

2007 Mont. Dist. LEXIS 121, \*

**MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiff, vs.  
MONTANA BOARD OF OIL AND GAS CONSERVATION, Defendant, and  
FIDELITY EXPLORATION AND PRODUCTION COMPANY, Defendant-  
Intervenor.**

Cause No. DV 04-31

**TWENTY-SECOND JUDICIAL DISTRICT COURT OF MONTANA, BIG HORN  
COUNTY**

2007 Mont. Dist. LEXIS 121

February 23, 2007, Decided

**PRIOR HISTORY:** Montana Environmental Info. Center v. Mt. Board of Oil & Gas Conserv., 2005 Mont. Dist. LEXIS 1484 (2005)

**JUDGES:** [\*1] BLAIR JONES, District Judge.

**OPINION BY:** BLAIR JONES

**OPINION**

Judge: **Blair Jones**

**ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

P1. Before the Court is a *Motion for Summary Judgment* filed by Plaintiff Montana Environmental Information Center (MEIC) and cross *Motions for Summary Judgment* filed by Defendant Montana Board of Oil and Gas Conservation (MBOGC) and Defendant-Intervenor Fidelity Exploration & Production Company (Fidelity), respectively. A hearing on the motions was held on August 14, 2006 at the Stillwater County Courthouse, Columbus, Montana. David K. W. Wilson, Jr., of Reynolds, Motl and Sherwood, Helena, Montana was present representing MEIC. Assistant Attorney General, C. Edward Hayes appeared on behalf of MBOGC. Jon Metropoulos and Dana Hupp of Gough, Shanahan, Johnson and Waterman, Helena, Montana appeared on behalf of Fidelity. Upon due consideration of the briefs and argument of counsel, the available record, together with the applicable law, the Court determines that the cross *Motions for Summary Judgment* of MBOGC and Fidelity should be granted. The *Motion for Summary Judgment* filed by MEIC should be denied.

**PROCEDURAL AND FACTUAL BACKGROUND**

P2. In January 2003, in cooperation with the Bureau of Land [\*2] Management (BLM) and the Montana Department of Environmental Quality (DEQ), MBOGC prepared a programmatic statewide Final Environmental Impact Statement and Resource Management Plan

Amendment (FEIS) to analyze the potential environmental impacts of coalbed natural gas (CBNG) development in southcentral and southeastern Montana. The FEIS considered impacts created by the development of up to twenty-six thousand (26,000) new CBNG wells.

P3. On March 26, 2003, MBOGC issued its Record of Decision approving and adopting the FEIS as a programmatic planning document from which to tier future site-specific permitting decisions. (*Record of Decision dated March 23, 2003, p. 1.*) MBOGC, DEQ and BLM selected and approved Alternative E as the preferred alternative for future, site-specific regulation of coal bed natural gas (CBNG) development in Montana. (*Id.*) Alternative E was designed to provide regulatory options and flexibility to facilitate CBNG exploration and development while sustaining resources, social values, and existing land uses. *FEIS, p. 2-13.* This alternative allowed for the discharge, impoundment, reinjection or beneficial use of groundwater produced from CBNG wells. MBOGC requires [\*3] operators to submit a Plan of Development (POD) outlining development of an area where CBNG well densities are greater than one well per 640 acres. (*Record of Decision dated March 23, 2003, p. 2.*)

P4. In February of 2004, Fidelity submitted to MBOGC a POD for Fidelity's proposed Tongue River-Coal Creek project (Coal Creek POD). In this POD, Fidelity proposed to develop a CBNG project encompassing federal, state, and private lands. It included a plan for drilling and completion of 217 wells (139 federal, 16 state, and 62 fee). (*Coal Creek POD, p. 2.*) The only wells at issue in this case are the sixty-two (62) fee wells permitted by MBOGC.

P5. On February 12, 2004, MBOGC convened in Billings, Montana and held a hearing on Fidelity's application for approval of Fidelity's POD. At the hearing, testimony was presented, and statements and exhibits were received. Thereafter, MBOGC approved the POD and issued findings of fact stating that: (1) due, proper, and sufficient notice was published and given

with respect to the time, place, and purpose of the hearing and all parties were afforded opportunity to present evidence, oral and documentary; and (2) "[t]he evidence indicates that granting [\*4] the application will serve to protect correlative rights and be in the interests of conservation of oil and gas in the State of Montana." (See *MBOGC Order No-7-2004, Ex. 3 to Pl.'s Br.*) MBOGC's approval order granted Fidelity's application for approval of its Coal Creek POD, "contingent upon completion of an environmental assessment." (*Id.*)

P6. On April 27, 2004, MEIC filed its *Complaint and Application for Writ of Mandamus* in the present case. MEIC alleged that MBOGC's Order dated February 12, 2004, approving Fidelity's Coal Creek POD prior to preparing an EA or EIS violated the Montana Environmental Policy Act (MEPA) and the Montana Constitution. MEIC also sought a writ of mandamus voiding MBOGC's decision approving the Coal Creek POD. A hearing on the request for mandamus was held before this Court on June 3, 2004.

P7. On August 24, 2004, this Court issued an order granting Fidelity's motion to dismiss Count III (mandamus) and denying MEIC's mandamus request on the basis that conditional approval of the POD was not a final agency decision. (See *Order dated August 24, 2004, p. 6.*) The Court concluded that because the MBOGC decision approving the Coal Creek POD did not, in itself, authorize [\*5] surface-disturbing activity, no final agency action had occurred. Accordingly, no duty to perform MEPA review had yet arisen. (*Id. at pp. 4-5.*)

P8. In January 2005, MBOGC, BLM, and DEQ jointly completed an environmental assessment (EA) necessitated by MBOGC's conditional approval of the Coal Creek POD for the Tongue River - Coal Creek project. On February 1, 2005, based on the environmental analysis contained in the Coal Creek EA, MBOGC separately issued a Finding of No Significant Impact (FONSI) and Notice of Decision relative to the sixty-two (62) fee wells and associated infrastructure. The FONSI and Notice of Decision provided, in relevant part, the following:

Based upon a review of the Environmental Assessment prepared for the project, the mitigation proposed by BLM for approval of the proposed federal actions, compliance with the requirements for monitoring and reporting associated with MDEQ's issuance of a MPDES discharge permit, and considering the scope and effect of the MBOGC's statutory and regulatory requirements, I determine that approval of the proposed action does not constitute a major state action significantly affecting the quality of the human environment, and does [\*6] not require the preparation of an environmental impact statement. (FONSI and *Notice of Decision, dated February 1, 2005, p. 2.*)

P9. Earlier, in 2003, the Northern Plains Resource

Council sued BLM challenging the FEIS in federal court on the basis that it violated the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.* Federal Magistrate Richard Anderson invalidated the adoption of the FEIS by BLM for federal purposes because the FEIS failed to adequately address a phased development alternative. (See *Anderson Order dated April 5, 2005, p. 3.*) Under Judge Anderson's analysis on the merits, however, the EIS generally passed muster under NEPA, with the exception of the failure to consider a phased development alternative.

P10. On April 1, 2005, MEIC moved for leave to file a *First Amended Complaint* in this cause premised upon Judge Anderson's decision. Leave to amend was subsequently granted by Order of this Court dated November 16, 2005.

#### STANDARD OF REVIEW

P11. Rule 56, M.R.Civ.P., controls the Court's consideration of a motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment [\*7] as a matter of law. See Rule 56(c), M.R.Civ.P.; *Spain-Morrow Ranch, Inc. v. West*, 264 Mont. 441, 442, 872 P.2d 330, 332 (1994); *Calder v. Anderson*, 275 Mont. 273, 911 P.2d 1157, 1159 (1996). The purpose of summary judgment is to dispose of claims for which there remains no genuine issues of material fact, which serves to eliminate the expense and burden associated with unnecessary trials. *Kane v. Miller*, 258 Mont. 182, 186, 852 P.2d 130, 133 (1993). Because summary judgment is an extreme remedy which should not be a substitute for a trial on the merits, all reasonable inferences which can be adduced from the evidence presented should be drawn in favor of the non-moving party. *Jobe v. City of Polson*, 2004 MT 183, P10, 322 Mont. 157, 94 P.3d 743, P10 (citing *Sherner v. Conoco, Inc.*, 2000 MT 50, P9, 298 Mont. 401, 995 P.2d 990, P9).

P12. The initial burden of proof rests with the party seeking summary judgment to provide the court with evidence which excludes any real doubt as to the existence of a genuine issue of material fact. *Berens v. Wilson*, 246 Mont. 269, 271, 806 P.2d 14, 16 (1990). Only after the moving party has met this burden of proof does the burden shift to the non-moving party to show that a genuine [\*8] issue of material fact exists. *Morton v. M-W-M, Inc.*, 263 Mont. 245, 249, 868 P.2d 576, 579 (1994). When raising allegations that disputed issues of fact exist, the nonmoving party has an affirmative duty to respond by affidavits or other sworn testimony containing material facts which raise genuine issues; conclusory or speculative statements will not suffice. *Koeplin v. Zortman Mining*, 267 Mont. 53, 59, 881 P.2d 1306 (1994). The opposing party's facts must be material and of a substantial nature, not fanciful,

frivolous, gauzy nor merely suspicions. *Westlake v. Osborne*, 220 Mont. 91, 94, 713 P.2d 548, 550 (1986) (citing *Silloway v. Jorgenson*, 146 Mont. 307, 310, 406 P.2d 167, 169 (1965)). Further, disputed facts are material if they involve the elements of the cause of action or defense at issue, to an extent that necessitates resolution of the issue by a trier of fact. *State Med. Oxygen v. American Med. Oxygen*, 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994).

P13. If the opposing party offers their own affidavit in an attempt to defeat summary judgment, such affidavit cannot contradict the opposing party's earlier testimony. *Stott v. Fox*, 246 Mont. 301, 309, 805 P.2d 1305, 1309-10 (1990). [\*9] Neither statements nor arguments of counsel satisfy a non-moving party's burden. *Brinkman & Lenon, Architects & Eng'rs v. P&D Land Enterprises*, 263 Mont. 238, 244, 867 P.2d 1112, 1116 (1994). In evaluating the merit of a party's opposition to a motion for summary judgment, a judge has neither a duty to anticipate material facts to the contrary nor anticipate possible proof at trial. *Tucker v. Trotter Treadmills*, 239 Mont. 233, 235, 779 P.2d 524, 525 (1989) (citing *Larry C. Iverson, Inc. v. Bouma*, 195 Mont. 351, 374, 639 P.2d 47, 59 (1981)). Should a non-moving party fail to meet the burden with an appropriate evidentiary showing, summary judgment or partial summary judgment in favor of the moving party must be granted as a matter of law. Rule 56(c), M.R.Civ.P.

### ISSUES

P14. The Court restates the issues as follows:

- 1. Whether Judge Anderson's April 5, 2005 ruling invalidates the FEIS adopted by MBOGC relative to MBOGC's MEPA review of the Coal Creek project.**
- 2. Whether MBOGC complied with MEPA requirements relative to the issuance of MBOGC's FONSI and Notice of Decision on the Coal Creek project.**
- 3. Whether MBOGC delegated unlawful authority to the administrator of MBOGC during the MEPA review and decision making [\*10] process.**
- 4. Whether MBOGC's FONSI and Notice of Decision violated the clean and healthful environment provision of the Montana Constitution.**

### DISCUSSION

P15. As an initial matter, MEIC dedicates a significant portion of its briefing urging this Court to reconsider its August 24, 2004 ruling that the conditional approval of the Coal Creek POD was not a final agency decision by MBOGC requiring MEPA review. Included in MEIC's argument in this regard is the contention that

failure to perform MEPA review prior to making a decision on the Coal Creek POD violated the public's right to participate or right to know under the Montana Constitution. In light of the fact that the Montana Supreme Court has not recognized any procedural bases for a reconsideration and, because this Court is now reviewing MBOGC's actions for compliance with MEPA, the Court declines MEIC's invitation to reconsider the August 24, 2004 ruling except to address the issue of the alleged violation of the public's constitutional right to know and participate.

P16. It is the law of this case that MEPA review was not required for conditional approval of the Coal Creek POD because such approval, conditioned upon an environmental [\*11] assessment, was not a final agency decision by MBOGC. The ruling of the Court in this regard defeats MEIC's argument relative to a violation of the public's right to participate. Because no final agency decision was made, the public's right to reasonably participate was not implicated. Moreover, the Court does not detect any attempt by MBOGC to inhibit or obstruct public input at the February 12, 2004 hearing on the Coal Creek POD. MEIC has not challenged the fact that the public participated at the hearing through testimony, statements, and exhibits that were received. (See *MBOGC Order No-7-2004, Ex. 3 to Pl.'s Br.*) Furthermore, MEIC has not challenged the accuracy of the administrative record, which reflects that "[d]ue, proper and sufficient notice was published and given of this matter, the hearing hereon, and of the time and place of said hearing, as well as the purpose of said hearing; all parties were afforded opportunity to present evidence, oral and documentary." (*Id.*) Accordingly MEIC's contention that the public's right to reasonably participate was violated when MBOGC conditionally approved the Coal Creek POD lacks merit.

- 1. Whether Judge Anderson's April 5, 2005 ruling [\*12] invalidates the FEIS adopted by MBOGC relative to MBOGC's MEPA review of the Coal Creek project.**

P17. MEIC contends that the effect of Judge Anderson's ruling invalidates the FEIS for all purposes. In that regard, MEIC argues that because the EA upon which MBOGC relies in making its FONSI relative to the Coal Creek project tiers to or relies upon the FEIS, invalidation of the FEIS invalidates the EA, thus rendering the FONSI premised thereon unsupportable. However, § 75-1-201(6)(a)(ii), MCA provides that challenges to a final agency action alleging failure to comply or inadequate compliance with a requirement under MEPA must be brought within sixty (60) days of the action that is the subject of the challenge. MEIC acknowledged at hearing on August 14, 2006 that MEIC did not initiate a challenge to the validity of the FEIS adopted by MBOGC relative to the Coal Creek project

pursuant to § 75-1-201(6)(a)(ii), MCA, within the sixty (60) day time frame. As a consequence of failing to follow the provisions of § 75-1-201(6)(a)(ii), MCA, MEIC's challenge to the validity of the FEIS, as the FEIS may impact state agency action, is time-barred. The Court concludes that for purposes of state agency [\*13] action, the FEIS, unchallenged under Montana's MEPA statutes, is valid.

P18. MEIC argues that a challenge taken pursuant to § 75-1-201(6)(a)(ii), MCA is unnecessary in light of the federal court decision. However, MEIC cites no authority which requires this Court to follow Judge Anderson's ruling to the exclusion or abrogation of Montana law that is definitive on the matter. Moreover, but for the failure to include a phased development alternative, Judge Anderson concluded that the FEIS passed muster under NEPA.

## 2. Whether MBOGC complied with MEPA requirements relative to the issuance of MBOGC's FONSI and Notice of Decision on the Coal Creek project.

P19. The standard for judicial review of an agency's action subject to MEPA is "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989). While the standard of review utilizes three terms, it breaks down into two basic parts. The first part concerns whether the agency action could be held unlawful, and the second relates to whether it could be held arbitrary or capricious. *Id.*, 238 Mont. at 459, 778 P.2d at 867. [\*14] Furthermore, because MEPA is closely modeled after NEPA, Montana courts, when called upon to interpret MEPA, find federal case law persuasive. *Ravalli County Fish and Game Ass'n v. Dep't of State Lands*, 273 Mont.371, 377, 903 P.2d 1362, 1366 (1995)(citing *Kadillak v. Anaconda Co.*, 184 Mont 127, 137, 602 P.2d 147, 153 (1979)).

### A. Whether MBOGC acted unlawfully in issuing the FONSI and Notice of Decision.

P20. To determine the lawfulness or unlawfulness of an agency decision, a Court reviews an agency's action for compliance with its own procedural rules under MEPA. *North Fork Preservation Ass'n*, 238 Mont. at 459, 778 P.2d at 867. MEPA directs that all state agencies use a "systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making that may have an impact on the human environment." See §75-1-201(1)(b)(i)(A), MCA. MBOGC falls under the definition of "state agency" found in A.R.M. 36.2.522(19). For the purpose of MEPA compliance, an agency's decision relative to projects involving the issuance of permits allowing for

CBNG development constitutes an "action." See A.R.M. 36.2.522(1).

P21. [\*15] The administrative rules promulgated by the Department of Natural Resources and Conservation (DNRC), to which MBOGC is administratively attached, requires an agency to assess the appropriate level of environmental review for each proposed action. See A.R.M. 36.2.523. To accomplish this, agencies must ascertain the significance of impacts associated with proposed actions through a review of the criteria found under A.R.M. 36.2.524.

P22. The rules provide that an agency "as an alternative to preparing an EIS, may prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be *mitigable* below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other governmental agencies." [Emphasis added.] See A.R.M. 36.2.524(4). Thus, administrative procedure allows for environmental review, consistent with MEPA but short of conducting an EIS, where impacts are insignificant or where such impacts may be mitigated to a point of insignificance. In such circumstances, under the administrative rules, an EA is all that is required.

P23. MBOGC's decision to issue a [\*16] FONSI based upon the results of the EA ostensibly eliminated the need to draft an EIS on the Coal Creek project. While MEIC does not challenge the administrative rules, it nevertheless cites to case law in support of its position that when it is determined that an agency's action *may* have a significant effect upon the environment, an EIS *must* be prepared. See *Ravalli*, *supra*. However, in *Ravalli*, the Montana Supreme Court also stated that "[a]n EIS is required only when there is a *substantial question* as to whether [the action] may have a significant effect upon the human environment." *Ravalli*, 273 Mont. at 382, 903 P.2d at 1370. [Emphasis added.] Moreover, in *Ravalli*, the Department of State Lands failed to engage in "significance of impact" analysis. Here, MBOGC did conduct such an analysis in the form of an EA of the project, which formed the basis for MBOGC's determination that the effects were either insignificant or mitigable below the level of significance. MBOGC's decision not to prepare an additional EIS is authorized pursuant to procedural rules promulgated under MEPA. See A.R.M. 36.2.524(2). Further, the role of a court is not to substitute its discretion for that of the [\*17] agency as to the choice that has been taken. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228, 100 S. Ct. 497, 500, 62 L. Ed. 2d 433 (1980) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 49 L. Ed. 2d 576, 96 S. Ct. 2718, 2730 (1976)).

B. *Whether MBOGC's decision to issue a FONSI was either arbitrary or capricious.*

P24. In reviewing an agency's decision not to prepare an EIS under NEPA, federal courts employ an arbitrary and capricious standard that requires a determination of whether the agency has taken a "hard look" at the consequences of its actions, "based on a consideration of the relevant factors," and provided a "convincing statement of reasons to explain why a project's impacts are insignificant." *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006) (citing *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001)). "[I]n making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must 'be [\*18] searching and careful,' but 'the ultimate standard of review is a narrow one.'" *North Fork Preservation Ass'n*, 238 Mont. 451, 465, 778 P.2d 862, 871.

P25. MEIC argues that the EA was "legally inadequate once prepared." (MEIC's *Brief in Support of Motion for Summary Judgment*, p. 12.) Specifically, MEIC claims MBOGC, through the EA, failed to take the requisite "hard look" by not adequately analyzing the impacts from the Coal Creek project and by neglecting to analyze "relevant alternatives." (Id.) MEIC asserts that the impacts to the environment are sufficiently significant that the preparation of an EIS is required. However, following a careful review of the relevant documents within the context of the parties' extensive arguments, the Court concludes that MEIC falls short of demonstrating that MBOGC was either unaware of these impacts or failed to consider them in MBOGC's environmental review of the Coal Creek project. Rather, MEIC simply recites elements from the project which will have an impact on the environment as evidence that these impacts will be significant, without sufficient analysis of mitigation measures.

P26. The critical factor, therefore, is MBOGC's determination of "significance" [\*19] of the proposed action. Federal courts have extended considerable deference to an agency's expertise in determining the level of significance associated with a particular action. *See e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375-76, 109 S. Ct. 1851, 1861, 104 L. Ed. 2d 377 (1989); *see also, Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S. Ct. 2246, 2255, 76 L. Ed. 2d 437 (1983); *see also, Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1017 (9th Cir. 2006). This concept was explained as follows:

"Agencies have wide discretion in assessing scientific evidence, but they must 'take a hard look at the

issues and respond to reasonable opposing viewpoints.' *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1301 (2003). 'Because analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies.' *Id.* 'When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive. At the same time, courts [\*20] must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence.' *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)). If an agency has failed to make a reasoned decision based on an evaluation of the evidence, we may properly conclude that an agency has acted arbitrarily and capriciously. *Id. at 1301.*" *Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1160, (9th Cir. 2006).

P27. Employing this reasoning, the Court must determine whether MBOGC's decision was based upon a sound evaluation of the available evidence supporting MBOGC's decision to issue a FONSI.

P28. MEIC specifically challenges the Coal Creek EA by stating that it "fails to address potential impacts from land application disposal (LAD) activities such as effects on native rangeland species, soil failure, salinization, loss of vegetative cover, erosion potential, soluble salts leaching to groundwater, saline seeps, impacts from gypsum, and impacts to surface water." (MEIC's *Brief in Support of Motion for Summary Judgment*, p. 14.) Further, MEIC asserts that the EA [\*21] failed to adequately address any issue relative to methane migration in addition to failing to adequately address issues related to saline and sodic-impacted soils beneath LAD operations and impoundments and their related costs. (Id.) MEIC also contends that the Coal Creek EA inadequately addressed cumulative impacts or established baseline conditions, including meaningful baseline information related to disposal of CBNG wastewater, LAD operations, wastewater impoundments, road building and potential for methane migration. These alleged flaws in the Coal Creek EA are unaccompanied by reference to evidence or substantive counteranalysis which demonstrates why the EA is "inadequate" or why MBOGC's analysis is not "meaningful."

P29. Under summary judgment rules, the Court may not rely upon conclusory and speculative statements to meet a party's burden. *See Koeplin, supra*, 267 Mont. 53, 59, 881 P.2d 1306. Moreover, such lack of substantive analysis is insufficient to raise the substantial questions necessary to trigger an EIS. In sum, without sufficient evidence or analysis to the contrary, the Court should defer to the experience and expertise of MBOGC

in its determination concerning [\*22] the appropriate level and depth of analysis contained within the EA. The Court concludes that MBOGC's decision was based on a consideration of the relevant factors detailed within the EA and the POD and there is no indication of a clear error of judgment. Accordingly, MBOGC's decision to issue a FONSI was neither arbitrary nor capricious.

### **3. Whether MBOGC unlawfully delegated authority to the administrator of MBOGC during MEPA review and decision-making process.**

P30. MEIC contends that the conditional approval of the Coal Creek POD was unlawful because MBOGC Administrator Tom Richmond subsequently signed the EA rather than a member of the Board. However, § 75-1-201(7), MCA, provides: "(7) The director of the agency responsible for the determination or recommendation shall endorse in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a determination of significance be made." Further, contrary to MEIC's contention, the administrator of MBOGC is authorized under Montana law to act as an agent for MBOGC. Specifically, § 2-15-3303(3), MCA authorizes MBOGC to "hire its own personnel" and "prescribe the duties" of four professional staff positions. [\*23] Finally, MEIC cites no authority which would preclude the administrator of MBOGC from signing a FONSI, or from processing an application for permit to drill (APD). *See A.R.M. 36.22.604*. As noted above, § 75-1-201(7), MCA, implicitly authorizes the director of the responsible agency to determine that state action does not significantly affect the environment. Here, the administrator of MBOGC made just such a determination. Hence, MBOGC's delegation of duties, including the signing of the EA by Richmond, was authorized by law.

### **4. Whether MBOGC's FONSI and Notice of Decision violated MEIC's right to a clean and healthful environment under Article II, Section 3 of the Montana Constitution.**

P31. MEIC has alleged that MBOGC failed to perform MEPA analysis and that such failure violated MEIC's right to a clean and healthful environment under *Article II, Section 3 of the Montana Constitution* and MBOGC's duty under *Article IX, Section 1* to maintain and improve a clean and healthful environment. MBOGC and Fidelity argue that since MEIC failed to challenge a state statute or rule, it may not challenge the constitutionality of the agency action. MEIC counters with citation to *MEIC v. DEQ, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999)*, [\*24] arguing that this case stands for the proposition that a constitutional challenge may be brought independently of a challenge to a state rule or statute. (*See MEIC's Reply Brief in Support of Motion for Summary Judgment, p. 10-11.*) The Court

disagrees. In addressing "state action," the Supreme Court concluded that "the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at *Article II, Section 3 of the Montana Constitution*, and that any *statute or rule* which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *MEIC, 1999 MT 248, P63, 988 P.2d 1236, P63. [Emphasis added.]* Moreover, Justice Leaphart, in a concurring opinion, clarified the definition of "state action" at issue in *MEIC, supra*, as follows: "[W]e are addressing [in this case] *state action; that is, the constitutionality of a state statute.*" *MEIC, 1999 MT 248, P83, 988 P.2d 1236, P83. [Emphasis added.]*

P32. This Court agrees [\*25] with the reasoning employed by First Judicial District Judge Jeffrey Sherlock upon his consideration of a constitutional challenge by MEIC to the issuance of a permit by DEQ absent a challenge to an underlying state statute or rule. Judge Sherlock stated:

MEIC suggests that it is the province of this Court to determine whether the agency's actions violate the constitution on a permit by permit basis while ignoring statutes duly enacted by the legislature. The system they suggest would be fraught with inconsistencies with no one able to determine whether they are acting within the laws of this state without a full fledged lawsuit. Furthermore, all decisions would be made by judges in courtrooms, rather than in an open process with public comment and expert input. If Plaintiffs believe that a permit can be issued without violating the Montana Clean Air Act but still be unconstitutional, the appropriate action is to challenge the statute or its implementing regulations as unconstitutional. *MEIC vs. DEQ, cause No. BDV-2002474; See Order dated Dec. 17, 2002, p.4.* The soundness of this rationale is self-evident.

P33. It is important to emphasize that, in this cause, the linchpin of MEIC's [\*26] argument is that failure of an agency to comply with MEPA raises the issue of the constitutionality of the agency's actions. (MEIC's *Reply Brief in Support of Motion for Summary Judgment, p. 11.*) The Court finds MEIC's position puzzling because failure of an agency to follow MEPA procedure voids the agency action and the Court need not thereafter engage in a constitutional inquiry. MEIC seems to be encouraging the Court to engage in an unnecessary inquiry contrary to well-established legal principles relative to review of constitutional issues. Nevertheless, because the Court has concluded here that MBOGC did comply with MEPA relative to the Coal Creek project, and MEIC has not challenged a state statute or rule, no constitutional

infirmity has been implicated.

P34. **WHEREFORE**, for the reasons stated above,

P35. **IT IS ORDERED** as follows:

P36. 1. The *Motion for Summary Judgment* filed by Plaintiff, Montana Environmental Information Center is hereby **DENIED**.

P37. 2. The cross *Motions for Summary Judgment* filed by Defendant Montana Board of Oil and Gas

Conservation and Defendant-Intervenor Fidelity Exploration and Production Company are hereby **GRANTED**.

P38. **Let Judgment be prepared and entered** [\*27] **accordingly**.

DATED this 23rd day of February, 2007.

**BLAIR JONES, District Judge**