dismiss Plaintiff Edens' petition for judicial review of the Final Order.

DONE AND DATED THIS 6th DAY OF JUNE 2001.



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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER and DAN EDENS, Plaintiffs, v. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and UDELL SHARP, Defendants.	)	Cause No. CDV-25-2001-309 . **DEFENDANT UDELL SHARP'S MOTION TO DISMISS**

Defendant Udell Sharp, respectfully moves this Court, pursuant to Rule 12, Mont. R. Civ. P., to dismiss Plaintiff Montana Environmental Information Center's (hereinafter "MEIC") Amended Petition for Judicial Review of a Final Agency Decision and Complaint and Demand for Declaratory and Injunctive Relief, as well as Plaintiff Eden's Complaint and Demand for Declaratory and Injunctive Relief for the following reasons:

1. Plaintiff MEIC fails to state a claim for which relief may be sought;
2. Plaintiff MEIC lacks standing to bring this action;
3. Plaintiffs MEIC and Edens have improperly combined an action for declaratory and injunctive relief, with a petition for judicial review of a final agency action;

Defendant Sharp further moves this Court to dismiss those parts of Plaintiff Eden's Petition for Judicial Review of a Final Agency Action that pertain to alleged impacts on anything other than Eden's surface water right. The basis for this motion is as follows:

1. Plaintiff Eden lacks standing to object to any agency decision that does not directly relate to his surface right.

This motion is supported by a brief to be filed within five days pursuant to Rule 2 of the Montana Uniform District Court Rules.

DATED this 7th day of June, 2001.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By: [signature]

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2001, a true copy of the foregoing was mailed by first-class mail, postage prepaid, addressed as follows:

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MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.	)	No. CDV–25-2001-309 DNRC Brief in Support of Motion to Dismiss

The Department of Natural Resources and Conservation (DNRC) has moved to dismiss MEIC from this case pursuant to Mont.R.Civ.P.12(b) since MEIC has never been a party to the action, did not exhaust its administrative remedies, and therefore cannot be aggrieved by the DNRC decision to issue a permit in this case. Consequently, MEIC is not entitled to judicial review under Mont. Code Ann. § 2-4-702, and DNRC's motion to dismiss should be granted. Additionally, Plaintiff MEIC and Plaintiff Edens have both improperly combined an action for declaratory and injunctive relief, an original district court action, with a petition for judicial review.

Plaintiff MEIC did not Exhaust its Administative Remedies

Mont. Code Ann. § 2-4-702(a)(1) provides for standing to bring an appeal of an administrative contested case as follows:

> (1) (a) A person who has exhausted all administrative remedies available within the agency *and* who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter....

(emphasis added).

The Water Use Act, Mont. Code Ann. § 85-2-101, et seq., provides broad standing for objections to water permit applications. Mont. Code Ann. § 85-2-308 reads:

> (1) (a) An objection to an application for a permit must be filed by the date specified by the department under 85-2-307(2).
>
> (b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.
>
> (2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-402 are not met.
>
> (3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.
>
> (4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.
>
> (5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.
>
> (6) ***An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under subsection (1), (2), or (4).***

(emphasis added).

If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498 (1982); State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975). In Kunz v. Silver-Bow, 244 Mont. 271, 797 P.2d 224 (1990), the Montana Supreme Court ruled:

> The District Court further concluded appellants failed to state a claim for which relief can be granted on the grounds that appellants failed to exhaust their administrative remedies. We agree with this reason for denying relief.
> The Butte-Silver Bow zoning ordinance was adopted by the Butte-Silver Bow Council of Commissioners pursuant to the municipal zoning procedures of § § 76-2-301, et seq., MCA . Section 76-2-305, MCA, sets forth the procedure for formally protesting a proposed zoning regulation. Additionally, the Butte- Silver Bow Municipal Code at Chapter 17.52.010 et seq., provides for an administrative appeal remedy. Chapter 17.52.010 et seq., allows for the submission of a petition to the Council of Commissioners or the Zoning Commission asking for a resolution of intent to amend, change, modify or repeal the zoning boundaries or restrictions. While there are facts recited in appellants' complaint showing they objected to the adoption of the zoning ordinance in question, there is nothing to show appellants followed the administrative appeal procedure available to them under the Butte-Silver Bow Municipal Code. Once appellants have exhausted their administrative remedies the District Court's function is limited to a determination of whether adoption of the ordinance constituted an abuse of discretion.

(emphasis added).

Similarly in this case, MEIC did not exhaust its administrative remedies. In addition to providing MEIC an objection process, Mont. Code Ann.§ 2-4-621(1) also provides for post-hearing comment on the proposal for decision before it is finalized:

> When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding other than the agency itself, may not

be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.

(emphasis added).

In accordance with the above statute, and because the Water Resources Division Administrator makes the final decision and signs the Final Order, the DNRC's procedural rules provide for a party to except to a proposal for decision and give the agency the opportunity to respond. Mont. Admin. R. § 36.12.229 (1) provides as follows:

> (1) Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention. Any exception that contains obscene, lewd, profane or abusive language shall be returned to the sender.
> (a) After the 20-day exception period has expired, the director or the director's designee shall:
> (i) adopt the proposal for decision as the final order;
> (ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision; or
> (iii) hold an oral argument hearing if requested, them adopt the proposal for decision as the final order or reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.

(emphasis added).

In the present case since MEIC did not object and become a party, did not participate at the hearing, did not produce any evidence, and did not file any

exceptions to the proposal for decision as provided by law, it failed to exhaust its adminsitrative remedies. Therefore, pursuant to Kunz, MEIC has failed to state a claim for which relief can be granted on the grounds that it failed to exhaust its administrative remedies, and its petition for judicial review should be dismissed. See also Knudsen v. Ereaux, 275 Mont. 146, 911 P.2d 835 (1996)(without standing to state a claim the plaintiffs can prove no set of facts in support of their action which would entitle them to relief).

Combining Judicial Review and Injunctive Relief is Not Proper

In this case both Plaintiff MEIC and Plaintiff Edens have improperly sought to combine a petition for judicial review with a motion for an injunction. Courts have distinguished between the appellate function of a court in a petition for judicial review setting compared to the original jurisidiction a court maintains when injunctive relief is sought. Bally's Louisiana, Inc. v. Louisiana Gaming Control Board, 2001 WL 80182 (La.App. 1 Cir. 2001)(trial court should not have consolidated casino co-owner's petition for judicial review of Gaming Control Board's order with co-owner's complaint seeking a preliminary injunction against enforcement of the Board's orders; the trial court was acting in its appellate capacity in reviewing the Board's orders, and its review was generally limited to the existing record, but was acting as a court of original jurisdiction when considering the injunction request); cf Deffenbaugh Industries, Inc. v. Potts, 802 S.W.2d 520 (Mo. 1990)(an action for injunctive or declaratory relief is not the appropriate remedy to seek judicial review of a quasi-judicial decision of an administrative agency in a contested case that affects a private right).

A similar matter came up in this judicial district several years ago when a party who had filed a petition for judicial review of a DNRC Final Order later came into court under the same case caption with a motion for a temporary restraining order and preliminary injunction. In the Ciotti[1] case pending before Judge McCarter, the Flathead Tribes had filed a petition for judicial review of a DNRC final agency order. See Attachment A. Some time after that petition for judicial review was filed, the Tribes also filed in the same case under the same case heading and docket number a "Motion for Temporary Restraining Order and Preliminary Injunction." See Attachment B. In a Minute Entry dated May 5, 1993, after hearing, Judge McCarter denied the motion. See Attachment C. Although the minute entry does not give the grounds of the denial, DNRC argued in that case that it was not appropriate to bring an action for a temporary restraining order and preliminary injunction in the same case that was before the court on a petition for judicial review of an agency Final Order, but that a separate cause of action was required. See Attachment D – Affidavit of DNRC Chief Legal Counsel Donald D. MacIntyre. Such is also the case here. If Plaintiffs MEIC and Edens want to pursue injunctive relief concerning the ground water permit issued to Udell Sharp, they must do it in a separate action according to the law pertaining to the issuance of injunctions, including the requirement of Mont. Code Ann. § 27-19-306 pertaining to the giving of security for damages.

[1] In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S76L, Pope, Cause No. ADV 92-745, First Judicial District of the State of Montana, Lewis and Clark County (1995), *on appeal* 278 Mont. 50, 923 P.2d 1073 (1996).

Additionally, it is clear that under Montana's Administrative Procedures Act the party to a contested case proceeding can properly ask to stay enforcement of the agency's decision. Mont. Code Ann.§ 2-4-702 provides in part:

> (3) Unless otherwise provided by statute, the filing of the petition may not stay enforcement of the agency's decision. The agency may grant or the reviewing court may order a stay upon terms that it considers proper, following notice to the affected parties and an opportunity for hearing. A stay may be issued without notice only if the provisions of 27-19-315, 27-19-316, and 27-19-317 are met.

Since MEIC did not choose to become a party is this case, it is not allowed to seek a stay under the above statute, and so has had to resort to combining a petition for judicial review with a motion for an injunction, something that confuses the reviewing functions of this court with the original jurisdiction of this court. MEIC's petition for judicial review should be dismissed by this Court, as should its and Plaintiff Edens' action for declaratory and injunctive relief. If MEIC and Edens want to challenge the EA in this case, and desire an injunction, they should have to file such an action separately and not confuse the functions of this Court. The Montana Administrative Procedures Act provides for limited new evidence during the judicial review of an agency's final decision, if at all, see Mont. Code Ann.§ 2-4-703 and 704, and MEIC and Edens should not be allowed to use their request for injunctive relief as a way to circumvent those statutory restrictions providing for a limited review on the record. This Court will have a difficult time separating its review of the administrative Final Order on the record when it is presented with new and additional evidence outside the existing certified administrative record attacking the adequacy and sufficiency of the EA. The complaint and amended complaint already go outside the existing

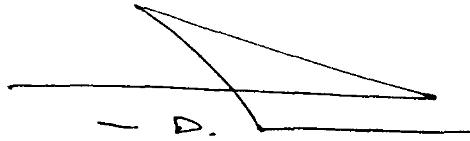
administrative record, citing Independent Record news stories about groundwater issues in the Helena valley.

MEIC and Edens in the "II. Standing, Jurisdiction and Venue" section of their complaint have not even invoked this Court's jurisdiction under the statutes providing for injunctive relief. Mont. Code Ann. §§ 27-19-101 to -406. Rather, the amended complaint simply requests an injunction in its prayer for relief.

THEREFORE, for all of the foregoing reasons, the DNRC prays that MEIC's petition for judicial review be dismissed with prejudice, that MEIC's action for declaratory and injunctive relief be dismissed without prejudice, and that Plaintiff Edens' action for declaratory and injunctive relief be dismissed without prejudice.

The DNRC is not moving to dismiss Plaintiff Edens' petition for judicial review of the Final Order.

DONE AND DATED THIS 6th DAY OF JUNE 2001.



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Attorneys for Respondent DNRC

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I certify that I sent via United States mail, postage prepaid, a true and correct copy of the foregoing to the following on the 6th day of June 2001:

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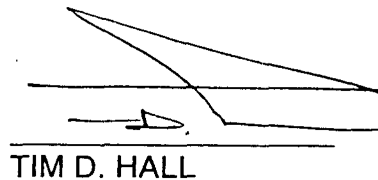

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DOROTHY McCARTER
Presiding Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LEWIS AND CLARK

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS. 66459-76L, Ciotti; 63574-s76L, Flemings; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; and APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	Cause No. ADV 92 745 CONFEDERATED SALISH AND KOOTENAI TRIBES' PETITION FOR JUDICIAL REVIEW OF A FINAL AGENCY ORDER

I.
STATEMENT OF THE CASE

1. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana are a confederation of American Indian Tribes, organized pursuant to the provisions of the

Indian Reorganization Act of June 18, 1934, 25 U.S.C. § 461 et seq., with a governing body duly recognized by the United States Secretary of the Interior.

2. By the Treaty of Hellgate of July 16, 1855, (12 Stat. 975), the Tribes agreed to convey vast portions of their aboriginal homelands to the United States while reserving to themselves the Flathead Indian Reservation within the boundaries of what is now the State of Montana. By the same treaty the United States promised and guaranteed that the lands and natural resources so reserved would be set aside for the "exclusive use and benefit of said confederated Tribes as an Indian reservation." (Article II, Treaty of Hellgate).

3. The Tribes possess various types of water rights both within and outside of the Reservation which are protected by federal law. The Treaty of Hellgate reserved to the Tribes the exclusive and paramount right to all waters necessary and convenient to any and all existing and future uses reasonably related to the purposes for which the Reservation was established.

4. These rights to reserved waters are commonly referred to as "treaty rights" or "Winter's rights." Some, such as waters used for agricultural purposes, carry a priority date at least as old as July 16, 1855, the date of the creation of the Flathead Reservation. Others, such as the right to sufficient instream flows and pool levels in Reservation waterbodies to protect the Tribal Treaty exclusive right to take fish, have a priority date of "time immemorial." All

such water rights, including those reserved for future uses, are senior to any other Reservation appropriation.

5. The Tribes are immune from suit in state court absent express waiver of immunity but recognize that their water rights may be impacted in a state proceeding as a result of the dual representational capacity of the United States.

6. The Montana Department of Natural Resources and Conservation ("DNRC") is the agency of state government charged with implementing portions of the Water Use Act, 85-2-101 et seq. MCA (the "Act").

7. DNRC admits that the Tribes possess senior water rights that have not been adjudicated and are therefore unquantified.

8. DNRC has conducted hearings and proposes to issue permits for new, post-1973, appropriations of Reservation waters to Ciotti, Flemings, Starner and Rasmussen and a change of appropriation authorization to Frank Pope.

9. The Tribes and State are formally in negotiation with the Montana Reserved Water Rights Compact Commission to resolve reserved and aboriginal water rights pursuant to § 85-2-702, MCA. Accordingly, all water right quantification proceedings under the Act are stayed pursuant to § 85-2-217, the suspension statute.

10. The Tribes initially appeared as Objector in all the individual proceedings, subsequently consolidated by DNRC in this proceeding, by filing a written objection to jurisdiction.

11. The United States also entered the individual proceedings as an Objector, filed a written jurisdictional objection and requested a hearing on law and fact relative to the actions on all captioned individuals except Starner.

12. On July 24, 1989, in response to the efforts of the United States to present a fact case in Pope, the Tribes filed a memorandum entitled ENTRY OF SPECIAL APPEARANCE TO CONTEST JURISDICTION and requested that DNRC bifurcate questions of fact from issues of law.

13. On JULY 20, 1989, DNRC granted the Tribes' request for bifurcation stayed the fact cases pending resolution of the Tribes' jurisdictional challenge, a challenge joined by the United States.

14. On April 30, 1990, the Director of DNRC ruled that the agency has the requisite jurisdiction to act on the applications in a one page ORDER and a twelve page supporting MEMORANDUM ("Memo"). The Tribes petitioned the Director for a rehearing, which was granted.

15. After re-hearing, on April 17, 1992, the Tribes were served with the DNRC Director's adverse ruling entitled FINAL ORDER ON JURISDICTION ("**Final Order**"). The Final Order appends and expressly incorporates the earlier Memorandum as a component of the Final Order. This combined Order is the final agency action for which the Tribes seek judicial review.

16. In the Final Order DNRC omitted from the caption DNRC applicants Crop Hail Management and Herbert Gray. The Tribes, in deference to that state act, do likewise.

17. In the combined Final Order, the Director interpreted § 85-2-309, § 85-2-311, § 85-2-217, and § 85-2-702 MCA to find agency regulatory authority over the applications.

18. The Tribes have exhausted DNRC administrative remedies and raise four questions of state law in this petition.

II.
JURISDICTION AND VENUE

19. This is a petition for limited judicial review of a final agency ruling on its jurisdiction to regulate the use of reserved and aboriginal waters within the Flathead Reservation under 2-4-702 MCA. The Tribes made a special appearance in this matter to contest jurisdiction, and continue, as petitioner, their special appearance status. The Tribes allege that the DNRC jurisdictional ruling appealed from is in violation of federal law, Montana law, is arbitrary, capricious and constitutes both an abuse of discretion and an unwarranted exercise of discretion, and is erroneous in law.

20. Venue is properly in this Court in accordance with the provisions of 2-4-702 (2)(a) MCA. The principal office of DNRC is located in Helena, Montana, in the First Judicial District of Montana.

III.
ISSUES PRESENTED FOR STATE COURT REVIEW

21. As a matter of state law, state law may not be applied by DNRC to administer and regulate the use of Reservation waters prior to a general inter sese water rights

adjudication or the conclusion of a State-Tribal Compact, contrary to the Director's interpretation of 85-2-217 and 85-2-702 MCA. **Memo p. 4.**

22. As a matter of state law, DNRC may not apply 85-2-309 to Reservation waters and thereby subject existing reserved and aboriginal water rights to the State Water Court. By invoking judicial certification under 85-2-309, DNRC has unlawfully subjected existing Tribal reserved and aboriginal water rights to a piecemeal state adjudication in violation of the provisions of 85-2-217, the suspension statute, as implemented to stay all proceedings to adjudicate water rights while the Tribes and State are in negotiation pursuant to 85-2-702 MCA. **Memo p. 3.**

23. As a matter of state law, DNRC erroneously concluded, regardless of its findings that the Tribes' water rights are reserved, are unadjudicated, and are undeniably senior, that it can find that unreserved waters exist in a source of supply and issue permits for new junior appropriations without adversely impacting the Tribes' senior reserved and aboriginal rights under 85-2-311 MCA. **Memo p. 4, 8, Final Order p. 3, 12.**

24. The issue of whether DNRC may issue new water right permits, under circumstances identical to those present here, has been previously adjudicated by this Court, a Court of competent jurisdiction, in United States and the Montana Power Company v. Department of Natural Resources and Conservation et al., Cause No. 50612 (the "Don Brown" case). In that case, this Court determined that DNRC may not proceed

to issue new permits pursuant to § 85-2-311 MCA under these circumstances. That decision, unappealed by the State, stands as a bar to the present proceedings of the DNRC in proceeding to issue new permits or to issue change of use on previous permits, and DNRC are estopped in proceeding with such permits.

25. While the above-contested matters were pending before the administrative agency, the Montana Legislature enacted certain amendments to Montana water statutes, including an amendment to § 85-2-311, subsection 1, MCA. Among the changes is the addition to § 85-2-311(1)(a) which requires a finding that "there are unappropriated waters in the source of supply at the proposed point of diversion" (Amendment emphasized). DNRC purported to invoke this amendment, as well as others, to try to distinguish the above-mentioned Don Brown case, in an effort to proceed with its illegal issuance of new permits and/or change in use permits. Without affording the Tribes or other parties the opportunity to do additional briefing or to otherwise raise issues with respect to such amendments. This procedure denied the Plaintiff procedural due process. Moreover, such changes in Montana water law amount to substantive changes which are unconstitutional in that they deny the Tribes and others process of law by taking property without the benefit of due process and in that they violate Art. IV, § 3 of the Montana Constitution. Specifically, the addition of the language regarding appropriated waters in the source of supply "at the

proposed point of diversion" serves to undermine settled expectations in water rights throughout the State of Montana and to render completely extraneous any finding that there be available water in the source of supply prior to issuance of new water rights certificates or permits which purport to authorize new uses of Montana's waters. Such procedure is arbitrary and capricious.

26. Because of the interjection of new legislation and the consideration by Defendants of such new legislation, without benefit of a hearing, briefing or the ability of the parties to make a record, parties are entitled to go beyond the administrative record compiled in this case to reach the question of whether the new amendments to the Montana water law and the application of such amendments to the presently challenged administrative proceedings are unconstitutional under the Montana Constitution.

IV.
FEDERAL QUESTIONS RESERVED

27. The Tribes address questions of state law and questions of federal law arising out of the challenged permitting practices of DNRC. It is not uncommon for one transaction to spawn both state and federal questions, as this matter amply demonstrates.

28. Based upon the rationale enunciated in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), the Tribes hereby notify the State Court of the following federal constitutional questions raised by the actions of DNRC and expressly reserve the disposition of

those federal questions to the federal judiciary in a federal proceeding captioned Karen Barclay Fagg, Frank Pope, Kenneth M. and Jorrie Ciotti, Cecil and Jane Flemmings, and Patricia and John Starner, and filed in Federal District Court, Missoula Division, contemporaneously with this suit.

The England rationale confirms that a plaintiff such as the Tribes:

> may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved.

Id. at 421-422. See also Confederated Salish and Kootenai Tribes v. Montana, CV 81-149-M, 13 ILR 3001 (D.Mont. September 6, 1986); United States v. Adair, 723 F.2d 1394, 1400-1401 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

29. Federal Question Reserved: Do the protections afforded by Article I § 8, Clause 3 (the Indian Commerce Clause), Article VI Clause 3 (the Supremacy Clause) and Article VI, Clause 2 (the Property Clause), and other provisions of the United States Constitution preempt the application of the Water Use Act to regulate waters on the Flathead Indian

Reservation?

30. Federal Question Reserved: As a matter of law, the Tribes and the United States are immune from regulatory actions of the state absent a waiver of sovereign immunity. Therefore, does DNRC's exercise of the regulatory portion of the Water Use Act in the absence of either immune government constitute a deprivation of the Tribes' due process protections contained in the Fifth and Fourteenth Amendment to the United States Constitution?

31. Federal Question Reserved: Do the protections afforded by Article I § 10, Clause 1, (the Contract Clause) and of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibit the application of the regulatory functions of the Water Use Act to the Tribes' reserved and aboriginal water rights which constitute a portion of the corpus of the contractual obligations between the United States and the Tribes contained in the Hellgate Treaty?

V.
MANNER IN WHICH PETITIONER IS AGGRIEVED

32. Petitioner Tribes are aggrieved because their senior and unadjudicated aboriginal and reserved water rights are being adversely impacted by the continuing practice of DNRC of assuming the existence of "surplus, non-reserved waters on the Reservation waters," and issuing permits for new junior appropriations for such purported waters **Final Order p. 10.**

33. DNRC admits that the Tribes' water rights have not been adjudicated by a McCarran-type general adjudication. Memo p. 3, 12. A priori the volume of the Tribes' rights have not been determined, nor have its places of use or purposes of use been finally determined. Therefore, there is no way in law or fact to defend DNRC's findings that "surplus" and "non reserved" waters exist on the Reservation under 85-2-311 MCA. This ruling is an error of law constituting abuse of discretion and is also a clearly erroneous finding of fact.

34. Priority dates are, as a matter of law, "time immemorial" for aboriginal rights and for Treaty purposes of the Reservation carry a priority date at least as old as 1855, the date of creation of the Reservation. Therefore, DNRC cannot, as a matter of law, find, as the Final Order purports to find, that the issuance of a new water permit will not adversely impact the Tribes' senior water rights because it cannot prove that

(a) "there are unappropriated waters in the source of supply" (85-2-311(a)); or

(b) That "the water rights of a prior appropriator [The Tribes] will not be adversely affected" (85-2-311(b)); or

(c) That the "proposed use will not interfere unreasonably with other planned uses or developments . . . for which water has been reserved," (85-2-311(e)). This ruling is both an error of law constituting an abuse of discretion and is comprised of clearly erroneous findings (or more appropriately, no findings) of fact.

35. As a result of the continuing and unlawful issuance of

new permits, the Tribes' senior water rights, some of which consist of instream flows for fishery habitat and are, therefore, by definition, "in the source of supply" (85-2-311(a)), are being unlawfully taken under color of state law.

36. DNRC erroneously concluded that since the challenged regulatory process is not a part of a general inter sese adjudication under the Act, the suspension provisions of 87-2-217 do not apply even though the Tribes and State are in formal negotiation under 85-2-702 MCA. **Memo p. 4.** As a consequence, the Tribes' senior and unquantified water rights continue to be unlawfully appropriated and diminished under color of state law and in contravention of the plain meaning of 85-2-217 MCA.

VI.
RELIEF REQUESTED AND GROUNDS UPON WHICH THE TRIBES ARE ENTITLED TO RELIEF

37. The Tribes are entitled to have this Court reverse the Final Order and to rule that DNRC is barred by operation of law from applying 85-2-311 MCA, on the Flathead Indian Reservation. All prior exercises of state authority under the Act must be declared void ab initio. DNRC's issuance of new permits absent the findings required under 85-2-311 constitutes clear, substantial and prejudicial error on the part of DNRC constituting an abuse of discretion.

38. The clearly erroneous findings of fact and abuses of discretion manifest in its findings of law in this matter have caused and will continue to cause prejudice upon the Tribes' unarguably senior, though unquantified, water rights

by allowing junior users to obtain and utilize Indian reserved waters to the derogation of the Tribes' exercise of its senior aboriginal and reserved rights.

39. DNRC violates state statutory provisions by issuing permits under 85-2-311 without the physical, factual, or legal ability to make the required findings of fact expressly called for that statute. This constitutes an abuse of discretion and constitutes a ruling "made upon unlawful procedure (2-4-704(2)(a)(iii)), as well as findings "in excess of the statutory authority of the agency" (2-4-704(2)(a)(ii)).

VII.
REQUEST FOR AGENCY TO FORWARD RECORD AND REQUEST TO COURT TO ESTABLISH A BRIEFING CONFERENCE

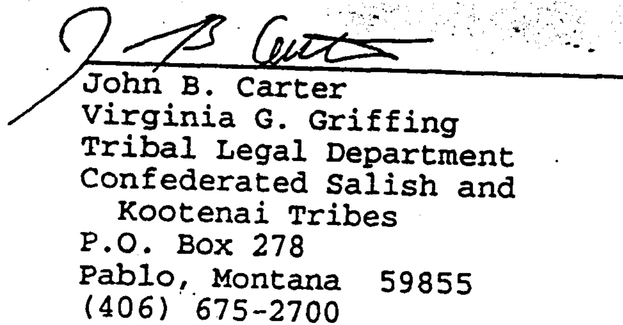
40. In accordance with the provisions of 2-4-702(4) MCA, the Tribes request DNRC to forward the record on this appeal and specifically to include the entire record on Application For Change of Appropriation Water Rights No. G15152-S76L, Frank Pope.

41. The Tribes also request that this Court convene a pretrial conference to establish a briefing schedule on the issues of state law addressing DNRC compliance with 85-2-207, 85-2-309, 85-2-311 and 85-2-702 MCA. Finally, the Tribes request oral argument on this matter.

42. The Tribes also request that this Court hold an evidentiary hearing and allow appropriate proof beyond the administrative record so that the Tribes may be afforded an opportunity to challenge the constitutionality of the

legislative amendments which were relied upon by the DNRC in reaching its ruling. The Tribes were not provided the opportunity to address, brief or offer proof with respect to such amendments in the administrative proceeding since those amendments were belatedly interjected into the proceedings by DNRC.

Respectfully submitted this 15th day of May, 1992.



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ATTORNEYS FOR CONFEDERATED
SALISH AND KOOTENAI TRIBES

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NOS.
66459-76L, Ciotti;
63574-s76L, Flemings;
63023-s76L, Rasmussen;
64988-g76LJ, Starner;

and

APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.

Cause No. ADV-92-745

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Applicants, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereinafter "Tribes"), move for a preliminary injunction and temporary restraining order. They seek an injunction of all actions of the Montana Department of Natural Resources & Conservation ("DNRC") taken under the Montana Water Use Act, MCA § 85-2-301, et seq., to issue any "proposals of decision"

or final orders on any pending application for a water use permit or change of use, as well as any water use or right certificates or any interim permits for drilling and testing for ground water, within the exterior boundaries of the Flathead Reservation. The Tribes further move that DNRC be enjoined from processing such applications, entering proposed orders, holding hearings on applications or otherwise taking actions to facilitate such applications. This motion for preliminary injunction is for the period pending resolution of the above-captioned case and any appeal thereof.

In connection with the motion for preliminary injunction, the Tribes move that the Court enter a temporary restraining order restraining the above-described acts pending a hearing on the motion for preliminary injunction.

A temporary restraining order may be granted without notice if:

1. It clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or his attorney could be heard in opposition; and

2. The applicant or the applicant's attorney certifies to the Court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that the notice should not be required. MCA § 27-19-315(1), (2).

The facts that demonstrate the nature of the immediate irreparable injury that would occur absent a stay or temporary restraining order are set forth in the accompanying brief and

affidavits. The certification required in paragraph 2, above, will be filed as soon as this Court provides a time at which the motion for temporary restraining order may be presented to the Court.

RESPECTFULLY SUBMITTED this 9 day of May, 1993.

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By:____________________
James H. Goetz
ATTORNEYS FOR APPLICANT
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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the above and foregoing was duly served upon the following counsel of record, by depositing same, postage prepaid, in the United States mail this 4th day of May, 1993:

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tribesta.mot

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[illegible] DEPT. OF NATURAL
RESOURCES & CONSERVATION

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

IN THE MATTER OF THE APPLICATION
FOR BENEFICIAL WATER USE PERMIT ADV-92-745
NOS.: 66459-761, CIOTTI, et al

This was time set for hearing the motion of The Confederated Salish and Kootenai Tribes for a temporary restraining order. Present in court were James Goetz, attorney for Confederated Salish and Kootenai Tribes, and Don MacIntyre and Tim Hall, attorneys for the Department of Natural Resources and Conservation.

Upon presentation, Court denied the motion.

HON. DOROTHY McCARTER
PRESIDING JUDGE

MINUTE ENTRY
May 5, 1993

pc: John B. Carter, Virginia G. Griffing, Tribal Legal Department, Confederated Salish and Kootenai Tribes, P. O. Box 278, Pablo, MT 59715
James H. Goetz, Goetz, Madden & Dunn, P.C., 35 N. Grand, Bozeman, MT 59715
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ATTACHMENT [illegible]

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Attorneys for Respondent DNRC

MONTANA FIRST JUDICIAL DISTRICT LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.	No. CDV–25-2001-309 Affidavit of Donald D. MacIntyre

Donald D. MacIntyre, being duly sworn, swears the following to be true:

1. I am Chief Legal Counsel of the Montana Department of Natural Resources and Conservation (DNRC).

2. I was lead counsel for the DNRC in the Ciotti case (In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti; 64988-G76L, Starner; and Application for Change of Appropriation Water Right No. G15152-S76L, Pope, Cause No. ADV 92-745, First Judicial District of the State of Montana, Lewis and Clark County (1995), on appeal 278 Mont. 50, 923 P.2d 1073 (1996)), when it was before Judge McCarter on a petition for judicial review of an agency Final Order filed by the Flathead Tribes.

3. Although Judge McCarter's "Minute Entry" denying the Tribes' motion for a temporary restraining order (TRO) is silent as to why it was denied, at the hearing on the Tribes' motion, the DNRC's primary argument was that it was inappropriate to bring a motion for a TRO and preliminary injunction in the same case pending before the Court on a petition for judicial review of an agency Final Order.

ATTACHMENT D

4. The Tribes' motion was made May 4, 1993, and the hearing on the TRO was denied after hearing on May 5, 1993. The DNRC made arguments at the hearing but no brief was prepared because of the press of time.

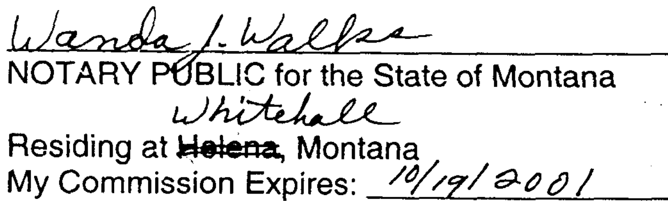
5. The Tribes did not thereafter file a new and separate action in district court for a TRO and preliminary injunction, and also did not appeal the denial of the TRO when the Ciotti case went to the Supreme Court.

DONE AND DATED THIS 6th DAY OF June 2001.

DONALD D. MACINTYRE

Subscribed and sworn to me this 6th day of June, 2001__, by the above-named Donald D. MacIntyre known by me to be the person named above.

NOTARY SEAL



NOTARY PUBLIC for the State of Montana
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My Commission Expires: 10/19/2001

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MONTANA FIRST JUDICIAL DISTRICT COURT LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, v. MONTANA DEPARTMENT OF NATURAL RESOURCES, and UDELL SHARP, Defendants.	No. CDV-25-2001-309 **PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS**

COME NOW, Montana Environmental Information Center (MEIC) and Dan Edens (EDENS), and hereby respectfully file their brief in response to the Montana Department of Natural Resources' (DNRC) and Udell Sharp's motions to dismiss.

I. INTRODUCTION

On May 16, 2001, MEIC and Dan Edens filed a Petition for Judicial Review of a Final Agency Decision and Complaint and Demand for Declaratory and Injunctive Relief. On June 1, 2001, the Plaintiffs filed an Amended Petition for Judicial Review of a Final Agency Decision and Complaint and Demand for

Declaratory and Injunctive Relief. By the Petition and Complaint, the Plaintiffs brought three causes of action, alleging violations of the Montana Water Use Act (MWA), the Montana Environmental Policy Act (MEPA), and the Montana Administrative Procedure Act (MAPA). The gravamen of the Petition for Judicial Review is that the DNRC failed to adequately characterize the aquifer and analyze the effects of Mr. Sharp's well on the surface water, Tenmile Creek, prior to issuing a permit to Udell Sharp to withdraw groundwater. Dan Edens has surface water rights to Tenmile Creek, and Mr. Sharp's groundwater well is only situated approximately 75 feet (75') from Tenmile Creek. Essentially, DNRC granted Mr. Sharp the groundwater permit even though the pump tests he conducted were not in compliance with the terms established by the DNRC, and the permit was based on incomplete and inaccurate information. Thus, both the procedure and facts relied on in issuing the permit were flawed.

The thrust of the Complaint and Demand for Declaratory and Injunctive Relief is that the DNRC's analysis was fundamentally flawed in the first instance, because the Environmental Assessment (EA) from which all decisions flowed was based upon insufficient and inaccurate information. Again, this argument questions both the procedure and substance of the permit.

Because the EA was incomplete, the DNRC's decision was based on the incomplete and faulty information. Therefore, these two actions can and should remain together because they are integrally intertwined and based upon much of the same information. Moreover, separating the two causes of action could result in the cases proceeding down two different tracks with inapposite outcomes in each instance. In the interests both justice and judicial economy, the Petitioner/Plaintiffs respectfully submit that these two actions, the Petition

for Judicial Review and the Complaint and Demand for Declaratory and Injunctive relief, should remain intact as filed.

Finally, there is no definitive case law that prohibits combining a petition for judicial review with a complaint and demand for declaratory and injunctive relief under the same caption. There are numerous cases wherein petitions for judicial review of an agency decision and a complaint and demand for declaratory and/or injunctive relief have both been brought under the same caption. *See, eg.,Teel Irrigation District v. Water Resources Dept.* 919 P.2d 1172, 1176-77 (Oregon 1996); *see also Jackson Hole Conservation Alliance v. Babbitt*, 96 F.Supp.2d 1288, 1291 (D.Wyo. 2000). As argued above, in this instance, it makes far more sense to combine the two actions to ensure that the Court is cognizant of all relevant information, and that the outcomes of the actions are not in conflict.

II. ARGUMENT

The DNRC sent Plaintiffs a brief supporting its motion to dismiss. Udell Sharp did not file an original brief, but incorporated and adopted the DNRC's brief. In its brief supporting its motion to dismiss, the DNRC argues that MEIC and Mr. Edens have improperly combined a petition for judicial review with a complaint for declaratory and injunctive relief. For the following reasons, their motion to dismiss must fail.

A. In the Interests of Justice and Judicial Economy, the Petition for Judicial Review and Complaint and Demand for Declaratory and Injunctive Relief Should Remain Together Under the Same Caption

The facts supporting all of the claims in this case were initially premised on the findings of the EA. However, as discussed above, the initial EA and the

subsequent EA that was performed in response to letters from Plaintiffs were incomplete and based on inaccurate information. Because the facts supporting all of the claims in the Petition and Complaint are so interwoven, this Court should hear all of the claims so that it will be informed as to all of the relevant information. Further, the interests of justice and judicial economy will be better served by combining the actions. Keeping the actions under the same caption will ensure that the outcomes are in concert, which will in turn prevent unnecessary future claims. Further, there is no law that prevents combining the actions.

To support their motions to dismiss, Defendants cite to an unpublished Louisiana state court opinion that is neither precedential nor persuasive. *See* DNRC's Brief in Support of Motion to Dismiss, p. 5 (citing to *Bally's Louisiana, Inc. v. Louisiana Gaming Control Board*, 2001 WL 80182 (LA.App. 2001). In the first instance, that opinion was based on Louisiana law. Secondly, the circumstances of that case were starkly different from the facts presently before this Court.

DNRC also cited to a Montana case that did not, at any level of the proceedings, discuss the propriety of combining a petition for judicial review with a complaint and demand for declaratory and injunctive relief. *See* DNRC Brief in Support of Motion to Dismiss, pp. 5-6 and Attachments (*citing in the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti*) (hereinafter *Ciotti*).There is nothing telling in either the documents attached to DNRC's brief or in the reported case. DNRC has attached the affidavit of Donald D. MacIntyre, Chief Counsel for DNRC, in an effort to persuade the Court that under *Ciotti* combining a petition for judicial review with a

complaint and demand for declaratory and injunctive relief is improper. *See* MacIntyre Aff., Attachment D to DNRC Brief in Support of Motion to Dismiss. However, Mr. MacIntyre's affidavit does not evince any evidence that the Court denied the injunction in the *Ciotti* case based on an improper joinder of petition and request for injunctive relief. *See id.* The only proposition that Mr. MacIntyre's affidavit conclusively demonstrates is that the Court was "silent as to why it [the TRO] was denied . . . ." *See id.* Mr. MacIntyre openly admits that the Court never discussed its reasons for denying the TRO. Moreover, the issue of combining a petition for judicial review with a complaint and request for injunctive relief was not addressed at the appellate level by the Montana Supreme Court. The *Ciotti* case was decided solely on jurisdictional grounds, and is strikingly different from the case now before the Court.

B. Plaintiff MEIC Has Standing to Bring the MEPA Claim Even if it Does Not Have Standing to Bring the Montana Water Act Claim, and Petitioner/Plaintiff Dan Edens has Standing to Bring Both Claims

Here, the issue is not jurisdictional. There is no question that the Court has jurisdiction to hear the petition for judicial review. Furthermore, there is no question that the Court has the power to hear the MEPA and MAPA claims. The real issue, then, becomes this: are the issues in this case so inextricably linked that they should be heard, if not at the same time, then at least by the same judge under the same caption? In this case, the answer is unquestionably "yes." The EA was incomplete, and consequently, the Final Order and Permit were premised on the faulty EA.

DNRC argues that the Court would have difficulty separating out the issues stating that: "[t]his Court will have a difficult time separating its review

of the administrative Final Order on the record when presented with new and additional evidence outside the existing certified administrative record attacking the adequacy and sufficiently of the EA" *See* DNRC Brief Supporting Motion to Dismiss, p. 7. However, it is precisely because the EA is itself faulty, and because the agency based its decision in part on the EA, that it is essential for the Court to look at the additional evidence attacking the sufficiency of the EA. Further, Plaintiffs have complete faith in this Court's ability to separate out the issues.

C. <u>The APA Provides that Under Circumstances Such as this, Additional Evidence May be Presented</u>

There is no question that, in instances such as this, the Court may properly be presented with additional evidence. Section 2-4-703, MCA, provides the Court with the discretion to consider additional evidence if application is made prior to any hearing, the additional evidence is material, and there were good reasons for not presenting such evidence in proceedings before the agency. Additionally, this Court has ample authority to consider additional evidence where irregularities in procedure that are not reflected in the administrative record have occurred. *See* § 2-4-704(1), MCA. That section of the MAPA provides that the Court may hear oral argument and receive written briefs in instances where the procedure is flawed. *See* § 2-4-704(1), MCA. The case now before the Court is just such a case.

Here, Plaintiffs have alleged that the MEPA analysis was flawed which in turn led to a flawed decision by the agency. As this Court knows, MEPA is a procedural statute. Plaintiffs have further alleged that Defendant Udell Sharp did not exercise the interim permit, and that other procedural errors occurred

in gathering information on which the Final Order was and Permit were based. Such allegations focus on procedural irregularities. Therefore, § 2-4-704(1) provides the applicable standard of review and allows additional evidence to be presented, as does § 2-4-703. Moreover, there is additional evidence that was not presented at the administrative hearing, because such evidence was not available at the time of the hearing. In particular, the Independent Record newspaper article submitted as an exhibit to the Petition and Complaint, and which the Defendants complain about in their brief, was not published until after the DNRC's final order and the permit were issued.

D. In the Event the Court Decides to Separate out the Issues, It Should Hear the MEPA and APA Claims Prior to Hearing the Petition for Judicial Review

Because the DNRC's Decision was based in part on the information derived through the MEPA process, and the MEPA process was flawed, the Court should first look at the MEPA issues raised by the Plaintiffs. For only if the EA was grounded in proper procedure and facts can the decisions flowing from the EA be procedurally and substantively valid.

In the instant case, the initial EA was flawed. Plaintiffs wrote to DNRC On July 31, 2000 expressing their concerns and pointing out some of the inadequacies of the EA. *See* Ex. 1 to Petition and Complaint. In response, the DNRC issued another EA on September 15, 2000, which is also deficient in its overall analyses.

Additionally, the Final Order is based upon the Proposal for Decision which was issued on July 11, 2000, approximately two months before the new EA was prepared. Therefore, the old EA formed one of the fundamental bases

for the final decision. Moreover, even if the Final Order had been based on the September 15, 2000 EA, it would still have been premised on incomplete and inaccurate information.

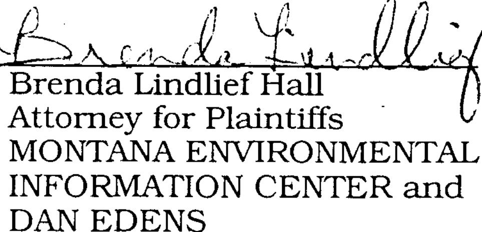
CONCLUSION

In sum, MEIC and Mr. Edens have full faith in the Court's ability to separate out the issues and rule on them accordingly. While the judicial review of the DNRC's decision should be made based upon the record that was before the agency when it made its decision, MAPA grants the Court broad discretion to view compelling new information. Moreover, where, as here, the procedures forming the bases for the decision are incomplete and flawed, the Court must address the issues that laid the foundation for the DNRC's decision.

WHEREFORE, Petitioner and Plaintiffs respectfully request that the DNRC's and Udell Sharp's Motions to Dismiss be denied, and that the Court leave the instant case intact under the same caption.

RESPECTFULLY SUBMITTED, this 9th day of July, 2001.

REYNOLDS, MOTL & SHERWOOD



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This is to certify that a true and correct copy of the foregoing was mailed, first class, this 4th day of July, 2001, to:

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Attorneys for Respondent DNRC

MONTANA FIRST JUDICIAL DISTRICT LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.	No. CDV–25-2001-309 DNRC Reply Brief on Motion to Dismiss

The DNRC Department of Natural Resources and Conservation (DNRC) files this brief in reply to the response brief filed in this matter by Plaintiff Montana Environmental Information Center (MEIC) and Dan Edens.

Judicial Economy Requires Exhaustion of Administrative Remedies

The Plaintiffs in their response brief discuss several times their willingness to trust this Court to combine its original and appellate functions in the name of judicial economy, but they avoid altogether any discussion of the fact that MEIC has never participated as a party in the administrative process, does not have standing, and did not exhaust its administrative remedies. Exhaustion of

administrative remedies is the embodiment of judicial economy. The Plaintiffs do not address in any way the issue of although MEIC never participated in the available administrative process, MEIC is here *now* to argue all the ways the DNRC allegedly violated the Water Use Act and the Administrative Procedure Act. Where was MEIC when all of these alleged violations were taking place? MEIC did not bring these matters to the attention of the DNRC at a time and in a way whereby the DNRC could have had the opportunity to do anything about it, i.e., through the cornerstone of administrative law – the exhausting of administrative remedies. Mont. Code Ann. § 2-4-702(a)(1) provides for standing to bring an appeal of an administrative contested case as follows:

> (1) (a) A person who has exhausted all administrative remedies available within the agency *and* who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter....

(emphasis added).

Three principles underlie the above section: (1) *that limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing*; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) *limited judicial review* is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence. Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 M 341, 553 P2d 980 (1976).

It is clear in this case that MEIC is attempting to ignore the clear requirements of administrative law. If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498 (1982); State ex rel. Jones v. Giles, 168 M 130, 541 P2d 355 (1975). In the present case since MEIC did not object and become a party, did not participate at the hearing, did not produce any evidence, and did not file any exceptions to the proposal for decision as provided by law, MEIC lacks standing to appeal and failed to exhaust its administrative remedies. Dismissal of the complaint, based on failure to follow the proper procedure for judicial review, was upheld in Cottonwood Hills, Inc. v. State, 238 M 404, 777 P2d 1301, (1989), where following an adverse decision by the Division of Workers' Compensation, the employer filed a complaint in District Court alleging bad faith and seeking damages. The proper procedure was to file a petition in District Court seeking review of the Board of Labor Appeals' decision. Judicial review has even been limited by the Montana Supreme Court to situations where there has to have been a *right* to a contested case hearing, even though a hearing had been held and there was a record to review. Nye v. Dept. of Livestock, 196 Mont. 222, 639 P2d 498(1982). See also In re Selon v. Bd. of Personnel Appeals, 194 Mont. 73, 634 P2d 646 (1981)(judicial review may be had only of a final decision in a contested case). In B.G.M. Enterprises v. State, 673 P2d 1205 (Mont. 1983) the plaintiff filed a complaint in district court for judicial review of an agency's determination. The district court dismissed the

case. On appeal, the Supreme Court held that only a party who has exhausted all administrative remedies is entitled to judicial review if aggrieved in a contested case. A contested case is a determination of legal rights after an opportunity for hearing, but because there was no hearing in that case, dismissal was proper. Thus, in the present case statutory law and case makes clear the petition for judicial review on behalf of MEIC must be dismissed. Montana's requirements for objecting and raising matters at the administrative level are the same as those of many other jurisdictions. See Wells v. Portland Yacht Club, 2001 ME 20, 771 A.2d 371 (Maine 2001)(a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal); Reifschneider v. State, 17 P.3d 907 (Kansas 2001)(a party appealing an administrative decision cannot raise an issue to the district court which has not been raised at the administrative level); K.J. Pennsylvania Dept. of Public Welfare, 767 A.2d 609 (Pa. 2001)(when party fails to raise issue in agency proceeding, issue is waived and cannot be considered for first time in a judicial appeal); Department of Health and Mental Hygiene v. Campbell, 364 Md. 108, 771 A.2d 1051, 2001 WL 488073 (2001)(a court is restricted to the record made before the administrative agency and may not pass upon issues that are presented to it for the first time on judicial review and are not encompassed in the final decision of the administrative agency).

MEIC does not have standing to bring a petition for judicial review, and its petition should be dismissed. So be it that the petition for judicial review proceeds with Edens. That is as it should be, the appellate review of an

administrative decision by this Court confined to the record and brought by a party who appeared at the hearing.

Combining Judicial Review and Declaratory Relief is Not Proper

MEIC and Edens have both improperly combined an action for declaratory relief, an original district court action, with a petition for judicial review, an appellate function of the district court on an essentially closed record. The Plaintiffs are trying to bootstrap together two separate cases and bring them together before this Court. Many courts have ruled adversely on this practice – the Louisiana decision panned in the response brief was simply the most recent.[1]

In Public Relations Board v. Stohr, 279 N.W.2d 286 (Iowa 1979) the court ruled:

> [The] district court, *reviewing agency action*, exercises *only* ***appellate*** *jurisdiction.* Iowa Public Service Co. v. Iowa State Commerce Commission, 263 N.W.2d 766, 768-69 (Iowa 1978). When resolution of a controversy has been delegated to an administrative agency, district court has *no Original authority to declare the rights of parties or the applicability of any statute* or rule. See Bonfield, Supra, at 806 & n.271. Its power to decide such issues is derived from and is dependent upon its authority to review agency action.

(emphasis added).

In Fort Dodge Security Police, Inc. v. Iowa Department of Revenue, 414 N.W. 2d 666 (Iowa 1987), the court ruled:

[1] Most of the discussion in a case cited by the Plaintiffs, Teel Irrigation District v. Water Resources Dept., 919 P.2d 1172 (Oregon 1996) concerns a very confusing set of facts in regard to the issue of whether letters constitute final orders, and was pursuant to a statute distinguishable from Montana's. The other cited case, Jackson Hole Conservation Alliance v. Babbitt, 96 F.Supp,2d 1288, 1291 (D.Wyo. 2000), is inapposite. It involved the appeal of an agency decision to build an entrance station to a national park, and an injunction was denied. That federal case and its legal circumstances do not compare to the case before this Court and the actions of the parties.

> ... petitioners incorrectly assert a right to judicial review of "other agency action" by bringing together in one action a judicial review proceeding and an original action or claim. *Judicial review proceedings of contested cases are fundamentally different from original actions.* Black, 362 N.W.2d at 462. In judicial review proceedings the district court exercises only *appellate* jurisdiction and has *no original* authority to declare the rights of the parties or the applicability of any statute or rule. Public Employment Relations Board v. Stohr, 279 N.W.2d 286, 290 (Iowa 1979). See Young Plumbing and Heating Co. v. Iowa Natural Resources Board, 276 N.W.2d 377, 381 (Iowa 1979). In Keeler v. Iowa State Board of Public Instruction, 331 N.W.2d 110, 111 (Iowa 1983), the court refused to permit petitioners in judicial review proceedings to include claims or causes of action that were *not appellate* in nature but instead fell within the *original jurisdiction* of the district court. See Black, 362 N.W.2d at 463; Iowans for Tax Relief v. Campaign Finance Disclosure Commission, 331 N.W.2d 862 at 863 (Iowa 1983).

(emphasis added).

2 Am. Jur. 2d Administrative Law § 559 states:

> A court has the power to review an administrative action as provided by law and in judicial review proceedings, and a district court exercises only appellate jurisdiction and has *no original authority* to declare the rights of the parties or the applicability of any statute or rule. The right to appeal an administrative agency's decision is purely statutory, and an appeal taken without statutory authority must be dismissed for want of jurisdiction. In addition, strict compliance with statutes creating the right to appeal from administrative agency decisions is required. Before the jurisdiction of a court may be invoked for review of an administrative action, a plaintiff must comply with all statutorily provided procedures, not merely the requirement that a petition for review be timely filed.

(emphasis added).

2 Am. Jur. Declaratory Judgments § 90 states:

> The courts are loath to interfere prematurely with administrative proceedings and they *will not, as a rule, assume jurisdiction of declaratory judgment proceedings until administrative remedies have been exhausted,* except where the administrative remedy is not adequate, as for example where one is so immediately injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process. Where there is no statutory provision for reviewing the action of an administrative board,

> declaratory relief is available for this purpose, *but if an appeal from the action of an administrative body is provided by statute, remedy by declaratory judgment will be denied.*

(emphasis added).

In the instance case there is an appeal process for reviewing administrative decisions of the DNRC by those who exhausted their administrative remedies, and the improperly combined complaint for injunctive and declaratory relief should be dismissed. Important administrative law principles are involved here that that cannot be overcome by parties merely saying *they* have "full faith" or "complete faith" in this Court to handle a combined proceeding.

MEIC and Edens ignore administrative law and the exhaustion requirement by arguing that it is for the sake of judicial economy that these two causes of action remain together. They argue that since they can still challenge the sufficiency of the EA, they may as well be joined in this one case. They also seem to argue that since additional evidence is allowed in *some* circumstances, see Mont. Code Ann. § § 2-4-703 and 704(1), there should be no reason not to combine evidentiary hearings and the appellate and original functions of this Court. The problem with that argument is that it improperly combines two types of proceedings in this case and it sets a bad precedent for future cases where MEIC will be encouraged to again ignore the administrative process and its exhaustion requirements, choosing instead to graft itself to some objector who did participate in an administrative proceeding, and then combine an attack on an EA with a petition for judicial review. Then during the district court review of the administrative decision it will again blast the administrative decision it never

participated in, and put on new evidence through the declaratory and injunctive relief actions. These tactics make a mockery of the administrative process and its exhaustion requirements. What the Montana Supreme Court said in Vita-Rich would be rendered meaningless: *limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing.*

And contrary to the Plaintiffs' response brief, it must be pointed out that the opportunity for additional evidence at the close of an administrative hearing is very limited. Mont. Code Ann. § 2-4-703 makes clear any new evidence must again first be presented *to the administrative agency*:

> If, before the date set for hearing, application is made to the court *for leave to present additional evidence* ***and*** it is shown to the satisfaction of the court that the additional evidence *is material* ***and*** that there were good reasons for failure to present it in the proceeding before the agency, *the court may order that the additional evidence be taken* ***before the agency*** upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(emphasis added).

There has been no such request here for leave to present additional evidence *to the agency*. They want this Court to hear all the evidence. What evidence? There is mention of Independent Record newspaper articles that came out after the Final Order, but that simply begs the question of how desperate are the Plaintiffs that they want to add *Independent Record* articles as evidence, and how could any administrative record ever be closed if it had to

continually be reopened for the "evidence" of later newspaper articles? These arguments are specious.

In addition, the requirements of Mont. Code Ann. § 2-4-704(1) bear closer scrutiny in light of what the Plaintiffs are attempting. That statute provides:

> 1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of *alleged irregularities in procedure* before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(emphasis added).

What is the Plaintiff's argument for coming within the remedial power of that statute? What procedural irregularity is alleged to have occurred that is not apparent in the record? It turns out that the argument is only that, "As this Court knows, MEPA is a procedural statute[2]," and so somehow disagreeing with the content of the EA makes it a "procedural irregularity." As an aside, the Plaintiffs description of MEPA as procedural doe not square with their earlier description of the EA in this case as the document "from which all decisions flowed."[3]

MEIC and Edens should not be allowed to improperly combine declaratory and injunctive actions with a petition for judicial review, and they should be dismissed.

Conclusion

THEREFORE, for the foregoing reasons, the DNRC prays that MEIC's "Amended Complaint and Petition for Judicial Review" be dismissed on all counts, and that Edens' "Amended Complaint" asking for declaratory and

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[2] Plaintiff's Brief in Response to Motions to Dismiss at 6.
[3] Id. at 2.

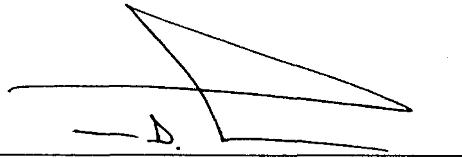
injunctive relief be dismissed as well. *The DNRC's position is that this petition for judicial review should go forward with Edens alone, and then only on the issue of adverse effect to surface water.*

This Court should dismiss the MEIC petition for judicial review for lack of jurisdiction since MEIC did not object in the administrative process and clearly lacks standing to appeal. MEIC's failure to object, lack of standing, and failure to exhaust its administrative remedies conclusively demonstrates that it has failed to state a claim upon which relief can be granted. The Montana Administrative Procedure Act provides for limited new evidence during the judicial review of an agency's final decision, if at all, see Mont. Code Ann.§ 2-4-703 (*before the agency*) and 704, and the Plaintiffs should not be allowed to use their request for declaratory and injunctive relief as a way to circumvent those statutory restrictions. This Court should not encourage individuals and organizations to ignore administrative proceedings and the Montana Administrative Procedure Act in its entirety, substituting in their place some sort of ill-defined district court review that confuses this Court's appellate and original jurisdiction functions. Otherwise, rather than actively participating and objecting to water use permit applications, individuals and organizations will feel encouraged to lay back and not object, not be parties, not participate in administrative proceedings, not create records, and not raise issues for the first time below. Clearly, administrative law and this Court's valuable time demand more. Judicial economy requires exhaustion of administrative remedies. This Court should not allow parties to ignore the administrative process and dump in its lap for the first

time all of the issues they should have raised as parties in the administrative proceeding. As the Montana Supreme Court ruled in Vita-Rich Dairy, Inc. v. Dept. of Business Regulation, 170 M 341, 553 P2d 980 (1976), *limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing.*

MEIC and Edens should not be allowed to improperly combine actions, and their complaint for declaratory and injunctive relief should be dismissed from the petition for judicial review.

DONE AND DATED THIS 18th DAY OF JULY 2001.



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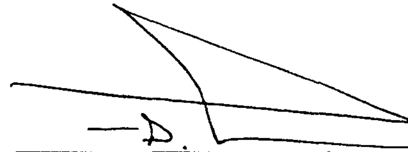

TIM D. HALL

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MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

* * * * * * * * * * * * * * * * * *	
MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs,	**Cause No. CDV-2001-309**
vs.	
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.	**MEMORANDUM AND ORDER**
* * * * * * * * * * * * * * * * * *	

Before the Court are:

1. The motion of Defendants Department of Natural Resources and Conservation (DNRC) and Udell Sharp to dismiss the petition of Plaintiff Montana Environmental Information Center (MEIC) for judicial review;

2. Defendants' motion to dismiss Plaintiffs' complaint and demand for declaratory and injunctive relief; and

3. Sharp's motion to limit the scope of the petition

of Plaintiff Dan Edens for judicial review.

The motions have been submitted on briefs and are ready for decision.

I. MEIC's PETITION FOR JUDICIAL REVIEW

This action arises out of DNRC's decision to grant Sharp a water use permit for the withdrawal of groundwater for the irrigation of hay land in the north Helena Valley. DNRC's decision followed a contested-case hearing. The final order was entered April 13, 2001. MEIC was not a party to the administrative proceeding.

DNRC and Sharp argue that because MEIC was not a party to the administrative proceeding, it did not exhaust its administrative remedies and cannot be aggrieved by DNRC's final decision to issue the water use permit. They contend, therefore, that MEIC is not entitled to judicial review.

The Montana Administrative Procedure Act (MAPA) provides:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.

Section 2-4-702(1)(a), MCA.

The Montana Water Use Act provides the opportunity for certain persons to object to water use permit applications. Section 85-2-308, MCA, states in relevant part:

> (1)(a) An objection to an application for a permit must be filed by the date specified by the

department under 85-2-307(2).

. . . .

> (3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.
>
> . . . .
>
> (5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.
>
> (6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under subsection (1),(2), or (4).

If an administrative remedy is provided by statute, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review. **Barnicoat v. Comm'r of Dep't of Labor and Indus.**, 201 Mont. 221, 653 P.2d 498 (1982).

Here, an administrative remedy has been provided by statute but MEIC did not participate in that process. Moreover, MEIC has not argued against dismissal of this claim in its brief. Therefore, in accordance with Section 2-4-702(1)(a), MCA, MEIC is precluded from bringing a petition for judicial review of DNRC's decision to issue the permit.

II. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants claim that MEIC and Edens have improperly combined an action for declaratory and injunctive relief with a petition for judicial review.

MAPA requires that judicial review be limited to the administrative record. Section 2-4-704, MCA. Only upon application to and leave from the court may a party present additional evidence upon judicial review. Section 2-4-703, MCA. In order to grant injunctive relief, a hearing must be held. Section 27-19-301, MCA. If the court were to hold such a hearing, it is probable that evidence not contained in the administrative record would be submitted.

The Montana Supreme Court has not faced this issue. DNRC cites a minute entry dated May 5, 1993, in which Montana First Judicial District Judge McCarter denied the motion of the Flathead Tribes for a temporary restraining order and preliminary injunction. The minute entry, however, does not state any reasons for Judge McCarter's decision.

DNRC also refers to other courts which have distinguished between the appellate function of a court in a petition for judicial review compared to the original jurisdiction of a court when injunctive relief is sought. DNRC cites **Deffenbaugh Industries, Inc. v. Potts**, 802 S.W.2d 520, 1990 Mo. App. LEXIS 964. There, a municipality denied an application for a special use permit to operate a landfill.

Appellant filed a petition for judicial review along with two separate counts for declaratory judgment. The appeals court held that in a statutory proceeding for judicial review of a final administrative decision, pleadings for declaratory judgment and injunction are anomalous. The court dismissed those pleadings.

Here, MEIC and Edens are asking the Court to commingle its appellate and original jurisdiction functions. Those two actions should remain separate. Therefore, Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief should be granted.

III. SHARP'S MOTION TO LIMIT SCOPE OF JUDICIAL REVIEW

Sharp has moved the Court to dismiss those parts of Eden's petition for judicial review that pertain to alleged impacts on anything other than Eden's surface water right. That issue should not be addressed on a motion to dismiss. Rather, it more appropriately should be addressed in the petition for judicial review.

For the foregoing reasons,

IT IS ORDERED:

1. Defendants' motion to dismiss MEIC's petition for judicial review **IS GRANTED**.

2. Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief **IS GRANTED** without prejudice.

3. The following schedule **SHALL CONTROL** Edens' petition for judicial review: (a) Edens shall file his opening brief on or before September 28, 2001; (b) Defendants shall file their answer briefs on or before October 19, 2001; (c) Edens shall file his reply brief on or before October 30, 2001; and (d) Oral argument will be scheduled at the request of any party.

DATED this 5th day of September, 2001.

Thomas C. Honzel
District Court Judge

pc: Brenda Lindlief Hall
Tim D. Hall/Fred Robinson
Steve Wade/Jeff Jaraczeski

MEIC.m&o

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MONTANA ENVIRONMENTAL INFORMATION CENTER, and DAN EDENS, Plaintiffs, vs. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and UDELL SHARP, Defendants.

Cause No. CDV-2001-309

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2003 ML 889*; *2003 Mont. Dist. LEXIS 3326

March 28, 2003, Decided

JUDGES: [**1] Thomas C. Honzel, District Court Judge.

OPINION BY: Thomas C. Honzel

OPINION

MEMORANDUM AND ORDER

[*1] Before the Court are:

[*2] 1) the petition of Dan Edens for judicial review of the final order of the Department of Natural Resources and Conservation (DNRC) granting Defendant Udell Sharp a beneficial water use permit;

[*3] 2) DNRC's motion to strike; and

[*4] 3) the motion of Edens and the Montana Environmental Information Center (MEIC) to reconsider the Court's Order entered September 5, 2001.

[*5] The matters have been submitted on briefs and are ready for decision.

BACKGROUND

[*6] On March 14, 1997, Sharp applied for a groundwater permit for sprinkler irrigation of 39 acres he owns in the Helena valley. An environmental assessment (EA) was done by DNRC on August 19, 1997.

[*7] Edens and nine others filed objections to the application. Sharp's well is located close to Ten Mile Creek. Edens has two surface water rights from Ten Mile Creek, downstream from Sharp's well.

[*8] A contested hearing was held March 5, 1999; however, the hearing officer did not issue a proposal for decision at that time. Rather, on July 6, 1999, DNRC issued [**2] an interim permit to Sharp which allowed him to appropriate water for irrigating the acreage. The interim permit was good until September 30, 1999. It required Sharp to perform a 24-hour aquifer test. The test was performed on September 12, 1999. An additional hearing was held February 16, 2000, at which Edens had the opportunity to cross-examine Sharp's expert and to present evidence on the results of the pump test.

[*9] On July 10, 2000, the hearing officer issued her proposal for decision in which she concluded that Sharp had met all the criteria for the issuance of a beneficial water use permit and that Sharp should be issued a permit subject to the certain conditions.

[*10] MEIC was not a party to the administrative proceeding. However, on July 31, 2000, Jim Jensen, MEIC's executive director, wrote Jack Stults, the administrator of DNRC's water resources division, complaining about the adequacy of the EA. On August 9, 2000, Stults responded to Jensen's letter. In his response, he stated that the Department was revisiting the environmental assessments on pending applications and that the Sharp application would be reviewed using the new guidelines. The second EA on [**3] the Sharp application was done September 15, 2000. On April 13, 2001, Stults issued the final order which granted Sharp a beneficial water use permit subject to certain conditions. This action followed.

[*11] By Memorandum and Order entered September 5, 2001, the Court granted the Defendants' motion to dismiss MEIC's petition for judicial review. The Court also granted without prejudice Defendants' motion to dismiss the Plaintiffs' complaint for declaratory and injunctive relief.

Motion to Strike

[*12] DNRC has moved to strike Exhibit 1 from Plaintiffs' opening brief and references in the brief to articles from the Helena Independent Record on the grounds that neither the exhibit nor the articles are a part of the administrative record. *Section 2-4-704 (1), MCA*, provides that judicial review of a contested case shall be confined to the record. In a case where the appellant had attached materials to his brief, the supreme court stated: "It is axiomatic that this Court will not consider evidence not contained in the record on appeal." *Johnson v. Killingsworth, 271 Mont. 1, 3, 894 P.2 272, 273 (1995).*

See also *Frank v. Harding, 1998 MT 215, 290 Mont. 448, 965 P.2d 254*. [**4]

[*13] Edens claims the material is offered to show DNRC did not consider all the relevant information in making its decision. He cites *Meeks v. DNRC, 1998 MT 36, 292 Mont. 317, 971 P.2d 1223*, as a case where a district court received and considered extra record material in a judicial review proceeding. Meeks, however, is distinguishable. In Meeks, the district court had allowed Meeks to depose the three DNRC employees who had made the underlying decision for DNRC in order to clarifying how they had arrived at their decision. Those employees had not testified in the administrative proceeding and, therefore, Meeks had not had the opportunity to cross-examine them.

[*14] Edens also cites *Skyline Sportsmen's Ass'n v. Board of Land Comm'rs, 286 Mont. 108, 951 P.2d 29 (1997)*, as authority for the Court to consider extra record facts. That case involved the review of an informal administrative decision, not judicial review of a final decision in a contested case, and it is not applicable here.

[*15] Edens was represented by counsel at the administrative hearing. He certainly could have offered the materials at the hearing but did not do so, and [**5] it is not appropriate for him to submit the materials as part of his argument for judicial review. Therefore, the Court concludes that the State's motion to strike should be granted.

Judicial Review

STANDARD

[*16] A district court review of an administrative agency's order is governed by the Montana Administrative Procedure Act. The standard of review for an agency decision is set forth in *Section 2-4-704 (2), MCA*, which provides:

The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

> (a) the administrative findings, inferences, conclusions, or decisions are:
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> (i) in violation of constitutional or statutory provisions;
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> (ii) in excess of the statutory authority of the agency;
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> (iii) made upon unlawful procedure;
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> (iv) affected by other error of law;
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> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
>
> (vi) arbitrary or capricious [**6] or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (b) findings of fact, upon issues essential to the decision, were not made although requested.

[*17] The Montana Supreme Court has adopted a three-part test to determine if a finding is clearly erroneous. *Weitz v. Montana Dept of Natural Res. & Conservation, 284 Mont. 130, 943 P.2d 990 (1997).* First, the Court is to review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, the Court is to determine whether the agency misapprehended the effect of the evidence. Third, even if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court can still determine that a finding is clearly erroneous "when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *Weitz, at 133-34, 943 P.2d at 992*. Conclusions of law, on the other hand, are reviewed to determine if the agency's interpretation of the law is correct. *Steer, Inc. v. Dep't of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).*

[**7] DISCUSSION

[*18] *Section 85-2-311, MCA*, provides that DNRC shall issue a permit if the applicant proves by a preponderance of evidence that certain criteria are met. Among other things, the applicant must show that the water is physically available and that the water rights of a prior appropriator will not be adversely affected. The hearing examiner found that Sharp had proved by a preponderance of the evidence that the statutory criteria had been met. Edens was the only objector who filed exceptions to the hearing examiner's proposal for decision. After reviewing the record, Stults determined that the evidence supported the hearing examiner's findings that the statutory criteria had been met.

[*19] Edens contends Sharp failed to establish that the water was physically and legally available. He also argues that there were procedural flaws which require returning the case to DNRC because Sharp failed to strictly adhere to the interim permit order and because the proposal for decision was issued before the EA was completed.

[*20] Sharp was issued an interim permit that allowed him to irrigate the land during the summer of 1999. The final [**8] order stated that Sharp irrigated

the land. That is not correct as he did not irrigate. However, he was not required to irrigate.

[*21] Although Sharp did not irrigate the land in 1999, he was required to conduct a 24-hour pump test, which he did. After the results of the tests were submitted, a hearing was held at which Edens had the opportunity to cross-examine Sharp and his hydrologist and to present further evidence.

[*22] Edens argues that the testimony of Vivian Drake, his expert, and Jim Beck, a DNRC employee, provides substantial evidence that the findings and conclusions are not supported by the record. This, however, was a contested hearing and Sharp presented testimony and evidence that the water was available and that Edens' water rights would not be adversely affected if his application was granted. After considering all the evidence, the hearing examiner determined that Sharp had proved that the water was physically available and that granting him a permit would not adversely affect the water rights of prior appropriators. Her findings are supported by substantial evidence in the record.

[*23] When the hearing examiner issued her proposal for decision, [**9] the initial EA had been prepared but the second had not. The second EA was prepared before the final order was issued. It was determined that the surface water in Ten Mile Creek was not connected to the ground water Sharp was pumping. That determination is supported by the record.

[*24] For the foregoing reasons, the Court concludes that the final order should be affirmed.

Motion for Reconsideration

[*25] Plaintiffs have asked the Court to reconsider that portion of the Order entered September 5, 2001, which granted Defendants' motion to dismiss Plaintiffs' complaint for declaratory and injunctive relief. Having considered the arguments presented, the Court concludes that the motion for reconsideration should be denied.

[*26] NOW, THEREFORE, IT IS ORDERED:

[*27] 1. DNRC's motion to strike IS GRANTED.

2. The final order entered by DNRC on April 13, 2001, IS AFFIRMED.

[*28] 3. Plaintiffs' motion for reconsideration IS DENIED.

DATED this 28th day of March, 2003.

Thomas C. Honzel

District Court Judge