MEIC, et al. v. Montana Power Co., et al.
Cause No. 49784, 1st Judicial District
Judge Gary
Decided 1984

MEPA Issue Litigated: Should the agency have conducted a MEPA analysis (a preliminary environmental review)?

Court Decision: Yes

FINDINGS OF FACT, CONCLUSIONS OF LAW,
ORDER AND MEMORANDUM

Judge

IN THE DISTRICT COURT

OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF LEWIS AND CLARK

* *

MONTANA ENVIRONMENTAL INFORMATION CENTER, a non-profit organization, and LOCAL 254, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, a membership organization,

Plaintiffs,

-vs-

MONTANA POWER COMPNAY, a public utility, the HAINES PIPELINE CONSTRUCTION COMPANY, an Oklahoma corporation, TED SCHWINDEN, JIM WALTERMIRE, E. V. "SONNY" OMHOLT, ED ARGENBRIGHT and MIKE GREELY, in their official capacity as Members of The Montana Board of Land Commissioners, DENNIS HEMMER, in his official capacity as Commissioner of the Montana Department of State Lands, DR. JOHN J. DRYNAN, in his official capacity as Director of the Montana Department of Health and Environmental Sciences, LEO BERRY, JR., in his official capacity as Director of the Montana Department of Natural Resources and Conservation, JIM W. FLYNN, in his official capacity as Director of the Montana Department of Fish, Wildlife and Parks, GARY WICKS, in his official capacity as Director of the Montana Department of Highways and MARCELLA SHERFY, in her official capacity as Director of the Montana State Historical Preservation Program,

Defendants.

No. 49784

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER and MEMORANDUM

The above-entitled matter was heard before the Court sitting without a jury. The Plaintiffs, MONTANA ENVIRONMENTAL INFORMATION CENTER and LOCAL 254, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, were represented by counsel William A. Rossbach and Karl Englund of Missoula. The Defendant, MONTANA POWER COMPANY, was represented by counsel John L. Peterson and Edward

Bartlett of Butte. The Defendant, HAINES PIPELINE CONSTRUCTION COMPANY, was represented by Shelley Hopkins of Butte. The Defendants, MONTANA STATE DEPARTMENTS, were represented by John F. North, Donald D. MacIntyre, Tim D. Hall, Steven J. Perlmutter, Kevin C. Meek, and W. D. Hutchison, of Helena. Having heard the testimony, examined the exhibits, and studied the briefs, the Court makes the following Order, and Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. That the pipeline construction involves a two hundred (200) mile long pipeline, a one hundred (100) foot cleared right-of-way, and a six (6) foot deep or deeper trench.

2. That the route crosses several major rivers, over two hundred (200) streams, swamps, hillsides, and agricultural lands.

3. That to date there have been no public hearings on the project, no draft environmental assessments, no request for public comment, no opportunity for public participation, and no apparent interagency consultation.

4. That site-specific mitigation measures were only devised for one river, and only then when litigation had commenced.

5. That at least five (5) state agencies are substantially involved in the pipeline project.

6. That when the Northern Border Pipeline was constructed, the State appointed a lead agency to prepare a comprehensive Environmental Impact Statement (EIS) of the environmental impacts.

7. That a number of mitigating measures appear to be appropriate and reasonable for the project, but were not considered or mandated by the State.

8. That the Plaintiff's delay in this case was minimal

- equity aids the vigilant & not those who slumber on their rights.

- It is claimed as one effect to assert right or claim which, when joined with lapse of time & other circumstances causing prejudice to adverse parties, operates as a bar in ct. of equity

and excusable due to the fact that no public notice was given, nor hearings held regarding the pipeline project.

9. That a slight delay in construction activities will not unfairly burden the Defendants because of the winter slowdown in construction activities.

CONCLUSIONS OF LAW

1. That members of the Environmental Information Center and the Laborers' Union are adversely affected by the proposed and existing pipeline construction.

2. That the injury alleged by the Plaintiffs is distinguishable from the injury to the public generally.

3. That standing to pursue the right to a clean environment is not limited to Montana environmental organizations.

4. That the Plaintiffs have standing.

5. That the equitable doctrine of laches can apply in a context of environmental litigation, but particular circumstances of each case must be considered.

6. That laches under the circumstances of this case would be inappropriately invoked since any delay by the Plaintiffs is excusable as well as minimal, and has not unduly prejudiced the Defendants.

7. That invoking laches in this case would defeat the environmental policy established by the Montana Legislature.

8. That state agencies may not avoid their obligations established by the Montana Environmental Policy Act (MEPA) by the fact that their involvement in a major project is merely a "permitting" procedure.

9. That the policy established by MEPA promotes an interagency comprehensive assessment of environmental impacts, and therefore the agencies may not assess their duties in isolation of each other.

10. That "reasonableness" is the standard of review

regarding the decision to forego any state environmental assessment.

11. That a preliminary injunction is appropriate in this case in view of the fact that the Plaintiffs' rights would be irreparably harmed, that monetary compensation would be inadequate, and that no undue burden will fall on the Defendants since the bulk of construction activities have been halted due to winter weather.

O R D E R

From the above,

IT IS HEREBY ORDERED that the preliminary injunction is granted pending a Preliminary Environmental Review (PER) and an additional hearing at that time to show this Court that either a comprehensive EIS should be undertaken, or that reasonable, site-specific conditions will mitigate the impact such as was accomplished by the Sun River PER.

DATED this 16th day of February, 1984.

Joseph B. Gary
District Judge

MEMORANDUM

PRELIMINARY CONSIDERATIONS

In examining the evidence and the pleadings of this case an important preliminary consideration is the policy embodied in the Montana Environmental Policy Act (MEPA) applicable to the issues herein, as set forth in the first two paragraphs of Section 75-1-103, MCA.

> (1) The legislature, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, and

> recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.
>
> (2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources...

In considering this policy it is the Court's conclusion that the construction of the pipeline by Montana Power Company is a necessity to the residents of western Montana. The Court recognizes that the existing pipeline is clearly inadequate, potentially unsafe, and needs to be replaced. However, the testimony also shows that this knowledge existed with the Montana Power Company for a long period of time, and that the actual planning of the replacement line commenced in 1980. Testimony further showed that the MPC did not advise the state agencies until sometime in 1983. At this juncture there is no evidence before this Court as to why an Environmental Impact Statement (EIS) was not required by the various state agencies. The pleading alleges that an EIS was waived, but the state agencies declined to offer evidence at the preliminary hearing as to why they waived an EIS, and took the position that they need not advise the Court as to why MEPA was bypassed.

It is also interesting to note from the evidence that when the matter became a serious question about the crossing of the Sun River, a preliminary environmental report (PER) was im-

mediately and quickly prepared. The PER outlined the necessities of protection of the environment in substantial detail. As a result the Court approved the crossing of the Sun River, and required MPC and Haines to comply with the PER in the construction activities.

The evidence clearly indicates that the pipelin construction affects streams, potential archeological sites, irrigation systems, and agricultural land. As a result, site-specific conditions could be helpful in mitigating the impact of the continuation of the construction of the pipeline.

For all these above reasons the Court, in weighing and balancing the various equities, is continuing the injunction on a preliminary basis, subject to preparation of PER statements for the balance of the construction. The Court does not wish to impose upon the users of Montana Power an unfair additional burden, but nevertheless feels that there has been a violation of the intent of the Montana Constitution and the Montana Environmental Policy Act by the Defendants MPC and the state agencies.

With the above as a preliminary, we shall discuss various parts of law raised by various counsel.

I. PLAINTIFFS HAVE STANDING

The Plaintiffs in this case are an environmental organization and a union. The Montana Power Company (MPC) has contested the standing of both Plaintiffs to maintain this action. MPC argues (1) that an association must show more than mere interest in the subject matter of the lawsuit to maintain standing; (2) that an association's members must allege more than violation of a civil right caused by the State's failure to prepare an environmental impact statement (EIS); (3) that purely economic concerns are outside the purview of MEPA, and are insufficient interests to grant standing to the union.

The Defendant MPC cited Sierra Club v. Morton, 405 US

727 (1972) wherein the United States Supreme Court held that a Plaintiff must have a "personal stake in the outcome of the controversy" in order to gain standing. The MPC also cited Port of Astoria v. Hodel, 595 Fed.2d 467, (9th Cir., 1979), in which the Court held that a Plaintiff with a strictly economical interest was outside the scope of MEPA.

First, in reviewing the holding of Sierra Club, this Court finds that its central rule is that an organization must allege that it or its members are adversely affected by the proposed action in order to have standing. Counsel for the Plaintiffs in the present case went to great lengths to present evidence that members of both organizations are adversely affected by the proposed and existing pipeline construction. Thus, each association showed more than a "mere interest" in the subject matter at hand.

Second, while the allegation has been made that the right to participate has been violated, this was not the sole allegation made to gain standing.

And third, with regard to the 9th Circuit holding that economic interests are outside the National Environmental Policy Act (NEPA), the Court did indeed rule that the Port of Astoria's alleged losses of potential tax base and revenue were insufficient to confer standing under MEPA. However, in the same case the Court held that individual plaintiffs and an organization of concerned citizens who alleged ecological and aesthetic injuries (including the emission of pollutants; impacts on agriculture, wildlife, and the enjoyment of recreational facilities; and demographic upheaval attended by housing, schooling, and traffic problems) did have standing on the basis of these injuries. Port of Astoria, supra at 476. Even more interesting, although a plaintiff broadcasting company's alleged injury of potential broadcast interference was also economic, the Court nevertheless

held that this kind of economic injury was causally related to an act which lay within MEPA's embrace, and the broadcasting company therefore had standing.

The Court therefore finds both associations have standing to bring this action. The three factors constituting sufficient minimum criteria which are found in Chief Justice Haswell's dissent in Montana Wilderness Association v. Board of Health, 559 P.2d 1157 (1976) are fully met. First, the Plaintiffs alleged a threatened injury to property and rights, including the "inalienable...right to a clean and healthful environment." Article 2, Section 3 of the Montana Constitution. The constitutional right to a clean environment is not limited to Montana environmental organizations.

Second, the Plaintiffs showed the alleged injury to be distinguishable from the injury to the public generally. Both organizations have members who live, work, and recreate in the area which is affected by the construction. Thus, standing can be conferred for the same reasons outlined by the 9th Circuit in Port of Astoria for a concerned citizens organization, individual plaintiffs, and a broadcasting company.

Third, unlawful environmental degredation is clearly within the judicial cognizance of the State sovereignity.

II. LACHES SHOULD NOT BE INVOKED

The Defendants in this case have asserted that laches should be invoked, and cited two cases which held that laches may apply in environmental litigation. The facts in Save Our Wet Lands, Inc. v. U. S. Corps of Engineers, et al., 549 Fed.2d 1021 (5th Cir., 1977), involved substantial real estate developments on the shore of a lake. It was alleged that serious adverse environmental impacts would occur. The Court said:

> It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation. Save Our Wet Lands, supra at 1026.

The second case, Citizens and Landowners Against the Miles City/New Underwood Power Line, et al v. U. S. Department of Energy, 683 Fed.2d 1171 (8th Cir., 1982), involved the construction of a 230-kilovolt electrical transmission line from Miles City, Montana, to New Underwood, South Dakota. The Court held:

> Although laches is not favored in environmental cases, it is properly invoked when a party seeking injunctive relief has engaged in unreasonable and inexcusable delay which results in undue prejudice to the other party. Citizens, supra at 1175.

In determining whether laches should apply in the present case, several broad but fundamental rules are applicable. First, as previously stated, laches is not a favored defense in environmental cases. (See also Coalition for Canyon Preservatic v. Bowers, 632 Fed.2d 774 (9th Cir., 1980).) The reason it is not favored, as discussed in Coalition, is that this defense should not be used to defeat the policies emanating from NEPA and MEPA. By the passage of those acts, the legislative branch mandated that environmental concerns be assessed in governmenta actions, and that agencies comply with procedural requirements to insure agency awareness and public involvement. The Court said:

> (The use of laches) should be restricted to avoid defeat of congress' environmental policy. In considering laches claims, it is relevant that the Plaintiff will not be the only victim of possible environmental damage. (Cites) Citizens have a right to assume that federal officials will comply with the applicable law. (Cite) As we stated in City of Davis v. Coleman: "to make faithful execution of this duty contingent upon vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to insure compliance with NEPA in the first instance." Coalition, supra at 779.

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Second, laches is an equitable defense. As stated in Citizens,

> The doctrine...is flexible; no fixed or arbitrary period of time controls its applicability...in determining whether the doctrine of laches should bar lawsuit, all the particular circumstances of each case must be considered, including the length of delay, the reasons for it, its affect on the Defendant, and the overall fairness of permitting the plaintiff to assert his or her action. Citizens, supra at 1174.

Third, the Court must balance the equities, and consider, as stated in Save Our Wet Lands,

> ...both the expenditures which have been made by the Defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed with this litigation. Save Our Wet Lands, supra at 1028.

Fourth, three independent criteria must be met before laches can be applied. The Defendant must show: (1) a delay in asserting a right or claim; (2) the delay was not excusable; and (3) there was undue prejudice to the party against whom the claim is asserted. Save Our Wet Lands, supra at 1026.

In concluding that the defense of laches is improperly asserted, the Court has compared the facts of the present case to those in the precedents cited by the Defendants, assessed the facts in view of the three criteria, and endeavored to balance the equities for both sides. In doing so, the Court found the facts of the present case to be strikingly different from the facts in both Save Our Wet Lands and Citizens. In Save Our Wet Lands--the case dealing with real estate developments on a lake shore--the project was highly publicized; public notice was made regarding the permit application; a revised application was requested and submitted; during the one year period between public notice of the permit application and issuance of the permit the plaintiffs failed to make comments, objections, or ask questions;

the plaintiffs waited nineteen months before they brought the action; an EIS was prepared; the appellants did not file their suit until two and one-half years after the EIS was prepared and the permit was issued; over TWENTY-SIX MILLION DOLLARS ($26,000,000.00) had been spent on the project; and the project was substantially completed at that time. In balancing the equities, the Court could only have ruled as it did.

The Citizens case over a power line is also distinguishable from Haines Pipeline. In Citizens public officials had conducted informational meetings; they had met with County Commissioners; they had sent letters to affected landowners; a draft EIS was issued and circulated; public meetings on the draft EIS were held; a final EIS was released a year later; construction began; and the lawsuit was instituted some three years after the original proposal was publicized. Compared to the present facts, and in view of the widely circulated and discussed information, the delay in bringing action was clearly unreasonabl

In the present case there was no public notice of application; there was no draft impact statement; there were no public hearings on any proposal; there were no informational sessions; and there were no public meetings with commissioners. Unlike the above two cases, the Plaintiffs in the present case had no forum at which to express their views and participate in the project. The Court therefore believes if there was a delay in filing the action, it is excusable. As one court stated:

> The tardiness of the parties raising the issue cannot excuse compliance with NEPA; primary responsibility under the act rests with the agency. Environmental Defense Fund v. TVA, 468 Fed.2d 1164 (6th Cir., 1972) at 1133.

In fact, the Defendants might have done a little delaying, themselves. Evidence presented during the five day trial showed that MPC has been contemplating the pipeline since

1980. It appears the State was not informed of the plans until three years later. More timely requests for state permits might have ensured that the construction would stay on schedule.

Finally, in balancing the equities the Court does not find undue prejudice against MPC if there is a pause in construction activities at this time. While MPC claims a financial loss of TWENTY THOUSAND DOLLARS ($20,000.00) per day, other evidence was presented to this Court indicating that winter weather would cause a temporary shut-down of construction activities in any case.

III. STATE AGENCIES ARE SUBJECT TO MEPA REQUIREMENTS IF THEY ARE SUBSTANTIALLY INVOLVED IN A PROJECT WITH SIGNIFICANT IMPACTS UPON THE ENVIRONMENT.

Section 75-1-201(1)(b)(iii), MCA, requires an EIS for all major actions of State government significantly affecting the quality of the human environment. The issue raised by the statutory language is whether the State action of granting permits for the Haines Pipeline is of a nature such that an EIS should be prepared. This issue occurs since it is not actually State action, but rather private action, which is causing the impact. The State is simply allowing it. A Court commented on this identical dilemma in Minnesota Public Interest Research Group v. Butts, 498 Fed.2d 1314 (1974), and said:

> There is little question that when the federal government commits millions of dollars to build dams, nuclear power plants, or highways that there is a major federal action. The question presented by the instant case is not so clear cut; these actions of the Forest Service (of extending and modifying contracts) cannot be quantified in terms of dollars to be spent or tons of earth to be moved. Minnesota Public Interest Research Group, supra at 1319.

The Department of State Lands argues that the project in this case is a private project of the Montana Power Company,

and not a project of State government. Therefore, it argues that the impact of the entire project need not be considered in an EIS, but only the segments over which the State has legal authority. The case of Winnebago Tribe of Nebraska v. Ray, 621 Fed.2d 269 (8th Cir., 1980), cert. den. 449 U.S. 836, is cited. In that case, the Court upheld a decision by the Corps of Engineers not to prepare an EIS on a Section 10 permit. The Corps had determined that its authority for approval only lay with a 1.25 mile river crossing out of the sixty-seven (67) miles long project. The Court agreed that the Corps had no legal authority over the remainder of the line.

Other state agency Defendants also argue that each of their separate involvements in the pipeline project are "de minimis", insignificant, or discretionary. Therefore, each agency standing alone has no obligations under MEPA.

While these arguments are interesting, the Court tends to find them to be rather creative excuses for the State to bypass obligations which are clearly the spirit if not the letter of MEPA.

On the first issue--whether government action that significantly affects the environment must in-and-of-itself also be "major" in order to trigger an EIS--this Court supports the approach adopted by the 9th (and also the 6th and 10th) Circuit Courts of Appeals. In the City of Davis v. Coleman, 521 Fed.2d 661, (9th Cir., 1975), a controversy surrounded a proposed freeway interchange and a federal EIS. The Court stated:

> The Defendants have...objected that the environmental consequences of development will result from local and private action, not federal action, and that therefore they need not consider the consequences of development in determining whether an EIS is required. They are wrong...the argument that the principle object of a federal project does not result from federal action contains its own refutation. (Cite) Thus, we hold that NEPA

> requires consideration of the effects of the planned development. City of Davis, supra at 677.

The Court is further persuaded by the fact that this approach has been incorporated into the Federal Regulations implementing NEPA. According to 43 C.F.R. 1508.18(b)(4), one of the catagories of federal action which trigger an EIS is:

> ...approval of specific projects such as construction or management activities located in a defined geographical area. Projects include actions approved by permit or other regulatory decisions as well as federal and federally assisted activities.

Regarding the second argument--that the invovlement of each state agency in the pipeline project can be assessed in isolation from the other state agencies--this Court can find no legal authority for such a proposition, and believes it casts aside the fundamental philosophy of NEPA which is to promote a comprehensive environmental assessment. It takes little imagination to realize that any major project can be divided into insignificant parts, and it is only the sum of the parts which creates a significant impact. This identical question was addressed by the D. C. Circuit in 1975, which held:

> The guidelines make clear that the statutory term, "major Federal actions" must be assessed "with a view to the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated."
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> ...
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> This interpretation of a statutory term is eminently reasonable, both because NEPA plainly mandates comprehensive consideration of the effects of all federal actions, (cite) which consideration would be defeated if impact statements were required only for individual projects of "major" size, and because any other interpretation would provide an escape hatch, through agency subdivision of "major" projects, from the impact statement requirement. Sierra Club v.

Morton, 514 Fed.2d 856, 871 (D.C. Cir., 1975) rev'd on other grounds 427 U.S. 390.

It would make little sense for this Court to review each agency's involvement in the pipeline separately from all the others. And it would seem that at an earlier date the agencies must have agreed with this comprehensive interpretation of MEPA in view of their efforts surrounding the Northern Border Pipeline Environmental Impact Statement, not withstanding the fact the EIS was prepared under NEPA.

Besides finding the comprehensive approach to be more in the spirit of MEPA, this Court also believes that the facts of Winnebago, supra are distinguishable from those in the presen case. In Winnebago, the Corps of Engineers was the sole agency considering the environmental impact, and its authority was limited to a small stretch of navigable waters. In the present case, the action is against numerous state agencies whose duties include authority over turbidity standards, streambank preservation involvement, land use, water pollution, weed control, historic preservation, stream-crossings, wildlife and fisheries, and social and economic impacts. The responsibility and involvement of all of these departments is hardly comparable to that of the Corps of Engineers in the construction of a power line crossing a single, navigable river.

The Court thus finds that substantial State invovleme is entailed in a pipeline project, the responsibility of which state agencies cannot evade by assessing their involvement in isolation from each other. The burden on the Plaintiffs is therefore to show this specific project would have significant impacts necessitating an EIS, and that the State unreasonably refused to assess them.

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IV. "REASONABLENESS" IS THE STANDARD OF REVIEW REGARDING THE DECISION TO FOREGO ANY STATE ENVIRONMENTAL ASSESSMENT

The Defendant MPC argues that the best standard for reviewing an agency's decision to forego an EIS is the four point criteria outlined in Cabinet Mountains Wilderness v. Peterson, 685 Fed.2d 678, (D.C. Circuit, 1982). The four criteria are as follows:

> (1) Whether the agency took a "hard look" at the problem;
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> (2) whether the agency identified the relevant areas of environmental concern;
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> (3) as to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and
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> (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.
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> The fourth criterion permits consideration of any mitigation measures that the agency imposed on the proposal... If, however, the proposal is modified prior to implementation by adding specific mitigation measures which completely compensate for any possible adverse environmental impacts stemming from the original proposal, the statutory threshold of significant environmental effects is not crossed and an EIS is not required. Cabinet Mountains, supra at 681-2.

On the other hand, the Plaintiffs argue that a decision not to prepare an impact statement should be reviewed using a "reasonableness" standard.

This Court sees no problem in using both approaches to reach its final conclusion.

The Court is aware that at least the 5th, 8th, 9th and 10th Circuit Courts of Appeals have determined that the initial agency determination is to be tested under a rule of reasonableness. In Foundation for North American Wild Sheep v. United

States Department of Agriculture, 681 Fed.2d 1172 (9th Cir., 1982), where the U. S. Forest Service decided not to prepare an EIS prior to granting a special use permit for the reconstructi and use of a road, the 9th Circuit held:

> Our first step in resolving the issues presented by this appeal is a determination of the appropriate standard for reviewing the Service's decision that no EIS was required prior to the issuance of a permit to reopen Road 2N06. It is firmly established in this Circuit that an agency's determination that a particular project does not require the preparation of an EIS is to be upheld unless unreasonable. Foundation, supra at 1177.

In discussing what "reasonableness" entails the Court said:

> The standard for determining whether the implementation of a proposal would significantly affect the quality of the human environment is whether "the Plaintiff has alleged facts which, if true, show that the proposed project may significantly degrade some human environmental factor." (Cites) A determination that significant effects on the human environment will in fact occur is not essential. (Cite) If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared. (Cites) (Emphasis in the opinion) Foundation, supra at 1177-8.

The Court is persuaded of the soundness of the "reasonable" rule in this case, as opposed to the "arbitrary, capricous, and abuse of discretion" rule, simply by the nature of the circumstances. While the Court is eager not to invade the province of state agencies, and substitute its judgment for their own, the Court in this instance is in the undesirable situation of reviewing a State decision on which there is no record. If some record were available, the more restricted "arbitrary and capricous" standard would be more appropriate.

This Court believes that the "reasonableness" criterion, at least in this instance, meshes quite well with the four criteria of Cabinet Mountains. However, the Cabinet Mountains case

is distinguishable on the facts because of the interagency approach and the substantial record which marked their decision. The facts in Cabinet Mountains involved a proposal for continuation of a minerals exploration program to be conducted over a three year period. In the process of concluding that a formal EIS was unnecessary, the following measures were taken: When the drilling proposal was submitted, an environmental assessment was prepared; copies were circulated to the public for comment; public meetings were held; biological evaluations were conducted evaluation was made regarding cumulative effects of the proposal fourteen (14) site-specific recommendations were made to reduce potential adverse affects; helicopter flights were restricted; monitoring of the project was established; roads were closed; overnight camping was prohibited in certain areas; etc.

This Court agrees with the Cabinet Mountains court--that mitigation measures were properly taken into consideration, and the agency's decision that an EIS was therefore unnecessary--was correct. But the Appeals Court also said:

> The record indicates that the Forest Service carefully considered the ASARCO proposal, was well informed on the problems presented, identified the relevant areas of environmental concern, and weighed the likely impacts. (Emphasis added)
>
> When ASARCO submitted its four year drilling proposal the agency prepared an environmental assessment, copies were circulated for comment, and public meetings were held. Cabinet Mountains, supra at 683.

Since there is no record in the present case, no hearings, no preliminary environmental assessment, no apparent interagency coordination, and no opportunity for public comment, this Court finds it difficult to determine whether the state agencies took a "hard look" at the potential problem, and whether they "identified the relevant areas of environmental concern." With

no record and no PER it is difficult to say the State made a convincing argument that the "impact was insignificant", and that mitigation measures "sufficiently reduced" negative impacts to a minimum.

In this respect, the Court found the specially crafted mitigating requirements of the PER regarding the crossing of the Sun River to be of great help, and can only wonder why such a document was not prepared for the entire project.

V. A PRELIMINARY INJUNCTION MAY ISSUE WHEN THE STATUS QUO SHOULD BE MAINTAINED TO PREVENT IRREPARABLE DAMAGE

The standard for a preliminary injunction is contained in Section 27-19-201, MCA (1983). The relevant Sections state an order may be granted in the following cases:

> (1) When it shall appear that the applicant is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of an act complained of, either for a limited period or perpetuity;
>
> (2) when it shall appear that the commission or continuance of an act during the litigation would produce great or irreparable injury to the applicant.

These standards are generally described as the "likelihood of success on the merits" and the "irreparable harm" tests. Under Montana law, passing either of the two tests entitles a Plaintiff to a preliminary injunction. A recent Montana case provides further clarification to the requirements of these statutory rules.

> 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. (Cites) 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, the

> Courts are inclined to issue the preliminary injunction to preserve the status quo pending trial. (Cite) Porter v. K&S Partnership, 627 P.2d 836, at 839 (1981).

The Court added:

> ...the limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial. If a preliminary injunction will not accomplish those purposes then it should not issue.

The Court found further clarification in the case of Troglia v. Bartolleti, 451 P.2d 106 (1969), where the Court said:

> A party applying for a temporary injunction has the burden of establishing a prima facie right to such relief, granting that it is not necessary to make out such a case as would entitle the pleader to relief at a final hearing. Troglia, supra at 109.

And finally, in the case of Lough v. Blount, 336 Fed. Supp. 627 (D. Mont. 1971) the Court discussed "irreparable injuries" in the context of an employment contract and allegedly insufficient administrative remedies. The Court said:

> Further, this type of relief is not a matter of right, even though the plaintiff may suffer irreparable injury. (Cite) A preliminary injunction is granted if, without such interference by the court, the plaintiff will suffer irreparable injury or if it is necessary to preserve the status quo. (Cite)
>
> Under the facts of the case at bar, plaintiff will not suffer irreparable injury. Any losses which he may suffer from the action of Defendant can be adequately compensated by a monetary award completed through the administrative procedure and subsequent judicial review provided. Consequently, there is no irreparable injury on which to base the injunction. Lough, supra at 628.

The Defendant MPC argues that because a preliminary injunction is an extraordinary remedy it must be based on a strict standard, and that the Plaintiffs have neither made out a prima facie case nor have they shown an irreparable injury. MPC argues

further that the Defendants would suffer substantial economic loss by enjoining construction, while no injury would befall the Plaintiffs if the preliminary injunction failed.

The Court feels cautious about any decision to grant a motion for preliminary injunction, and does not believe that so serious a remedy should be frivolously considered. However, the Plaintiffs have not asked for a permanent injunction, but only for a preliminary injunction. The Court believes that the evidence presented in five days of trial raised substantial doubt about environmental impacts, and that preserving the status quo pending a preliminary environmental review is justifiable. The Court is particularly persuaded by the discussion in Lough, where the Court said that in an injunction was an improper remedy where monetary damages would suffice. The type of harm discussed by the Plaintiffs in this case involves the violation of the constitutional right to a clean and healthful environment; and the violation of statutory rights including failure to assess potential environmental impacts, excluding the public from participating in the decision, and failure to take reasonable mitigation measures.

The Court believes that a temporary pause in construction activities pending a PER will only be a small burden for the Defendants who for the most part have temporarily halted construction activities due to winter weather.

VI. CONCLUSIONS

To summarize, the Court holds that the Plaintiffs have standing in view of the fact that a convincing case was made regarding adverse effects on the organization members.

Laches would be inappropriate under the circumstances since any delay by the Plaintiffs appears to be excusable as well as minimal, and has not unduly prejudiced the Defendants.

State agencies may not slide out from under their MEPA

obligations by arguing that their permitting procedures were not "major" or that their duties viewed in isolation of each other are de minimus.

It is this Court's duty to decide whether the decision to forego an environmental assessment was "reasonable."

A preliminary injunction is in order since a convincing case has been made that constitutional and statutory rights will be irreparably harmed, and monetary damages would be inadequate compensation.

The Court finds it surprising that a PER was not undertaken at the time of the proposed pipeline in view of the one hundred (100) foot wide corridor, the two hundred (200) mile length, the six (6) foot or deeper ditch, and the crossing of several major rivers, as well as over two hundred (200) streams, swamps, hillsides, and agricultural lands. Asking for a PER does not appear unreasonable in view of the fact that a complete EIS was done for the Northern Border Pipeline.

The Court finds it is slightly ironic that the state agency Defendants chose to argue that their participation was so minimal it failed to warrant an EIS. And on the other hand, the MPC Defendant argued that there was so much responsible government involvement and such a "plethora of permits" that an EIS was unwarranted. It is a little difficult to have it both ways.

Therefore, this Court grants a preliminary injunction pending a preliminary environmental review or other appropriate State record which will prove that the environmental impact was indeed assessed, and that either a full blown EIS should be undertaken or that reasonable site-specific measures will be attached to the permits. to mitigate the impact, as was done by the Sun River PER.

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This Court would simply like some kind of record to assure itself that the State indeed is abiding by the environmental law of this land.

DATED this 16th day of February, 1984.

Joseph B. Gary
District Judge

cc: Counsels of record