National Wildlife Federation, et al. v. Department of Environmental Quality (previously Department of State Lands), et al.
Cause No. CDV-92-486, First Judicial District
Judge Honzel
Lewis and Clark County
Decided 2002

OPINION

NATIONAL WILDLIFE FEDERATION; MONTANA ENVIRONMENTAL INFORMATION CENTER; MINERAL POLICY CENTER; GALLATIN WILDLIFE ASSOCIATION; SIERRA CLUB, Plaintiffs, vs. MONTANA DEPARTMENT OF STATE LANDS; GOLDEN SUNLIGHT MINES, INC., Defendants.

Cause No. CDV-92-486

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

1994 Mont. Dist. LEXIS 716

September 1, 1994, Decided

JUDGES: [*1] Hon. Honzel, DISTRICT COURT JUDGE.

OPINION BY: Hon. Honzel

OPINION

MEMORANDUM AND ORDER

Before the Court is Plaintiffs' motion for summary judgment. The motion was heard March 8, 1994, and is ready for decision.

BACKGROUND

In 1975, Defendant Department of State Lands (DSL), in conjunction with the U.S. Bureau of Land Management (BLM), issued a permit for development of the Golden Sunlight Mine, an open pit gold mine in the southern Bull Mountains near Whitehall, Montana. The permit was issued to Defendant Golden Sunlight Mines, Inc. (Golden Sunlight), a wholly owned subsidiary of Placer Dome U.S. Inc. of San Francisco, California. The permit covers a total land area of 4,113 acres, with 1,751 acres currently permitted for ground disturbance. The land covered by the permit represents a patchwork of state, federal, and private holdings on which Golden Sunlight controls surface and mineral rights through a combination of fee simple ownership, patented claims, and unpatented claims which it either owns or leases.

Between 1975 and 1988, DSL issued seven amendments to Golden Sunlight's operating permit. During this time, DSL also approved a number of lesser revisions to the permit without issuing [*2] formal amendments. Under the permit as amended and revised through 1988, Golden Sunlight will have completed stage III of its overall mining plan for the site, and will have generated 90 million tons of waste rock and processed 20 million tons of ore.

On March 11, 1988, Golden Sunlight applied for Amendment 008, which is the subject of this litigation. This amendment authorizes implementation of stages IV and V of the company's plan, and provides for disturbance of an additional 986 acres of land. (EA at p. 41.) It also calls for expansion of the pit from 140 to 209 acres, excavation of an additional 210 million tons of waste rock and 30 million tons of ore, and extension of the mine's operating life through the year 2005. (EA at p. 4.)

After Golden Sunlight submitted its application for Amendment 008, DSL and BLM prepared three draft environmental assessments (EAs), pursuant to the Montana Environmental Policy Act (MEPA). The purpose of those assessments was to evaluate the environmental impacts of the proposal. All three draft EAs concluded that the project might cause significant environmental impacts, a conclusion which would typically trigger preparation of a more extensive [*3] environmental impact statement (EIS), and/or denial of the application.

Following the issuance of the draft EAs, Golden Sunlight offered a number of "supplemental commitments" to its original reclamation plan in order to mitigate the impacts of its proposal and assuage the agencies' concerns. These commitments are evaluated in Chapter IV of the final EA.

DSL and BLM reviewed Golden Sunlight's supplemental commitments and determined that concerns over water quality, acid mine drainage, and aesthetics were not adequately resolved. Consequently, the agencies proposed a series of "additional modifications" which, together with Golden Sunlight's original proposal and its supplemental commitments, constituted the "preferred alternative." This alternative is set out and evaluated in Chapter V of the final EA.

DSL and BLM issued their final EA for Amendment 008 on May 30, 1990, concluding that even under the preferred alternative, the long-term environmental impacts of the mine expansion contemplated by

Amendment 008 might still be significant. The agencies then solicited public comment on the final EA, and held a public hearing in Whitehall, Montana, on June 20, 1990. They received [*4] substantial response from the public as well as from Golden Sunlight, which proffered further commitments. BLM and DSL then issued separate records of decision (RODs) approving Amendment 008, subject to 31 additional stipulations, which were developed between June 25 and June 30, 1990.

On September 13, 1990, a number of environmental organizations filed an appeal with the Interior Board of Land Appeals (IBLA), BLM's administrative review tribunal. They alleged that BLM violated the National Environmental Policy Act (NEPA) by failing to prepare an EIS for the project. On April 14, 1993, the IBLA upheld BLM's decision not to prepare an EIS, but remanded the case back to BLM for modification of the plan or increased bonding.

Plaintiffs filed this action on March 30, 1992. Their complaint contains eight separate counts. The first three allege that in failing to perform an EIS, DSL violated MEPA and its accompanying regulations. Count Four alleges violations of the Metal Mine Reclamation Act (MMRA). Counts Five and Six allege violations of Article IX of the Montana Constitution. Count Seven alleges that in foregoing an EIS, DSL acted arbitrarily, capriciously and unlawfully. Count Eight [*5] alleges that a declaratory judgment is appropriate. The Court has already dismissed Count Three, in which Plaintiffs requested relief in the nature of mandamus.

Plaintiffs have not requested injunctive relief. Consequently, the mine's activities under Amendment 008 have thus far been unaffected by this litigation.

DISCUSSION

I. EQUITABLE DEFENSES

A. Laches

Golden Sunlight argues that Plaintiffs' claims are barred by laches. Laches is an equitable doctrine invoked to deny relief to a party who is guilty of unexplained and inexcusable delay in prosecuting its claim for relief. See *27 Am. Jur. 2d, Equity §§ 152, 164* (1966). In Montana, "[l]aches exists when there has been an unexplained delay of such duration or character as to render the enforcement of an asserted right inequitable." *Brabender v. Kit Mfg. Co., 174 Mont. 63, 67-68, 568 P.2d 547, 549 (1977)*. Laches is appropriate when a party is actually or presumptively aware of his rights but fails to act. *Clayton by Murphy v. Atl. Richfield Co., 221 Mont. 166, 170, 717 P.2d 558, 561 (1986)*. There is no absolute rule as to what [*6] constitutes laches, and each case is determined according to its own particular circumstances. *Gue v. Olds, 245 Mont. 117, 120, 799 P.2d 543, 545 (1990)*.

The Ninth Circuit Court of Appeals has held that

> [l]aches is not a favored defense in environmental cases. Its use should be restricted to avoid defeat of Congress' environmental policy. In considering laches claims, it is relevant that the plaintiff will not be the only victim of possible environmental damage. Citizens have a right to assume that federal officials will comply with the applicable law. As we stated in *City of Davis v. Coleman [521 F.2d 661, 678]*: "To make faithful execution of this duty contingent upon the vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with NEPA in the first instance."

Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980) (citations omitted). Furthermore, for laches to apply, there must be both a lack of diligence on the part of the party against whom the defense is [*7] asserted, and prejudice to the party asserting the defense. *Gue v. Olds, 245 Mont. at 120, 799 P.2d at 545*.

Because BLM has concurrent jurisdiction over the mine with DSL, some of the Plaintiffs to this action sought review of BLM's approval of Amendment 008 before the IBLA. They maintain that their initial decision to seek relief before the IBLA was predicated on considerations of efficiency and conservation of organizational resources, and when no decision issued from the IBLA after more than a year from the time the case was submitted, they decided to bring the instant suit.

Although Plaintiffs' IBLA appeal was filed in August 1990, a decision was not rendered until April 1993. The total time between DSL's approval of Amendment 008 and the filing of Plaintiffs' complaint in this Court was approximately twenty months. Had Plaintiffs done nothing to vindicate their interests during this period, Defendants' laches claim might be persuasive. But some of the Plaintiffs in this case did timely seek relief, and the Court does not believe that their initial choice to do so in the federal forum constitutes a "lack of diligence."

Moreover, it cannot be said that Defendants [*8] were prejudiced by the suddenness of Plaintiffs' objections to Amendment 008. Both DSL and Golden Sunlight actively participated in the IBLA proceedings and were fully aware of the fact that some of these Plaintiffs had concerns that had not been resolved

through that process.

Because the Court finds that Plaintiffs have exercised reasonable diligence in prosecuting their claims regarding Amendment 008, and because it would be unjust to bar Plaintiffs' claims in this Court due in part to a delay over which they had no control, Golden Sunlight's request that the Court apply the doctrine of laches to bar those claims should be denied.

B. Equitable Estoppel

Golden Sunlight also contends that Plaintiffs should be equitably estopped from bringing their claims in this case. The doctrine of equitable estoppel is based in equity and good conscience, and its object is to prevent a party from taking unconscionable advantage of his own wrong while asserting his strict legal right. *Matter of Shaw, 189 Mont. 310, 615 P.2d 910 (1980).* It arises where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do. [*9] *Norman v. State, 182 Mont. 439, 597 P.2d 715 (1979).* The requirements for equitable estoppel are:

> a. conduct, acts, language, or silence amounting to representation or concealment of facts by the nonmoving party;
>
> b. knowledge of the true facts by that party;
>
> c. ignorance of the true facts by the moving party;
>
> d. intent that the moving party will act upon such conduct, acts, language or silence;
>
> e. the moving party's reliance on the non-moving party's conduct, acts, language, or silence; and
>
> f. detriment to the moving party.

Shaw, 189 Mont. at 316-17, 615 P.2d at 914. Additionally, a finding of estoppel brings with it the attendant implication of bad faith on the party who is being estopped. *Wassberg v. Anaconda Copper Co., 215 Mont. 309, 697 P.2d 909 (1985).*

Golden Sunlight contends that statements purportedly made by Tom France, counsel for Plaintiff National Wildlife Federation, in connection with the IBLA proceedings concerning Amendment 008, and reported in The Montana Standard on August 16, 1990, constitute the grounds for equitable estoppel. According to that article, France indicated it was not his organization's [*10] intent to delay mining operations, and he believed an EIS could be prepared without interfering with the mine's operations. Golden Sunlight maintains that France's true objective was/is to shut the mine down, and that he has masked those intentions in an attempt to deceive them. Golden Sunlight contends that it has invested more than $ 40 million to expand its operations in reliance on this statement.

First, the Court finds it difficult to believe that Golden Sunlight invested $ 40 million in reliance on an unconfirmed report appearing in a newspaper, as it claims it did. Moreover, a review of the news article in question fails to reveal any statements by France which might give rise to equitable estoppel. If Plaintiffs' legal objective was to shut the mine down, they could have sought a preliminary injunction. They have not, and the mine has continued to operate unfettered by this litigation. Finally, at the March 8, 1994, hearing, Plaintiffs again represented to this Court that they do not seek to shut the mine down, and the Court has seen no evidence that would cast doubt on this representation.

Because equitable estoppel is such an extreme and disfavored remedy, *Fiers v. Jacobson, 123 Mont. 242, 211 P.2d 968 (1949),* [*11] and because Golden Sunlight has failed to make out a prima facie case for such relief, its request that the Court dismiss Plaintiffs' complaint on the grounds of equitable estoppel should be denied.

C. Collateral Estoppel

Both Golden Sunlight and DSL argue that Plaintiffs' MEPA claims are barred by collateral estoppel. Collateral estoppel, also known as "issue preclusion," is a form of res judicata which serves to bar the relitigation of issues actually litigated and determined in a prior suit. *Smith v. Schweigert, 241 Mont. 54, 58, 785 P.2d 195, 197 (1992).* It differs from res judicata in that res judicata bars the same parties from relitigating the same cause of action, while collateral estoppel bars the same parties, or their privies, from relitigating issues which have been decided in a different cause of action. Id. Collateral estoppel has three elements:

> "1. The issue has been decided in a prior adjudication and is identical to the one presented.
>
> "2. A final judgment on the merits was issued.
>
> "3. The party against whom the plea is asserted was a party or privity to the party in the prior adjudication."

Id. (quoting *In re the Marriage of Stout, 216 Mont. 342, 701 P.2d 729 (1985)).* [*12] Defendants contend that since MEPA is comparable to NEPA (which formed the basis of Plaintiffs' claims before the IBLA), and since the parties are nearly identical (all but one of the Plaintiffs in this case were complainants in the IBLA proceedings), Plaintiffs should be barred from bringing before this Court a claim based on MEPA. There are, however, several weaknesses in this position.

1. Identity of Issues

The first prerequisite for the application of collateral estoppel is that the precise question at issue must have been previously adjudicated by a tribunal of competent jurisdiction. While MEPA is indeed very similar to its federal counterpart, it is not identical. As the Montana Supreme Court has noted: "[L]ooking to federal [NEPA] decisions is not always conclusive [for the purposes of interpreting MEPA] . . . ." *North Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 457, 778 P.2d 862, 866 (1989).*

Restatement (Second) of Judgments § 83 (1980) states, in pertinent part:

> (4) An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in [*13] another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
>
> . . . .
>
> (b) The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.

The state of Montana not only has its own environmental policy act, but it has specific constitutional guarantees respecting the environment as well. (Art. II, § 3, and *Art. IX, §§ 1* and *2, Mont. Const.*) That the people's right to a clean and healthy environment has been elevated to constitutional status in this state indicates a strong public policy in favor of environmental protection. As this Court has said previously, these constitutional provisions mean something. The Court concludes, therefore, that the constitutional and legislative policies embodied in MEPA strongly favor independent review of cases such as this.

2. Finality of the IBLA Decision

Another requirement of collateral estoppel is that the decision giving rise to the estoppel must have been final. In the case before the IBLA, the administrative law judge stated:

> [I]t is clear that the technical staffs of BLM and DSL believe [*14] that GSM has little chance of success in reclaiming 2:1 slopes. . . .
>
> Based on the record before us, we must conclude that the plan approved by BLM does not adequately ensure the absence of any significant environmental impact. Accordingly, we must set aside approval of that plan and remand the case to allow modification of the plan or increased bonding [to cover the costs of test plot failure].

(*National Wildlife Federation, et al., 126 IBLA 48, 63* (April 14, 1993).) Because the case was remanded on this issue, the IBLA's decision was not "final," and further proceedings are possible before a final decision is rendered.

3. Identity of Parties

The final requirement for application of collateral estoppel is that the party or parties against whom the plea is asserted are identical to, or in privity with, the parties who were bound by the prior adjudication. While each Defendant takes a different approach to this issue, both would have the Court adopt a loose interpretation of this requirement in order to get around the fact that one of the Plaintiffs in this case--Gallatin Wildlife Association--was not a party to the IBLA proceedings. Golden Sunlight asserts [*15] that "the Gallatin Wildlife Association must be deemed to be in privity with appellants in the IBLA proceeding because it shares the same claim as the other plaintiffs--that an EIS should be prepared." Golden Sunlight's Summ. J. Resp. Br. at pp. 15-16. Golden Sunlight, however, offers no authority to support the contention that mutuality of interest constitutes privity for the purposes of collateral estoppel. Furthermore, the Court finds that it would be unjust to deny Plaintiff Gallatin Wildlife Association access to courts of this state on the grounds that their co-Plaintiffs have litigated a similar claim before a federal administrative tribunal.

DSL offers a different theory for why Gallatin Wildlife Association is in privity with the Plaintiffs who appeared before the IBLA. It maintains that since Plaintiffs are asserting general public rights, a judgment against one is a judgment against all. In support of this position, DSL cites *State ex rel. Sullivan v. Sch. Dist. No. 1, 100 Mont. 468, 472, 50 P.2d 252, 253 (1935).* That case involved a class of individuals (taxpayers), any of whom would have been entitled to bring an action that would serve to resolve the issue [*16] with respect to the

entire class. In contrast, the Court cannot conclude that all environmental groups constitute a single, legally cognizable class such that the actions of one before a federal administrative tribunal can serve to bar another's right to redress of its grievances in the courts of this state.

Finally, the Court notes that because Plaintiffs Mineral Policy Center and Sierra Club were dismissed from the IBLA proceedings for failing to meet that tribunal's standing requirements, they, like the Gallatin Wildlife Association, were not "parties" to the IBLA decision. This means that of the five Plaintiffs in this case, only two--the Montana Wildlife Federation and the Montana Environmental Information Center--were actually "parties" to that decision.

For the foregoing reasons, Defendants' request that Plaintiffs be collaterally estopped from maintaining this action should be denied.

II. MONTANA ENVIRONMENTAL POLICY ACT

The Montana Environmental Policy Act (MEPA) is a procedural act designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. [*17] *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)* (agencies must take a "hard look" at the environmental consequences of their actions). Because MEPA is modeled after the National Environmental Policy Act (NEPA), *42 U.S.C. §§ 4321-70 (1988)*, Montana courts often look to federal NEPA caselaw to resolve questions arising under *MEPA. Montana Wilderness Ass'n v. Bd. of Health and Envtl. Sciences, 171 Mont. 477, 493, 559 P.2d 1157, 1165 (1976)*; *Kadilak v. Anaconda Co., 184 Mont. 127, 141, 602 P.2d 147, 153 (1979)*; *North Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 458, 778 P.2d 862, 866 (1989)*.

Under MEPA, state agencies must

> (iii) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on:
>
> (A) the environmental impact of the proposed action;
>
> (B) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (C) alternatives to the proposed [*18] action;
>
> (D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
>
> (E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented . . . .

Section 75-1-201 (1)(b)(iii), MCA. This "detailed statement," known as an environmental impact statement (EIS), must be prepared for any major state action which may significantly impact the environment. See e.g., *Foundation for N. Am. Wild Sheep v. Dept. of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)*. Under MEPA, if an agency is unsure whether an EIS is necessary, it may first prepare an EA on the proposal. (ARM 26.2.643 (2)(c).) An EA is a less exhaustive environmental review prepared for proposed activities which do not rise to the level of "major actions of state government significantly affecting the quality of the human environment," but which nevertheless involve "unresolved conflicts concerning alternative uses of available resources . . . ." *Section 75-1-201 (1)(b)(iv), MCA*. If an EA demonstrates that no significant [*19] environmental impacts will occur as a result of the proposal, the agency may proceed with the project. If, however, the EA establishes that significant environmental impacts may occur, the agency must then prepare an EIS.

ARM 26.2.643 (4) provides that a "mitigated EA" may be prepared in lieu of an EIS "whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies." The rule further provides that for a mitigated EA to be sufficient, "the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur." It was DSL's decision to forego an EIS in favor of a mitigated EA which constitutes the basis for Plaintiffs' MEPA claim.

In its final EA, DSL concluded that the environmental impacts of Amendment 008 would in fact be significant. (EA at p. 143.) Given that determination, both MEPA and DSL's administrative regulations [*20] would normally require DSL to prepare an EIS analyzing those impacts in greater detail. ARM 26.2.643 (1)(a). In this case, however, DSL attached 31 stipulations to its ROD, stating that the stipulations were "believed to preclude significant impacts" and that they minimized potential impacts "to the extent reasonable and feasible . . . ." (ROD at p. 9.) Based on those stipulations, DSL

concluded that it did not have to prepare an EIS prior to approving Amendment 008.

Plaintiffs argue that it was improper for DSL to base its approval of Amendment 008 on the stipulations incorporated into the ROD for two reasons. First, they maintain that DSL cannot rely on mitigation measures that were neither included nor evaluated in the EA. Second, they argue that insofar as many of the stipulations call for continued monitoring, additional studies, and the submission of revised plans, DSL's conclusion that environmental impacts had been reduced below the level of significance was unsubstantiated, arbitrary, and capricious. Plaintiffs highlight three specific areas of concern which they maintain should have been more thoroughly evaluated in an EIS: (1) the potential for reclamation failure within [*21] the waste rock dumps; (2) the potential for acid mine drainage from the waste rock dumps and/or tailings impoundments; and (3) the potential for contamination of ground and surface waters.

Under MEPA, an agency's decision not to prepare an EIS will be upheld unless the agency acted arbitrarily, capriciously, or unlawfully. *North Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 458-459, 778 P.2d 862, 867 (1989)*. This standard breaks down into two basic parts: whether the agency's action could be considered unlawful, or whether it could be considered arbitrary or capricious. *Id. at 459, 778 P.2d at 867*. Determining whether an agency's action was unlawful involves whether the agency violated any of the statutes or regulations relating to the challenged actions. Id. In determining whether the action was arbitrary and capricious, the Court '"must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."' *Id. at 465, 778 P.2d at 871* (quoting *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 395, 109 S. Ct. 1851 (1989))*. [*22] A reviewing court may not substitute its judgment for that of the agency, but "must examine the Department's decision to see whether the information set out in the [record] was considered, or the decision to forego an EIS was so at odds with that information that it could be characterized as arbitrary or the product of caprice." *North Fork at 465, 778 P.2d at 871*.

In North Fork, a state land lessee sought DSL's permission to drill an exploratory oil well near Glacier National Park. DSL's approval of the lessee's operating plan relied upon 42 protective stipulations, 11 of which were contained in the lease and 31 of which were attached to the approval of the operating plan. The supreme court held that this procedure was neither unlawful nor arbitrary and capricious. *Id. at 467, 778 P.2d at 872*. Furthermore, DSL's administrative regulations specifically provide for the use of protective stipulations to reduce impacts to below the level of significance. ARM 26.2.643 (4). The Court concludes, therefore, that the practice of using protective stipulations to reduce environmental impacts below the level of significance is permissible under MEPA.

That conclusion, [*23] however, does not end the inquiry. The Court must still determine whether DSL complied with the relevant statutes and regulations, and whether its conclusion regarding the insignificance of impacts was arbitrary or capricious. For the reasons stated below, the Court finds that DSL did violate the requirements of ARM 26.2.643 (4), and that its decision to forego preparation of an EIS based on the 31 permit stipulations was arbitrary, capricious, and unlawful.

A. DSL's Decision was Arbitrary and Capricious

1. Waste Rock Dump Reclamation

To reach the gold deposits, Golden Sunlight must remove large quantities of material with no economic value, known as "overburden" or "waste rock." This material is transported and deposited in large piles known as waste rock dumps. Both the MMRA and the state constitution require that these dumps be reclaimed. One of the most controversial aspects of Golden Sunlight's reclamation plan involves the slope angle at which the company will reclaim, or attempt to reclaim, these waste rock dumps. According to DSL:

> The scale of this operation in conjunction with the proposed reclamation of steep slopes and the reactive nature of the waste materials [*24] adds new dimensions to an already large reclamation undertaking. The success of reclamation here is critical.

(EA at p. 1.) Reclamation of Golden Sunlight's waste rock dumps involves several stages. These include:

> a. Reducing the slope angle of the dumps;
>
> b. Placing a "cap" layer of oxidized (non acid-forming) waste rock over the unoxidized (acid-forming) waste rock;
>
> c. Adding lime to further neutralize the oxidized rock cap;
>
> d. Replacing soils; and
>
> e. Revegetation.

Slope angle is expressed as a ratio of horizontal length (h) to vertical height (v). For example, a 2h:1v slope is twice as long as it is high and considerably steeper than a 3h:1v slope. Waste rock at the Golden Sunlight Mine is initially deposited at the "angle of

repose," which is approximately 36 degrees from the horizontal, or 1.5h:1v. Because slopes of this angle are too steep and erodible to be successfully reclaimed, they must be reduced.

Under the original operating permit issued in 1975, Golden Sunlight was required to reduce waste rock slopes to 6.7h:1v. Through a series of permit amendments, however, this standard has been steadily relaxed until, by the time DSL issued Amendment 006 [*25] in 1988, the requirement had been reduced to 2h:1v. In its application for Amendment 008, Golden Sunlight sought to extend the 2h:1v standard to its new waste rock dumps, which will contain approximately 210 million tons of additional waste material.

Reclamation experts within both DSL and BLM have expressed serious reservations about attempting to reclaim 2h:1v slopes. In a memorandum to Hard Rock Bureau Chief Sandi Olsen, the Bureau's technical staff wrote:

> It has been made redundantly clear to the department administration and to Golden Sunlight that consideration of 2h:1v slopes . . . was based on the Golden Sunlight contention that the waste rock was neutral, or had negligible potential for acid generation. Subsequent analyses by Doug Dollhopf of Montana State University have substantiated that acid-producing potential exists, and that the proposed reclamation plan for the dumps was, therefore, inapplicable. . . .
>
> Both the Hard Rock Bureau technical staff and the Bureau of Land Management have been uniform in their reasoning and documentation in support of at least 3h:1v slopes. To permit reclamation of 2h:1v slopes, either outright or by "test-plot" permitting, would [*26] not be responsible representation of both industry and public interests.
>
> The environmental consequences and potential costs to the State of Montana for failed reclamation on these expansive, acidic dumps will be exponentially greater than if reasonable reclamation is required and conducted on the initial effort by Golden Sunlight. The historical mistakes of mining practices in our country are thoroughly recognized and understood; to knowingly allow the same practices to continue today is improper administration of the Metal Mine Reclamation Act and Rules, and demonstrates a lack of commitment to environmental protection through responsible resource development.

(Plaintiffs' Exhibit F--Memorandum dated January 23, 1990) (emphasis supplied). This strongly worded memorandum was signed by six Hard Rock Bureau technical staff members.

Moreover, these same concerns were echoed in the final EA, which states:

> Reclamation success of the almost 800 acres and 300 million tons of waste rock is necessary to minimize potential impacts to water quality and aesthetics . . . . Observed oxidation of pyritic sulfur and the acid production potential of the waste rock makes reclamation success [*27] even more critical. Staff expertise, literature review and discussions with reclamation specialists suggest that reclamation of the long, steep, extensive 2h:1v slopes would be difficult under normal conditions. Given the nature of the waste rock, the need to uniformly apply cap rock and soil, and the potential need for application of other amendments, as well as routine revegetation practices, reclamation of the 2h:1v waste rock dump slopes at Golden Sunlight would be even more difficult to achieve.
>
> Slope reduction to 3h:1v was recommended by the regulatory agencies because of erosion potential on long, steep slopes. . . . In the agencies (sic) evaluation, soil loss on 2h:1v slopes could not be reduced to levels presumed acceptable . . . . In contrast, soil losses were reduced to acceptable limits on 3h:1v slopes when combined with several additional agricultural practices which can't be implemented on 2h:1v slopes. . . .
>
> In addition to higher erosion rates, 2h:1v slope reduction would provide marginal opportunities for reclamation success on potentially acid producing materials because of equipment limitations. . . . Finally, 3h:1v slope reduction would increase revegetation [*28] potential and provide more complete water use which would, in turn, decrease the potential for long-term acid mine drainage from the reclaimed waste rock dumps.

(EA at pp. 98-99) (emphasis supplied) (citations and references omitted).

In an attempt to strike a compromise between the conclusions of their technical staffs and the wishes of the permittee, BLM and DSL decided to allow Golden Sunlight to experiment with reclamation at the steeper 2h:1v slope angle by establishing a number of 2h:1v "test plots." DSL's technical staff has expressed concern over the potential for significant long-term environmental impacts should problems with these test plots not appear immediately:

> [M]ajor impacts . . . could result if the waste rock dump test succeeds in some degree. If the reclamation on the waste rock dump slopes is marginally successful, then concurrent reclamation on waste rock dumps could be postponed indefinitely. The test could continue for up to 10 years. The waste rock dump test would monitor soluble sulfate changes over time, which would indicate potential long-term acidification in the waste rock dump. The waste rock dump test does not measure heat or oxygen relations [*29] in the dump which would indicate the effectiveness of the replaced rock cap and soil in shutting off the oxidation of pyrite. Development of the oxidation reaction could progress slowly after reclamation is implemented, thereby delaying the acidification of the soil cover and development of acid mine drainage until years after the final reclamation is completed.
>
> . . . .
>
> An additional impact which would occur in the event the 3h:1v [sic (all test plots are 2h:1v)] test plot on the south dump was not successful, is the reduced likelihood of any eventual reclamation on the south waste rock dump. It would be extremely difficult to salvage reclamation on the large waste rock dump if testing demonstrated that a 2h:1v reduction is too steep because soil resources would have been lost and/or contaminated by acid producing waste rock. The south dump occupies approximately 65 acres or 8 percent of the waste rock dump complex and is one of the most visible of the waste rock dumps.

(EA at p. 101) (emphasis supplied).

Nevertheless, BLM and DSL sanctioned the test plots, and concluded that an EIS would not be necessary to evaluate their environmental impacts. To justify its decision, [*30] DSL relies on nine permit stipulations attached to the ROD (Stipulation Nos. 1 through 9). Many of these stipulations involve additional monitoring, further studies, and the submission of revised plans. For example, Stipulation No. 2 requires Golden Sunlight to develop research and monitoring plans designed to measure the effectiveness of reclamation efforts for the waste rock dumps. Stipulation Nos. 5, 6 and 7 call for Golden Sunlight to conduct further tests regarding the effectiveness of reclamation on the slope surface, the waste rock cap, and soils. Stipulation No. 9 requires Golden Sunlight to submit a revised plan and schedule for waste rock dump reclamation.

The Ninth Circuit Court of Appeals has held that "reliance on a post-licensing study to fully develop a mitigation plan deprives [the agency] of any foundation upon which to base their conclusion that the project's impact . . . will not be significant." *LaFlamme v. F.E.R.C., 852 F.2d 389, 400 (9th Cir. 1988)*. Furthermore, "'the very purpose of [the] requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for speculation by insuring that [*31] available data is gathered and analyzed prior to the implementation of the proposed action.'" Id. (emphasis supplied) (quoting *Foundation for N. Am. Wild Sheep v. U. S. Dep't of Agric., 681 F.2d 1172, 1179 (9th Cir. 1982))*. In *Conner v. Burford, 836 F.2d 1521, 1531 (9th Cir. 1988)*, the Ninth Circuit held that the practice of approving now and asking questions later is "precisely the type of environmentally blind decision-making NEPA was designed to avoid." An analogous situation exists here. The information which DSL has allowed Golden Sunlight to collect subsequent to its approval of Amendment 008 is precisely the kind of information that MEPA requires agencies to gather, evaluate, and make available to the public before sanctioning such a proposal.

In light of the unambiguous position of its own professional staff that allowing Golden Sunlight to attempt to reclaim 2h:1v slopes, even on an experimental basis, is ill-advised, the Court concludes that DSL's failure to further evaluate the environmental consequences of 2h:1v slope reclamation in an EIS, prior to sanctioning its use, was arbitrary and capricious.

2. Acid Mine Drainage

After waste rock [*32] is removed, the gold-bearing ore is loaded on trucks and transported to an on-site mill where it is crushed and the gold extracted through a cyanide vat leaching process. The waste materials that remain after the gold is leached out of the crushed ore are called tailings. Tailings are mixed with water and then "slurried" to a tailings impoundment.

Under Amendment 008, the Golden Sunlight mine will generate an additional 30 million tons of tailings. This will require development of a second tailings impoundment (tailings impoundment II) east of the existing tailings impoundment (tailings impoundment I). Tailings impoundment II will cover 250 acres, have an embankment height of 150 feet, and be up to 250 feet deep. Unlike the first impoundment, tailings impoundment II will be constructed with a synthetic liner to help control seepage. (EA at p. 4.)

Both the waste rock and the tailings at the Golden Sunlight Mine contain the mineral pyrite. When pyrite is exposed to oxygen and water, it oxidizes. This process produces sulfuric acid, a highly toxic chemical. If sulfuric acid is allowed to form in the waste rock dumps or tailings impoundments, it could migrate down through those structures [*33] and contaminate ground and surface waters feeding the Jefferson River. Also, oxidation of pyrite generates heat, which could cause acidic water vapor to rise and contaminate the overlying soils of the waste rock dumps and tailings impoundments. Furthermore, sulfuric acid can leach heavy metals out of the tailings and waste rock, creating the additional risk of heavy metal contamination of ground and surface water. Because of these concerns, preventing oxidation within the waste rock dumps and tailings impoundments is critical to successful reclamation. Nevertheless, DSL noted in 1990 that some oxidation of waste rock had already occurred.

Plaintiffs maintain that DSL has not adequately evaluated the potential for acid mine drainage. They point out that DSL has been unable to quantify the seepage that actually migrates out of the waste rock dumps, the tailings impoundments, or the pit itself. They also argue that DSL has not considered the effect of possible reclamation failure on the potential for acid mine drainage.

Here again, DSL relies on protective stipulations incorporated into the ROD to conclude that the environmental impacts of Amendment 008 will not be significant. Many [*34] of these stipulations simply call for further study. Even with regard to those stipulations which do set forth specific standards and mitigation measures, however, the Court agrees that DSL has failed to evaluate their effectiveness, either in the EA or elsewhere.

In order to justify a decision to forego preparing an EIS, an agency must supply a convincing statement of reasons why potential impacts are insignificant. *The Steamboaters v. F.E.R.C., 759 F.2d 1382, 1393 (9th Cir. 1985)*. When relying on mitigation measures to support a conclusion that impacts are not significant, an agency is further obliged to explain how those mitigation measures serve to reduce impacts below the level of significance. *Id. at 1394*; *LaFlamme v. F.E.R.C., 852 F.2d 389, 399 (9th Cir. 1988)*; *Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986)*. "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 697 (9th Cir. 1986)* (rev'd on other grounds sub nom. *Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319*). [*35] In this case, DSL has provided neither a convincing statement of reasons nor an adequate explanation of how the additional studies and mitigation measures contemplated by its stipulations render the potential environmental impacts of Golden Sunlight's reclamation plan insignificant.

3. Long-term Water Quality/pit Reclamation

Golden Sunlight predicts that conditions in the pit will stabilize after 400 years. According to Golden Sunlight, this "steady state" condition will consist of a 40-acre lake with an inflow of two gallons of water per minute (gpm). DSL believes, however, that several of Golden Sunlight's assumptions regarding groundwater flow are "not substantiated by data" and that Golden Sunlight's inflow figures "could be low by an order of magnitude." (EA at p. 116.) Consequently, DSL has anticipated the need for a 70-acre landfill disposal facility, as opposed to the 10-acre facility proposed by Golden Sunlight.

Plaintiffs contend that although Golden Sunlight has committed to treating wastewater from the pit and tailings impoundments in perpetuity if necessary, DSL has violated MEPA by failing to evaluate the effectiveness, as well as the environmental impacts, of such [*36] a facility, which would be required to treat approximately 95 gallons of toxic water every minute for the rest of time. (EA at p. 116.) The Court agrees. For the same reasons that DSL's failure to prepare an EIS evaluating the impacts previously discussed was arbitrary and capricious, its failure to prepare an EIS to evaluate the environmental impacts associated with perpetual wastewater treatment was likewise arbitrary and capricious.

B. DSL's Decision was Unlawful

In order to forego preparing an EIS in favor of a mitigated EA, DSL's MEPA regulations require it to conclude that any potential environmental effects "will be mitigated below the level of significance." ARM 26.2.643 (4) (emphasis supplied). In this case, DSL stated merely that the 31 permit stipulations were "believed to preclude" significant environmental impacts, and that potential impacts "have been minimized to the extent reasonable and feasible." (ROD at p. 9) (emphasis supplied).

On page 1 of its ROD, DSL stated: "The EA

concluded that the agencies could not categorically state that impacts would or would not be significant without stipulations to the proposed plan and requirements for additional information [*37] to be collected on an ongoing basis." This is a mischaracterization of what the EA actually says, which is: "Although impacts to the environment have been further reduced by [the preferred] alternative, the agencies cannot categorically state that long-term cumulative impacts would or would not be significant." (EA at p. 143.) The additional language regarding the necessity of stipulations and collection of additional information was retrospectively supplied by DSL in order to bolster its decision to approve Amendment 008 without preparing an EIS.

Absent a conclusive determination that no significant impacts will occur, the Court finds that DSL's approval of Amendment 008 based upon a mitigated EA was not only at odds with the available information, but also a violation of ARM 26.2.643 (4).

C. Conclusion

The Golden Sunlight Mine is an enormous project, in economic as well as environmental terms. Mining through stage V will result in the cumulative production of 50 million tons of potentially acidic tailings and 300 million tons of potentially acidic waste rock, and will disturb approximately 2,600 acres of land. Even after it is shut down, the mine will continue to generate [*38] an estimated 95 gallons of toxic water every minute for the rest of time. Obviously, this is a major state action with significant environmental impacts. Furthermore, substantial questions were left unanswered, or were put off pending the completion of future studies. MEPA does not permit this kind of approve-now, ask-questions-later approach to environmental decision-making.

For the foregoing reasons, the Court concludes that Plaintiffs are entitled to summary judgment on Counts One and Two. DSL should have prepared an EIS for Amendment 008. The EA should now be set aside and the matter remanded to DSL for compliance with MEPA.

III. METAL MINE RECLAMATION ACT

The Metal Mine Reclamation Act (MMRA), *Sections 82-4-301 through -362, MCA*, was adopted in 1971 to insure that "the usefulness, productivity, and scenic values of all lands and surface waters involved in mining and mining exploration within the boundaries and lawful jurisdiction of the state will receive the greatest reasonable degree of protection and reclamation to beneficial use . . . ." *Section 82-4-302 (1)(a), MCA*. Under the MMRA, no person may engage in mining activities without an operating [*39] permit from the Board of Land Commissioners. *Section 82-4-335, MCA*. In order to obtain such a permit, the applicant must prepare and submit a proposed reclamation plan. *Section 82-4-335(4)(c), MCA*.

Plaintiffs claim that Golden Sunlight's reclamation plan violates the MMRA because:

> a. it fails to provide for simultaneous reclamation, as required by *Section 82-4-336 (1), MCA*;
>
> b. it fails to assure prevention of groundwater contamination, as required by *Section 82-4-336 (5), MCA*;
>
> c. it fails to evaluate the feasibility of reclaiming the pit, as required by *Section 82-4-336 (7), MCA*;
>
> d. it fails to set forth a reclamation schedule as required by *Section 82-4-303 (15)(i), MCA*; and
>
> e. it fails to provide for the reclamation of all facilities as required by *Section 82-4-336 (7), MCA*.

Plaintiffs also claim that because a final schedule and standards for reclamation await the results of various test plots and other studies, the plan fails to provide any assurance of reclamation, [*40] which they also characterize as a violation of the MMRA.

A. Simultaneous Reclamation

Section 82-4-336 (1), MCA, provides:

> The reclamation plan shall provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, shall be conducted simultaneously with the operation and in any case shall be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance. In the absence of an order by the board [of land commissioners] providing a longer period, the plan shall provide that reclamation activities shall be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.

Plaintiffs maintain that Golden Sunlight's reclamation plan violates this section because it defers some reclamation beyond the statutory period without a specific exemption by the Board. DSL contends that such an exemption need not be made by the Board, but may be made by DSL or its employees pursuant to a formal delegation of authority authorized by *Sections 82-4-321* and *2-15-112 (2)(b), MCA*, and [*41] documented at

Volume XV of the Minutes of State Board of Land Commissioners at pp. 172-173.

It is clear that the plan, as approved, does not require reclamation to be completed within the time frame set forth in *Section 82-4-336 (1), MCA*. Furthermore, the record contains no evidence of a specific order by the Board, DSL, or its employees granting an extension. Nevertheless, the Board and DSL are both authorized to extend the statutory period for reclamation, and it is obvious that such an extension has been granted in this case, either explicitly or by default. Although this is not the proper procedure, the Court does not believe a judicially imposed remedy is warranted here. Rather, since the plan is being remanded to DSL for the reasons set forth below, the Board or DSL should, if deemed appropriate, issue an order granting the necessary extension.

B. Reclamation of "Objectionable Effluent"

Section 82-4-336 (5), MCA, provides:

> Where mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive [*42] solutions (hereinafter "objectionable effluents") on exposure to moisture, the reclamation plan shall include provisions which adequately provide for:
>
> (a) insulation of all faces from moisture or water contact by covering to a depth of 2 feet or more with material or fill not susceptible itself to generation of objectionable effluents;
>
> (b) processing of any objectionable effluents in the pit before their being allowed to flow or be pumped out of it to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the board;
>
> (c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the board before release from the settling basin; or
>
> (d) absorption or evaporation of objectionable effluents in the open pit itself; and
>
> (e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and such other devices as may reasonably be required by the board.

Plaintiffs maintain that the plan violates this section because Amendment 008 creates a substantial risk of groundwater contamination. [*43] Defendants, on the other hand, argue that concerns identified in the EA have been remedied through a number of supplemental commitments and permit stipulations, and that water quality violations will not occur.

On page 138 of the EA, DSL states that "[Golden Sunlight's] supplemental commitment to treat discharge water from the tailing impoundments and pit in perpetuity would likely limit pollution of groundwater to only seepage from the waste rock dumps. Seepage from the waste rock dump [sic] is not expected to violate state groundwater quality standards." Yet on the previous page, the agency concedes that "[t]he actual amount of seepage into the groundwater system in the area from the waste rock dumps, tailing impoundments and pit is not known with any certainty." (EA at p. 137) (emphasis supplied). While the plan does provide for treatment of wastewater from the pit and tailings impoundments, no measures are provided to prevent seepage from these facilities, apart from the lining of tailings impoundment II. The Court does not understand how DSL can assure the public that water quality violations will not occur when it has little or no idea how much contaminated water might [*44] issue from those facilities. Furthermore, Defendants' contention that water quality will not be compromised by the mine is called into question by an August 10, 1993, letter to mine manager Don Wilson from state Water Quality Bureau chief Dan Fraser, which cites the discharge of cyanide-bearing wastewater from the mill, as well as seepage of contaminated water from two of the waste rock dumps. (See Plaintiffs' Exhibit K.) Consequently, the Court finds DSL's conclusion that Amendment 008 does not constitute a potential hazard to groundwater quality to be contradicted by information contained in the EA. The Court also finds that the reclamation plan, insofar as it neither provides a reliable evaluation of the potential for groundwater contamination nor guards against such contamination, violates *Section 82-4-336 (5), MCA*.

C. Pit Reclamation

Section 82-4-336 (7), MCA, provides:

> The reclamation plan shall provide for the reclamation of all disturbed land. Proposed reclamation shall provide for the reclamation of disturbed land to comparable utility and stability as that of adjacent areas, except for open pits and rock faces [*45] which may not be feasible to reclaim. In such excepted

> cases, the board shall require sufficient measures to insure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

Plaintiffs allege that since DSL failed to evaluate the feasibility of reclaiming the open pit, it could not reasonably conclude that such reclamation is not feasible, so as to sanction procedures commensurate with "excepted cases." Defendants maintain that *Section 82-4-336 (5), MCA*, discussed above, provides the proper standards for reclamation of the pit since that subsection deals specifically with such features. They further maintain that Golden Sunlight's reclamation plan, as approved, complies with those provisions.

Because subsection (7) exempts only those open pits and rock faces which may not be feasible to reclaim, DSL should have at least considered the possibility of reclaiming the pit before concluding that the measures set out in subsection (5) are sufficient. Furthermore, *Article IX, Section 2 of the Montana Constitution*, provides that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed." That language [*46] does not exempt open pit mines from reclamation. As discussed below, because subsection (7) does not require reclamation of open pit mines which may not be feasible to reclaim, it is also in conflict with Article IX, Section 2 of the constitution.

D. Reclamation Schedule

Section 82-4-303 (15)(i), MCA, provides that a reclamation plan must, to the extent practical, include a time schedule for reclamation that conforms to the requirements set out in *Section 82-4-336, MCA*. Plaintiffs argue that because Golden Sunlight's reclamation plan postpones many key reclamation decisions, there is no schedule. Defendants contend that Golden Sunlight's plan does meet the timing requirements of *Sections 82-4-303(15)* and *82-4-336, MCA*, to the extent practical, and therefore satisfies the MMRA. They point out that Stipulation No. 9 requires Golden Sunlight to submit a revised schedule for decommissioning the mine and for concurrent reclamation of waste rock dumps during mine life. They also point out that the plan requires Golden Sunlight to begin reclaiming the tailings impoundments immediately upon decommissioning.

At the heart of the [*47] parties' dispute on this issue is a debate over the phrase "to the extent practical." Defendants argue that Golden Sunlight's plan meets this standard. Plaintiffs, on the other hand, contend that Golden Sunlight and DSL failed to consider several other more prudent and effective reclamation strategies which were also "practical," and thus unlawfully avoided establishing a fixed schedule for reclamation.

Regarding this issue, the Court concludes that whether Golden Sunlight's reclamation plan complies with the timing requirements of *Section 82-4-303 (15), MCA*, "to the extent practical", constitutes a material factual dispute. Consequently, it cannot be resolved through summary judgment.

E. Reclamation of Water Treatment Plant, Landfill, and Other Miscellaneous Facilities

Golden Sunlight has committed itself to treating wastewater from the pit and tailings impoundments for as long as necessary to prevent surface and groundwater contamination from those facilities. DSL has estimated that this would require the construction of a water treatment plant, a 9-acre evaporation pond, and a 70-acre landfill. (EA at p. 117.) Such a facility would likely produce [*48] hazardous wastes subject to federal regulation under the Resource Conservation and Recovery Act. (EA at p. 98.)

Plaintiffs contend that the reclamation plan fails to provide for reclamation of this treatment facility in violation of *Section 82-4-336 (7), MCA*, which requires the reclamation of "all disturbed land." Plaintiffs also maintain that the plan fails to provide for the reclamation of other miscellaneous facilities, such as areas along the haul roads and around the mill. They argue that although DSL characterized Golden Sunlight's proposed reclamation plan for miscellaneous facilities as inadequate (EA at p. 133), no changes were made to that plan prior to approval of Amendment 008.

Defendants maintain that it was not necessary to plan for the reclamation of the treatment facility since it might be used to treat wastewater from the pit and tailings impoundments forever. Regarding the other facilities, Defendants maintain that this problem has been corrected by Stipulation No. 26, which states:

> At the end of operations, GSM must test areas which have the potential to acidify and take any additional measures necessary to cover and revegetate [*49] these areas, or to channel drainage from these areas to treatment facilities, where necessary.

In the Court's view, the possibility of perpetual wastewater treatment does not exempt Golden Sunlight from the duty to provide for the reclamation of such facilities in its plan. Moreover, what are the environmental impacts associated with such a treatment facility? What are the bonding requirements? These issues were not addressed in Golden Sunlight's reclamation plan.

The Court further concludes that the plan violates *Section 82-4-336 (7)* with respect to the other miscellaneous facilities as well. Given the EA's conclusion that the plan's treatment of miscellaneous

facilities was inadequate, the Court does not believe that DSL's eleventh hour incorporation of a catch-all stipulation requiring Golden Sunlight to test for acid-producing potential and "take any additional measures necessary" to reclaim those areas, satisfies the MMRA's mandate that all disturbed lands be reclaimed.

For the reasons set forth above, the Court concludes that DSL has violated the MMRA. Consequently, Plaintiffs are entitled to summary judgment on Count Four, and the reclamation plan should be remanded [*50] back to DSL for compliance with the MMRA.

IV. CONSTITUTIONAL CLAIMS

A. Article IX, Section 1

Article IX, Section 1 of the Montana Constitution provides:

> Protection and improvement. (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.

In Count Six of their complaint, Plaintiffs allege that by granting Amendment 008, DSL violated this provision of the Montana Constitution because it is authorizing the permanent destruction and removal of the south end of the Bull Mountain range as well as permanent and significant violations of water quality standards in the Jefferson River. In their supporting memorandum, Plaintiffs set forth three reasons for finding that DSL has violated the constitutional provisions:

> a. Its failure to follow the provisions of the MMRA;
>
> b. Its [*51] failure to require reclamation of the pit; and
>
> c. The massive scale of disturbance caused by the mine expansion.

The fact that this is a large open pit mining operation which will eliminate a portion of the Bull Mountains does not necessarily violate the constitution. The issue is whether such an operation constitutes an "unreasonable depletion and degradation of natural resources." That is a factual issue for which summary judgment is not appropriate.

The EA certainly indicates that there is a significant potential for pollution of the Jefferson River. DSL contends that there will not be any pollution because of the stipulations attached to the permit. This creates a factual dispute and, again, summary judgment is not appropriate.

The Court has concluded that DSL should have required an EIS and that it did not follow the provisions of the MMRA. Arguably, the failure to require an EIS and the failure to comply with the MMRA constitute violations of Article IX, Section 1. The remedy, however, would be for DSL to comply with MEPA and the MMRA. Plaintiffs have not shown that those remedies are inadequate. The Court concludes, therefore, that it is not necessary to find that [*52] DSL has violated Article IX, Section 1.

B. Article IX, Section 2

Article IX, Section 2(1) of the Montana Constitution provides: "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed." The constitution does not define reclamation. Instead, it requires the legislature to set "requirements and standards" for reclamation.

Webster's New Collegiate Dictionary, 1980 Edition, defines reclamation as "the act or process of reclaiming." Reclaim is defined as "to make available for human use by changing natural conditions."

Prior to 1985, *Section 82-4-336 (7), MCA*, stated:

> The reclamation plan shall provide for the reclamation of all disturbed land. Proposed reclamation need not reclaim the areas to a better condition or different use than that which existed prior to development or mining.

In 1985, the subsection was amended to its present form which reads:

> The reclamation plan shall provide for the reclamation of all disturbed land. Proposed reclamation shall provide for the reclamation of disturbed land to comparable [*53] utility and stability as that of adjacent areas, except for open pits and rock faces which may not be feasible to reclaim. In such excepted cases, the board shall require sufficient measures to

> insure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

Section 82-4-336 (7), MCA (1993).

In this case, there is no reclamation plan for the pit. (EA at p. 70.) Apparently, there was not even an analysis of the feasibility of pit reclamation. (EA at p. 114.)

The language of Article IX, Section 2, does not exempt open pit mines from reclamation. Moreover, there is nothing in the transcript of the constitutional convention proceedings to indicate that open pit mines are exempt from reclamation. As reported out of committee, the section read:

> All lands disturbed by the taking of natural resources must be reclaimed to as good a condition or use as prior to the disturbance. The condition or use to which the land is to be reclaimed and the method of enforcement of the reclamation must be established by the Legislature.

(Tr. of Proceedings at p. 1275.) During the course of debate, the delegates [*54] passed a motion amending the first sentence to read: "All lands disturbed by the taking of natural resources must be reclaimed to a beneficial and productive use." (Tr. of Proceedings, pp. 1299-1300) (emphasis supplied). Later in the proceedings, the delegates reconsidered their action and struck the words "to a beneficial and productive use." (Tr. of Proceedings, pp. 1353-63.)

During the debate, concerns were raised about whether the reclamation provision would be applied retroactively, the effect of such a provision on the Berkeley Pit, and whether a phrase such as "beneficial and productive use" should be included in a state constitution. There was, however, no indication that open pit mines, particularly mines which might be permitted in the future, should be exempt from reclamation. Because *Section 82-4-336 (7)* does not require reclamation of open pit mines which may not be feasible to reclaim, it is in conflict with Article IX, Section 2 of the constitution.

To the extent Plaintiffs are seeking a declaration that *Section 82-4-336 (7), MCA*, is in conflict with the constitution, their motion for summary judgment should be granted. The Court, however, [*55] is not prepared to go beyond that at this time. The Golden Sunlight Mine has been in operation for 19 years. Amendment 008 was approved in 1990 and allows for significant expansion of the mine. Golden Sunlight operated under that amendment for two years before Plaintiffs filed this action, and Golden Sunlight has continued operating under the amendment during the pendency of this action. Furthermore, the Court does not know what the water situation in the pit is today, or whether reclamation is even feasible. Given this background, the Court concludes only that despite the exception contained in *Section 82-4-336(7)*, a reclamation plan is constitutionally required for open pit mines.

ORDER

For the foregoing reasons, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment on Counts One and Two is GRANTED;

2. Except as specifically noted above, Plaintiffs' motion for summary judgment on Count Four is GRANTED;

3. To the extent that *Section 82-4-336 (7), MCA*, is in conflict with *Article IX, Section 2 of the Montana Constitution*, Plaintiffs' motion for summary judgment on Count Five is GRANTED;

4. Plaintiffs' motion for summary judgment on [*56] Count Six is DENIED.

DATED this 1st day of September, 1994.

Hon. Honzel District Court Judge

OPINION

NATIONAL WILDLIFE FEDERATION; MONTANA ENVIRONMENTAL INFORMATION CENTER; MINERAL POLICY CENTER; GALLATIN WILDLIFE ASSOCIATION; SIERRA CLUB, Plaintiffs, vs. MONTANA DEPARTMENT OF STATE LANDS; GOLDEN SUNLIGHT MINES, INC., Defendants.

Cause No. CDV-92-486

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

1998 Mont. Dist. LEXIS 159

November 20, 1998, Decided

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

OPINION BY: Thomas C. Honzel

OPINION

MEMORANDUM AND ORDER

Before the Court is Plaintiffs' motion for leave to file a supplemental complaint. The motion was heard October 26, 1998, and is ready for decision.

BACKGROUND

This case involves the expansion of the Golden Sunlight Mine, an open pit gold mine located in the Southern Bull Mountains near Whitehall, Jefferson County, Montana. Defendant Golden Sunlight Mines, Inc., has been operating the mine since 1975 under a permit issued by Defendant Montana Department of State Lands (DSL), now known as Department of Environmental Quality (DEQ). Between 1975 and 1988, the Department also issued seven amendments to the operating permit. This litigation originally involved Amendment 008 which Golden Sunlight applied for in 1988.

On March 30, 1992, Plaintiffs filed this action in which they challenge the issuance of Amendment 008. Plaintiffs alleged violations of the Montana Environmental Policy Act (MEPA), the Metal Mine Reclamation Act (MMRA), and violations of *Article IX, Sections 1* and *2 of the Montana Constitution*.

On September 1, 1994, the Court issued its Memorandum and Order on Plaintiffs' [*2] motion for partial summary judgment. The Court granted Plaintiffs summary judgment on their claim that DSL had violated MEPA by failing to have prepared an environmental impact statement (EIS) for Amendment 008.

The Court also concluded that in approving Golden Sunlight's proposed reclamation plan, DSL had violated the MMRA and, consequently, granted Plaintiffs' motion for summary judgment on that claim. Finally, the Court determined that *Section 82-4-336 (7), MCA* (1993), which provided an exception for open pit mines from reclamation, was in conflict with *Article IX, Section 2 of the Montana Constitution* which provides that "[a]ll land disturbed by the taking of natural resources shall be reclaimed."

On February 7, 1995, the parties entered into a stipulation in which they agreed to seek entry of final

judgment only with respect to the Court's decision on Count Five of the original complaint, which related to the constitutionality of *Section 82-4-336 (7), MCA* (1993). With respect to the MEPA and the MMRA claims, the parties agreed to a stay of further proceedings pending preparation of an EIS as provided for in the [*3] stipulation and entry of a record of decision (ROD) following publication of the final EIS. Under the stipulation, the Court was to retain jurisdiction during the pendency of the stay. An order approving the stipulation was entered February 7, 1995.

In April of 1998, DEQ issued a final EIS for the mine expansion. On June 29, 1998, DEQ, jointly with the Bureau of Land Management, issued a ROD which approved expansion of the mine. On July 24, 1998, pursuant to a joint request of the parties, the Court lifted the stay which had been issued February 7, 1995.

In their proposed supplemental complaint, Plaintiffs allege additional facts which have occurred since the Court issued its Memorandum and Order in September of 1994. Plaintiffs claim that DEQ's approval of the Golden Sunlight Mine expansion violates the MMRA; that *Section 82-4-336 (7), MCA* (1995), is unconstitutional as applied to the Golden Sunlight Mine expansion; and that DEQ's approval of the Golden Sunlight Mine expansion violates *Article IX, Sections 1*, 2, and 3 of the Montana Constitution.

Golden Sunlight opposes the motion to file a supple-mental complaint. It contends that the action [*4] filed in 1992 was concluded and, therefore, cannot not now be revived. Golden Sunlight further contends that if Plaintiffs want to challenge the new EIS and ROD, they are required to file a new lawsuit in Jefferson County pursuant to *Section 82-4-354 (4), MCA* (1997).

STANDARD

> Rule 15(d) of the Montana Rules of Civil Procedure, which is identical to the federal rule, states: Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

"Rule 15(d) permits the filing of a supplemental pleading which introduces a cause of action not alleged in the original complaint and not in existence when the original complaint was filed." Cabrera v. City of Huntington Park, No. 96-55268 and *No. 96-55431, 1998 U.S. App. LEXIS 26123*, [*5] at *19 (9th Cir. Oct. 16, 1998) (quoting *United States v. Reiten, 313 F.2d 673, 674 (9th Cir. 1963))*.

Parties may supplement pleadings even when the original action has reached final resolution if the district court retained jurisdiction over the matter. Id., n.11. See also *Griffin v. County Sch. Bd., 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964)*.

> Rule 15(d) is intended to give district courts broad discretion in allowing supplemental pleadings. *Story Gold Dredging Co. v. Wilson, 106 Mont. 166, 76 P.2d 73 (1935)*. See also *Fed. R. Civ. P. 15*, advisory committee note. "The rule is a tool of judicial economy and convenience. Its use is therefore favored." *Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988)*.
>
> [Rule 15(d)] is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried . . . . So useful they are and of such service in the efficient administration of justice that they ought to be allowed as [sic] of course, unless some particular [*6] reason for disallowing them appears . . . .

Id. Liberal construction of Rule 15(d) should apply absent a showing of prejudice to the defendant. *Id. at 475*. "[T]he fact that the supplemental pleading technically states a new cause of action should not be a bar to its allowance, but only a factor to be considered by the court in the exercise of its discretion, along with such factors as possible prejudice or laches." *Id. at 474*. The interpretation of Rule 15(d) is supported by the general purpose of the rules to minimize technical obstacles to a

determination of the controversy on the merits. *Id. at 475-76*.

DISCUSSION

Golden Sunlight contends that the 1992 action has been completed. However, the February 7, 1995 stipulation provided that DSL would prepare an EIS to address the violations determined by the Court in its September 1, 1994 Memorandum and Order. The stipulation further provided that the Court would retain jurisdiction and that Court proceedings would be stayed pending preparation of an EIS and the entry of a ROD. The stay has now been lifted and until a final judgment is entered on all claims, the case remains active. [*7] Golden Sunlight's principal objection to the motion to file a supplemental complaint is Golden Sunlight's contention that *Section 82-4-354 (4), MCA* (1997), requires that any new claims against it for violation of the MMRA must be brought in Jefferson County, where the mine is located. *Section 82-4-354, MCA*, as amended by the 1997 legislature, provides:

> (1) A person having an interest that is or may be adversely affected, with know-ledge that a requirement of this part or a rule adopted under this part is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule, may bring the failure to the attention of the public officer or employee by an affidavit stating the specific facts of the failure. Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed for false swearing, as provided in 45-7-202.
>
> (2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the affidavit to enforce the requirement or rule, the affiant may bring an action of mandamus in the district court of the first judicial district [*8] or in the district court of the county in which the land is located. If the court finds that a requirement of this part or a rule adopted under this part is not being enforced, it shall order the public officer or employee to perform the duties. If the officer or employee fails to do so, the public officer or employee must be held in contempt of court and is subject to the penalties provided by law.
>
> (3) A person having an interest that is or may be adversely affected may commence a civil action to compel compliance with this part against a person for the violation of this part or any rule, order, or permit issued under it. However, an action may not be commenced:
>
> (a) prior to 60 days after the plaintiff has given notice in writing to the department and to the alleged violator; or
>
> (b) if the department has commenced and is diligently prosecuting a civil action to require compliance with the provisions of this part or any rule, order, or permit issued under it. A person having an interest that is or may be adversely affected may intervene as a matter of right in the civil action.
>
> (4) Legal actions under subsection (3)(a) must be brought in the district court of the [*9] county in which the alleged violation occurred or, if mutually agreed to by the parties to the action, in any other judicial district.
>
> (5) Nothing in this section restricts any right of any person under any statute or common law to seek enforcement of this part or the rules adopted under it or to seek any other relief.

Subsection (4) does not say that the action must be brought in the county where the mine is located but rather in the county where the alleged violations occurred. Normally, if a mining operation is alleged to have violated the MMRA, the alleged violations would be in the county where the mine is located. Here, however,

although Golden Sunlight is a named Defendant, the proposed supplemental complaint alleges that the Department violated the MMRA in approving the mine expansion without requiring an appropriate reclamation plan. The Department's actions took place in Lewis and Clark County.

> Furthermore, *Section 82-4-354, MCA,* seems to contemplate a lawsuit against a mining operation, not against the State. There is nothing in the statute or in its legislative history which indicates a legislative intent that lawsuits challenging [*10] the issuance of a mining permit must be brought in the county where the mine is located. In this regard, the title of House Bill 395, which amended *Section 82-4-354, MCA*, reads:
>
> AN ACT SPECIFYING THE VENUE FOR ACTIONS BROUGHT BY THIRD PARTIES TO ENFORCE COMPLIANCE WITH THE METAL MINE RECLAMATION LAWS AND FOR ACTIONS BROUGHT BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY FOR RECOVERY OF CIVIL PENALTIES OR INJUNCTIVE RELIEF UNDER THE METAL MINE RECLAMATION LAWS . . . .

Consequently, the Court concludes the statute does not apply to lawsuits challenging the actions of the Department in issuing permits.

> In other actions alleging violations by state actors, the complaint could be brought in Lewis and Clark County. *Section 25-2-126 (1), MCA*, specifically provides:
>
> The proper place of trial for an action against the state is in the county in which the claim arose or in Lewis and Clark County. In an action brought by a resident of the state, the county of his residence is also a proper place of trial.

Section 82-4-354 (5), MCA, expressly provides that the statute does not operate to change [*11] rights or remedies provided by any other statute or common law rule. Had the legislature intended *Section 82-4-354 (4), MCA*, to supersede *Section 25-2-126, MCA*, it certainly would have amended *Section 25-2-126* at the time it passed *Section 82-4-354 (4)*.

Finally, it is a long-standing principle of law that when a plaintiff brings a lawsuit in a proper venue, a defendant may not change the venue simply because another venue is also proper. See *Section 25-2-115, MCA*.

For the foregoing reasons, the Court concludes that Lewis and Clark County is the proper venue for trial of this matter and that Plaintiffs' motion to file a supplemental complaint should be granted.

NOW, THEREFORE, IT IS ORDERED that Plaintiffs' motion to file a supplemental complaint is GRANTED.

DATED this 20th day of November, 1998.

Thomas C. Honzel

District Court Judge

OPINION

NATIONAL WILDLIFE FEDERATION; MONTANA ENVIRONMENTAL INFORMATION CENTER; MINERAL POLICY CENTER; GALLATIN WILDLIFE ASSOCIATION; SIERRA CLUB, Plaintiffs, vs. MONTANA DEPARTMENT OF STATE LANDS; GOLDEN SUNLIGHT MINES, INC., Defendants.

Cause No. CDV-92-486

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

1999 Mont. Dist. LEXIS 571

July 13, 1999, Decided

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

OPINION BY: Thomas C. Honzel

OPINION

Before the Court is the motion of Plaintiffs National Wildlife Federation, Montana Environmental Information Center, Mineral Policy Center, Gallatin Wildlife Association and Sierra Club to amend their supplemental complaint. The matter has been submitted on briefs and is ready for decision.

BACKGROUND

Golden Sunlight Mines, Inc. (GSM) operates an open pit gold mine near Whitehall, Montana. In 1992, Plaintiffs challenged a decision of the Department of Environmental Quality (DEQ), formerly the Department of State Lands, to allow GSM to expand its operations. After the Court granted partial summary judgment in favor of the Plaintiffs, the parties entered into a series of stipulations. The Court retained jurisdiction while DEQ prepared an Environmental Impact Statement (EIS) with respect to the expansion. DEQ issued its final EIS in April of 1998. On June 29, 1998, DEQ issued its Record of Decision (ROD) allowing GSM to expand its operations.

After the ROD was issued, the Court lifted the stay. Plaintiffs were allowed to file a supplemental complaint challenging DEQ's actions and decisions with respect [*2] to the new mine expansion. The supplemental complaint alleges that DEQ violated the Montana Metal Mine Reclamation Act; that Section 82-4-336 (7) of the Metal Mine Reclamation Act is unconstitutional as applied to the GSM expansion; and that DEQ's decision violates *Article IX, Sections 1* and *2 of the Montana Constitution*.

The Court entered a scheduling order setting trial for December 13, 1999, and providing for other deadlines. The parties then stipulated to revise the scheduling order. The revised schedule provided:

Discovery to close May 14, 1999

All pretrial motions due June 11, 1999

Summary judgment hearing August 20, 1999

Reopen limited discovery 30-day period following summary judgment decision if denied

Trial February 7, 2000

On May 3, 1999, Plaintiffs moved to amend their supplemental complaint. They seek to add an additional count alleging a violation of the Montana Environmental Policy Act based on DEQ's decision not to require GSM to partially backfill the pit when the mine is closed. GSM, DEQ, and Intervenor CURE oppose the motion.

After the motion to amend was filed, the parties agreed to the following changes to the scheduling [*3] order:

Trial February 7, 2000

Disclosure of expert witnesses August 13, 1999

Close of discovery September 3, 1999

Pretrial motions due September 17, 1999

Hearing on summary judgment November 18, 1999

Reopen limited discovery 30-day period following summary judgment decision if denied.

STANDARD

> Rule 15(a), M.R.Civ.P., provides in pertinent part:
>
> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The rule clearly favors allowing amendments. The Montana Supreme Court has stated that allowing amendments of pleadings is the general rule and denying a motion to amend is the exception. *Hobble-Diamond Cattle Co. v. Triangle Irrigation, 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991).* The Court [*4] went on to hold that "it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to relief sought." *Id. at 325, 815 P.2d at 1155-56* (citing authority). However, "a trial court is justified in denying a motion for an apparent reason 'such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowance of the amendment, futility of the amendment, etc.'" *Peuse v. Malkuch, 275 Mont. 221, 227, 911 P.2d 1153, 1156-57 (1996)* (quoting *Lindey's, Inc. v. Professional Consultants, 244 Mont. 238, 242, 797 P.2d 920, 928 (1990)).*

DISCUSSION

Defendants assert that the motion to amend should be denied because allowing the amendment would cause undue delay and prejudice the defense. They contend that the amendment would require them to further depose some witnesses who have already been deposed and would require the scheduling order to be vacated in order to reopen discovery. They do not contend that witnesses [*5] are unavailable for additional deposing, only that the taking of additional testimony would require further time and effort. In addition, they assert that Plaintiffs were in possession of all the documents underlying the proposed new claim before the motion for supplemental complaint was filed, and thus, that Plaintiffs should have brought the MEPA claim at the time they filed their first supplemental complaint.

Plaintiffs argue that they could not have brought this claim sooner because discovery was required in order to ascertain that a MEPA violation had occurred. In addition, Plaintiffs contend that Defendants were intimately involved in the process and decisions on which the MEPA claim is based, and, therefore, Defendants are already in possession of the facts surrounding the MEPA claim. Further, Plaintiffs assert that discovery may be re-opened and any information which Defendants lack could be acquired, curing any potential prejudice.

Trial is seven months away. Under the revised scheduling order, the time for completing discovery and for filing motions has been extended. Therefore, the Court concludes that Defendants will not suffer undue prejudice by allowing the [*6] amendment and that Plaintiffs' motion for leave to amend their supplement complaint should be granted.

NOW, THEREFORE, IT IS ORDERED that Plaintiffs' motion to amend their supplemental complaint is GRANTED.

DATED this 13th day of July, 1999.

Thomas C. Honzel

District Court Judge

MEMORANDUM AND ORDER

2002 Mont. Dist. LEXIS 2820,*;2002 ML 916

NATIONAL WILDLIFE FEDERATION; MONTANA ENVIRONMENTAL INFORMATION CENTER; MINERAL POLICY CENTER; GALLATIN WILDLIFE ASSOCIATION; SIERRA CLUB, Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; GOLDEN SUNLIGHT MINES, INC., Defendants, and CITIZENS UNITED FOR A REALISTIC ENVIRONMENT (CURE), Intervenor.

Cause No. CDV-92-486

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2002 ML 916; 2002 Mont. Dist. LEXIS 2820

March 21, 2002, Decided

PRIOR HISTORY: Nat'l Wildlife Fed. v. Mt. Dep't of Environ. Quality, 2000 Mont. Dist. LEXIS 1960 (2000)

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

OPINION BY: Thomas C. Honzel

OPINION

MEMORANDUM AND ORDER

Before the Court are:

(1) Plaintiffs' motion for summary judgment;

(2) Defendant Department of Environmental Quality's (DEQ) motion for partial summary judgment;

(3) Plaintiffs' motion to strike the affidavits submitted by Golden Sunlight Mines, Inc. (GSM); and

(4) DEQ's motion to limit the use of the affidavits submitted by GSM. The motions were heard December 18, 2001, and are ready for decision.

The general background of this case is set out in the Court's Memoranda and Orders entered September 1, 1994, and February 16, 2000. Following the Court's decision of February 16, 2000, the Montana legislature amended the standards for reclamation of open pits and rock faces. Ch. 7, Sp. L. May 2000. Section 82-4-336 (9) of the Metal Mine Reclamation Act (MMRA) now provides in part:

(b) With regard to open pits and rock faces, the reclamation plan must provide for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat [*2] to public safety and the environment;

(ii) that affords some utility to humans or the environment; and

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands.

(c) The reclamation of open pits and rock faces does not require backfilling, in whole or in part, except and only to the extent necessary to meet the requirements of the applicable provisions of Title 75, chapters 2 and 5.

Because of the change in the reclamation standards for open pits and rock faces, DEQ moved to alter or amend the Court's February 16, 2000, Memorandum and Order. On October 24, 2000, the Court entered an Order vacating the February 16, 2000, Memorandum and Order and giving Plaintiffs time within which to file an amended complaint. In addition, the Court ordered that if DEQ was going to take further administrative action, it had to notify Plaintiffs of its intention to do so within 30 days of the date of the Order. DEQ then issued a letter dated November 22, 2000, which states in pertinent part:

The Department has reviewed the reclamation requirements of Golden Sunlight's operating permit in light of these amended standards. The Draft and Final [*3] Environmental Impact Statements that culminated in the 1998 Record of Decision analyzed the structural stability and utility of the open pit, the mitigation of visual impacts, and compliance with air and water quality standards for each of the alternatives under consideration. The discussion of these factors in the 1998 Record of Decision demonstrates that the proposed expansion as modified by the no

diversion and no pit pond alternatives complies with the amended reclamation standards. The Department, there-fore, affirms its approval of Amendments 008 and 010 to Golden Sunlight Mine's operating permit.

On December 8, 2000, Plaintiffs filed their second amended supplemental complaint in which they contend that the 2000 amendments to the MMRA are unconstitutional and that DEQ's approval of the GSM expansion violates the MMRA. The second amended supplemental complaint also contains a count that DEQ's approval of the mine expansion violates the Montana Environmental Policy Act (MEPA). However, Plaintiffs have not moved for summary judgment on the MEPA claim and, therefore, in accordance with the Court's scheduling order, they have waived their right to pursue that claim.

[*4] The amendments to the reclamation standards for open pits and rock faces and DEQ's November 2, 2000, decision affirming its approval of Amendments 008 and 010 to Golden Sunlight's operating permit form the basis of the cross-motions for summary judgment. Before addressing those motions, it is necessary to consider Plaintiffs' motion to strike the affidavits submitted by GSM and DEQ's motion to limit the use of those affidavits. I. GSM'S AFFIDAVITS

GSM has filed the affidavits of three experts in an effort to rebut the conclusion of the Environmental Impact Statement (EIS) and the Record of Decision (ROD) that the partial pit backfill alternative is environmentally preferred.

Plaintiffs contend that only the agency record should be considered since this is a judicial review of an agency decision and the function of judicial review is to consider whether the facts as found by the agency, support the agency's actions. Plaintiffs further contend that a more proper forum for the affidavits is before DEQ in a motion to modify the reclamation plan or to prepare a supplemental EIS. Plaintiffs argue that since GSM has failed to submit the findings of the affidavits [*5] to DEQ, it should be precluded from supplementing the record before the Court.

In its motion, DEQ requests that the Court limit the use of the affidavits by precluding GSM or Intervenor Citizens United for a Realistic Environment (CURE) from relying on the affidavits as a basis for requesting imposition of the no-action alternative should the Court proceed to an evidentiary hearing.

GSM submitted the affidavits in opposition to Plaintiffs' motion for summary judgment. It asserts that the affidavits raise issues of material fact which preclude summary judgment.

In the typical lawsuit the Court would consider the affidavits to determine whether summary judgment was appropriate. This case, however, has its genesis in the EIS, the ROD and DEQ's November 22, 2000, decision to adopt the no pit pond alternative. Plaintiffs are not challenging the EIS but do challenge DEQ's decision to adopt the no pit pond alternative. Plaintiffs also contend that the amendments to the reclamation standards are unconstitutional.

As noted by DEQ, claims set forth in the pleadings control the course of the litigation and that the only claims asserted against the [*6] permit amendments approved by DEQ are those asserted by Plaintiffs.

Except for the intervening legislative amendments to the reclamation standards and DEQ's November 22, 2000, decision, the record has not changed materially since the Court's ruling on February 16, 2000. GSM certainly had ample opportunity to submit its concerns to DEQ during the EIS process. If it was not satisfied with DEQ's decision based on the agency's record or if it thought DEQ did not do a proper analysis, GSM could have filed its own action. However, GSM never has challenged the sufficiency of the EIS either before DEQ or the Court.

For the foregoing reasons, the Court concludes that the affidavits submitted by GSM should not be considered in this proceeding and, therefore, Plaintiffs' motion to strike the affidavits should be granted.

Although the Court will not consider the affidavits in this proceeding, GSM is not without recourse as it can take its concerns to DEQ under the provisions of Section 82-4337(3), MCA. II. CROSS-MOTIONS FOR SUMMARY JUDGMENT

Although both Plaintiffs and DEQ seek summary judgment on Counts One through Four of Plaintiffs' second amended [*7] supplemental complaint, the case turns on the constitutionality of the 2000 amendments to the MMRA and in particular, Section 82-4336(9)(c), MCA, which allows for backfilling only to the extent necessary to meet state air and water quality standards without regard to site-specific conditions and circumstances.

Article IX, section 2(1) of the Montana constitution provides:

All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.

In its September 1, 1994, Memorandum and Order, the Court held that Section 82-4336(7), MCA (1993), was unconstitutional because it exempted certain open pit mines and rock faces

from reclamation. In 1995, the legislature amended the statute to require the reclamation of open pits and rock faces to a condition that achieved structural stability, afforded utility to humans and the surrounding natural system to the extent feasible, and blended with the appearance of the surrounding area to the extent feasible.

Pursuant to the stipulation of the parties, DEQ prepared an EIS. In the EIS, DEQ found [*8] that the partial pit backfill alternative was technically feasible as a method of pit reclamation but that it was not economically feasible because Golden Sunlight likely would not receive a positive return on its investment. In June 1998, DEQ issued its ROD in which it discussed both the partial backfill alternative and the no-pit pond alternative and found that the partial backfill alternative provided for more comprehensive reclamation of the Golden Sunlight Mine than did the no-pit pond alternative. The ROD then stated that Section 82-4336(7), MCA (1995), required DEQ to impose the partial backfill alternative if it was feasible. However, as in the EIS, the ROD concluded that the partial backfill alternative was not economically feasible and, therefore, DEQ adopted the no-pit pond alternative.

In its February 16, 2000, Memorandum and Order, the Court determined there was nothing in the constitution or the MMRA which allowed a reclamation decision to be based on a threshold determination of whether a mine operator would make a profit. The Court held that since DEQ had determined the partial backfill alternative to be technically feasible, the constitution and the MMRA [*9] required DEQ to provide for reclamation at the Golden Sunlight Mine under that plan. The legislature then enacted the 2000 amendments which preclude DEQ from requiring backfilling except to the extent necessary to meet state air and water quality standards.

The term "reclamation" is not defined in the MMRA but it is defined in the Montana Strip and Underground Mine Reclamation Act:

"Reclamation" means backfilling, subsidence stabilization, water control, grading, highwall reduction, topsoiling, planting, revegetation, and other work to restore an area of land affected by strip mining or underground mining under a plan approved by the department.

§ 84-4-203 (26), MCA.

Section 1-2-107, MCA, provides that when a word is defined in any part of the code, that definition applies to the same word wherever it occurs in other parts of the code except where a contrary intention plainly appears. See also Dep't of Revenue v. Gallatin Outpatient Clinic, 234 Mont. 425, 430, 763 P.2d 1128, 1131 (1988); and SJL of Montana v. City of Billings, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993).

[*10] DEQ and GSM argue that the definition in the Strip and Underground Mine Reclamation Act does not apply to the MMRA because the legislature clearly has stated that backfilling is not required for the reclamation of open pits and rock faces and, therefore, a contrary intention plainly appears in the MMRA itself.

The term "reclamation" also is defined in the Montana Opencut Mining Act but that definition does not mention backfilling. It reads:

"Reclamation" means the reconditioning of the area of land affected by opencut-mining operations to make the area suitable for productive use, including but not limited to forestry, agriculture, grazing, wildlife, recreation, or residential and industrial sites.

§ 82-4-403 (13), MCA.

Even though the Montana Strip and Underground Mine Reclamation Act uses the terms "backfilling" and "highwall reduction", it is not necessary to hold that the definition in that Act specifically applies here. What the definition demonstrates is that backfilling can be an effective reclamation tool. Furthermore, while the Montana Opencut Mining Act doesn't mention backfilling, it does not preclude [*11] its use. Likewise, with respect to other disturbed land subject to the MMRA, backfilling is not precluded.

With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas.

§ 82-4-336 (9)(a), MCA.

Section 82-4-336 (1), MCA, provides that site-specific conditions and circumstances must be taken into account in preparing a reclamation plan. Here, the EIS did take into consideration site specific conditions and circumstances and concluded that the partial pit backfill alternative was the environmentally preferred alternative. However, the legislature has prohibited DEQ from requiring backfilling even though it is recognized as an important and effective method of reclamation. Indeed, the no-pit pond alternative which DEQ has adopted requires some backfilling.

GSM asserts that the prohibition on backfilling is an effective reclamation standard. GSM states that the delegates to the constitutional convention chose to give the legislature the discretion [*12] and flexibility to promulgate standards and requirements that do not require "one size fits

all" reclamation. However, with regard to open pits and rock faces, the opposite has occurred. Unless required by air and water quality standards, DEQ is precluded from requiring backfilling as part of a reclamation plan in all cases involving open pits and rock faces, regardless of the size of the mine or the site specific conditions and circumstances.

In its February 16, 2000, Memorandum and Order, the Court found:

Today, the record before the Court reveals that the major environmental and reclamation concerns at Golden Sunlight Mine, specifically, the open pit and the highwall, are best capable of being reclaimed by means of the partial pit backfill alternative. In addition, the record shows that partial pit backfill reclamation will provide comparable utility and stability with other disturbed lands. Furthermore, partially backfilling the pit can significantly reduce acid mine drainage.

Mem. and Order at 19, l. 7.

That record has not changed. Because 82-4-336 (9)(c), MCA (2000), eliminates an effective reclamation tool, the Court concludes that [*13] the statute violates Article IX, section 2 of the Montana constitution which requires that all lands that have been disturbed by the extraction of natural resources shall be reclaimed.

Because the Court finds that Section 82-4-336 (9)(c), MCA, is unconstitutional, it is not necessary to address Count Three of Plaintiffs' second amended supplemental complaint which is based on Article II, section 3, and Article IX, section 1 of the constitution.

For the foregoing reasons,

IT IS ORDERED:

1. Plaintiffs' motion to strike the affidavits submitted by GSM IS GRANTED.

2. Plaintiffs' motion for summary judgment on Counts One, Two and Four of their second amended supplemental complaint IS GRANTED.

3. DEQ's motion for summary judgment IS DENIED.

DATED this 21st day of March, 2001.

Thomas C. Honzel District Court Judge