COMPLAINT AND APPLICATION FOR ALTERNATE WRIT OF MANDATE

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

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MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH,	)	CAUSE NO.
Plaintiffs,	)	COMPLAINT AND APPLICATION FOR ALTERNATE WRIT OF MANDATE
v.	)	
DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Defendant.	)	

* * * * * * * *

COME NOW Plaintiffs, with their claims for declaratory relief and Mandamus against the Montana Department of Environmental Quality, and allege as follows:

I. INTRODUCTION

1. The Seven-Up Pete Joint Venture (SPJV) has submitted an application for a massive open-pit gold mine (McDonald Project) in the upper Blackfoot River valley, near the confluence of the Landers Fork and Blackfoot Rivers. SPJV is a partnership between Phelps Dodge Mining Co. and Canyon

Resources Crop. and has been actively exploring gold deposits in the area of the mine for the past several years.

2. This Complaint challenges actions by the Montana Department of Environmental Quality (DEQ) in approving actions connected with this mine proposal. This summer, DEQ illegally amended a mineral exploration license held by SPJV to allow for the discharge of groundwater containing high levels of arsenic and zinc into the shallow aquifers of the Blackfoot and Landers Fork Rivers. DEQ's actions violate the Montana Water Quality Act and the Montana Environmental Policy Act, the Montana Administrative Procedures Act and the Montana Constitution.

3. DEQ's violation of these laws creates a substantial and significant risk of pollution in the Landers Fork and Blackfoot Rivers.

II. PARTIES, JURISDICTION, AND VENUE

4. The Montana Environmental Information Center (MEIC) is an incorporated Montana non-profit organization with approximately 1,500 members, most of whom live in Montana. MEIC was formed in 1973, and since that time has been actively involved in issues relating to the protection and enhancement of water quality, fish and wildlife and their habitat, and the wise use of Montana's natural resources. MEIC members regularly float, fish, hunt and view wildlife on the public and private lands and waters in the vicinity of the waterways at issue in this case. Its 1994 annual "Rendezvous" was held in Lincoln, Montana. MEIC's office is in Helena, Montana.

5. The Clark Fork-Pend Oreille Coalition (CFC) is a non-profit corporation organized under the laws of Montana. CFC has approximately 1000 members, with most members residing in the Clark Fork drainage of Montana and Idaho. For the past 10 years, CFC has worked to improve water quality in the Clark Fork drainage. The Blackfoot River is a major tributary to

the Clark Fork, and the potential impacts of the McDonald Project are a significant threat to water quality throughout the basin. Members of the Clark Fork Coalition regularly, hunt, fish, swim, and float in the Blackfoot River drainage.

6. Women's Voice for the Earth (WVE) is a non-profit organization based in Missoula, Montana, dedicated to protecting biological diversity of the Northern Rockies. WVE members live, work and recreate on and around the Blackfoot River, and many of its members depend upon the Missoula aquifer, which could be impacted by any pollution of the Blackfoot River, for their drinking water.

7. Defendant Montana Department of Environmental Quality (DEQ) is the state agency charged with protecting water quality and administering and permitting hard rock mines.[1] DEQ must comply with the Montana Water Quality Act, §§ 75-5-301 *et seq.*, MCA, the Montana Metal Mine Reclamation Act, §§ 82-4-301 *et seq.*, MCA, the Montana Environmental Policy Act, §§ 75-5-101 *et seq.*, MCA, the Montana Administrative Procedures Act, §§ 2-4-101 *et seq.*, MCA, and the Montana Constitution,

8. This Court has jurisdiction over this action pursuant to Article VII, Section 4 of the Montana Constitution.

9. Venue lies in this Court by virtue of § 25-2-126(1), MCA.

III. GENERAL ALLEGATIONS

10. Seven-Up Pete Joint Venture (SPJV), is presently seeking a mine permit from DEQ for what will be the largest gold mine in Montana, and one of

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[1] Prior to the 1995 legislative session, the Metal Mine Reclamation Act was administered by the Department of State Lands and the Water Quality Act was administered by the Department of Health and Environmental Sciences. The legislature reorganized the state's natural resource agencies and consolidated all regulatory functions into a new agency, the Department of Environmental Quality.

the largest open-pit, cyanide-heap leach mines in the world. The mine, known as the McDonald Project, will be situated on the headwaters of the Blackfoot River.

11. The Blackfoot River is one of Montana's most famous rivers. Immortalized in Norman MacLean's classic book, A River Runs Through It, the Blackfoot attracts thousands of anglers, floaters and other recreationists every year. The Blackfoot supports a world-renowned trout fishery and provides habitat for many different species of fish and wildlife. In particular, the Blackfoot supplies some of the best remaining habitat for the imperiled bull trout, a species the U.S. Fish and Wildlife Service has found is warranted for listing under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*

12. While the lower Blackfoot contains high-quality fish habitat, much of the upper river has been severely impacted by years of mining, and the river is only now beginning to recover from these activities.

13. The Landers Fork River is an important tributary of the Blackfoot in terms of both water flow and fish habitat. The Lander Fork provides critical spawning and rearing habitat for bull trout.

14. DEQ will be preparing an Environmental Impact Statement (EIS) on the mine permit application submitted by SPJV. This EIS and permit evaluation will be conducted pursuant to the Metal Mine Reclamation Act (MMRA) and the Montana Environmental Policy Act (MEPA). In 1992, and prior to submitting its mine permit application, SPJV applied for an exploration license under the MMRA, and DEQ prepared an environmental assessment pursuant to MEPA. Under Exploration License No. 00497, SPJV was authorized to collect geophysical information and generally explore the mineral formations associated with the proposed mine. The EA conducted for

the exploration did not fully evaluate the pumping which is the subject of this suit.

15. On June 2, 1995, SPJV submitted a new work plan for conducting extended pumping at the McDonald Project near Lincoln, Montana. SPJV sought approval for the pumping under Exploration License No. 00497. The pumping is presently underway and is apparently intended to provide data to help determine the long term response of dewatering at the McDonald Project. The letter seeking approval to amend the Exploration License 00497 is attached as Plaintiffs' Exhibit 1.

16. Under the pumping proposal submitted by SPJV, groundwater will be pumped from the bedrock aquifer and discharged into two infiltration galleries. One gallery is located in the Blackfoot River alluvium and one is in Landers Fork alluvium.

17. On June 14, 1995, Scott D. Spano, the Exploration Program Supervisor at DEQ's Hard Rock Bureau, approved SPJV's application to amend Exploration License No. 00497 to allow the pumping. Through its June 14 letter, DEQ concurred with the company's position that a MPDES (Montana Pollutant Discharge Elimination System) permit was not required for the discharges of polluted waters into the Blackfoot and Landers Fork alluvium. This letter is attached as Plaintiffs' Exhibit 2.

18. At some point in June, DEQ realized that the water being pumped out of the bedrock and discharged into the Blackfoot and Landers Fork alluvium contained concentrations of arsenic, zinc and iron that exceeded water quality standards. As such, these discharges were in violation of the Montana Water Quality Act, § 75-5-401, MCA.

19. On June 30, 1995, Scott Spano of DEQ orally rescinded his approval of the Exploration License due to his "erroneous impression" that the

well water was of the same quality as the alluvial water. This conversation was memorialized by Mr. Spano, and his memorandum is attached hereto as Plaintiffs' Exhibit 3.

20. In response to these water quality violations, SPJV hired consultants who proposed a solution to the problem. Water Management Consultants suggested that if the Blackfoot and Landers Fork alluviums were declared mixing zones for pollutants, then the discharges of arsenic, zinc and iron could continue. See Plaintiffs' Exhibit 4.

21. On July 31, 1995, DEQ gave SPJV oral authorization to proceed with its testing, with the understanding that a mixing zone would be identified so as to bring the discharges into the alluvials into compliance with state law. As a basis for the mixing zone calculations, DEQ used the data collected by Water Management Consultants.

22. On August 10, 1995, DEQ issued formal written authorization in a letter to SPJV. See Plaintiffs' Exhibit 5. That letter contained two "Statement of Basis", one for the mixing zone in the Blackfoot River Alluvial Aquifer, and one for the mixing zone in the Landers Fork Alluvial Aquifer. While this authorization formally identified mixing zones in the alluvium for the two pump tests, it also found that the Landers Fork discharge was directly connected to surface water. Further, it indicates that the water quality of the water being pumped is worse than the water quality of the receiving waters. Despite this finding, no MPDES permit was required by DEQ.

23. To the best of Plaintiffs' knowledge, SPJV has been conducting pumping and discharging polluted waters from the wells into the mixing zones, and in the case of the Landers Fork mixing zone, into the Landers Fork River, since before DEQ issued its August 10, 1995 authorization, and continues to do so.

24. Plaintiffs, as entities using the Blackfoot drainage, have been damaged and will continue to be damaged by the actions of the DEQ in allowing SPJV to continue to violate the law as set forth above and pollute the Blackfoot and Landers Fork Rivers. Plaintiffs received no notice of the actions of DEQ, and only found out about them, by accident, several weeks after approval was granted.

COUNT I

THE APPROVAL OF THE PHELPS DODGE PUMP TESTS VIOLATES MONTANA'S NON-DEGRADATION POLICY.

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

26. Section 75-5-303, MCA, establishes a policy of protecting high-quality waters from pollution. By statute and regulation, both the alluvium and the waters of the Landers Fork and Blackfoot are high-quality waters.

27. Section 75-5-303(3), MCA, prohibits DEQ from authorizing activities that degrade high-quality waters unless a preponderance of evidence shows that (in summary): (1) the degradation is necessary and there are no feasible alternatives; (2) the proposed project will result in important economic or social development; (3) existing and anticipated use of state waters will be fully protected; and (4) the least degrading water quality protection practices are feasible.

28. The 1995 legislature amended the Water Quality Act and established a list of activities that it categorically determined would not degrade high-quality waters regardless of the amount of pollution these activities produced, § 75-5-317, MCA, and were therefore exempt from the provisions of § 75-5-303 (3) and (4), MCA. Correspondence between DEQ and

SPJV indicates that a determination was made that the pump tests were considered exempted by the DEQ from Montana's nondegradation policy by § 75-5-317 (2)(j), MCA, which exempts, among other things, water well and monitoring well tests. The pump tests being conducted by SPJV do not qualify for this exemption from Montana's nondegradation policy.

29. DEQ has failed to follow the provisions of § 75-5-303, MCA, in this instance. DEQ has acted arbitrarily and capriciously in its haste to accommodate SPJV and has not weighed the corresponding harm to the environment and the public as it is required to do under § 75-5-303 (3 & 4), MCA.

COUNT 2

DEQ FAILED TO FOLLOW THE REQUISITE PROCEDURE IN CREATING THE MIXING ZONE

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

31. Mixing zones are areas where the concentrations of pollutants are allowed to exceed water quality standards. Mixing zones are a polite term for pollution dilution zones. Mixing zones are allowed by statute, but their designation is closely controlled. See § 75-5-103(14), MCA; § 75-5-301(4), MCA.

32. The water being pumped by SPJV from a deep aquifer into the Landers Fork Alluvial aquifer, and thence into the Landers Fork River. exceeds state standards for arsenic.

33. The mixing zone created by DEQ for SPJV Exploration License violates the procedures and standards set out in § 75-5-301(4), MCA, which requires areas designated as mixing zones to have (1) the smallest practicable size, (2) a minimum practicable effect on water uses, and (3) definable

boundaries. No such findings are contained in either statement of basis attached as Exhibit 5.

34. ARM § 16.20.1010 authorizes DEQ to allow the discharge of pollutants to **groundwater** where a mixing zone has been established pursuant to law and the regulations ARM §§ 16.20.1801 through 16.20.1810.

35. ARM § 16.20.1804 precludes the creation of a mixing zone if it would "threaten or impair existing beneficial uses." It also requires specific procedures for DEQ to follow, called a "water quality assesment", when establishing a mixing zone. DEQ failed to follow the water quality assesment procedure set forth at ARM § 16.20.1804 in establishing the mixing zones for exploration permit 00497. The discharge of arsenic and zinc from the deep aquifer into shallow groundwater threatens domestic water supplies and fisheries values and as such seriously impacts existing beneficial users.

36. ARM § 16.20.1805(2) precludes DEQ from creating a mixing zone where discharges to **surface** water will harm beneficial uses. The Statement of Basis for the Landers' Fork Alluvial Aquifer mixing zone includes a discharge to the surface water of the Landers Fork River. (Exhibit 5, Landers Fork Alluvial Aquifer Statement of Basis, page 2) The discharge of arsenic and zinc from the deep aquifer into shallow groundwater, and in turn, into Landers Fork, threatens domestic water supplies and fisheries values and as such seriously impacts existing beneficial users.

37. DEQ has failed to follow its own regulations for the creation of mixing zones for groundwater and surface water when it created the mixing zones for the Blackfoot and Landers Fork aquifers.

COUNT 3

DEQ FAILED TO ISSUE A MPDES PERMIT FOR THE LANDERS FORK RIVER

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

39. Pursuant to § 75-5-401(1)(a), MCA, an MPDES permit is required for any person who discharges any pollutant into surface waters.

40. DEQ's Statement of Basis for the Landers Fork mixing zone (Exhibit 5) discloses that there is a direct connection between the Landers Fork alluvial and the river, and that pollutants are migrating into the surface waters of Landers Fork River.

41. Because there will be a discharge of pollutants to the Landers Fork which will cause the receiving waters to exceed standards, the exemption from the permit requirements set forth at § 75-5-401(1)(b), MCA, does not apply and an MPDES permit is required. The failure of DEQ to require an MPDES permit is a violation of the Montana Water Quality Act.

COUNT 4

DEQ'S FAILURE TO COMPLETE AN ENVIRONMENTAL ASSESSMENT ON THE PUMP TESTS IS A VIOLATION OF MEPA.

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

43. The Montana Environmental Policy Act and rules promulgated thereunder require preparation of an Environmental Assessment (EA) when it is not clear without the preparation of one whether the proposed action is a major one significantly affecting the quality of the human environment. ARM § 16.2.626.

44. The DEQ prepared an EA for the pump tests **prior** to its discovery that the pumped ground water exceeded existing concentrations in receiving water. There was no public involvement in or notice of this EA. The EA did not discuss or contemplate the pump tests herein complained of. Those pump tests, which are being conducted in violation of the Montana Water Quality Act, have the potential to significantly affect the quality of the human environment, and DEQ was required to conduct an EA prior the approval of the amendment to Exploration License 00497.

COUNT 5

DEQ HAS VIOLATED THE MONTANA ADMINISTRATIVE PROCEDURE ACT

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

46. The Montana Administrative Procedure Act prohibits agency decisions that are arbitrary, capricious and unlawful.

47. The failure of DEQ to comply with the requirements of Montana's nondegradation policy, the laws and regulations for the establishment of mixing zones, the laws and regulations for the issuance of MPDES permits, and duties imposed by the Montana Environmental Policy Act are all decisions that are arbitrary, capricious and unlawful.

COUNT 6

CONSTITUTIONAL VIOLATION

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

49. Article IX, Section 1 (1) of the Montana Constitution requires the State to maintain and improve a clean and healthful environment for present and future generations. Article IX, Section 1 (3) requires the Legislature to

provide adequate remedies for the protection of the environmental life support system from degradation.

50. To the extent that §§ 75-5-301, 303(3) through (8), 317 and 401(1)(b) and (5), MCA, allow degradation of state waters by means of degradation waivers, the creation of mixing zones, allowance of "non-significant activities" which degrade water quality, or the exemption from permit requirements of certain polluting activities, those statutes are unconstitutional in violation of Article IX, Section 1 of the Montana Constitution.

COUNT SEVEN

MANDAMUS

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

52. The DEQ has failed in its clear legal duty by failing to: a) require SPJV to go through the degradation petition requirements of § 75-5-303, MCA, and the rules promulgated thereunder, prior to issuing the amendment to Exploration License 00497; b) follow the proper procedure for establishment of a mixing zone, as set forth at § 75-5-301, MCA, and the rules promulgated thereunder; and 3) require an MPDES permit for discharges to the surface waters of the Landers Fork River.

53. Plaintiffs have no plain, speedy and adequate remedy in that they only discovered DEQ's actions after activity under the mixing zone amendments were under way, and those activities, which harm the water quality of the Landers Fork and the Blackfoot River, are ongoing.

54. A peremptory writ of mandate is necessary and proper pursuant to § 27-26-101, *et seq.*, MCA.

COUNT EIGHT

DECLARATORY JUDGMENT

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

56. As a non-preferred alternative to mandamus, Plaintiffs request that the Court grant them declaratory judgment on Counts One through Six of this Complaint.

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court:

1. Declare Exploration License 00497 void for the DEQ's failure to follow the law in issuing the statements of basis (Exhibit 5) which allow two mixing zones in the Landers Fork and Blackfoot alluviums.

2. Issue a peremptory writ of mandate against Defendant DEQ to compel DEQ to:

a. Require SPJV to go through the degradation requirements of § 75-5-303, MCA, before allowing SPJV to use the mixing zones;

b. Follow the proper statutory and regulatory procedure for the creation of mixing zones; and

c. Require an MPDES permit prior to allowing SPJV to discharge to the surface waters of the Landers Fork.

2. Alternatively, issue a permanent injunction ordering DEQ to suspend Exploration License 00497 pending full compliance with the Montana Water Quality Act, the Montana Environmental Policy Act, and the Montana Constitution.

3. Grant Plaintiffs their reasonable costs and attorneys' fees pursuant to § 27-26-402, MCA; and

4. Grant whatever further relief this Court deems is just and proper.

DATED this 4 day of October, 1995.

For Thomas M. France
Attorney for Plaintiffs

David K. W. Wilson, Jr.
Attorney for Plaintiffs

VERIFICATION

STATE OF MONTANA)
:ss.
County of Lewis & Clark)

James Jensen, being first duly sworn, deposes and says:

That he is one of the Plaintiffs in the foregoing; that he has read and knows the contents thereof; and that the facts and matters contained therein are true, accurate, and complete to the best of his knowledge and belief.

James Jensen

On this 4th day of October, 1995, before me, a notary public, personally appeared James Jensen, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Notary Public for the
State of Montana
Residing at: Helena
My commission expires: 12/5/95

ORDER ON DEFENDANT'S MOTION TO DISMISS

ALICE DOVE

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH, Plaintiffs, vs. DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant.	**Cause No. BDV-95-1184** **ORDER ON DEFENDANT'S MOTION TO DISMISS**

Presently pending before the Court is Defendant's motion to dismiss parts of the complaint.

This case arises out of certain actions taken by the Department of Environmental Quality (DEQ) on its exploration license 00497, which was issued to Seven-Up Pete Joint Venture (SPJV). DEQ allowed SPJV to conduct pump tests and create mixing zones near its proposed mine just outside of Lincoln, Montana. The well-pumping was done by SPJV to garner information on

de-watering the mineral deposits.

Plaintiffs contend that the subsequent discharges from the pumping tests into the Landers Fork and Blackfoot Rivers are discharges in excess of water quality standards.

On October 6, 1995, Plaintiffs filed this suit seeking relief by a writ of mandate, an injunction, and declaratory judgment. On October 27, 1995, this Court denied the request for a writ of mandate.

Thereafter, the Court was informed that on or about November 8, 1995, SPJV said its pumping activities would cease.

According to DEQ, the cessation of the pumping activities ended the authorization to conduct the well tests that was earlier issued. Thus, contends DEQ, all of Counts 3 and 5 and parts of Count 2 are moot.

MOTION TO DISMISS

The Montana Supreme Court has summarized the rules to be applied in deciding a motion to dismiss. Wheeler v. Moe, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973). A trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 161, 515 P.2d at 683 (citations omitted).

Motions to dismiss should only be granted if it appears clearly on the face of the complaint that there is an insuperable bar to relief. "In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim." Id. *See also* Buttrell v. McBride Land & Livestock Co., 170 Mont. 296, 298, 553 P.2d 407, 408 (1976).

A motion to dismiss only tests whether a claim has been adequately stated in the complaint. The Court's inquiry is limited to the contents of the complaint. A motion to dismiss admits all of the well-pleaded allegations of the complaint. *See* Gebhardt v. D. A. Davidson, 203 Mont. 384, 389, 661 P.2d 855, 858 (1983).

Based on the above rules that apply to motions to dismiss, Defendant's motion to dismiss on the ground of mootness must be denied. The question as to whether pumping has stopped is not something that is contained in the complaint. This information was provided to the Court after the filing of the complaint. Further, this Court has no idea as to whether the pumping could be reinstituted under the previous authorization.

The Court realizes that it has authority to treat this issue as a motion for summary judgment, but declines to do so. If DEQ wants to file a motion for summary judgment on this issue,

it is certainly free to do so. Certainly, such a procedure would better allow the Court to be fully advised of all of the parameters involved in the potential of any new pumping.

STANDING

DEQ also requests that Count 7 of the complaint be dismissed. Count 7 asserts an alleged constitutional violation. In its entirety, Count 7 reads as follows:

> **CONSTITUTIONAL VIOLATION**
>
> 53. The preceding paragraphs are realleged as though set forth in full hereunder.
>
> 54. Article IX, Section 1 (1) of the Montana Constitution requires the State to maintain and improve a clean and healthful environment for present and future generations. Article IX, Section 1 (3) requires the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation.
>
> 55. To the extent that §§ 75-5-301, 303(3) through (8), 317 and 401(1)(b) and (5), MCA, allow degradation of state waters by means of degradation waivers, the creation of mixing zones, allowance of "non-significant activities" which degrade water quality, or the exemption from permit requirements of certain polluting activities, those statutes are unconstitutional in violation of Article IX, Section 1 of the Montana Constitution.

DEQ contends that Plaintiffs do not have standing to attempt a facial attack on the constitutionality of the above statutes. DEQ also suggest that Plaintiffs have no standing to

attack the constitutionality of some of the statutes mentioned in the complaint since some of those statutes have nothing to do with this case.

Based on the aforementioned rules that deal with how a court is to view a motion to dismiss, this Court does not feel it appropriate to rule on the issue of whether Plaintiffs have standing in a "facial" versus an "as applied" constitutional challenge.

However, that leaves us the question of whether Plaintiffs have standing to challenge all of the statutes referenced in their complaint, whether the challenge be "facial" or "as applied". "It is a well-established principle that a party does not have standing to challenge the constitutionality of a statute unless he has been adversely affected by the challenged statute." Allmaras v. Yellowstone Basin Properties, 248 Mont. 477, 480, 812 P.2d 770, 771 (1991).

Plaintiffs allege in their brief that they use the Blackfoot River and that the river is adversely impacted by the activities mentioned in the complaint. Specifically, Plaintiffs reference the pumping tests as having caused detrimental changes in water quality. *See* Plaintiffs' Brief in Response to Motion to Dismiss, p.12. That may be well and good but, as pointed out by DEQ, several of the statutes referenced by Plaintiffs in their complaint don't have anything to do with the pumping tests here

in question. In their response brief, Plaintiffs fail to articulate any reason why they should be allowed to challenge things such as "in situ mining of uranium facilities . . . ." *See* Section 75-5-401(5)(i). Section 75-5-401(5) contains some 11 types of discharges into state waters that are not subject to the ground water permit requirements adopted by the state. Plaintiffs seem to be disputing only Section 75-5-401(5)(j). However, they have totally failed to articulate any reason why they should be allowed to challenge the other exemptions contained in Section 75-5-401(5).

In its reply brief in support of its motion to dismiss, DEQ has divided the statutes mentioned in Count 7 of Plaintiffs' complaint into three categories. First are the statutes that have no bearing on this case and were never used by the Department for the activities complained of by Plaintiffs. These include Section 75-5-303 and Section 75-5-301(5). Then, there are statutes that have exemptions that don't apply to the well testing here involved, such as Section 75-5-317 that lists 18 activities that are presumed not to cause degradation, and Section 75-5-401(5) and its 11 types of activities. The final category contains those statutes that were used by DEQ in permitting the well-testing here involved. Those are Sections 75-5-301(4), Section 75-5-401(1)(b), Section 75-5-317(2)(j), and Section 75-5-401(5)(j). If these are the statutes that have

caused the problems mentioned in the complaint, then Plaintiffs, at least at this stage of the proceeding, should be allowed to continue with their attack on those statutes, whether on a facial or as applied standard. It is this last category of statutes that the Court determines should survive the motion to dismiss. Part of the Court's problem in this regard is that Plaintiffs haven't been very specific in their reply brief concerning which statutes have caused the problems mentioned in the complaint.

Based on the above, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

1. Defendant's motion to dismiss on the basis of mootness is **DENIED.**

2. Defendant's motion to dismiss Count 7 on the basis of a lack of standing is **GRANTED** except that Plaintiffs shall, at least at this stage of the proceeding, be deemed to have standing to challenge the following statutes: Section 75-5-301(4), Section 75-5-401(1)(b), Section 75-5-317(2)(j), and Section 75-5-401(5)(j).

DATED this 18 day of March, 1996.

District Court Judge

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/////

pc: Thomas M. France
David K. W. Wilson, Jr.
John North/DEQ
Ronald F. Waterman

MEIC.ord

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ORDER

Tom France

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AUG 09 1996
DEQ LEGAL UNIT

NANCY SWEENEY
CLERK OF DISTRICT COURT
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MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH,	)	Cause No. BDV-95-1184
Plaintiffs,	)	**ORDER**
- v -	)	
DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Defendant,	)	
- and -	)	
SEVEN-UP PETE JOINT VENTURE,	)	
Intervenor.	)	

Plaintiffs' request for a temporary restraining order is DENIED. The matter will be reconsidered by the Court at the hearing to be held on August 13, 1996, at 2 p.m.

DATED this 7 day of August, 1996.

DISTRICT COURT JUDGE

pc: Leo Berry
John North
Ron Waterman
Thomas M. France
David K. Wilson

deq.or4

ORDER

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH,	)	Cause No. BDV-95-1184
Plaintiffs,	)	**ORDER**
- v -	)	
DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Defendant,	)	
- and -	)	
SEVEN-UP PETE JOINT VENTURE,	)	
Intervenor.	)	

This matter is presently before the Court on cross-motions for summary judgment filed by Plaintiffs and by Defendant (the State). Both parties are seeking summary judgment on Counts 4, 5, 6, and part of Count 7 of the complaint filed in this matter.

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FACTUAL BACKGROUND

On October 4, 1995, Plaintiffs filed their complaint. In the complaint, Plaintiffs sought a writ of mandamus over the State's approving a series of pump tests to be conducted by the Seven-Up Pete Joint Venture (SPJV). The pump tests were to be conducted near a proposed cyanide heap leach mine proposed to be operated by SPJV near Lincoln, Montana.

The writ of mandamus was denied by the Court. Thereafter, Plaintiffs sought a preliminary injunction. However, on the day of the hearing on the preliminary injunction (November 8, 1995), the Court was advised that the pump tests had ceased.

Thereafter, the State moved to dismiss portions of the complaint, which motion was denied by this Court on March 18, 1996.

Plaintiffs' current request is for two forms of relief. The first is a preliminary injunction seeking to suspend the exploration license issued by the State to SPJV. Plaintiffs contend that the State has not complied with the law in issuance of the exploration license.

Further, Plaintiffs seek summary judgment declaring that recently enacted portions of the Water Quality Act are unconstitutional. Plaintiffs also seek a declaration that the State has violated the Metal Mine Reclamation Act, Montana's Environmental Policy Act, and Montana's Administrative Procedure Act.

SPJV consists of the firms of Phelps Dodge Corporation and Canyon Resources. They propose to mine an area near Lincoln, Montana, which has been called the McDonald Project. The mine is seven miles east of Lincoln and is near

the confluence of the Blackfoot and Landers Fork Rivers.

On June 2, 1995, SPJV submitted plans to the State to do certain aquifer tests to the area near the McDonald Project. *See* Exhibit 1 to the complaint. Three water wells were to operate from July through October of 1995. The stated purpose of the wells was to help determine the long-term effect of dewatering at the McDonald Project.

On June 14, 1995, the State approved SPJV's proposal for groundwater pumping. *See* Exhibit 2 to the complaint.

Thereafter, on June 30, 1995, the permission allowing the pumping of the wells was rescinded by the State. *See* Exhibit 3 attached to the complaint. According to a letter sent by the State, it was:

> under the erroneous impression that the well water was the same quality as the alluvial water and therefore the mixing zone rules would not apply. However, after speaking with Tom Reed WQD, I was told this assumption was wrong. Therefore, the HRB will calculate mixing zones for both the Landers Fork and Blackfoot sites, and, if appropriate, reissue formal approval (with a mixing zone) at a later time.

See Exhibit 3 attached to the complaint.

Thereafter, SPJV submitted a second plan for well testing that used the concept of mixing zones. *See* Exhibit 4 attached to the complaint.

Thereafter, the State gave its oral approval to the new plan in late July of 1995. A formal written approval was issued by the State on August 10, 1995. *See* Exhibit 5 to the complaint. The approval was given as an amendment to Exploration License No. 00497 that had already been issued to SPJV.

Attached to Exhibit 5 are two "Statements of Basis" prepared by Joe Gurrieri, a hydrologist for the State. One statement of basis dealt with the

Blackfoot River test wells and the other dealt with the Landers Fork test well.

STANDARD OF REVIEW

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. ***Wagner v. Glasgow Livestock Sale Co.***, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); ***Clarks Fork National Bank v. Papp***, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); ***Bonawitz v. Bourke***, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), M.R.Civ.P.; ***Cate v. Hargrave***, 209 Mont. 265, 269, 680 P.2d 952, 954 (1984). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. ***Kober v. Stewart***, 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. ***Denny Driscoll Boys Home v. State***, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." ***Reaves v.***

Reinbold, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. ***Rogers v. Swingley***, 206 Mont. 306, 670 P.2d 1386 (1983); ***Cheyenne Western Bank v. Young***, 179 Mont. 492, 587 P.2d 401 (1978); ***Kober*** at 122, 417 P.2d at 479.

ALLEGED VIOLATION OF THE MONTANA ENVIRONMENTAL PROTECTION ACT, SECTION 75-1-101, ET SEQ., MCA

This count alleges that the State should have prepared an environmental impact statement or an environmental assessment before reauthorizing the pump tests or allowing the creation of the mixing zones. ***See*** Count 5 of the amended complaint.

The State contends that this issue is moot.

This issue is resolved by the parties' stipulation dated June 18, 1996. According to that stipulation, Count 5 of Plaintiffs' amended complaint and that portion of Count 6 of the plaintiffs' amended complaint that pertains to alleged violations of the Montana Environmental Protection Act were dismissed without prejudice. Pursuant to this stipulation signed by the parties, the Court entered an order on dismissing the MEPA related claims. Therefore, the Court will not address those claims in this order.

ALLEGED VIOLATION OF THE METAL MINE RECOVERY ACT

This topic relates to Count 4 of Plaintiffs' complaint, which alleges that the State has violated Montana's Metal Mine Recovery Act, Section 82-4-301, et seq., MCA. The specific concerns of Plaintiffs are, first, that the State erred in authorizing the pump tests by amending the exploration license already issued by the State pursuant to the Metal Mine Recovery Act. Second, Plaintiffs contend

that the State erred and that there is no authority for the State to approve the water tests or mixing zones under the Metal Mine Recovery Act.

As earlier noted, the pump tests here at issue were authorized by amending an exploration license that SPJV already had from the State pursuant to the Metal Mine Recovery Act. That exploration license was numbered 00497. Plaintiffs contend that the pump tests are not exploration and thus cannot be authorized under SPJV's exploration license. Exploration is defined under the Metal Mine Recovery Act as:

> all activities that are conducted on or beneath the surface of lands and that result in material disturbance of the surface for the purpose of determining the presence, location, extent, depth, grade, and economic viability of mineralization in those lands, if any, other than mining for production and economic exploitation;

Section 82-4-303(7)(a), MCA.

According to the State, the pump tests are designed to determine the economic viability of the mineralization of the McDonald Project.

The Court has before it the affidavit of James Volberding, which was filed with this Court on May 24, 1996. Mr. Volberding is senior project geologist for SPJV. According to paragraph 2 of his affidavit, the pump tests are critical for determining the economic viability of the mineralization of the project. The tests are needed to determine the costs associated with dewatering the ore body and the costs of treating mine waters to meet water quality standards. According to Mr. Volberding, both of these factors are important elements in determining whether or not the mine is economically feasible.

This Court would rule that the pump tests certainly are exploration as defined under Section 82-4-303(7), MCA.

The next issue is whether or not the State could authorize a mixing zone under the Metal Mine Recovery Act. According to Plaintiffs, mixing zones can only be authorized pursuant to Montana's Water Quality Act, Section 75-5-101, et seq., MCA.

According to the Water Quality Act, a mixing zone is defined as: "an area established in a permit or final decision on nondegradation issued by the department where water quality standards may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board." Section 75-5-103(14), MCA. (Hereinafter referred to as Section 103)

Also at issue is Section 75-5-401(6), MCA, which provides as follows: "Notwithstanding the provisions of 75-5-301(4), mixing zones for activities excluded from permit requirements under subsection (5) of this section must be established by the permitting agency for those activities in accordance with 75-5-301(4)(a) through (4)(c)." (Hereinafter referred to as Section 401(6)). The reader will note that Section 401(6) indicates that if certain activities are excluded from permit requirements pursuant to subsection (5), mixing zones must be established by the permitting agency.

Section 75-5-401, MCA, generally requires that certain activities are required to obtain a groundwater permit. However, subsection (5) of Section 75-5-401, MCA, excludes certain activities from the groundwater permit requirements. Specifically at issue here is that portion of Section 75-5-401(5), MCA, that excludes "mining operations subject to operating permits or exploration licenses in compliance with the Strip and Underground Mine and Reclamation Act,

Title 82, Chapter 4, part 2, or the metal mine reclamation laws, Title 82, Chapter 4, part 3." *See* Section 75-5-401(5)(j), MCA. In plain English, this statutory scheme seems to state that these water well tests, since they are conducted pursuant to an exploration license issued by the Metal Mine Recovery Act, are not subject to the groundwater permit requirement. However, Section 401(6) does require the creation of a mixing zone for these activities. According to Plaintiffs, a mixing zone can only be established after nondegradation review under the Water Quality Act or under a groundwater permit issued by the State pursuant to the Water Quality Act.

However, the statutes say otherwise. Section 401(6) specifically authorizes "permitting agencies" to set up mixing zones for any activities excluded from groundwater permit requirements." As noted by the State, the Water Quality Act constantly refers to the Department of Environmental Quality as the "Department." However, in Section 401(6) instead of referring to the Department, the legislature refers to "the permitting agency." This would certainly evidence a legislative intent that mixing zones can be authorized by agencies other than the Department of Environmental Quality, and that they can be authorized under statutory schemes other than the Water Quality Act.

To make the SPJV obtain a groundwater permit would be in direct contradiction to the legislature's intent in Section 75-5-401(5)(j), MCA.

It is not the function of this Court to opine as to the wisdom of the aforementioned legislative scheme. Rather, this Court's function at this time is to determine whether or not the State could create a mixing zone pursuant to the Metal Mine Recovery Act. This Court concludes that Section 401(6) authorizes

the State to create a mixing zone pursuant to the Metal Mine Recovery Act.[1]

ALLEGED VIOLATION OF THE MONTANA ADMINISTRATIVE PROCEDURE ACT, SECTION 2-4-101, MCA

These allegations concern Count 6 of the complaint. Plaintiffs contend that the action of the State in this case in approving the mixing zones and authorizing the well tests were arbitrary, capricious, and unlawful and therefore in violation of the Montana Administrative Procedure Act. The State contends that the Montana Administrative Procedure Act does not apply to the amendment of an exploration permit and the designation of mixing zones. The State contends that such activities are neither rule making nor the results of a contested case that would give rise to judicial review under the Montana Administrative Procedure Act. This Court agrees with the State's contention. This is certainly not a rule making proceeding and is not a contested case in the sense that those words are used in the Montana Administrative Procedure Act. Even if this were a contested case under the Administrative Procedure Act, judicial review of the contested case decision must be requested within 30 days after the final agency decision. Section 2-4-702(2), MCA. The "final decision" if one there be, was filed on August 10, 1995. The complaint was filed on October 6, 1995, well beyond the 30 day limit. However, it would appear that Plaintiffs are entitled to review the State's administrative activities to see if the record establishes whether or not the agency acted arbitrarily, capriciously, and unlawfully. ***See North Fork Preservation Association v. Department of State Lands***, 238 Mont. 451, 459, 778 P.2d 862,

[1]The Metal Mine Recovery Act is administered by the Department of Environmental Quality.

867 (1989). In that case, the Montana Supreme Court held that a reviewing court is not to substitute its judgment for that of the administrative agency by deciding if the administrative agency was correct. Instead, the court is examine the agency action to see if it is arbitrary or capricious. *Id.* at 465, 778 P.2d at 871. The court also noted that the reviewing court's inquiry must be searching and careful but the ultimate standard of review is a narrow one. *Id.*

Plaintiffs complain that the State failed to create an environmental assessment. Plaintiffs' concern is that there is no administrative record showing that the State took a careful look at the environmental consequences of its approval of the mixing zones and pump tests here at question.

Further, Plaintiffs are concerned with the State's failure to explain its enforcement (or lack thereof) of Montana's Water Quality Act. Specifically, Plaintiffs feel that the State has erred in failing to justify its amendment of SPJV's exploration license to allow massive pump tests or to explain its actions in creating mixing zones and in not requiring a Montana pollution discharge elimination system permit.

The State and SPJV suggest that these issues can be addressed not only in the existing administrative record but by affidavits and testimony presented at trial. Specifically, the State refers to the hearing of October 18, 1995, on the issue of mandamus. At pages 61-83 of the transcript of that proceeding, Joe Gurrieri testified concerning matters he considered in evaluating the mixing zones here in question. The State also points to the affidavits of Mr. Gurrieri and Mr. Volberding that were filed at the October 18, 1995, hearing.

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The dispute of the parties concerning this issue, then, revolves around what record the Court is to review. Plaintiffs take the view that the only record the Court should be allowed to review is the administrative record that was created by the State prior to the October 18, 1995, hearing. The State and SPJV, on the other hand, take the position that the Court should be allowed to consider matters presented to it at the October 18, 1995, hearing, along with the affidavits of Mr. Gurrieri and Mr. Volberding.

This Court has reviewed this issue as it has arisen in the federal courts and would adopt the conclusion of the Ninth Circuit announced in the case of ***Friends of the Earth v. Hintz***, 800 F.2d 822 (9th Cir. 1986). In ***Hintz***, the Ninth Circuit noted that usually judicial review of agency action is limited to a review of the administrative record. ***Id.*** at 828. The court, however, went on to note:

> But exceptions exist to the rule that review of agency action is limited to the administrative record. A court may consider evidence outside the administrative record as necessary to explain agency action. . . . When there is "such a failure to explain administrative action as to frustrate effective judicial review," the court may "obtain from an agency, either through affidavits or testimony, such additional explanation of the reasons for the public decisions as may prove necessary." Quoting ***Public Power Council v. Johnson***, 674 F.2d 791, 793-94 (9th Cir. 1982); quoting ***Camp v. Pitts***, 411 U.S. 138, 143 (1973).

Id. at 829.

Thus, the Court concludes that it is appropriate to consider not only the administrative record but also the testimony and affidavits introduced at the hearing.

It is important here to note that the rules for reviewing agency action do not require that the agency come up with any particular result. Rather, they are

designed to make sure that the agency considers relevant factors and makes an informed and nonarbitrary decision. Based upon the administrative record presented to the Court, along with the testimony of Mr. Gurrieri and his affidavit and the affidavit of Mr. Volberding, the Court concludes that the State did not act arbitrarily, capriciously, or unlawfully in approving the mixing zones or granting permission to conduct the pump tests hereunder consideration.

THE CONSTITUTIONALITY OF SECTION 75-5-317(2)(j), MCA

Plaintiffs contend that Section 75-5-317(2)(j), MCA, is unconstitutional. That section, enacted by the 1995 Legislature, provides as follows:

> (2) The following categories or classes of activities are not subject to the provisions of 75-5-303:
>
> . . . .
>
> (j) discharges of water from water well or monitoring well tests, hydrostatic pressure and leakage tests, or wastewater from the disinfection or flushing of water mains and storage reservoirs, conducted in accordance with department-approved water quality protection practices;

Plaintiffs suggest that this categorical exemption of discharges of water from water well tests from Montana's Nondegradation Policy, set forth in Section 75-5-303, MCA, violates the Montana Constitution.

The specific provisions of the Constitution allege to have been violated are Article II, Section 3 and Article IX, Section 1. Article II, Section 3 provides:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful

ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Article IX, Section 1 provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Plaintiffs' concern is that the categorical exclusion from Montana's nondegradation review of discharges from water wells is done without any regard to the actual impact of the water well tests. Plaintiffs admit that most water well tests do not cause any significant impact on water quality or the environment. However, Plaintiffs' concern is that this categorical exclusion, mentioned above, does not give the State the ability to properly deal with a water well discharge that does in fact have an adverse impact on the environment.

The first question the Court must address is whether or not the right to a clean and healthful environment set forth in Article II, Section 3 of the Constitution is an inalienable, fundamental right. In ***Wadsworth v. State***, 53 St. Rep. 146, 150, ___ Mont. ___, ___ P.2d ___ (1996), the Montana Supreme Court indicated that a right may be fundamental if it is found in the Constitution's Declaration of Rights. In that case, the court held that the right to pursue life's basic necessities, since it is in the Declaration of Rights, is a fundamental right. This Court would conclude that since the right to a clean and healthful

environment is contained in the same sentence as the right found to be fundamental in *Wadsworth*, the right to a clean and healthful environment must also be a fundamental right. If such a right is declared to be inalienable, as it is in the Montana Constitution, it is hard to see how it could not be considered fundamental.

The State suggests that the founders of the Constitution did not provide for a private right to sue to enforce the inalienable rights set forth in Article II, Section 3 of the Constitution. One might inquire, in disposing of this argument, as to how a right could be inalienable and fundamental and yet a person would be forbidden to go to court to enforce that right. Certainly, an individual has a right to come to court to seek to vindicate their inalienable and fundamental rights.

It should also be noted that the constitutional challenge here must be on an "as applied" basis. If this were a facial challenge, it would prove most difficult, since under such a facial challenge, the proponent must show that under no set of circumstances can the challenged regulation be valid. *See U. S. v. Salerno*, 481 U.S. 739 (1987). Indeed, Plaintiffs have on several occasions admitted that the statute here in question would usually operate in a constitutional fashion. Thus, the Court must examine whether in its operation, this statute is constitutional.

If the right to a clean and healthful environment is a fundamental right, which this Court concludes it is, then the question arises as to what standard of review the Court must undertake in analyzing what the State has done. Plaintiffs suggest that the activities of the State must be given strict scrutiny since

they interfere with the exercise of a citizen's fundamental right to a clean and healthful environment. If strict scrutiny is required, then the State must show a compelling state interest to justify the activities undertaken by the State. ***See Wadsworth*** 53 St. Rep. at 152. The key question, then, is whether the State's activities complained of by Plaintiffs impermissibly interfere with the right of each and every Montanan to a clean and healthful environment.

As noted by the supreme court, if a plaintiff does not show that a fundamental right has been substantially abridged, then a court does not use strict scrutiny in analyzing the alleged constitutional violation. ***See State v. Oberg***, 207 Mont. 277, 281, 674 P.2d 494, 496 (1983). The crucial analysis, then, must come only after a careful review of the factual record before this Court on the environmental impacts of the water well testing and the mixing zones of which Plaintiffs complain.[2]

One element that is quite crucial is that there is no proof in this case that any of these discharges from mixing zones have exceeded water quality standards. Those standards still apply. Further, Section 75-5-605, MCA, specifically prohibits anyone from causing pollution of the state waters. The statutory scheme of which Plaintiffs complain does not excuse these pump tests and mixing zones from the requirement that they not violate water quality standards and not cause pollution.

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[2] The parties have spent a great deal of time debating whose idea it was to enact Section 75-5-317(2)(j), MCA. In this Court's view of things, it does not matter if the statute was enacted after lobbying efforts undertaken by the mining industry or whether this was a proposal suggested by the State itself.

Section 75-5-303, MCA, sets forth the State's nondegradation policy. Prior to the enactment of the statute here in question, the Montana Administrative Rules provided for exemptions from the nondegradation policy for certain activities that were deemed to be nonsignificant. *See* 16.20.712 ARM. The thrust of Plaintiffs' constitutional complaint is that the statute here in question does away with the nondegradation review that otherwise would have taken place under the administrative rules.

However, the Court must concentrate on the actual impact of Montana's water by the activities in question.

At page 12 of Plaintiffs' brief and throughout their argument, they refer to a certain exhibit that was introduced by the State as Exhibit B at the hearing on October 18, 1995. It was prepared by Joe Gurrieri and was his calculation of what the concentration of various particles would be at the downstream edge of the mixing zone for both the Landers Fork and Blackfoot Rivers. *See* Gurrieri testimony, pp. 78 and 80. Simply put, these calculations were Mr. Gurrieri's prediction of what would occur, not the reality of what in fact occurred.

Plaintiffs argue that under nondegradation standards, an analysis of these chemicals in the water would allow them to be called nonsignificant, and thus exempt from nondegradation review, only if the concentration of pollutants outside the mixing zone does not exceed 15 percent of the lowest applicable standard. *See* 16.20.712(1)(c), ARM. Plaintiffs then point out that several of the elements in the aforementioned chart exceed the 15 percent standard.

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However, as noted above, this chart, originally Exhibit B at the hearing of October 18, 1995, and now reprinted on page 12 of Plaintiffs' brief, is nothing but a prediction. The significant issue here is what concentration of these elements are actually contained in the waters of the Blackfoot and Landers Fork Rivers at the outside of the mixing zones.

At page 11 of Plaintiffs' brief, they also refer to water receiving groundwater laced with arsenic as high as .155 milligrams per liter. Plaintiffs note that this is 50 times the amount of arsenic contained in the receiving waters in the Blackfoot alluvium. The receiving waters of the Blackfoot alluvium have a arsenic level of .03 milligrams per liter. ***See*** the affidavit of Karen Hegalstein, October 18, 1995.

However, it appears that this arsenic-laden water was never discharged. ***See*** the affidavit of Mr. Volberding of May 24, 1996. In that affidavit, he indicates that this arsenic-laced water was from a well test of July 13, 1995. This was before SPJV began their pump test on July 26, 1995. Further, Mr. Volberding indicates that this arsenic-laced water was not discharged to either the Blackfoot or the Landers Fork alluvium.

For the actual results of the mixing zone process, the Court has the aforementioned affidavit of Mr. Volberding of May 24, 1996. According to Mr. Volberding's affidavit, long term monitoring from surface waters, monitoring wells, the mixing zones, and domestic wells shows no significant change from prewater well tests conditions. For example, at page 5 of his affidavit, Mr. Volberding indicates that sampling locations SW-32B and SW-40B are surface water sampling locations on the Blackfoot River upstream and downstream

from the Blackfoot infiltration gallery. During and after the water well tests of water wells numbered 4 and 5, no significant change of any water quality parameter of interest was observed between the upstream and the downstream stations. Locations SW-53L and SW-44L are surface water sampling locations on the Landers Fork River, upstream and downstream from the Landers Fork infiltration gallery. During and after the water well test of well number 6, no significant change of any water quality parameters of interest was observed between upstream and downstream locations. *See* Volberding affidavit, paragraph 6 , p. 3.

The balance of the Volberding affidavit contains references to other specific monitoring sites which notice no significant change from prewater well test conditions. Attached to his affidavit are several pages of specific findings over a period of time from a variety of sampling locations on both rivers.

Plaintiffs present the affidavit testimony of Mr. Dan Frazier, former head of the Water Quality Bureau. Mr. Frazier finds that the water well tests are causing serious degradation to Montana waters.

Plaintiffs' position seems to be that the nondegradation review from which these water wells are now exempted pursuant to the statute here in question, is the constitutional equivalent to a clean and healthful environment. Thus, Plaintiffs argue that it must be that when an activity is exempted from nondegradation review then the legislature has failed in its requirement to maintain a clean and healthful environment.

However, this Court has a real question as to whether or not using the administrative review requirements of 16.20.712, ARM, would produce a

different result. At page 12 of their brief, Plaintiffs apply the nondegradation review to the State's prediction of what concentration of various elements would be in the mixing zone waters as they entered the alluvium of the Blackfoot and Landers Fork Rivers. However, no such analysis has been done on the actual concentration of elements as they enter those waters. When coupled with Mr. Volberding's affidavit, there is certainly a factual question that prevents the granting of summary judgment on the constitutional issue.

At this stage of the proceeding, Plaintiffs have failed to prove that the actions of the state in approving the water well testing program mentioned above violates the Montana Constitution. The mere fact that discharges from water wells are categorically exempted from nondegradation view does not automatically give rise to a finding that the statute is unconstitutional. There must be a factual showing that the waters of the Blackfoot and Landers Fork Rivers are so threatened by the discharges here in question as to threaten public health or as to violate applicable water quality standards or as to cause a significant impact on either river.

The record seems to tell us that the mixing zones are working well and that no significant impact is occurring to either river. It is also crucial to note that the State is constantly monitoring the discharges from these wells. Absent a finding of an actual injury, the Court cannot rule, on the facts now before it, that in its operation, Section 75-5-317(2)(j), MCA, is unconstitutional. On the other hand, the Court has the affidavit of Mr. Frazier that states that the well tests are significantly impacting the rivers. The Court has, then, a factual dispute that precludes the issuance of summary judgment to either party.

However, summary judgment is granted to the State as requested on Counts 4, 5, and 6.

DATED this 5 day of August, 1996.

DISTRICT COURT JUDGE

pc: Leo Berry
John North
Ron Waterman
Thomas M. France
David K. Wilson

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ORDER

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH,	)	Cause No. BDV-95-1184
Plaintiffs,	)	**ORDER**
- v -	)	
DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Defendant,	)	
- and -	)	
SEVEN-UP PETE JOINT VENTURE,	)	
Intervenor.	)	

This matter is again before the Court on Plaintiffs' request for a preliminary injunction. Instead of reviewing the factual background of this case, the Court merely refers the reader to this Court's orders entered earlier in this case on October 27, 1995 and August 5, 1996.

At this stage, the specific factual milieu with which we find ourselves concerned is the proposal by Seven-Up Pete Joint Venture (SPJV)

to begin a series of new pump tests on the Landers Fork River. The pump tests were authorized by the State of Montana (State) on or about August 7, 1996.

The Court held a hearing on this issue on August 13, 1996, at which time evidence was received. In addition, the Court has before it affidavits filed by numerous persons.

The issue presently before the Court involves the amount of arsenic that will be present in the water discharged from the proposed wells. The existing level of arsenic in the Landers Fork River is .0015 milligrams per liter. The State has calculated what it considers to be the level of arsenic in the well water that will be discharged into the infiltration gallery prior to entering the mixing zone. That calculation predicts an arsenic level of .014 milligrams per liter. However, the State predicts that the level of arsenic at the end of the mixing zone would be .006 milligrams per liter. Again, the numbers above are the State's predictions of the arsenic levels in the water to be pumped from the test wells. These figures have proven to be conservative based on the actual results of the 1995 pump well tests.

SPJV has done its own calculations of the arsenic it expects will be in the discharged well water. SPJV concludes that the average level of arsenic in water to be discharged into the infiltration galleries is .009 milligrams per liter.

The level of arsenic in the city of Helena drinking water is .009 milligrams per liter. The standard for aquatic life is .190 milligrams per liter. The human health standard for arsenic is .018 milligrams per liter.

Testifying at the hearing was Geoffrey Beal, the hydrologist for SPJV. Mr. Beal testified that the average discharge concentration of arsenic

mentioned above (.009 milligrams per liter) is from actual testing of the water standing in the well. Based upon the results of the 1995 pump tests, Mr. Beal believes that these arsenic levels will drop as water is pumped. He also believes that these levels will further drop as the water is released into the trench and exposed to the environment.

Based upon the 1995 tests, Mr. Beal testified that there will be no detectible change in the ambient level of arsenic in the water 50 feet downstream from the point of discharge. As noted above, the ambient arsenic concentration in the water is .0015 milligrams per liter.

By this Court's order of August 5, 1996, this Court held: "There must be a factual showing that the waters of the Blackfoot and Landers Fork Rivers are so threatened by the discharges here in question as to threaten public health or as to violate applicable water quality standards or as to cause a significant impact on either river." *See* Order of August 5, 1996, p. 19. Here, Plaintiffs' acknowledge that there is no evidence of threat to public health and no violation of water quality standards. However, Plaintiffs do contend that these discharges of arsenic will cause a significant impact to the Landers Fork River.

Plaintiffs rely on Section 16.20.712(1)(b), ARM. According to that rule, any activities that change surface or groundwater quality which meet all of certain listed criteria are nonsignificant and are not required to undergo review under Section 75-5-303, MCA. The specific criteria with which Plaintiffs are here concerned is contained in 16.20.712(1)(b), ARM. Pursuant to that rule, discharges containing carcinogens are only considered nonsignificant if the concentration of carcinogens in the discharge is less than that of the receiving water. According to

Plaintiffs, the evidence presently before the Court shows that the arsenic in the water to be discharged from the proposed wells exceeds the natural concentration of arsenic in the receiving waters of the Landers Fork. Thus, according to Plaintiffs, these activities are significant and must undergo review pursuant to Section 75-3-303, MCA.

However, the same problem that has dogged Plaintiffs throughout this case still exists. This old nemesis of Plaintiffs is Section 75-5-317(2)(j), MCA, which categorically excuses discharges of water well tests from review under Section 75-5-303, MCA. Thus, in order for Plaintiffs to obtain relief, they must request the Court to declare the aforementioned statute unconstitutional. In this Court's Order of August 5, 1996, this Court indicated that if the discharges were shown to cause significant impact on the Landers Fork River, the Court would consider declaring the statute unconstitutional as applied to these test wells. Plaintiffs contend that the discharges here cause a significant impact on the river. However, the best evidence that the Court has, which has been confirmed in 1995 pump tests, is that the arsenic levels in the Landers Fork River will return to ambient standards within 50 feet from the discharge point of the well water. Under the evidence presently before it, this Court cannot conclude that such a state of facts constitutes a "significant impact" on the Landers Fork River.

The parties will be monitoring the arsenic levels in the river. Therefore, the Court will certainly stand ready to reexamine its opinion should the arsenic levels in the Landers Fork River prove to be other than as suggested by Mr. Beal. Thus, since the Court, at this stage of the proceedings, cannot declare

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Section 75-5-317(2)(j), MCA, unconstitutional, Plaintiffs are not entitled to the relief that they currently seek.

In addition, a preliminary injunction is to be granted at the following times only:

> 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;

Section 27-19-201, MCA.

The Court concludes that under the plain terms of this statute, Plaintiffs are not entitled to the relief they request at this time. In the first instance, it does not appear, at this stage of the proceeding, that Plaintiffs are entitled to the relief demanded. The relief demanded is a declaration of unconstitutionality of Section 75-5-317(2)(j), MCA. Again, at this stage of the proceeding, the Court has not found a significant impact on the Landers Fork River that would give rise to a conclusion that Section 75-5-317(2)(j), MCA, is allowing an unconstitutional degradation of Montana's environment pursuant to these well tests.

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Next, it does not appear that these tests will cause a great or irreparable injury, since the evidence presently before the Court is that ambient arsenic standards will be restored to the Landers Fork River within 50 feet of the point of discharge.

Finally, the Court does not feel that it is appropriate to issue a preliminary injunction under subsection (3) of Section 27-19-201, MCA, because, at this time, these tests do not appear to cause a significant impact on the river.

The Court would indicate to all parties that it encourages constant monitoring of the water well discharges. Plaintiffs are certainly free to approach the Court for further relief if it should appear that there is a factual basis to believe that the water wells threaten public health, violate applicable water quality standards, or are causing significant impacts on the Blackfoot or Landers Fork Rivers.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs request for preliminary injunction is DENIED.

DATED this 14 day of August, 1996.

DISTRICT COURT JUDGE

pc: Leo Berry
John North
Ron Waterman
Thomas M. France
David K. Wilson

deq.or5

ORDER AND DECISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH, Plaintiffs, - v - DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant, - and - SEVEN-UP PETE JOINT VENTURE, Intervenor.

Cause No. BDV-95-1184

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

1996 Mont. Dist. LEXIS 738

August 2, 1996, Decided

JUDGES: [*1] Honorable Judge Sherlock, DISTRICT COURT JUDGE.

OPINION BY: Sherlock

OPINION

ORDER

This matter is presently before the Court on cross-motions for summary judgment filed by Plaintiffs and by Defendant (the State). Both parties are seeking summary judgment on Counts 4, 5, 6, and part of Count 7 of the complaint filed in this matter.

FACTUAL BACKGROUND

On October 4, 1995, Plaintiffs filed their complaint. In the complaint, Plaintiffs sought a writ of mandamus over the State's approving a series of pump tests to be conducted by the Seven-Up Pete Joint Venture (SPJV). The pump tests were to be conducted near a proposed cyanide heap leach mine proposed to be operated by SPJV near Lincoln, Montana.

The writ of mandamus was denied by the Court. Thereafter, Plaintiffs sought a preliminary injunction. However, on the day of the hearing on the preliminary injunction (November 8, 1995), the Court was advised that the pump tests had ceased.

Thereafter, the State moved to dismiss portions of the complaint, which motion was denied by this Court on March 18, 1996.

Plaintiffs' current request is for two forms of relief. The first is a preliminary injunction seeking to suspend the exploration license [*2] issued by the State to SPJV. Plaintiffs contend that the State has not complied with the law in issuance of the exploration license.

Further, Plaintiffs seek summary judgment declaring that recently enacted portions of the Water Quality Act are unconstitutional. Plaintiffs also seek a declaration that the State has violated the Metal Mine Reclamation Act, Montana's Environmental Policy Act, and Montana's Administrative Procedure Act.

SPJV consists of the firms of Phelps Dodge Corporation and Canyon Resources. They propose to mine an area near Lincoln, Montana, which has been called the McDonald Project. The mine is seven miles east of Lincoln and is near the confluence of the Blackfoot and Landers Fork Rivers.

On June 2, 1995, SPJV submitted plans to the State

to do certain aquifer tests to the area near the McDonald Project. See Exhibit 1 to the complaint. Three water wells were to operate from July through October of 1995. The stated purpose of the wells was to help determine the long-term effect of dewatering at the McDonald Project.

On June 14, 1995, the State approved SPJV's proposal for groundwater pumping. See Exhibit 2 to the complaint.

Thereafter, on June 30, 1995, the [*3] permission allowing the pumping of the wells was rescinded by the State. See Exhibit 3 attached to the complaint. According to a letter sent by the State, it was:

> under the erroneous impression that the well water was the same quality as the alluvial water and therefore the mixing zone rules would not apply. However, after speaking with Tom Reed WQD, I was told this assumption was wrong. Therefore, the HRB will calculate mixing zones for both the Landers Fork and Blackfoot sites, and, if appropriate, reissue formal approval (with a mixing zone) at a later time.

See Exhibit 3 attached to the complaint.

Thereafter, SPJV submitted a second plan for well testing that used the concept of mixing zones. See Exhibit 4 attached to the complaint.

Thereafter, the State gave its oral approval to the new plan in late July of 1995. A formal written approval was issued by the State on August 10, 1995. See Exhibit 5 to the complaint. The approval was given as an amendment to Exploration License No. 00497 that had already been issued to SPJV.

Attached to Exhibit 5 are two "Statements of Basis" prepared by Joe Gurrieri, a hydrologist for the State. One statement of basis dealt with [*4] the Blackfoot River test wells and the other dealt with the Landers Fork test well.

STANDARD OF REVIEW

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. *Wagner v. Glasgow Livestock Sale Co., 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986)*; *Clarks Fork National Bank v. Papp, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985)*; *Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977)*.

Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), M.R.Civ.P.; *Cate v. Hargrave, 209 Mont. 265, 269, 680 P.2d 952, 954 (1984)*. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this [*5] burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Kober v. Stewart, 148 Mont. 117, 417 P.2d 476 (1966)*.

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. *Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987)*. Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." *Reaves v. Reinbold, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980)*. If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983)*; *Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978)*; *Kober at 122, 417 P.2d at 479*.

ALLEGED VIOLATION OF THE MONTANA ENVIRONMENTAL PROTECTION ACT, *SECTION 75-1-101, ET SEQ., MCA*

This count alleges that the State should have prepared an environmental impact statement or an environmental assessment before [*6] reauthorizing the pump tests or allowing the creation of the mixing zones. See Count 5 of the amended complaint.

The State contends that this issue is moot.

This issue is resolved by the parties' stipulation dated June 18, 1996. According to that stipulation, Count 5 of Plaintiffs' amended complaint and that portion of Count 6 of the plaintiffs' amended complaint that pertains to alleged violations of the Montana Environmental Protection Act were dismissed without prejudice. Pursuant to this stipulation signed by the parties, the Court entered an order on dismissing the MEPA related claims. Therefore, the Court will not address those claims in this order.

ALLEGED VIOLATION OF THE METAL MINE RECOVERY ACT

This topic relates to Count 4 of Plaintiffs' complaint, which alleges that the State has violated Montana's Metal Mine Recovery Act, *Section 82-4-301, et seq., MCA*. The specific concerns of Plaintiffs are, first, that the State erred in authorizing the pump tests by amending the exploration license already issued by the State pursuant to the Metal Mine Recovery Act. Second, Plaintiffs contend that the State erred and that there is no authority for the State to approve the water [*7] tests or mixing zones under the Metal Mine Recovery Act.

As earlier noted, the pump tests here at issue were authorized by amending an exploration license that SPJV already had from the State pursuant to the Metal Mine Recovery Act. That exploration license was numbered 00497. Plaintiffs contend that the pump tests are not exploration and thus cannot be authorized under SPJV's exploration license. Exploration is defined under the Metal Mine Recovery Act as:

> all activities that are conducted on or beneath the surface of lands and that result in material disturbance of the surface for the purpose of determining the presence, location, extent, depth, grade, and economic viability of mineralization in those lands, if any, other than mining for production and economic exploitation;

Section 82-4-303 (7)(a), MCA.

According to the State, the pump tests are designed to determine the economic viability of the mineralization of the McDonald Project.

The Court has before it the affidavit of James Volberding, which was filed with this Court on May 24, 1996. Mr. Volberding is senior project geologist for SPJV. According to paragraph 2 of his affidavit, [*8] the pump tests are critical for determining the economic viability of the mineralization of the project. The tests are needed to determine the costs associated with dewatering the ore body and the costs of treating mine waters to meet water quality standards. According to Mr. Volberding, both of these factors are important elements in determining whether or not the mine is economically feasible.

This Court would rule that the pump tests certainly are exploration as defined under *Section 82-4-303 (7), MCA*.

The next issue is whether or not the State could authorize a mixing zone under the Metal Mine Recovery Act. According to Plaintiffs, mixing zones can only be authorized pursuant to Montana's Water Quality Act, *Section 75-5-101, et seq., MCA*.

According to the Water Quality Act, a mixing zone is defined as:

> "an area established in a permit or final decision on nondegradation issued by the department where water quality standards may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board." *Section 75-5-103 (14), MCA*. (Hereinafter referred to as [*9] Section 103)

Also at issue is *Section 75-5-401 (6), MCA*, which provides as follows: "Notwithstanding the provisions of 75-5-301 (4), mixing zones for activities excluded from permit requirements under subsection (5) of this section must be established by the permitting agency for those activities in accordance with 75-5-301 (4)(a) through (4)(c)." (Hereinafter referred to as Section 401(6)). The reader will note that Section 401(6) indicates that if certain activities are excluded from permit requirements pursuant to subsection (5), mixing zones must be established by the permitting agency.

Section 75-5-401, MCA, generally requires that certain activities are required to obtain a groundwater permit. However, subsection (5) of *Section 75-5-401, MCA*, excludes certain activities from the groundwater

permit requirements. Specifically at issue here is that portion of *Section 75-5-401(5), MCA*, that excludes "mining operations subject to operating permits or exploration licenses in compliance with the Strip and Underground Mine and Reclamation Act, Title 82, Chapter 4, part [*10] 2, or the metal mine reclamation laws, Title 82, Chapter 4, part 3." See *Section 75-5-401 (5)(j), MCA*. In plain English, this statutory scheme seems to state that these water well tests, since they are conducted pursuant to an exploration license issued by the Metal Mine Recovery Act, are not subject to the groundwater permit requirement. However, Section 401(6) does require the creation of a mixing zone for these activities. According to Plaintiffs, a mixing zone can only be established after nondegradation review under the Water Quality Act or under a groundwater permit issued by the State pursuant to the Water Quality Act.

However, the statutes say otherwise. Section 401(6) specifically authorizes "permitting agencies" to set up mixing zones for any activities excluded from groundwater permit requirements." As noted by the State, the Water Quality Act constantly refers to the Department of Environmental Quality as the "Department." However, in Section 401(6) instead of referring to the Department, the legislature refers to "the permitting agency." This would certainly evidence a legislative intent that mixing zones can be authorized by agencies other [*11] than the Department of Environmental Quality, and that they can be authorized under statutory schemes other than the Water Quality Act.

To make the SPJV obtain a groundwater permit would be in direct contradiction to the legislature's intent in *Section 75-5-401 (5)(j), MCA*.

It is not the function of this Court to opine as to the wisdom of the aforementioned legislative scheme. Rather, this Court's function at this time is to determine whether or not the State could create a mixing zone pursuant to the Metal Mine Recovery Act. This Court concludes that Section 401(6) authorizes the State to create a mixing zone pursuant to the Metal Mine Recovery Act. [1]

1 The Metal Mine Recovery Act is administered by the Department of Environmental Quality.

ALLEGED VIOLATION OF THE MONTANA ADMINISTRATIVE PROCEDURE ACT, *SECTION 2-4-101, MCA*

These allegations concern Count 6 of the complaint. Plaintiffs contend that the action of the State in this case in approving the [*12] mixing zones and authorizing the well tests were arbitrary, capricious, and unlawful and therefore in violation of the Montana Administrative Procedure Act. The State contends that the Montana Administrative Procedure Act does not apply to the amendment of an exploration permit and the designation of mixing zones. The State contends that such activities are neither rule making nor the results of a contested case that would give rise to judicial review under the Montana Administrative Procedure Act. This Court agrees with the State's contention. This is certainly not a rule making proceeding and is not a contested case in the sense that those words are used in the Montana Administrative Procedure Act. Even if this were a contested case under the Administrative Procedure Act, judicial review of the contested case decision must be requested within 30 days after the final agency decision. *Section 2-4-702 (2), MCA*. The "final decision" if one there be, was filed on August 10, 1995. The complaint was filed on October 6, 1995, well beyond the 30 day limit. However, it would appear that Plaintiffs are entitled to review the State's administrative activities to see [*13] if the record establishes whether or not the agency acted arbitrarily, capriciously, and unlawfully. See *North Fork Preservation Association v. Department of State Lands, 238 Mont. 451, 459, 778 P.2d 862, 867 (1989)*. In that case, the Montana Supreme Court held that a reviewing court is not to substitute its judgment for that of the administrative agency by deciding if the administrative agency was correct. Instead, the court is examine the agency action to see if it is arbitrary or capricious. *Id. at 465, 778 P.2d at 871*. The court also noted that the reviewing court's inquiry must be searching and careful but the ultimate standard of review is a narrow one. Id.

Plaintiffs complain that the State failed to create an environmental assessment. Plaintiffs' concern is that there is no administrative record showing that the State took a careful look at the environmental consequences of its approval of the mixing zones and pump tests here at question.

Further, Plaintiffs are concerned with the State's failure to explain its enforcement (or lack thereof) of Montana's Water Quality Act. Specifically, Plaintiffs feel that the State has erred in failing to justify [*14] its

amendment of SPJV's exploration license to allow massive pump tests or to explain its actions in creating mixing zones and in not requiring a Montana pollution discharge elimination system permit.

The State and SPJV suggest that these issues can be addressed not only in the existing administrative record but by affidavits and testimony presented at trial. Specifically, the State refers to the hearing of October 18, 1995, on the issue of mandamus. At pages 61-83 of the transcript of that proceeding, Joe Gurrieri testified concerning matters he considered in evaluating the mixing zones here in question. The State also points to the affidavits of Mr. Gurrieri and Mr. Volberding that were filed at the October 18, 1995, hearing.

The dispute of the parties concerning this issue, then, revolves around what record the Court is to review. Plaintiffs take the view that the only record the Court should be allowed to review is the administrative record that was created by the State prior to the October 18, 1995, hearing. The State and SPJV, on the other hand, take the position that the Court should be allowed to consider matters presented to it at the October 18, 1995, hearing, along with [*15] the affidavits of Mr. Gurrieri and Mr. Volberding.

This Court has reviewed this issue as it has arisen in the federal courts and would adopt the conclusion of the Ninth Circuit announced in the case of *Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986)*. In Hintz, the Ninth Circuit noted that usually judicial review of agency action is limited to a review of the administrative record. *Id. at 828*. The court, however, went on to note:

> But exceptions exist to the rule that review of agency action is limited to the administrative record. A court may consider evidence outside the administrative record as necessary to explain agency action. . . . When there is "such a failure to explain administrative action as to frustrate effective judicial review," the court may "obtain from an agency, either through affidavits or testimony, such additional explanation of the reasons for the public decisions as may prove necessary." Quoting *Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982)*; quoting *Camp v. Pitts, 411 U.S. 138, 143 (1973)*.

Id. at 829.

Thus, the Court concludes that it is appropriate to consider [*16] not only the administrative record but also the testimony and affidavits introduced at the hearing.

It is important here to note that the rules for reviewing agency action do not require that the agency come up with any particular result. Rather, they are designed to make sure that the agency considers relevant factors and makes an informed and nonarbitrary decision. Based upon the administrative record presented to the Court, along with the testimony of Mr. Gurrieri and his affidavit and the affidavit of Mr. Volberding, the Court concludes that the State did not act arbitrarily, capriciously, or unlawfully in approving the mixing zones or granting permission to conduct the pump tests hereunder consideration.

THE CONSTITUTIONALITY OF *SECTION 75-5-317 (2)(j), MCA*

Plaintiffs contend that *Section 75-5-317 (2)(j), MCA*, is unconstitutional. That section, enacted by the 1995 Legislature, provides as follows:

> (2) The following categories or classes of activities are not subject to the provisions of 75-5-303:
>
> . . . .
>
> (j) discharges of water from water well or monitoring well tests, hydrostatic pressure and leakage tests, [*17] or wastewater from the disinfection or flushing of water mains and storage reservoirs, conducted in accordance with department-approved water quality protection practices;

Plaintiffs suggest that this categorical exemption of discharges of water from water well tests from Montana's Nondegradation Policy, set forth in *Section 75-5-303, MCA*, violates the Montana Constitution.

The specific provisions of the Constitution allege to

have been violated are Article II, Section 3 and Article IX, Section 1. Article II, Section 3 provides:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Article IX, Section 1 provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature [*18] shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Plaintiffs' concern is that the categorical exclusion from Montana's nondegradation review of discharges from water wells is done without any regard to the actual impact of the water well tests. Plaintiffs admit that most water well tests do not cause any significant impact on water quality or the environment. However, Plaintiffs' concern is that this categorical exclusion, mentioned above, does not give the State the ability to properly deal with a water well discharge that does in fact have an adverse impact on the environment.

The first question the Court must address is whether or not the right to a clean and healthful environment set forth in Article II, Section 3 of the Constitution is an inalienable, fundamental right. In *Wadsworth v. State, 53 St. Rep. 146, 150,* ___ Mont. ___, ___ P.2d ___ (1996), the Montana Supreme Court indicated that a right may be fundamental [*19] if it is found in the Constitution's Declaration of Rights. In that case, the court held that the right to pursue life's basic necessities, since it is in the Declaration of Rights, is a fundamental right. This Court would conclude that since the right to a clean and healthful environment is contained in the same sentence as the right found to be fundamental in Wadsworth, the right to a clean and healthful environment must also be a fundamental right. If such a right is declared to be inalienable, as it is in the Montana Constitution, it is hard to see how it could not be considered fundamental.

The State suggests that the founders of the Constitution did not provide for a private right to sue to enforce the inalienable rights set forth in Article II, Section 3 of the Constitution. One might inquire, in disposing of this argument, as to how a right could be inalienable and fundamental and yet a person would be forbidden to go to court to enforce that right. Certainly, an individual has a right to come to court to seek to vindicate their inalienable and fundamental rights.

It should also be noted that the constitutional challenge here must be on an "as applied" basis. If this were [*20] a facial challenge, it would prove most difficult, since under such a facial challenge, the proponent must show that under no set of circumstances can the challenged regulation be valid. See *U. S. v. Salerno, 481 U.S. 739 (1987).* Indeed, Plaintiffs have on several occasions admitted that the statute here in question would usually operate in a constitutional fashion. Thus, the Court must examine whether in its operation, this statute is constitutional.

If the right to a clean and healthful environment is a fundamental right, which this Court concludes it is, then the question arises as to what standard of review the Court must undertake in analyzing what the State has done. Plaintiffs suggest that the activities of the State must be given strict scrutiny since they interfere with the exercise of a citizen's fundamental right to a clean and healthful environment. If strict scrutiny is required, then the State must show a compelling state interest to justify the activities undertaken by the State. See *Wadsworth 53 St. Rep. at 152*. The key question, then, is whether the State's activities complained of by Plaintiffs impermissibly interfere with the right of [*21] each and every Montanan to a clean and healthful environment.

As noted by the supreme court, if a plaintiff does not show that a fundamental right has been substantially abridged, then a court does not use strict scrutiny in

analyzing the alleged constitutional violation. See *State v. Oberg, 207 Mont. 277, 281, 674 P.2d 494, 496 (1983).* The crucial analysis, then, must come only after a careful review of the factual record before this Court on the environmental impacts of the water well testing and the mixing zones of which Plaintiffs complain. [2]

> 2 The parties have spent a great deal of time debating whose idea it was to enact *Section 75-5-317 (2)(j), MCA*. In this Court's view of things, it does not matter if the statute was enacted after lobbying efforts undertaken by the mining industry or whether this was a proposal suggested by the State itself.

One element that is quite crucial is that there is no proof in this case that any of these discharges from mixing zones [*22] have exceeded water quality standards. Those standards still apply. Further, *Section 75-5-605, MCA*, specifically prohibits anyone from causing pollution of the state waters. The statutory scheme of which Plaintiffs complain does not excuse these pump tests and mixing zones from the requirement that they not violate water quality standards and not cause pollution.

Section 75-5-303, MCA, sets forth the State's nondegradation policy. Prior to the enactment of the statute here in question, the Montana Administrative Rules provided for exemptions from the nondegradation policy for certain activities that were deemed to be nonsignificant. See 16.20.712 ARM. The thrust of Plaintiffs' constitutional complaint is that the statute here in question does away with the nondegradation review that otherwise would have taken place under the administrative rules.

However, the Court must concentrate on the actual impact of Montana's water by the activities in question.

At page 12 of Plaintiffs' brief and throughout their argument, they refer to a certain exhibit that was introduced by the State as Exhibit B at the hearing on October 18, 1995. It [*23] was prepared by Joe Gurrieri and was his calculation of what the concentration of various particles would be at the downstream edge of the mixing zone for both the Landers Fork and Blackfoot Rivers. See Gurrieri testimony, pp. 78 and 80. Simply put, these calculations were Mr. Gurrieri's prediction of what would occur, not the reality of what in fact occurred.

Plaintiffs argue that under nondegradation standards, an analysis of these chemicals in the water would allow them to be called nonsignificant, and thus exempt from nondegradation review, only if the concentration of pollutants outside the mixing zone does not exceed 15 percent of the lowest applicable standard. See 16.20.712 (1)(c), ARM. Plaintiffs then point out that several of the elements in the aforementioned chart exceed the 15 percent standard.

However, as noted above, this chart, originally Exhibit B at the hearing of October 18, 1995, and now reprinted on page 12 of Plaintiffs' brief, is nothing but a prediction. The significant issue here is what concentration of these elements are actually contained in the waters of the Blackfoot and Landers Fork Rivers at the outside of the mixing zones.

At page 11 of Plaintiffs' [*24] brief, they also refer to water receiving groundwater laced with arsenic as high as .155 milligrams per liter. Plaintiffs note that this is 50 times the amount of arsenic contained in the receiving waters in the Blackfoot alluvium. The receiving waters of the Blackfoot alluvium have a arsenic level of .03 milligrams per liter. See the affidavit of Karen Hegalstein, October 18, 1995.

However, it appears that this arsenic-laden water was never discharged. See the affidavit of Mr. Volberding of May 24, 1996. In that affidavit, he indicates that this arsenic-laced water was from a well test of July 13, 1995. This was before SPJV began their pump test on July 26, 1995. Further, Mr. Volberding indicates that this arsenic-laced water was not discharged to either the Blackfoot or the Landers Fork alluvium.

For the actual results of the mixing zone process, the Court has the aforementioned affidavit of Mr. Volberding of May 24, 1996. According to Mr. Volberding's affidavit, long term monitoring from surface waters, monitoring wells, the mixing zones, and domestic wells shows no significant change from prewater well tests conditions. For example, at page 5 of his affidavit, Mr. Volberding [*25] indicates that sampling locations SW-32B and SW-40B are surface water sampling locations on the Blackfoot River upstream and downstream from the Blackfoot infiltration gallery. During and after the water well tests of water wells numbered 4 and 5, no significant change of any water quality parameter of interest was observed between the upstream and the downstream stations. Locations

SW-53L and SW-44L are surface water sampling locations on the Landers Fork River, upstream and downstream from the Landers Fork infiltration gallery. During and after the water well test of well number 6, no significant change of any water quality parameters of interest was observed between upstream and downstream locations. See Volberding affidavit, paragraph 6, p. 3.

The balance of the Volberding affidavit contains references to other specific monitoring sites which notice no significant change from prewater well test conditions. Attached to his affidavit are several pages of specific findings over a period of time from a variety of sampling locations on both rivers.

Plaintiffs present the affidavit testimony of Mr. Dan Frazier, former head of the Water Quality Bureau. Mr. Frazier finds that the water [*26] well tests are causing serious degradation to Montana waters.

Plaintiffs' position seems to be that the nondegradation review from which these water wells are now exempted pursuant to the statute here in question, is the constitutional equivalent to a clean and healthful environment. Thus, Plaintiffs argue that it must be that when an activity is exempted from nondegradation review then the legislature has failed in its requirement to maintain a clean and healthful environment.

However, this Court has a real question as to whether or not using the administrative review requirements of 16.20.712, ARM, would produce a different result. At page 12 of their brief, Plaintiffs apply the nondegradation review to the State's prediction of what concentration of various elements would be in the mixing zone waters as they entered the alluvium of the Blackfoot and Landers Fork Rivers. However, no such analysis has been done on the actual concentration of elements as they enter those waters. When coupled with Mr. Volberding's affidavit, there is certainly a factual question that prevents the granting of summary judgment on the constitutional issue.

At this stage of the proceeding, Plaintiffs [*27] have failed to prove that the actions of the state in approving the water well testing program mentioned above violates the Montana Constitution. The mere fact that discharges from water wells are categorically exempted from nondegradation view does not automatically give rise to a finding that the statute is unconstitutional. There must be a factual showing that the waters of the Blackfoot and Landers Fork Rivers are so threatened by the discharges here in question as to threaten public health or as to violate applicable water quality standards or as to cause a significant impact on either river.

The record seems to tell us that the mixing zones are working well and that no significant impact is occurring to either river. It is also crucial to note that the State is constantly monitoring the discharges from these wells. Absent a finding of an actual injury, the Court cannot rule, on the facts now before it, that in its operation, *Section 75-5-317 (2)(j), MCA*, is unconstitutional. On the other hand, the Court has the affidavit of Mr. Frazier that states that the well tests are significantly impacting the rivers. The Court has, then, a factual dispute that [*28] precludes the issuance of summary judgment to either party.

However, summary judgment is granted to the State as requested on Counts 4, 5, and 6.

DATED this 2nd day of August, 1996.

DISTRICT COURT JUDGE

ORDER GRANTING EXTENSION

Read 1/7/97 D

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMAL CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH, Plaintiffs, v. DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant, and SEVEN-UP PETE JOINT VENTURE, Intervenor.	No. BDV 95-1184 **ORDER GRANTING EXTENSION**

Upon motion of Intervenor and for good cause shown,

IT IS HEREBY ORDERED that Intervenor shall have to and including January 6, 1997, in which to file its Brief in Response to Plaintiff's Motion for Reconsideration.

Dated this 24 day of Dec, 1996.

District Judge

FINAL ORDER

MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION CENTER, CLARK FORK-PEND OREILLE COALITION, WOMEN'S VOICE FOR THE EARTH, Plaintiffs, vs. DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant, and SEVEN-UP PETE JOINT VENTURE, Intervenor.	**Cause No. BDV-95-1184** **FINAL ORDER**

This Court has before it a motion for reconsideration filed by Plaintiffs. The motion seeks reconsideration of this Court's Orders of August 5, 1996, denying Plaintiffs' request for summary judgment; and August 14, 1996, denying Plaintiffs'

request for a preliminary injunction. At this point, the Court will not attempt to recap the procedural drama that has attended this case. Rather, the Court would refer the interested reader to the aforementioned Orders for a summary of these events.

Plaintiffs seek to obtain this Court's order on the constitutionality of Section 75-5-317(2)(j), MCA. This Court's Order of August 5 found a factual dispute that prevented the Court from granting summary judgment to either party regarding the constitutionality of this statute. Plaintiffs now inform the Court they feel there are no facts in dispute, and request that the Court rule on this issue. In order to get this matter finalized, Plaintiffs indicate they are willing to dismiss Counts 1, 2 and 3, and with a final ruling on the constitutionality issue, they believe the matter will be ripe for appeal. The Department of Environmental Quality apparently agrees with this process. However, Seven-Up Pete Joint Venture disagrees.

Plaintiffs at page 7 of their brief make the following statement: "Plaintiffs doubt whether additional **facts** will change the Court's **legal** conclusion on the issue, and thus a final order is appropriate on Count 7 of this case."

The Court would point out that additional facts might well change this Court's legal conclusion. However, since Plaintiffs apparently are unable to come forth with those additional facts, the motion to reconsider will be denied.

Plaintiffs also request this Court to issue a ruling on

the constitutionality of the aforementioned statute. Accordingly, this Court will, somewhat reluctantly, rule on the constitutionality issue. The Court finds that Section 75-5-317(2)(j), MCA, based upon the facts presented thus far, is constitutional.

Also, Counts 1, 2 and 3 of Plaintiffs' complaint are dismissed. Plaintiffs are directed to present a judgment to this Court in conformity with this Order.

DATED this 29 day of January, 1997.

District Court Judge

pc: Thomas M. France
David K. Wilson
John F. North
Alan L. Joscelyn

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MEPA

1/27/82

Ruling in ASARCO suit bolsters state environmental policy act

By KEVIN MILLER
of the Missoulian

In a decision involving ASARCO's hardrock mine near Troy, a Helena judge appears to have substantially broadened the authority of state agencies to alter private projects that might harm the environment.

"This could affect anything where you have a state agency making an environmental permit decision," John North, staff counsel for the state Department of Lands, said Thursday.

The ruling will have no immediate effect on ASARCO's silver-and-copper mine. However, it leaves open the chance that the company might eventually be required to spend more money to protect the environment near the operation.

District Judge Gordon Bennett ruled this week that the Lands Department has, as a matter of general policy, "misinterpreted" the effect of the Montana Environmental Policy Act. He said the department must consider policy-act requirements when granting a permit for a hardrock mine.

The department and ASARCO (American Smelting & Refining Co.) have argued that only the requirements of the less-stringent federal Hardrock Mining Act should be applied in such a case.

Bennett's ruling is part of an interim opinion in a lawsuit filed in 1979 by the Montana Wilderness Association and the Cabinet Resource Group. The latter group is named after the Cabinet Mountains, which are across the Bull River Valley from ASARCO's mine.

The lawsuit basically charges that the state was lax in ensuring environmental protection when it granted the ASARCO permit in 1979. Both the state and the company are named as defendants.

William Rossbach, a Missoula lawyer who represents the plaintiffs, said Thursday that his clients want the state to require better protection for wildlife and water quality around the mine.

"We don't want to shut them down," he said of ASARCO. "We just want to make them do what they can do economically and reasonably."

The Missoulian tried unsuccessfully Thursday to contact ASARCO's lawyer in the case.

Bennett left open the question of whether the state made specific errors in writing the ASARCO permit, and that matter appears to be headed for trial in his court.

But the judge rejected the state's claim that, in general, the federal hardrock act precludes the consideration of Montana Environmental Policy Act requirements.

"MEPA must be applied," wrote Bennett, "and if properly applied undoubtedly binds (the department) to consideration of factors beyond those specified in (the hardrock act)."

North, the Lands Department lawyer, acknowledged that Bennett's policy-act ruling could have a far-reaching effect on the way the state handles environmental matters.

Typically under policy-act rules, when a state agency is considering a project that might cause environmental damage, it requires an environmental-impact statement.

After the impact statement has been reviewed, the agency decides whether to grant the permit. If the agency decides to grant the permit, then it must also decide which restrictions, if any, to place on the project.

In deciding which restrictions to employ, the agency often looks to a law other than environmental-policy act for guidance. In doing so, the agency discards many suggestions made in the required impact statement.

For example, in the ASARCO matter, the Lands Department looked to the hardrock act rather than to the environmental-policy act.

"We believed we were required to," said North.

That procedure bothers environmentalists, who say the restrictions in laws like the hardrock act seldom afford as much environmental protection as does the environmental-policy act. They say it makes no sense to complete an impact statement under the policy act and then to ignore the suggestions in the impact statement when writing a permit.

North said the Lands Department employed suggestions from the ASARCO impact statement only when those suggestions were compatible with requirements of the hardrock act.

North had not determined Thursday whether Bennett's ruling can be appealed.