ORDER ON MOTION TO DISMISS AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

MEIC v. DOT
Decided June 21, 1999
Honorable Judge Sherlock
First Judicial District

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, INC., PLAN HELENA, INC.,
Plaintiffs,

v.

MONTANA DEPARTMENT OF TRANSPORTATION, MONTANA BOARD OF TRANSPORTATION COMMISSIONERS,
Defendants.

Cause No. BDV 99-248

ORDER ON MOTION TO DISMISS AND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

FACTUAL BACKGROUND

A hearing in this matter was held on May 26, 1999. David K. W. Wilson and Jack R. Tuholske represented Plaintiffs. Lyle R. Manley and Edward G. Beaudette represented Defendants (hereinafter MDOT and MTC). At issue was whether the Court should issue a temporary restraining order or preliminary injunction against the construction of the Forestvale Interchange in the Helena Valley. Also at issue was Defendants' motion to dismiss. The Court should note that Defendants are scheduled to let bids for the construction of the Forestvale Interchange on June 24, 1999.

Over the past several years, North Montana Avenue has become quite congested. Years ago, the MDOT began to look at possible solutions to the problem. Four alternatives and one no-action alternative were reviewed in a draft environmental impact statement dated September 4, 1991. All four of the proposed alternatives had new interchanges located at various

spots along the Interstate 15 corridor as it passes through the Helena Valley. One of the main purposes of an interchange was to reduce traffic pressure on Montana Avenue.

The MDOT selected the Forestvale Interchange from the four alternative interchanges presented. After a period of public review and comment, a final environmental impact statement (EIS) was prepared on March 4, 1992, and a record of decision (ROD) was prepared by the Federal Highway Administration (FHWA) on August 28, 1992. The draft EIS was received at the hearing as Exhibit A, and the ROD was received as Exhibit B.

After the final EIS and ROD were prepared, no action was taken for years. Beginning in 1996 and continuing through 1997, questions arose whether the Forestvale Interchange would reduce traffic on North Montana Avenue as was envisioned in the final EIS and the ROD prepared in 1992.

The MDOT provided technical assistance to the City of Helena and to Lewis and Clark County to address their concerns. This assistance and the questioning of the initial assumption underlying the final EIS and the ROD resulted in a joint resolution of the City of Helena Commission and the Lewis and Clark County Commission (hereinafter Joint Commission) dated November 17, 1997. This resolution was admitted into evidence as Exhibit C. The resolution suggested that the MDOT continue with right-of-way acquisition for the Forestvale Interchange. However, the resolution went on to conclude that a certain alternate package of proposals attached to the resolution as Exhibit A would more effectively address the immediate transportation safety needs of the community than would the Forestvale Interchange. The Joint Commission went on to suggest that the MDOT fund the transportation improvement alternatives as an alternative to the construction of the Forestvale Interchange.

The alternatives on Exhibit A to the resolution are as follows: 1) complete right-of-way acquisition for the Forestvale/I-15 Interchange; 2) widen and construct turning lanes on Montana Avenue; 3) realign the Frontage Road to Washington Street; 4) construct turning lanes and install a signal at the Custer Avenue and McHugh Drive intersection; and 5) conduct a Capitol interchange traffic study and EIS.

Just prior to the Joint Commission resolution, the MDOT's Director Marvin Dye (Dye) supplied an editorial to the Helena Independent Record newspaper. The editorial was received as Exhibit E. Dye wrote that "[t]raffic patterns and needs have changed dramatically since Forestvale was identified a decade

or more ago. It looked like a good project then, but so much has changed now. Based on current information -- what's actually happened and is likely to happen -- Forestvale very likely won't have much impact on Helena's traffic problems." Dye went on to note that "[t]ransportation projects have the potential to alter neighborhoods and land use patterns. As a result, they deserve careful study and the involvement of everyone in the community before final decisions are made." (Ex. E.)

Dye then wrote a November 25, 1997, letter to various members of the MTC. In that letter, Dye again opined that "the proposed interchange will very likely not do what it was intended to -- that the Forestvale Interchange won't deliver any substantial benefit." He went on to note that "[a]t this final but critical step in the process[,] I urge your endorsement of the difficult work done by the city and county commissions . . ." (Ex. F.)

Thereafter, the MTC met on December 3, 1997. The result of its efforts was introduced at the hearing as Exhibit H. The MTC voted to reject a motion that was made to delete the Forestvale Interchange. At that hearing, Dye stated that "we are not past the point where we cannot look at something else." (Ex. H at 8.) Further, Dye noted that "[a]s we were progressing with this project there were significant changes in the areas where growth is happening. There was a lot that occurred south and east and in the valley. The commercial area growth on Montana Avenue is tremendous. As we were proceeding to work and develop Forestvale it was brought to my attention that in all probability Forestvale would not solve the problem, just move the problem to another area. That is when we started to take another look at alternatives and went to the city and county with ideas of alternatives since we were not past the point of no return." (Ex. H at 8.)

After the MTC's meeting, the MDOT conducted an in-house evaluation. That evaluation focused on the new growth information to see if it was significant or warranted a supplemental EIS. The public was not involved in this in-house evaluation.

On February 1, 1999, the MDOT issued a decision based on its in-house evaluation, which was received at the hearing as Exhibit M. In that document, the MDOT asked concurrence of the Federal Highway Administration (FHWA) that a supplemental EIS was not necessary to proceed with the construction of the Forestvale Interchange. The FHWA did so concur.

On page 3 of Exhibit M, the author noted that the original

growth assumption used in the 1992 EIS did not take into account the development that has occurred in the area since 1993. Therefore, a new traffic model was constructed. The new traffic model suggested that, "at least to the south, traffic that normally would not pass through this area is being drawn north to the interchange. The new interchange could actually decrease the traffic on Montana Avenue and the frontage road between 30% and 50% south of the interchange." (Ex. M at 3.) The report went on to conclude that, as a result of the new traffic studies, "approximately 11% of the existing traffic on Montana Avenue and 30% of the existing traffic on the frontage road destined north of the interchange would also shift to Interstate 15." (Id.) The report noted that, if the Forestvale Interchange was constructed, "traffic volumes are expected to remain the same on I-15 north of the interchange and increase by 67% south of the interchange. This compares to a 13% increase north and a 92% increase south of the interchange in the Final EIS." (Id.) Exhibit M, at page 8, discussed the Joint Commission's resolution. As a result, the report concluded that a supplemental EIS would not be necessary because the new information or circumstances did not result in any significant environmental impacts.

DEFENDANTS' MOTION TO DISMISS

Defendants have filed a motion to dismiss these proceedings.

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P., courts must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. Goodman Realty, Inc. v. Monson, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under Rule 12(b)(6), M.R.Civ.P., unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Wheeler v. Moe, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973). "In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." Id. at 161, 515 P.2d at 683. See also Buttrell v. McBride Land & Livestock Co., 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

After reviewing Defendants' motion to dismiss, the Court concludes that the motion should be denied.

a. Statute of Limitations

Defendants contend that this action is barred by the five-

year statute of limitations contained at Section 27-2-231, MCA, which provides "[a]n action for relief not otherwise provided for must be commenced within 5 years after the cause of action accrues."

Defendants point out that the ROD was issued on August 28, 1992. Defendants argue that this is the final agency action from which the five-year statute of limitations began to run. However, this argument is unpersuasive, since Plaintiffs are not contesting the final EIS or the ROD. Their cause of action, if any, arose as a result of the happening or not happening of two later occurrences, one in 1997 and one in 1999. Thus, the five-year statute of limitations has not run.

Next, Defendants contend that this action is barred by Section 2-3-114, MCA, which provides that "[t]he district courts of the state have jurisdiction to set aside an agency decision under this part upon petition made within 30 days of the date of the decision of any person whose rights have been prejudiced." Defendants argue that since the complaint in this action was not filed until April 22, 1999, the 30-day limit has long run. The Court will address this issue later.

b. Supplementation of EIS

ARM 18.2.247(1) provides as follows:

Supplements to Environmental Impact Statements

(1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

(a) the agency or the applicant makes a substantial change in a proposed action;

(b) there are significant new circumstances, discovered prior to the final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; or

(c) following preparation of a draft EIS and prior to completion of a final EIS, the agency determines that there is a need for substantial, additional information to evaluate the impacts of a proposed action or reasonable alternatives.

For our purposes, the relevant portion of this administrative rule is Subsection 1(b). According to Defendants, the final agency decision occurred at the final EIS or the ROD. Thus, according to Defendants, there are no new circumstances discovered prior to the final agency decision, since, if there were any new circumstances, they came after the

final agency decision.

This Court does not regard the ROD or the final EIS to be the final agency action in this case. This issue is addressed more fully in this Court's discussion relating to the preliminary injunction.

c. Alternatives

Next, Defendants suggest that the options the Joint Commission considered in the Helena Valley traffic network were not "alternatives" as that word is used in environmental law.

This Court does not find this argument convincing. Perhaps this assertion of Defendants is correct in that the Helena Valley "alternatives" are not alternatives as the word is used in environmental law. However, as far as this Court can determine, the consideration of whether something is an "alternative" is relevant when examining the final EIS. Here, we are conducting no such examination. Rather, we are determining whether the Defendants needed to supplement their final EIS due to the discovery of significant new circumstances. Whether those new circumstances are "alternatives," as that term is defined in environmental law does not matter as long as the new circumstances are significant and are discovered prior to final agency decision.

d. Failure to Join Federal Highway Administration

Finally, Defendants suggest that this case should be dismissed since the FHWA is an indispensable party and it is not joined in this action. Defendants note that the Forestvale Interchange is part of the federal highway system. This project's funding and approval are controlled by the FHWA. According to Defendants, the FHWA is an indispensable party and it must be joined. Since the FHWA cannot be sued in state court, Defendants suggest that this matter should be dismissed.

The outcome of this issue is ruled by Rule 19(a), M.R.Civ.P., which provides as follows:

> Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a property case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

The Court disagrees that the FHWA is an indispensable party. Plaintiffs' complaint concentrates on actions of agencies of the state of Montana, the Montana Administrative Procedure Act, and the Montana Constitution. Nowhere in the complaint is it stated that the FHWA has done something wrong, is a participant in any sort of wrongdoing, or violated Montana's constitution, statutes or administrative rules.

Defendants suggest that the relief requested would have to be approved by the FHWA. The relief sought is an injunction and not this Court's declaration that Defendants should proceed with the Montana Avenue improvements. An injunction, if it is issued, does not have to be approved by the FHWA.

Further, Defendants contend that the FHWA would have to approve any supplemental EIS. That may be true, but the question here is whether these Defendants were required to do a supplemental EIS. The fact that the FHWA may have to ultimately approve a required supplemental EIS does not make it an indispensable party to these proceedings.

Defendants also suggest that if this Court proceeds without the FHWA, they will be subject to a substantial risk of incurring double, multiple, or inconsistent obligations. Although Defendants raise this assertion, they have not shown "a substantial risk" that they are going to incur a double, multiple, or inconsistent obligation. Certainly the burden is on Defendants to make a clear showing that there is a substantial risk of inconsistent obligations. This has not been done. Such being the case, this Court determines that the FHWA is not an indispensable party.

Based on the above, the Court concludes that Defendants' motion to dismiss should be denied.

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

This suit followed close on the heels of the issuance of

Exhibit M. Plaintiffs allege several irregularities in the proceedings. First, at the hearing, Plaintiffs admitted that this proceeding is really about the procedure followed by the Defendants and is not about any threatened environmental damage. This does not lessen the Plaintiffs' or this Court's concerns, but merely focuses it in one direction.

Plaintiffs are concerned about alleged violations in the Montana Environmental Protection Act (MEPA) and in the public's ability to participate in government proceedings. Plaintiffs set forth three alleged procedural violations:

1) that Defendants violated MEPA by failing to supplement the final EIS prior to the final MTC meeting in December 1997;

2) that the MDOT's February 1999 decision should have included the public and failed to include MEPA procedures in reviewing the agency's decision to forego supplementing the EIS;

3) that Defendants failed to allow public participation as required in Montana's constitution and statutes in that:

a. there was no MEPA public review when the MTC decided not to reconsider the Forestvale Interchange decision in December 1997; and

b. the public's right to participate was violated when there was no public review in the re-evaluation conducted by the MDOT in February 1999 (Ex. M) when it decided not to perform a supplemental EIS. (Pls.' Br. Support Mot. Temp. Restrain. Ord. & Prelim. Inj. at 8.)

a. Standard of Review

This Court must review the actions of the MDOT to determine whether a preliminary injunction should be issued. Part of this analysis requires a review of the MDOT's compliance with MEPA. In so doing, this Court must review the agency action to see if it was arbitrary, capricious, or unlawful. North Fork Preservation Ass'n v. Department of State Lands, 238 Mont. 451, 459, 778 P.2d 862, 867 (1989).

To determine if the agency action is lawful, the Court must determine whether the agency violated any statutes or regulations that were applicable to it. In order to determine if the decision is arbitrary or capricious, the Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. In such an analysis, the Court is not to decide if the agency reached the correct decision by substituting its judgment for that of the administrative agency. Id. at 465, 778 P.2d at 871.

In determining whether a preliminary injunction should

issue, the Court must first examine Section 27-19-201, MCA, which provides:

> When preliminary injunction may be granted. An injunction order may be granted in the following cases:
>
> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
>
> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
>
> (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

The Montana Supreme Court construed this statute as follows:

> The allowance of a preliminary injunction is vested in the sound legal discretion of the District Court, with the exercise of which the Supreme Court will not interfere except in instances of manifest abuse. An applicant for a preliminary injunction must establish a prima facie case, or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated. If either showing is made, then courts are inclined to issue the preliminary injunction to preserve the status quo pending trial.

Porter v. K & S Partnership, 192 Mont. 175, 181, 627 P.2d 836,

839 (1981) (internal citation omitted) (citations omitted).

b. Supplementing the EIS

As noted earlier, the draft EIS and final EIS in this case were done in 1992. Plaintiffs contend that with the new information concerning the impact (or lack thereof) of the Forestvale Interchange on the heavily congested Montana Avenue, the MDOT should have done a supplemental EIS.

ARM 18.2.247(1)(b) provides that an EIS shall be supplemented when "there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision."

The MDOT contends that there is no requirement to supplement the EIS, since the final agency action is the record of decision that occurred in 1992. However, this Court does not agree. Final agency action, in the view of this Court, occurred either in December 1997, when the MTC voted to proceed with the Forestvale Interchange, or, at the very latest, in February 1999, when the MDOT decided not to supplement the final EIS. This contention is borne out by statements of MDOT's director. For example, Exhibit E is an editorial written by Dye dated November 4, 1997. This editorial was quoted earlier in this decision. However, it bears repeating. "Transportation projects have the potential to alter neighborhoods and land use patterns. As a result, they deserve careful study and the involvement of everyone in the community before final decisions are made." (Ex. E) (Emphasis added.) Thus, Dye recognized that, at least by November 1997, no final decision had been made.

Further, Exhibit F is a letter of November 1997 from Dye to a member of the MTC, when, contemplating the MTC's meeting in December 1997, Dye noted "this final but critical step in the process." (Ex. F.) Thus, the MDOT's contention that there is no requirement to at least consider updating the EIS is not well taken.

The United States Supreme Court, in a case cited by both parties, considered the circumstances under which an agency must supplement an existing EIS. Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Initially, the Marsh Court held that:

> These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only

to find the new information outdated by the time a decision is made.

On the other hand, and as petitioners concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval. Application of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect[,] the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: [i]f there remains "major Federal action" to occur, and if the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh, 490 U.S. at 373-74, 109 S.Ct. at 1859, 104 L.Ed.2d at 392-93 (internal citations omitted) (citations omitted).

If the agency's decision not to supplement the EIS was not arbitrary or capricious, it should not be set aside. Id., at 377, 109 S.Ct. at 1861, 104 L.Ed.2d at 394. As noted by the Marsh Court:

[I]n making the factual inquiry into 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 searching and careful," but "the ultimate standard of review is a narrow one."

When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts even, as an original matter, a court might find contrary views more persuasive. On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance - or lack of significance - of the new information.

Id., at 378, 109 S.Ct. at 1861, 104 L.Ed.2d at 395.

The above discussion, then, gives an analytical framework within which to analyze whether the MDOT's February 1999 decision not to do a supplemental EIS was appropriate.

The Court finds that both under the Montana administrative rules and the process announced by the United States Supreme Court, the MDOT has given a sufficient enough "hard look" at the new traffic information to avoid the issuance of a preliminary injunction. The original EIS indicates that its primary purpose is to reduce traffic on Montana Avenue and increase traffic on under traveled I-15, along with providing quicker access and better response time for fire department and other emergency vehicles to and from I-15. (Ex. A at 8.) There has been no question raised but that the Forestvale Interchange will still provide quicker access and better response times for fire department and other emergency vehicles. The Court then must analyze the comments that were made by Dye in 1997. At that time, Dye stated that the Forestvale Interchange would not make much of an impact on the traffic on Montana Avenue. In his deposition that was filed with the Court, Dye made clear that his 1997 statements relating to the impact of the Forestvale Interchange on the traffic on Montana Avenue were nothing more than a generalization and speculation. (Dye Dep. at 9 - 10, 26 - 27.)

Thus, the statements with which Plaintiffs are rightly concerned, appear to be nothing more than "windshield speculation" made by MDOT employees. The February 1999 "hard look" at the new information (Ex. M) and the decision not to do a supplemental EIS were based on a specific traffic study, and not speculation. This distinction is important for a couple of reasons. First, the Court is not presented with dueling studies with which other courts have been faced in this type of case. In other words, the Court does not have a traffic study presented by Plaintiffs that shows that the traffic study mentioned by the MDOT in Exhibit M is incorrect. Indeed, the only expert evidence the Court has is contained in Exhibit M. It shows that the MDOT did take a hard look at these issues. At page 3 of Exhibit M, based upon the new traffic study, the author of the report indicated that "the new interchange could actually decrease the traffic on Montana Avenue and the Frontage Road between 30% and 50% south of the interchange." Thus, the MDOT's analysis shows that the purpose and need of the original EIS is still anticipated to occur by construction of the Forestvale Interchange, that is a significant reduction

of traffic on Montana Avenue south of the interchange. Thus, there is nothing in the record to show that the speculative new information bandied about in 1997 would actually "change the basis of the decision" as is required by ARM 18.2.247(1)(b).

Further, when considering the Marsh criteria, there is no evidence in the record that would show that the new traffic information indicates that the construction of the Forestvale Interchange will have a significant impact (or lack thereof) that has not already been considered by the EIS.

It would appear that the decision not to supplement the EIS was based on a consideration of the relevant factors (traffic studies) and there has been no showing that there has been a clear error of judgment. See North Fork Preservation Ass'n v. Department of State Lands, 238 Mont. at 465, 778 P.2d at 871. Although reasonable people may disagree with the conclusion of the traffic experts as contained in Exhibit M, this Court is not to substitute its judgment for that of the experts.

The Court must also address Plaintiffs' contention that there should have been MEPA public participation in the December 1997 decision of the MTC to go ahead with the Forestvale Interchange. In the first instance, it must be noted that there has been tremendous public participation during this entire process, at least up to December 1997. Section 2-3-104, MCA, indicates that an agency will be deemed to have complied with the notice provisions of the Public Participation in Governmental Operations Act, if "an environmental impact statement is prepared and distributed as required by the Montana Environmental Policy Act." Section 2-3-104(1), MCA. Clearly, the initial process of creating the draft EIS and the final EIS involved the public. Further, the process up to the decision of the MTC heavily involved the public. For example, at page 8 of Exhibit M, it is noted that the Joint Commission held a public hearing on the alternative package of projects on August 23, 1997. Two hundred people attended this meeting. It goes on to note that, over the next several months, the city and the county held joint work sessions with the public to discuss the alternative package. In the December 3 and 4, 1997, minutes of the MTC, it was noted that "there were quite a few people here." (Ex. H at 8.) There has been no intimation whatsoever that the MTC meeting in December 1997 was held in secret or without proper public notice of that meeting.

Clearly, the process of constructing the Forestvale Interchange has been going on for many years. There is no

question that the public has been involved with the process prior to 1992 and up through December 1997. It cannot be said that the MDOT has been operating in secret.

c. Public Participation in the MDOT's February 1, 1999, Decision

The Court has not yet addressed Plaintiffs' claim of a violation of the public's right to participate as it relates to the MDOT's February 1, 1999, decision not to supplement the EIS. Implicated here is Article II, section 8, of the Montana Constitution, which provides that "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." (Emphasis added.) The public's right to participate in governmental agencies is not specifically addressed in the aforementioned constitutional provision. Rather, we must look to specific statutes to see what public participation is "provided by law." In this regard, Plaintiffs cite Section 2-3-101, MCA, the Public Participation in Governmental Operations Act. This section specifically shows that it has been enacted to implement Article II, section 8, of the Montana Constitution.

Of interest is Section 2-3-103(1), MCA, which provides:

> Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public.

The Public Participation in Governmental Operations Act has a enforcement mechanism in Section 2-3-114, MCA, which provides: "The district courts of the state have jurisdiction to set aside an agency decision under this part upon petition made within 30 days of the date of the decision of any person whose rights have been prejudiced."

The complaint in this case was filed on April 22, 1999, clearly more than 30 days beyond the date of the agency action on February 1, 1999. The MDOT contends that this portion of Plaintiffs' complaint seeking vindication of the public's right to participate in the agency decisions should be dismissed for violation of the aforementioned statute of limitations. This Court agrees.

Such being the case, the Court need not address whether

the MDOT's actions in its February 1, 1999, decision actually violated the public's right to participate in governmental operations.

Plaintiffs contend that their constitutional claim, brought pursuant to Article II, section 8, is not time barred by Section 2-3-114, MCA. However, by reading the constitution, the right granted by the constitution is activated by Section 2-3-101, MCA, which provides a specific enforcement mechanism and a specific statute of limitations.

The Montana Supreme Court has previously held that an action to set aside agency action must be filed within 30 days of the agency action or the district court would not have jurisdiction to entertain the suit. Kadillak v. Anaconda Co., 184 Mont. 127, 140, 602 P.2d 147, 155 (1979). Further, as noted in Kadillak, the public's right to participate, as announced in Article II, section 8, of the 1972 Montana Constitution, is limited to those instances where that right is provided for by law. Kadillak, 184 Mont. at 141, 602 P.2d at 155. This supports this Court's conclusion that Plaintiffs' claimed independent constitutional cause of action does not exist separate and apart from a cause of action provided by law, which in this case is the Public Participation in Governmental Act, Section 2-3-101, et seq., MCA.

This Court's conclusion is further bolstered by the recent Montana Supreme Court case of Goyen v. City of Troy, 276 Mont. 213, 915 P.2d 824 (1996). That case was an action brought seeking a writ of prohibition and a writ of mandamus against certain actions of a city council. That case alleged violations of Montana's Open Meeting Act, which follow in the Montana code just after the Public Participation in Governmental Operations Act. Section 2-3-201, et seq., MCA (Open Meeting Act).

It is interesting to note that the Open Meeting Act provides a voidability section, Section 2-3-213, MCA, that is similar, if not identical for all practical purposes, to the enforcement provision of the Public Participation in Governmental Operations Act, Section 2-3-114, MCA. The Open Meeting Act also provides for a 30-day statute of limitations. In Goyen, the supreme court held that writs of mandamus and prohibition were not for the enforcement of alleged violations of the Open Meeting Act. Goyen, 276 Mont. at 223, 915 P.2d at 831. Further, the supreme court noted that violations of the open meeting law are to be brought to a court's attention by a simple petition to void an action or by a petition for declaratory judgment. Id., at 223, 915 P.2d at 830-31.

Since the enforcement provisions of the Open Meeting Act are virtually identical to those in the Public Participation in Governmental Operations Act, it would appear that the analysis in Goyen should apply to the case here under consideration. If a writ of prohibition which stops action or a writ of mandate to compel action are not appropriate in an open meeting case, then it follows that an injunction is not appropriate either. It appears that the legislature provided a remedy for a violation of the open meeting law in Section 2-3-213, MCA. In Goyen, the supreme court told us that this is the avenue that litigants must take to contest violations of the open meeting law. If such is the case, then the statute of limitations contained in the Open Meeting Act must apply to actions that are brought contesting alleged violation of the Open Meeting Act.

The same analysis would apply to public participation claims such as the one currently before the Court. Thus, Section 2-3-114, MCA, has provided a remedy for a violation of the Public Participation in Governmental Operations Act. As in Goyen, the Plaintiffs are free to bring a petition to void the agency action or for a declaratory judgment. However, the 30-day statute of limitations contained in the public participation act must apply. Further, there is nothing in this case that would allow the Court to stay the operation of the 30-day statute of limitations.

Therefore, the Court rules that such parts of the Plaintiffs' claim that allege violation of law by failure to involve the public in the MDOT's February 1, 1999, decision not to obtain a supplemental EIS are barred by the 30-day statute of limitation contained in Section 2-3-114, MCA. Consequently, the Court need not address the specific violations alleged by Plaintiffs.

It could be argued by Plaintiffs that they have a right to a declaratory judgment that the action MDOT on February 1, 1999, was a violation of the Public Participation in Governmental Operations Act. However, such a declaration would be without effect and would be nothing more than an advisory opinion. It would have no impact on this case and the future rights and duties of the parties to this litigation. As such, the Court can, and does, decline to issue a declaratory ruling as it would not affect an existing controversy. See Flesh v. Mineral and Missoula Counties, 241 Mont. 158, 163, 786 P.2d 4, 7 (1990).

CONCLUSION

Based on the above, the Court hereby concludes that the

Montana Department of Transportation did not act arbitrarily, capriciously or unlawfully in deciding in February 1999 not to perform a supplemental environmental impact statement.

Further, this Court concludes that the decisions made by the Montana Transportation Commission in December 1997 and by the Montana Department of Transportation in February 1999 did not violate any statute, administrative rule or case law that would require more public participation than was afforded.

Based on the above, the Court hereby enters the following rulings:

1. Defendants' motion to dismiss is DENIED.
2. Plaintiffs' motion for a temporary restraining order or preliminary injunction is DENIED.

DATED this 21st day of June, 1999.

JEFFREY M. SHERLOCK
District Court Judge

DECISION

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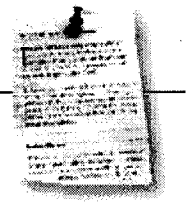

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Montana Environmental Info. Center v. Dept. of Transportation
Decided Jan. 11, 2000

MONTANA ENVIRONMENTAL INFORMATION
INFORMATION CENTER, INC., and
PLAN HELENA, INC.

Plaintiffs and Appellants,

v.

MONTANA DEPARTMENT OF
TRANSPORTATION, and MONTANA
BOARD OF TRANSPORTATION
COMMISSIONERS,

Defendants and Respondents.

No. 99-422.

Submitted on Briefs December 2, 1999.

Decided January 11, 2000.

2000 MT 5.

57 St.Rep. 18.

____Mont.____.

____P.2d____.

ENVIRONMENTAL LAW

1. ENVIRONMENTAL LAW. In deciding whether the decision not to supplement an EIS is arbitrary or capricious, the courts must satisfy themselves that the agency has made a reasoned decision based on its evaluation of the significance or lack of significance of the new information. Additionally, 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.

2. ENVIRONMENTAL LAW. The change in traffic patterns, the development around the Capitol Interchange, the patterns of development in Helena and the proposed alternatives to **Forestvale**, specifically the Montana Avenue alternative, were all significant new circumstances which required a supplemental EIS pursuant to Rule 18.2.247, ARM. Therefore, the Department's decision to not prepare a supplemental EIS was arbitrary and did not comply with the requirements of Rule 18.2.247, ARM.

Plaintiffs filed action for declaratory judgment and injunctive relief to enjoin defendants from proceeding with the **Forestvale** Interchange project without a supplemental Environmental Impact Statement. The parties stipulated that denial of the preliminary injunction constituted a final disposition of the case. The

injunction was denied and plaintiffs appealed. An injunction pending appeal was granted in part, allowing the bid to be let on the project, but construction was stayed pending resolution of the appeal. The Supreme Court, Justice Trieweiler, held that the Department's decision to not prepare a supplemental EIS was arbitrary and did not comply with the requirements of Rule 18.2.247, ARM.

Reversed.

JUSTICE LEAPHART dissenting, joined by CHIEF JUSTICE TURNAGE and JUSTICE GRAY.

CHIEF JUSTICE TURNAGE dissenting.

Appeal from the District Court of Lewis and Clark County.
First Judicial District.
Honorable Jeffrey M. Sherlock, Judge.

For Appellants: Jack R. Tuholske, Attorney at Law, P.C.; Missoula; David K. W. Wilson, Jr. and William S. Keller, Reynolds, Motl and Sherwood; Helena.

For Respondents: Lyle Manley, Montana Department of Transportation; Helena.

JUSTICE TRIEWEILER delivered the opinion of the Court.

P1 The Plaintiffs, Montana Environmental Information Center, Inc. (MEIC) and Plan Helena, Inc., commenced this action for declaratory judgment and injunctive relief in the District Court for the First Judicial District in Lewis and Clark County. They sought a determination that the Defendants, Montana Department of Transportation (Department) and Montana Board of Transportation Commissioners, violated the Montana Environmental Policy Act, and a preliminary injunction enjoining the Defendants from proceeding any further with the project known as the "**Forestvale** Interchange." The District Court denied relief following a hearing. Both parties then stipulated that denial of the preliminary injunction constituted a final disposition of the case. Plaintiffs appeal from that judgment. We reverse the judgment of the District Court.

P2 The sole issue on appeal is whether the District Court erred when it held that the Defendants were not required to prepare a supplemental environmental impact statement.

ISSUE

FACTUAL BACKGROUND

P3 This dispute relates to the Department's plan to revise and improve the transportation network in the North Helena Valley. The primary purpose of the plan is to improve safety and convenience by reducing traffic congestion on North Montana Avenue. Reduction of congestion is to be accomplished by increasing accessability to Interstate Highway 15. The proposed project would provide an interchange, known as the **Forestvale** interchange, north of Custer Avenue and provide access between Interstate 15, Montana Avenue, and **Forestvale** Road.

P4 In 1991, a draft environmental impact statement (EIS) concerning the proposed **Forestvale** Inter-

change was approved by the Federal Highway Administration. The draft EIS evaluated four different alternatives. Each alternative contemplated building a new interchange along Interstate 15. Subsequently, in 1992 a final EIS was prepared and approved, accompanied by a Record of Decision which selected the **Forestvale** interchange as the course of action the Department would pursue. Between 1992 and 1996, the Department initiated preconstruction

activities on the **Forestvale** interchange project, including design, preliminary surveys, and right of way acquisitions.

P5 In late 1996, information began to surface from the Department of Transportation that the **Forestvale** interchange project may not as effectively address the traffic problems on North Montana Avenue as was originally anticipated in 1992. In an Opinion published in the Helena Independent Record by Marvin Dye, Director of the Montana Department of Transportation, Dye stated that "[b]ased on current information - what's actually happened and is likely to happen - **Forestvale** very likely won't have much impact on Helena's traffic problems."

P6 In late November 1997, the Helena City Commission and the Board of County Commissioners of Lewis and Clark County passed a joint resolution based on their determination that an alternative package of improvements would more effectively address the immediate transportation and safety needs of the community than the **Forestvale** interchange. The joint resolution requested the Montana Transportation Commission to schedule and fund the alternative package as an alternative to the construction of the **Forestvale** interchange. The Joint Resolution provided four alternative projects to the **Forestvale** interchange: widen and construct turning lanes on North Montana Avenue; realign the Frontage Road to Washington Street; construct turning lanes and install a traffic signal at the Custer Avenue and McHugh Drive intersection; or conduct a capitol interchange area traffic study and EIS.

P7 On December 3, 1997, the Montana Transportation Commission considered the joint resolution's request that the Commission adopt an alternative to the **Forestvale** interchange. The Commission declined to adopt any of the alternatives proposed by the joint resolution and affirmed its decision to proceed with the **Forestvale** interchange.

P8 Following the Commission's decision to proceed with the **Forestvale** project, the Department of Transportation conducted an in-house review to determine whether a supplemental EIS would be required pursuant to Rule 18.2.247 of the Montana Administrative Rules. In February 1999, as a result of its in-house reevaluation of the **Forestvale** interchange, the Department concluded that a supplemental EIS was not necessary "because the changes in the proposed project's Scope-of-Work and the new information or circumstances relevant to environmental concerns and bearings discussed below do not result in any significant environmental impacts."

P9 As a result of the Department's decision in February 1999 that a supplemental EIS was not necessary, the Department decided to let the contract for the **Forestvale** interchange in April 1999. On April 22, 1999, the Plaintiffs, MEIC and Plan Helena, filed a complaint challenging the Defendants' approval of the proposed **Forestvale** Interchange on Interstate 15 in the Helena valley and the Defendants' decision not to prepare a supplemental EIS pursuant to the Montana Environmental Protection Act (MEPA). As a result of this lawsuit, the Department delayed letting the bids to **Forestvale**.

P10 On May 26, 1999, the District Court held a hearing to consider the Plaintiffs' request for a preliminary injunction, as well as the Defendants' motion to dismiss the case. On June 21, 1999 the District Court issued its decision. It denied Plaintiffs' request for a preliminary injunction and denied Defendants' motion to dismiss. Both parties then agreed to adopt the District Court's opinion on the preliminary injunction as the final order in the case, and therefore, the District Court dismissed the action on July 2, 1999.

P11 On July 6, 1999, the Plaintiffs moved the District Court for an injunction pending appeal pursuant to Rule 62 of the Montana Rules of Civil Procedure. Because the District Court did not immediately act upon the motion, the Plaintiffs filed an Application for an Injunction Pending Appeal in this Court on July 19, 1999. Following remand back to the District Court, the District Court denied the Plaintiffs' motion. The Plaintiffs then

reapplied to this Court for an injunction pending appeal, which we granted in part, allowing the Department to let the bid, but staying construction until resolution of this appeal.

STANDARD OF REVIEW

P12 The proper standard of review of an administrative decision pursuant to the Montana Environmental Protection Act (MEPA), is whether the agency decision was arbitrary or capricious. North Fork Preservation Ass'n v. Department of State Lands (1989), 238 Mont. 451, 465, 778 P.2d 862, 871. In North Fork Preservation Ass'n, we stated that:

> [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 searching and careful," but "the ultimate standard of review is a narrow one."

North Fork Preservation Ass'n, 238 Mont. at 465, 778 P.2d at 871 (citing Marsh v. Oregon Natural Resources Council (1989), 490 U.S. 360, 378).

P13 In Marsh, the U.S. Supreme Court stated:

> [I]n the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance or lack of significance of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

Marsh, 490 U.S. at 378.

DISCUSSION

P14 Did the District Court err when it held that the Defendants were not required to prepare a supplemental environmental impact statement? Issue

P15 The Plaintiffs contend that the Defendants' failure to prepare a supplemental EIS to analyze the alternatives that were

developed, as a result of changed growth and traffic patterns, violated MEPA. The Defendants reply that the Department properly determined that a supplemental EIS was not necessary as a result of the Department's determination that there were no significant new circumstances bearing on the proposed project or its impacts, and that the project still met the purpose and needs as set forth in the final EIS prepared in 1992.

P16 Rule 18.2.247, ARM, provides the following:

> (1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:
>
> (a) the agency or the applicant makes a substantial change in a proposed action;
>
> (b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision;

(Emphasis added).

P17 Rule 18.2.247, ARM, further provides that:

> (2) A supplement must include, but is not limited to, a description of the following:
>
> (a) an explanation of the need for the supplement;
>
> (b) the proposed action; and
>
> (c) any impacts, alternatives or other items required by ARM 18.2.243 for a draft EIS or ARM 18.2.245 for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.

(Emphasis added.) Additionally, Rule 18.2.236(2)(a)(i), ARM, defines "alternative" as: "an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action."

P18 The draft EIS for the **Forestvale** Interchange project was prepared in 1991. The "purpose of and need for action" section states that: "[a] primary purpose of the proposed project will be to improve safety and convenience by reducing traffic demand on the heavily traveled and deficient Montana Avenue by increasing accessibility and traffic demand on the under-traveled Interstate 15." The final EIS, prepared in 1992, states that:

> Major intersections along the Montana Avenue corridor are experiencing capacity problems making north south travel difficult and growth in the North Helena Valley is increasing pressure on the corridor. Providing

access to the interstate will alleviate pressure on Montana Avenue, shorten overall travel times, increase safety and minimize road user costs.

Clearly, the primary purpose of the **Forestvale** Interchange project was to lessen the traffic congestion on Montana Avenue by diverting traffic onto Interstate 15.

P19 In 1997, the Montana Department of Transportation began to question the adequacy of the final EIS due to several changed conditions since the time the document was prepared in 1992. In a memorandum regarding a March 1997 meeting between members of the Montana Department of Transportation's Environmental Services and the Federal Highway Administration, MDT's Manager of Environmental Services, Joel Marshik, stated that "[t]he concern of MDT was the fact that the [**Forestvale** Interchange] project does not meet the purpose and need as presently stated [in the EIS]: to relieve congestion on Montana Avenue."

P20 In an Opinion published in the Helena Independent Record on November 4, 1997, Marvin Dye, Director of the Montana Department of Transportation, questioned the effectiveness of the **Forestvale** Interchange project, in light of changed circumstances in

the city of Helena over the past several years. Dye stated the following in his editorial:

> There've been dramatic changes in Helena in the last few years. Traffic patterns and needs have changed dramatically since **Forestvale** was identified a decade or more ago. It looked like a good project then, but so much has changed now. Based on current information what's actually happened and is likely to happen **Forestvale** very likely won't have much impact on Helena's traffic problems.
>
> When I talk about traffic problems, I'm talking mainly about the Capitol Interchange area and Fee Street near Albertson's/McDonald's, as well as the traffic around Montana and Custer. All the growth around Shopko, County Market and the new Albertson's along north Montana weren't even on the horizon when **Forestvale** was planned. That area is a destination now for thousands of motorists.

P21 Additionally, on November 17, 1997, the Helena City Commission and the Board of County Commissioners for Lewis and Clark County passed a joint resolution in which they requested the Montana Transportation Commission to schedule and fund a package of transportation improvements as an alternative to the

construction of the **Forestvale** Interchange. The joint resolution stated the following:

> NOW, THEREFORE, BE IT RESOLVED that the Lewis and Clark County Board of Commissioners and the City of Helena Commission that they have determined the alternative package of improvements outlined in Exhibit A, would more effectively address the immediate transportation and safety needs of the community than the **Forestvale** Interchange.

P22 Moreover, in a letter to the Montana Board of Transportation Commissioners in which Dye sought the endorsement of the Board for the package of proposed projects, including widening North Montana Avenue, as an alternative to constructing the **Forestvale** Interchange, Dye stated:

> It was MDT that first raised the issue; specifically, that the proposed Interchange will very likely not do what it was intended to that the **Forestvale** Interchange won't deliver any substantial benefit. In raising the issue, we also made an offer because of the unique and favorable circumstances, a project or projects that will make some difference can be substituted to make the very best use of limited funding.

P23 Because the Montana Board of Transportation Commissioners voted in December 1997 to continue with the **Forestvale** Interchange project, rather than pursue one of the suggested alternatives, the Montana Department of Transportation initiated a reevaluation of the final EIS for the **Forestvale** Interchange. The purpose of the reevaluation was to ascertain whether the Department was required to prepare a supplemental EIS pursuant to Rule 18.2.247, ARM.

P24 The documentation of the reevaluation demonstrates the Department's review of the following changed circumstances: updated traffic projections; growth and traffic patterns at the Capitol Interchange; and effects to the Cedar Street Interchange. There is no discussion in the reevaluation of the proposed alternatives to the **Forestvale** Interchange, nor is there any significant discussion of the changed patterns of development in Helena since the 1992 final EIS. In the reevaluation the Department concluded that "a supplemental EIS will not be necessary because the changes in the proposed project's Scope-of-Work and the new information or circumstances relevant to environmental concerns and bearings discussed below do not result in any significant environmental impacts."

P25 With regard to the Capitol Interchange, the reevaluation states:

> Without the **Forestvale** Interchange, the intersection of the southbound off ramp with U.S. 12 would reach LOS F

[the lowest category of service in the Department's ranking system of A through F. LOS F is a thoroughly congested, stop and go traffic flow, which increases air pollution, safety hazards and driver frustration,] in approximately fifteen years. With the **Forestvale** Interchange, the intersection would reach LOS F in five years during the morning peak and LOS F will be reached in ten years during the evening peak. This means that if **Forestvale** Interchange is constructed, traffic at the intersection will exceed capacity during the morning peak after five years. At the end of ten years, the intersection will exceed capacity during the evening peak if no improvements are made.

The Capital Interchange will degrade with or without **Forestvale** Interchange and while the impacts will be noticeable, they are not considered significant.

P26 The District Court concluded that the Department gave a "sufficient enough hard look at the new traffic information" and because "the decision not to supplement the EIS was based on a consideration of the relevant factors (traffic studies) and there has been no showing that there has been a clear error of

judgment," the Department was not required to supplement the EIS.
P27 [1] In deciding whether the decision not to supplement the EIS was arbitrary or capricious, we are guided by the language in Marsh, 490 U.S. at 378, in which the U.S. Supreme Court stated, in the context of reviewing a decision not to supplement an EIS, that courts must satisfy themselves "that the agency has made a reasoned decision based on its evaluation of the significance or lack of significance of the new information". Additionally, as stated in North Fork Preservation Ass'n, 238 Mont. at 465, 778 P.2d at 871, "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."

Legal Standard

P28 Our review of the Department's decision not to supplement the EIS leads us to conclude that the Department did not make a reasoned decision based on all relevant factors when it concluded that a supplemental EIS was not necessary.
P29 [2] We conclude that the change in traffic patterns, the development around the Capitol Interchange, the patterns of development in Helena, and the proposed alternatives to **Forestvale**, specifically the Montana Avenue alternative, were all significant new circumstances which required a supplemental EIS pursuant to Rule 18.2.247, ARM. We further conclude, therefore, that the Department's decision to not prepare a supplemental EIS was arbitrary and did not comply with the requirements of Rule 18.2.247, ARM. Accordingly, we reverse the judgment of the

Holding

District Court.
JUSTICE HUNT, NELSON and REGNIER concur.

* * *

JUSTICE LEAPHART, dissenting.
P30 I dissent.
P31 The Court cites Rule 18.2.247(1), ARM, which requires that an agency shall prepare supplements to a final EIS whenever "there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision;" and Rule 18.2.247(2), ARM, which provides that a supplemental EIS must include a description of any alternatives. In concluding that the Department should have prepared a supplemental EIS, the majority places considerable stock in the fact that the Helena City Commission and the Board of County Commissioners of Lewis and Clark County passed a joint resolution expressing their determination that an alternative package of improvements would more effectively address the transportation and safety needs than the **Forestvale** Interchange. The Court further emphasizes that this joint resolution was rejected by the Montana Transportation Commission and that the Department's subsequent reevaluation of the EIS did not discuss the proposed alternatives to the **Forestvale** Interchange.
P32 As I read Rule 18.2.247(2), ARM, the requirement that the agency describe alternatives only pertains if it is first determined that a supplemental EIS is required under Rule 18.2.247(1), ARM. In other words, the fact that alternatives to the **Forestvale** Interchange were proposed is not a basis for determining that a supplemental EIS is required in the first instance. The necessity of a supplemental EIS hinges, not upon proposed alternatives, but upon significant new circumstances which affect the environment in ways not already considered.
P33 In Marsh v. Oregon Natural Resources Council (1989), 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377, the United States Supreme Court held that an agency need not supplement an EIS every time new information comes to light after an EIS is finalized. "To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh, 490 U.S. at 373. The Court continued:

> In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh, 490 U.S. at 374.
P34 In determining that a supplemental EIS was not necessary, the Department conducted a reevaluation in February 1999, in which it considered whether recent growth and traffic patterns in the Helena area defeated the purposes and needs outlined in the EIS. As Chief Justice Turnage notes in his dissent, using the new 1999 traffic data, the Department came to the conclusion that the **Forestvale** project would relieve congestion on North Montana Avenue by 30 to 50 percent. It also concluded that the project

would reduce traffic in front of Rossiter School by 58 percent and would not significantly affect the Capitol Interchange, which would have to be reconstructed in any event for unrelated reasons.

P35 While one can dispute the correctness of the Department's conclusions, it cannot be said that the Department did not take a hard look at the significance of any possible new impacts or that its decision to forego a supplemental EIS was arbitrary and capricious. See North Fork Pres. v. Dept. of State Lands (1989), 238 Mont. 451, 459, 778 P.2d 862, 867. MEIC has not pointed to any new information or circumstances showing that the **Forestvale** project will affect the environment in a significant manner not already considered in the original EIS. The "Montana Avenue Alternative" is not itself a "new circumstance" triggering a need for a supplemental EIS under Rule 18.2.247(1), ARM.
P36 I would affirm the decision of the District Court.

* * *

CHIEF JUSTICE TURNAGE and JUSTICE GRAY join in the foregoing dissenting opinion.

* * *

CHIEF JUSTICE TURNAGE dissents.
P37 It is undisputed that a complete study of the need for and environmental impact of the proposed **Forestvale** Interchange project was conducted in 1991 and 1992. The extensive re-evalua tion conducted by the Department of Transportation in 1999 led the Department to conclude that there was no change of circum stances justifying a supplemental environmental impact statement. In my view, the Department's reliance on its experts to reach that conclusion was neither arbitrary nor capricious. Therefore, under our standard of review, it must not be overturned.
P38 A supplemental environmental impact statement is required only when significant new circumstances bear on the proposed action or its impacts. See Rule 18.2.247, A.R.M. While the plaintiffs may not agree with the results, it cannot be denied that the Department thoroughly searched for possible significant new circumstances in 1999, and found none. Simply because an agency takes another look at a proposed project and publicly questions some of its assumptions does not mean that significant new circumstances exist.
P39 In this case, the record establishes that the Department's February 1999 evaluation looked at recent traffic data to deter mine whether the growth patterns in the Helena area had resulted in the **Forestvale** Project becoming unnecessary to the purpose and needs of the final environmental impact statement. The new analysis used 1999 traffic data and came to the conclusion that the project would relieve congestion on North Montana Avenue by 30 to 50 percent and would reduce traffic in front of Rossiter School by 58 percent.
P40 Moreover, the analysis concluded that the project would not significantly affect the Capitol Interchange. The report makes clear that the Capitol Interchange needs to be reconstructed in any event, because of factors unrelated to the **Forestvale** Inter change such as the need for seismic retrofitting and to accommo date pedestrians. The report states that the main vehicular traffic congestion at the Capitol Interchange is at the north bound on-ramp and the northbound off-ramp, both of which are on the east side of the interchange. The addition of traffic on the southbound off-ramp on the west side of the interchange as a result of the **Forestvale** Interchange will not influence the time frame under which a redesign of the Capitol Interchange must occur. The many other problems with the Capitol Interchange would make it necessary to reconstruct the interchange before the

additional traffic as a result of the **Forestvale** Interchange would require reconstruction.

P41 The reevaluation also considered whether there were any new impacts from the **Forestvale** Interchange upon the Cedar Street Interchange, and foresaw both benefits and nonsubstantial nega tive impacts upon that interchange. The report then went on to discuss any possible new impacts to land use, social and economic matters, noise, water quality, wetlands, historical and archaeo logical preservation, relocation, air quality, permits, public comments and coordination, and cumulative impacts. The report requested the concurrence of the Federal Highway Administration (FHWA) that the new information or circumstances relevant to environmental concerns and bearings do not result in any signifi cant environmental impacts. FHWA concurred.

P42 The existence of other proposals for highway improvements in the Helena area (which the plaintiffs refer to as "alternatives," including widening Montana Avenue) does not render the decision not to perform a supplemental environmental impact statement arbitrary or capricious. It is significant that the purposes for this project as documented in the original EIS include not only to relieve congestion on Montana Avenue, but also to provide quicker access and better response time for fire department and other emergency vehicles.

P43 Nor do off-the-cuff statements of one individual, even the Director of the Department of Transportation, negate his own agency's technical study. The District Court noted that in Director Marv Dye's deposition, he made it clear that his 1997 statements relating to the impact of the **Forestvale** Interchange on the traffic on Montana Avenue were nothing more than general ization and speculation.

P44 An agency decision not to supplement an EIS in light of new information is reasonable when the agency has carefully consid ered the information, evaluated its impact, and supported its decision not to supplement with a statement of explanation. Animal Defense Council v. Hodel (9th Cir. 1988), 840 F.2d 1432, 1438. Like the District Court, I would conclude that the Depart ment did not act arbitrarily, capriciously, or unlawfully in reaching its February 1999 decision that a supplemental environ mental impact statement was not necessary.

P45 It does not require a panel of highway construction experts to determine that traffic flow on North Montana Avenue has surpassed acceptable safety standards. This can be readily ascertained by asking any of the local residents required to daily travel this road. The sad result of this decision is to delay any improvement of this traffic nightmare for, in all probability, years to come. After new studies, public meetings, and environmental impact statements have been conducted, another lawsuit will surely be filed seeking further supplemental envi ronmental impact statements. This road leads to nowhere. I therefore respectfully dissent.

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