Ravalli County Fish and Game Association, et al. v. Department of State Lands, et al.
Montana Supreme Court case
Decided 1995

MEPA Issue Litigated: Should the state agency have conducted a MEPA analysis (an EA or EIS)?

Court Decision: Yes

OPINION AND ORDER

(B)

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Last half of document regarding to ques. on MEPA fairly interesting ?

HON. JEFFREY H. LANGTON
District Judge
Twenty-first Judicial District
Ravalli County Courthouse
205 Bedford Street
Hamilton, MT 59840
Telephone: (406) 363-3412

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT,
RAVALLI COUNTY
* * * * * * * * * * *

RAVALLI COUNTY FISH AND GAME ASSOCIATION, INC., MONTANA WILDLIFE FEDERATION, INC., SKYLINE SPORTSMEN CLUB, INC., and ANACONDA SPORTSMEN CLUB, INC.,
Plaintiffs,

-vs-

MONTANA DEPARTMENT OF STATE LANDS, MONTANA BOARD OF LAND COMMISSIONERS, and GEORGE MADDEN,
Defendants.

Cause No. DV-93-148

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OPINION AND ORDER

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Pending before the Court are cross-motions for summary judgment as to all parties. The motions have been briefed, oral argument has been waived, and the motions are ready for ruling.

At issue in this case are two ten-year grazing leases, State Forest Grazing Licenses 3060911 and 3060518, renewed by the Department of State Lands (Department) to Ralph Shoberg on January 20, 1989, granting Shoberg a license to graze livestock on approximately 3,792 acres of State school trust lands located in the Sula State Forest in Ravalli County in the East Fork of the Bitterroot River. On January 29, 1991, the rights to hold the remaining term of the Shoberg leases were assigned by Shoberg to Defendant George R. Madden (Madden) with the approval of the Department. No environmental

review document was prepared by the Department prior to renewal or assignment of the grazing leases.

Plaintiffs are all non-profit Montana corporations dedicated to the conservation of Montana's wildlife. Plaintiffs claim that the Department violated Constitutional provisions and Montana's Environmental Policy Act (MEPA) because grazing of domestic sheep under the grazing leases may have serious adverse consequences on a wild herd of Rocky Mountain Bighorn sheep, thus requiring the Department to prepare an Environmental Impact Statement (EIS) before renewing the leases or approving the assignment of the leases. Plaintiffs further allege that the Department failed to obtain fair market value when entering into the lease agreements as mandated by Art. X, § 11 of the 1972 Montana Constitution and did not consider the policy of multiple use of state trust lands as mandated by § 77-1-203, MCA.

In response to Plaintiffs' concerns, the Department investigated in 1992, via a Draft Environmental Assessment (EA) and a Revised EA, to determine whether the grazing of domestic sheep on the lands would adversely impact the local wild sheep population. The chief concern reviewed was the transmission of Pasteurella Haemolytica from domestic sheep to wild sheep. As a result of the investigation, the Department amended, with Defendant Madden's agreement, the grazing licenses to reduce the opportunity for contact between domestic and wild sheep.

Plaintiffs subsequently brought this cause of action seeking a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, MCA § 27-8-101, *et seq.*, declaring the grazing leases void, as well as seeking injunctive relief pursuant to MCA § 27-19-101 *et seq.*, enjoining the Department from granting grazing leases to any person or otherwise permitting the continued grazing of domestic sheep on the lands at issue until such time as the Department has completed an EIS. To support their Amended Complaint, Plaintiffs assert five legal theories why the leases should be voided and an injunction should issue:

Count I - Violation of the MEPA by failing to prepare an EIS, or alternatively failing to prepare an adequate EA;

Count II - Failure to obtain fair market value for the grazing licenses;

Count III - Arbitrary and capricious action by failing to comply with mandatory constitutional and statutory duties in the management of the state lands;

Count IV - Breach of fiduciary duty by failing to preserve and protect wildlife on the state lands;

Count V - Statutory and constitutional violations resulting in injury to the environment.

All Counts, with the exception of Count II, are in actuality the same, as they are merely alternative statements for Plaintiffs' primary premise that the Department has a fiduciary duty under Montana's Constitution and the MEPA to protect the herd of wild sheep at issue in this case by preparing an EIS in conjunction with the Shoberg/Madden grazing leases.

STANDARD OF REVIEW

When reviewing actions by administrative agencies, the role of the district court is as a court of review and not as a trier of fact. The standard of review applied by the district court depends on the type of procedure which occurred at the administrative level.

When the Court's review is of a final administrative decision following a contested case hearing, MCA § 2-4-704 of the Montana Administrative Procedure Act (MAPA) establishes the standard of review. A contested case is defined at § 2-4-102(4), MCA, as a proceeding before an agency where a "determination of legal rights, duties, or privileges" of a party is required to be made "after an opportunity for hearing". See *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 456, 778 P.2d 862, 866 (1989). When the administrative action to be reviewed is not the result of a contested case hearing, there is no "evidentiary record" against which to measure the Department's decision to determine whether it was clearly erroneous, and MCA § 2-4-704 does not apply . *Id.* at 456-57, 778 P.2d at 866. No evidentiary hearing was required or held in this case; thus, this is not a contested case as defined by MAPA, and § 2-4-704, MCA, does not apply.

In cases which are not contested cases as defined by MAPA, the standard of review to be applied by the district court depends on whether the issues presented relate to the administrative agency's interpretation of the law or to the decisions made and actions taken by the administrative agency. When the issue is the administrative agency's interpretation of law, the reviewing court is to determine whether the administrative agency's interpretation of the law is correct. *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990). Such is the case raised in Plaintiffs' Amended Complaint where the issue is whether the Department correctly interpreted the law to mean that the Department did not need to do either an EA or an EIS when it renewed the existing grazing leases in 1989 or when it approved the assignment of the existing grazing leases in 1991.

Where the issues relate to the agency's decisions or actions while exercising the agency's discretionary powers, the district court is to review the agency's record to determine whether the record establishes that the agency acted arbitrarily, capriciously, or

unlawfully in its exercise of its discretionary powers. *North Fork Preservation*, 238 Mont. at 458-59, 778 P.2d at 867. The Court may not substitute its discretion for the discretion reposed in an administrative agency by the legislature. *Id.* at 457, 778 P.2d at 866. The Court will not compel a state agency to make a particular decision with respect to a matter when that agency exercises its own judgment and discretion and has not violated any statutory provisions or engaged in fraudulent action. *Jeppeson v. Dep't of State Lands*, 205 Mont. 282, 293, 667 P.2d 428, 433 (1983). Rather, on review the Court may inquire only insofar as to ascertain if the agency stayed within the statutory bounds and has not acted arbitrarily, capriciously, or unlawfully. *North Fork Preservation*, 238 Mont. at 457, 778 P.2d at 867. In reviewing a decision made by the Department of State Lands as to whether an EIS was required, the Montana Supreme Court quoted the United States Supreme Court to explain the rationale behind adopting an arbitrary and capricious standard in such cases, rather than the clearly erroneous standard based on the "evidentiary record" as applied in contested cases pursuant to § 2-4-704, MCA.

> The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise . . .. Because analysis of the relevant documents 'requires a high level of technical expertise', we must defer to 'the informed discretion of the responsible federal agencies.' [citations]
>
> The Department in this case was carrying out its statutorily-imposed duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. Section 77-1-202, MCA. The Department also had to carry out duties imposed by MEPA, pursuant to which it prepared a PER [now known as an EA] in order to gather information for its decision on whether to prepare an EIS for Cenex's proposed action. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the North Department, not the courts. In light of this, and the cases cited above, we hold that the standard of review to be applied by the trial court and this Court is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully.

North Fork Preservation, 238 Mont. at 458-59, 778 P.2d at 871, citing *March v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

Thus, it is clear the arbitrary, capricious, or unlawful standard is to be applied by this Court on the issues raised by Plaintiffs regarding the decisions made and actions taken by the Department in relation to the Department's exercise of its discretion in carrying out its fiduciary duties under Art. X, §§ 4 and 11 of the 1972 Montana Constitution, under The Enabling Act (Feb. 22, 1889) at 25 Stat. 676, under the State Lands provisions at MCA Title 77, under the Administrative Rules of Montana at MCA Title 26, and under the Montana Environmental Policy Act at MCA Title 75. This Court may not determine whether, in this Court's opinion, the decisions and actions by the Department were the

right decisions and actions, but rather the Court must determine whether the Department's decisions made and actions taken in this case are supported in the agency record such that those decisions and actions were not arbitrary, capricious, or unlawful.

IDENTIFYING THE ISSUES AND REMEDIES

Despite this Court's November 23, 1993 Opinion and Order directing the parties to limit their arguments and supporting exhibits to the proper issues under this Court's limited standard of review regarding the Department's actions and decisions, Plaintiffs continue to present legal and factual arguments that are not properly before this Court on judicial review, requiring Defendants to respond to Plaintiffs' extraneous arguments and supporting exhibits. After careful review of Plaintiffs' legal arguments and supporting documents, it is clear that Plaintiffs either do not understand, or choose to ignore, the limited nature of this Court's review. Therefore, this Court will begin its judicial review by identifying the proper issues before the Court.

Although Plaintiffs indicate that they only seek to enforce the Department's alleged duty to prepare an EIS under MEPA, Plaintiffs' legal arguments and supporting exhibits clearly show that Plaintiffs are challenging the correctness of the Department's decision to allow domestic sheep to graze on the subject state lands. In other words, Plaintiffs seek to have this Court become a fact finder by weighing the evidence which was before the Department at the time it made its decision and performed its duties against additional evidence presented to this Court by the Plaintiffs on judicial review by way of supporting affidavits, depositions, and professional research documents, and to substitute this Court's discretion for that of the Department's discretion pursuant to those factual determinations as to whether domestic sheep should be allowed to continue to graze on the subject state lands.

The Department is both empowered and constrained by a set of statutes and regulations relevant to its actions challenged by Plaintiffs in this case. It is well settled that the lands granted by the federal government to the states for the support of public schools constitute a trust, and the state is trustee of those lands. *Jeppeson*, 205 Mont. at 288, 667 at 431. Thus, a fiduciary duty is placed upon the Board of Land Commissioners and the Department of State Lands to manage the trust according to the highest standards. *Id.* The Department, under the direction of the Board, has responsibility for leasing, managing, and otherwise disposing of state lands subject to trust guidelines. *Id.*, § 77-1-301, MCA. In carrying out its fiduciary duty as trustee, the Department must implement the policy of the State of Montana to "seek the highest development of state owned lands in order that they might be placed to their highest and best use and thereby derive greater

revenue for the support of the common schools, the university system, and other institutions benefiting therefrom, and that in so doing the economy of the local community as well as the state is benefited as a result of the impact of such development." § 77-1-601, MCA. To that end, the Department has large discretionary power in the "direction, control, leasing and sale" of the lands in order to "secure the largest measure of legitimate and reasonable advantage to the state" as required by § 77-1-202, MCA. Jeppeson, 205 Mont. at 289, 667 P.2d at 431. The Department "shall lease all agricultural and grazing lands . . . open to leasing upon proper application". § 77-6-102, MCA. In order to secure the largest measure of advantage to the state when leasing grazing land, the Department is required to procure grazing leases through competitive bidding to ensure the state receives fair market value for its grazing leases. § 77-6-202, MCA.

The procedures followed by the Department in carrying out its duties as trustee of the lands are governed in part by MEPA (MCA § 75-1-101, *et seq.*) and by administrative rules enacted pursuant to MEPA (ARM 26.2.642, *et seq.*). MEPA is modeled after the National Environmental Policy Act (NEPA), 42 USCS § 4332, *et seq.*, both of which were drafted for the dual purpose of ensuring informed decision making by administrative agencies and public input prior to the making of those decisions. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989). Both the NEPA and the MEPA are essentially procedural Acts. Matsumoto v. Brinegar, 568 F.2d 1289, 1290 ((9th Cir. 1978). The Acts merely require an "informed decision". Id. The Acts create only procedural rights to individuals affected by governmental action and do not direct an agency's discretion concerning the choice of action to be taken or the weight to be given any environmental factors. Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 100 S.Ct. 497, 499, 62 L.Ed.2d 433 (1980). The Acts do not subject an "informed decision" to challenge even if the agency' decision is a "complete blunder". Matsumoto, 568 F.2d at 1290. Therefore, Plaintiffs obvious attempt to have this Court review and weigh factual evidence to determine the correctness of the Department's decision to allow the continued grazing of domestic sheep is not proper on judicial review. Rather, under the limited standard of review as set forth, *supra*, the only issues properly before this Court are:

(1) whether the Department correctly interpreted the law that neither an EA, nor an EIS, was required when the Department renewed the existing grazing leases;

(2) whether the Department correctly interpreted the law that neither an EA, nor an EIS, was required when the Department approved the assignment of the existing grazing leases;

(3) whether judicial review of the agency's decisions and actions in this case are barred by a two-year statute of limitations;

(4) whether the Department unlawfully failed to follow the required statutory procedures in preparing the voluntary Revised EA;

(5) whether the Department's decision was arbitrary and capricious that the voluntary Revised EA did not establish a need to prepare an EIS.

Available Remedies.

Plaintiffs' Amended Complaint seeks remedies in the form of a declaratory judgment whereby this Court would declare the Department in violation of its Constitutional and statutory duties to protect the wild sheep, accompanied by a finding by this Court that the grazing leases are void *ab initio* as a result of the Department's violations. Should the Court determine that an EA was required under MEPA and/or that the subsequently prepared EA is inadequate as a result of the Department's unlawful failure to follow the required statutory procedures, the available remedy would be to return the case to the Department for preparation of an EA which does satisfy the required statutory procedures. Likewise, should the Court determine an EIS is required under MEPA, the available remedy would be to return the case to the Department for preparation of an EIS. By seeking the remedy of declaring the grazing leases void *ab initio*, Plaintiffs are in reality asking this Court to improperly substitute its discretion for that of the Department's and determine that domestic sheep should not be allowed to graze the subject state lands. See Wilderness Ass'n v. DNRC, 200 Mont. 11, 22, 648 P.2d 734, 740 (1982), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 555, 98 S.Ct. 1197, 1217, 55 L.Ed.2d 460 (1978) (the court should not substitute its judgment for that of the agency as to the environmental consequences of the agency's actions).

Additionally, Plaintiffs seek an injunction preventing any further grazing of domestic sheep on the subject state lands until the Department has complied with its Constitutional and statutory duties. Should the Court determine that the Department must redo the Revised EA, and/or prepare an EIS, then this Court will need to address whether an injunction is available during the environmental re-assessment period. See Strykers Bay Neighborhood Council v. City of N.Y., 695 F.Supp. 1531, 1543-44 (S.D.N.Y. 1988) (sole remedy was to enjoin construction while agency considered all the environmental consequences, however, injunction not available when construction had already been completed); Jeppeson, 205 Mont. at 287-88, 667 P.2d at 430-31 (injunction not available to prevent agency from performing non-discretionary statutory duty or when a private real estate interest is being litigated, mandamus not available to compel performance of a

discretionary act); *North Fork Preservation*, 238 Mont. at 467, 778 P.2d at 872 (mandamus not available to compel discretionary act of preparing an EIS).

Plaintiffs' Claim Regarding Fair Market Rental Value.

Count II of Plaintiffs' Amended Complaint presents the legal theory that the Department violated its statutory and constitutional duties as trustee of the subject state lands by failing to obtain fair market value under the subject grazing licenses. This issue was never raised before the Department and is being asserted for the first time at the district court level. Therefore, entertaining the issue would require this Court to improperly become a fact finder by looking outside the Department's record to determine the fair market rental value of the subject state lands. See *Don't Ruin Our Park v. Stone*, 749 F.Supp. 1388 (M.D.Pa. 1990), *aff'd* without opinion 931 F.2d 49 (3rd Cir. 1991) (judicial review does not involve the resolution of disputed issues of fact or the receipt of additional factual evidence beyond the agency record). Having failed to raise this issue with the agency below, Plaintiffs are precluded from asserting it on judicial review, and Defendants are entitled to summary judgment as a matter of law as to Count II of Plaintiffs' Amended Complaint. The Court notes that even if the issue was properly before the Court, as a legal issue only, regarding whether the Department followed the statutory requirements for establishing fair market value, Plaintiffs have not established that the Department failed to seek competitive bidding for the subject leases or that the rental rates per "animal-unit-month" under the subject leases are less than the statutory formula set by the Legislature to determine the minimum rental value when no competitive bids have been received by the Department. See MCA §§ 77-6-502, 77-6-507, and 77-6-508.

LEGAL ANALYSIS OF THE ISSUES

Did the Department of State Lands correctly interpret the law when the Department determined that it did not need to prepare an EA or an EIS prior to renewing the existing grazing leases?

An EA is defined as "a written analysis of a proposed action to determine whether an EIS is required or to serve one or more of the other purposes described in ARM 26.2.643(2)". ARM 26.2.642(9). An EIS is defined as "a detailed written statement required by section 75-1-201, MCA, which may take several forms" i.e., a draft EIS, a final EIS, or a joint EIS. ARM 26.2.642(10). Under MEPA, the Department must prepare an EIS "whenever an EA indicates that an EIS is necessary, or whenever, based on the criteria in ARM 26.2.644, the proposed action is a major action of state government significantly affecting the quality of the human environment". ARM 26.2.643(1). State action is defined as "a project, program, or activity directly undertaken

by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies." ARM 26.2.642(1). Under the above regulatory definitions, it is clear that the issuance of a lease requires the preparation of an EIS if issuance of the lease "significantly affects the quality of the human environment". ARM 26.2.643(1). Human environment "includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see 26.2.643(1)), economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed." ARM 26.2.642(12). The Department does not challenge Plaintiffs' assertions that an EIS will generally be required under NEPA and MEPA when an initial lease is issued. See *Kadillak v. Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979); *NRDC v. Morton*, 388 F.Supp. 829 (1974). [The initial grazing leases in the case at bar were issued in the 1920's, and any potential environmental issues regarding the initial issuances are not before this Court.] However, the majority of jurisdictions hold that unlike the issuance of an initial lease, the renewal of an existing lease does not require an EIS as long as the renewal merely preserves the status quo of the existing lease. See *NRDC v. Berklund*, 609 F.2d 553, 558 (D.C.Cir. 1979).

Even more importantly, pursuant to MCA § 77-6-205 and ARM 26.3.144(2) Shoberg was entitled to have the grazing leases renewed when Shoberg applied in January of 1989 for renewal of the subject grazing leases and there were no other applications. Those provisions mandated that the Department renew the leases to Shoberg. The renewal was automatic and no discretion was involved or allowed to the Department. Because the stated purpose of MEPA is to aid the Department in decision-making, the need for preparing an EA and/or an EIS is not triggered when the Department has no discretion to refuse to renew the leases. ARM 26.2.643(5) (EA or EIS not required when Department is exercising a ministerial action, defined as "actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner"); also see *South Dakota v. Andres*, 614 F.2d 1190, 1193 (8th Cir. 1980), *cert. den.* 449 U.S. 822 (1980) (NEPA does not transform a ministerial act into one with

discretion requiring an EA or EIS); *Berklund*, 609 F.2d at 558 (NEPA document not required when NRDC lacked authority to deny a lease).

Plaintiffs cite an unpublished opinion from an administrative court in Utah to show that at least one administrative decision of the Bureau of Land Management (BLM) has concluded that the renewal of a grazing lease is subject to NEPA. *Feller v. BLM*, No. UT-0689-02 (unpublished opinion of BLM Office of Hearings and Appeals, Salt Lake City, Utah, dated August 13, 1990) (opinion attached to Plaintiffs' Brief in Response to State's Motion to Dismiss). However, the Court has reviewed the Utah BLM opinion and found that it is not well reasoned, it is in conflict with the majority of federal jurisdictions, and is not applicable to this case in light of Montana's clear mandate for the Department to renew the leases. MCA § 77-6-205 and ARM 26.3.144(2).

Plaintiffs further argue that, despite MCA § 77-6-205 and ARM 26.3.144(2), the Department did have discretion to refuse to renew the subject leases in this case because the leases contained a clause giving the Department the power to:

> . . . cancel this license for any of the following causes: misrepresentation, fraud, or concealment of facts relating to the issuance of this license where such facts if known would have prevented the issuance of this license; use of the premises for purposes other than those herein authorized; overgrazing or any other misuse or abuse of the premises; or **for any other reason which in the judgment of the Division of Forestry is necessary for the protection of the best interests of the licensor.**

See Plaintiffs' Exhibit 1 in Support of Motion for Summary Judgment. Plaintiffs have presented no evidence whatsoever that any reason existed at the time Shoberg sought renewal of the leases in 1989 which would have triggered the Department's discretion to cancel the lease under the above provision. There were no domestic sheep on the subject state lands at that time, and renewal to Shoberg merely maintained the status quo of the existing leases. Plaintiffs having failed to establish that Shoberg was in breach or that any condition existed at that time which would have given the Department any discretion in the renewal of the leases to Shoberg in 1989, Plaintiffs' claim that the Department should have prepared an EIS, or at the very least an EA, at the time of the renewal is without merit.

Did the Department of State Lands correctly interpret the law when the Department determined that it did not need to prepare an EA or an EIS prior to approving the assignment of the existing grazing leases?

In January of 1991 Shoberg assigned his interests in the remaining term of the grazing leases to Defendant Madden. The Department approved the assignments pursuant to § 77-6-208, MCA, which requires the Department's approval before the assignments are binding on the State. Likewise, the leases themselves contained a provision requiring

Shoberg to obtain the Department's approval before assigning his interests. Because the leases were renewed in 1989 by Shoberg for a term of ten years, the assigned leases are set to expire in 1999. The grazing leases are based on a set number of animal units per month and do not distinguish what type of livestock can be grazed on the property. Once the leases were assigned to Defendant Madden, he had his choice under the leases, as did his predecessors as far back as the early 1920's, of what type of livestock to graze on the state lands. At some point in time Defendant Madden began grazing domestic sheep on the lands. Although domestic sheep had historically grazed the lands from the early 1920's when the initial leases were issued through the mid-1960's, Madden's immediate predecessors had grazed livestock other than domestic sheep such that domestic sheep had not been on the state lands since the subject herd of wild sheep had been transported to the area from Idaho by the Department of Fish, Wildlife, and Parks (FWP) in 1972. Plaintiffs contend that in light of the potential danger presented by Madden's domestic sheep to the herd of wild sheep, the Department should have prepared an EIS, or at the very least an EA, before approving the assignment.

The Department responds that the approval of the assignments was a routine ministerial act which did not require the preparation of an EA or an EIS because the assignments did not create anything new or more extensive than those actions originally contemplated when the grazing leases were first issued back in the 1920's. However, because the Department has discretionary power to approve or disapprove assignments, it is not a routine ministerial act under MEPA. See *Jeppeson*, 205 Mont. at 289, 667 P.2d at 432. Therefore, the Department was required to prepare an EIS, or at least an EA, if the Department had reason to believe that approval of the assignments would create a significant impact on the quality of the human environment **which would not exist** if the Department denied its approval of the assignments. No evidence has been presented that the Department was aware before it approved the assignments that Defendant Madden intended to graze domestic sheep. Even if the Department was aware of that fact, the existing leases gave Shoberg the same option and, therefore, nothing changed by the assignments other than the identity of the lessee. The vast majority of jurisdictions hold that when an assignment merely changes ownership, the status quo is preserved and the requirement for preparing an environmental document under NEPA is not triggered. See *City and County of San Francisco* v. *United States*, 615 F.2d 498, 501 (9th Cir. 1980) (mere change in ownership of a project cannot result in significant impacts to the environment); *Sabine River Authority* v. *Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992), *cert. den.* 113 S.Ct. 75 (1992) (mere change in ownership of conservation easement

could not result in significant impacts to the environment); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-17 (9th Cir. 1980) (governmental financial assistance aiding transfer of ownership of airport not result in significant impacts because there are no significant impacts from the continued operation of a facility); *Plaza Bank of West Port v. Board of Governors*, 575 F.2d 1248, 1250-51 (8th Cir. 1978) (governmental order to transfer bank shares not result in significant impacts to the environment); *Illinois v. United States*, 604 F.2d 519, 528 (7th Cir. 1979) (ICC order allowing acquisition of railroad not result in significant impacts where railroad merely continues operation, even if volume increases); *Upper Snake River v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (routine activity in varying the amounts of water released from dam does not change status quo which would trigger need for EIS); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C.Cir. 1979) (assignment of government parking lot to new management firm not a change in status quo and EIS requirement has not been triggered).

It is clear from the above line of cases that the mere change of the ownership of the leases from Shoberg to Defendant Madden did not change the status quo and the need for either an EA or an EIS was not triggered. Absent a triggering event whereby the Department's actions changed the terms or conditions under the leases which would specifically raise concerns of significant environmental impacts through state action, the Department had no reason to consider the need for an EA or an EIS when Shoberg and Madden sought approval of the assignments in this case. Absent such a triggering event, the Department's approval of a change in the ownership of the leases in January 1991 did not change the status quo under the existing leases, and Plaintiffs' claim that the Department's approval of the assignments required the preparation of an EIS, or at the very least an EA, is without merit.

Is judicial review of the Department's decisions and actions in this case barred by a two- year statute of limitations pursuant to MCA § 27-2-211?

Defendants contend that they are entitled to have Plaintiffs' claims dismissed as the claims are barred under § 27-2-211, MCA, which establishes a two-year statute of limitations for actions based on a liability created by statute. Defendants reason that Plaintiffs' claims commenced on January 20, 1989, as to the issues relating to the renewal of the leases, and on January 29, 1991, as to the issues relating to the assignment of the leases. § 27-2-102, MCA. Plaintiffs did not file this action until May 12, 1993. In response, Plaintiffs argue that § 27-2-211, MCA, has never been applied to MEPA cases. Plaintiffs contend that courts have even been reluctant to apply the defense of laches to environmental cases. See *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th

Cir. 1980) [finding that the doctrine of laches did not barr a claim under the NEPA], *overruling* 479 F.Supp. 815 (D.Mont. 1979).

Because this Court has determined under the facts of this case that neither an EA nor an EIS was required under MEPA when the Department renewed the subject leases in 1989 or when the Department approved the assignment of the leases in 1991, the issue of whether a two-year statute of limitations applies is moot as to those claims.

Even when an EA or EIS is not required under MEPA as is the case at bar, the Act does not prevent the Department from voluntarily preparing an EA to assist the Department in making decisions while exercising its' discretionary powers. See ARM 26.2.643(2). In this case, the Department voluntarily prepared a Draft EA and a Revised EA in response to Plaintiffs' environmental concerns. Once the Department prepared and adopted the Revised EA, judicial review was appropriate to ascertain whether the Department acted unlawfully by failing to follow the required statutory procedures in preparing the EA, and/or whether the Department acted arbitrarily and capriciously when it determined via the EA that an EIS was not required. See *North Fork Preservation*, 238 Mont. at 459-61, 778 P.2d at 867-68. Because the Revised EA was approved and adopted by the Department on December 30, 1992, and this suit was filed a mere four and one-half months later on May 12, 1993, § 27-2-211, MCA, has not been triggered and this Court does not reach the determination whether the two-year statute of limitations applies generally in Montana to MEPA cases.

Did the Department act unlawfully by failing to follow the required statutory procedures in subsequently preparing the voluntary Revised EA?

When Plaintiffs became aware of the presence of Defendant Madden's domestic sheep, Plaintiffs expressed those concerns to the Department. In an attempt to resolve Plaintiffs' concerns, Plaintiffs and the Department entered a Memorandum of Agreement on October 31, 1991, whereby the Department agreed to review the leases pursuant to MEPA. Pursuant to that agreement, the Department prepared a Draft EA. Exhibit 1 attached to Affidavit of Gregory P. Hallsten, "Draft Environmental Assessment: Review of Grazing Licenses 3060518 and 3060911 on the Sula State Forest", filed with the Court on February 28, 1994. Following submission of public comment and input from the Department's wildlife biologist and from FWP, the Department approved and adopted a Revised EA on December 30, 1992. Exhibit 2 attached to Affidavit of Gregory P. Hallsten, "Revised Draft Environmental Assessment: Review of Grazing Licenses 3060518 and 3060911 on the Sula State Forest", filed with the Court on February 28, 1994. The Revised EA concluded that an EIS was not required and presented six alternatives to mitigate against the possibility of contact between the domestic sheep and the wild sheep.

The Department Commissioner adopted Defendant Madden's proposal, designated as Alternative 6, whereby Defendant Madden would stipulate to the use of human sheep herders, herding dogs, and at least 12 guard dogs. Defendant Madden would also use trucking, rather than herding, to move the domestic sheep to and from certain locations, and would refrain from using certain sections of both the state lands and Madden's own private lands during certain times of the year when contact between the domestic sheep and the wild sheep would most likely occur.

Defendant Madden was responsible for the decision to graze domestic sheep under historical grazing leases which had allowed the grazing of domestic sheep as far back as the early 1920's, and the actions challenged by Plaintiffs are in reality the actions of a private citizen and not "proposed" actions of State government as contemplated by MEPA, and neither an EA nor an EIS was required. However, once the Department decided to voluntarily prepare an EA pursuant to MEPA in response to Plaintiffs' concerns, the Department was obligated to follow the statutory procedures for preparation of an EA under MEPA.

The Department concluded in the Revised EA that the likelihood of contact between the domestic sheep and wild sheep was minimal because the wild sheep prefer terrain very different from that used by Madden for grazing his domestic sheep and the use of the mitigating factors in Alternative 6 further reduced the potential for contact. Because the Department had concluded that Alternative 6 adequately mitigated the potential harm to the wild sheep, the Department reasoned that Defendant Madden's actions would have no significant effect on the quality of the human environment which would trigger the need for an EIS.

Although Plaintiffs protest otherwise, it is clear from Plaintiffs' Amended Complaint and the arguments presented in the present motions that Plaintiffs strongly disagree with the Department's decision to allow continued grazing of domestic sheep. However, as the Court noted, *supra*, MEPA is essentially a procedural act. Matsumoto, 568 F.2d at 1290. MEPA merely requires an "informed decision". Id. MEPA does not direct the Department's discretion concerning the choice of action to be taken or the weight to be given any environmental factors. Stryker's Bay Neighborhood Council, 100 S.Ct. at 499. MEPA does not subject the Department's decision to challenge even if the Department's decision is a "complete blunder" as long as it is an "informed decision". Matsumoto, 568 F.2d at 1290. Where the issues relate to the Department's decisions or actions while exercising the Department's discretionary powers, this Court is to review the Department's record to determine whether the record establishes that the Department acted

arbitrarily, capriciously, or unlawfully in its exercise of its discretionary powers. North Fork Preservation, 238 Mont. at 458-59, 778 P.2d at 867. The Court may not substitute its discretion for the discretion reposed in the Department by the legislature. Id. at 457, 778 P.2d at 866. The Court will not compel the Department to make a particular decision with respect to the domestic and wild sheep when the Department has exercised its own judgment and discretion, and has not violated any statutory provisions or engaged in fraudulent action. Jeppeson, 205 Mont. at 293, 667 P.2d at 433. Rather, on review this Court may inquire only insofar as to ascertain if the Department acted lawfully by following the statutory procedures in preparation of the EA and has not acted arbitrarily and capriciously when the Department determined an EIS was not required under MEPA. North Fork Preservation, 238 Mont. at 457, 778 P.2d at 867. The Court believes these principles to be especially applicable in this case where the only relevant "state action" appears to be the Department's voluntary preparation of an EA, in response to Plaintiffs' concerns for the wild sheep herd, in order to determine the environmental effects of a private citizen's actions in placing domestic sheep on state school trust lands under an existing grazing lease.

ARM 26.2.645 sets forth the guidelines for the preparation and contents of an EA. Subsection (3) provides that the EA must include the following: a description of the proposed action; a description of the benefits and purpose of the proposed action; a list of other agencies with overlapping jurisdiction or responsibility; an evaluation of the impacts on the physical environment (in this case on terrestrial life and limited environmental resources); an evaluation of the impact on the human population in the area (including access to and quality of recreational and wilderness activities); a description and analysis of reasonable alternatives; a listing and evaluation of mitigation, stipulations, and other controls available; a listing of other agencies or groups contributing information; the names of persons responsible for preparation of the EA; and a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA.

Of the above requirements, Plaintiffs contend that the Revised EA failed to adequately evaluate the impacts on the physical environment by failing to address the significance of the impacts on the wild sheep associated with the grazing of domestic sheep, and that the Revised EA further failed to adequately evaluate the impacts on the human population's access to view and hunt wild sheep. Plaintiffs base that contention on a statement contained in the Revised EA that provides: "Because the purpose of this EA is to incorporate the natural and social sciences into the agency's decision making to examine alternatives to an existing situation, rather than a proposed action, the significance

of impacts was not determined". See p. 2 of Exhibit 2 to Affidavit of Gregory P. Hallsten, "Revised Draft Environmental Assessment: Review of Grazing Licenses 3060518 and 3060911 on the Sula State Forest", filed with the Court on February 28, 1994. Plaintiffs miss the point of the Department's statement. Plaintiffs' arguments might have some merit if an EA or an EIS had been required due to the existence of a "proposed" action by the State. However, in this case, the Department used its discretionary power pursuant to ARM 26.2.643(2) to prepare an EA to evaluate a "pre-existing" condition created by a private citizen based on historical leases going back some seventy years. Under those conditions, the State had the discretionary power to prepare an EA to help the Department examine alternatives to the existing conditions which "might otherwise be deemed significant" to determine whether the conditions are "mitigable below the level of significance through . . . enforceable controls or stipulations or both . . .." ARM 26.2.643(4) and 26.2.645(2). "For an EA to suffice in this instance, 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 significant, and that no significant impact is likely to occur . . .." ARM 26.2.643(4). Because the Department in this case was examining existing conditions created by a private individual, and not a proposed project by State government, the Court finds that the Department was not acting unlawfully when it drafted the Revised EA under the procedures set forth in ARM 26.2.643(4) and 26.2.645(2), rather than the more in-depth analysis of "significance of impacts" required in ARM 26.2.644 when a proposed State action is at issue. In any event, despite the Department's statement that "the significance of impacts was not determined", a reading of the Revised EA reveals that the Department did in fact address the impacts through its discussion of the mitigation measures agreed to with the lessee, Defendant Madden. These mitigation measures are aimed directly at the potential impacts asserted by Plaintiffs. It is clear that the significance of the impacts were considered by the Department and that the Department concluded that implementation of the mitigation measures would render the likelihood of actual contact between the domestic and wild sheep minimal. Therefore, the Court finds that the Department did not unlawfully fail to follow the procedures set forth in preparing an EA under the facts of this case, and Plaintiffs' procedural challenges to the Revised EA are without merit.

Was the Department's decision arbitrary and capricious that the Revised EA did not establish a need to prepare an EIS?

Plaintiffs present depositions and affidavits from expert witnesses and reports and studies done by professionals in the field of wildlife biology as a basis to argue that the Department acted arbitrarily and capriciously when it decided that implementing the

mitigating measures in Alternative 6 would sufficiently mitigate the effects of Defendant Madden's actions such that "no significant impact was likely to occur", thus no EIS was required. See ARM 26.2.643(4).

Plaintiffs cite *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988), and *Foundation for N. Am. Wild Sheep v. United States*, 681 F.2d 1172 (9th Cir. 1982), as support for their argument that the Revised EA has inadequately evaluated the potential impacts in this case. However, those cases are not particularly helpful to the case at bar, as the 9th Circuit applies a "reasonableness" test rather than the "arbitrary and capricious" test. Montana soundly rejected the reasonableness test in *North Fork Preservation*, 238 Mont. at 457-59, 778 P.2d at 866-67. In evaluating the Department's decision to forego an EIS in that case, the Montana Supreme Court recognized the limited scope of review in administrative cases in Montana and stated:

> We cannot substitute our judgment for that of the Department by determining whether its decision was "correct". Instead, we must examine the Department's decision to see whether the information set out in the PER's [now known as EA's] 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 Preservation, 238 Mont. at 465, 778 P.2d at 871. In addressing the "arbitrary and capricious" standard, the United States Supreme Court stated:

> As we observed in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 [91 S.Ct. 814, 823, 28 L.Ed. 136] (1971), in making the factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'

North Fork Preservation, 238 Mont. at 465, 778 P.2d at 871, citing *March v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 1961, 104 L.Ed.2d 377 (1989).

As long as the Department made an informed decision, it is not subject to challenge even if the decision turns out to be the wrong decision. *Matsumoto*, 568 F.2d at 1290 (9th Cir. 1978). A review of the Revised EA in this case shows that the Department cited 25 articles and studies on the issue, took testimony from two scientists who have studied the issue, and responded in writing to 38 difference public comments. Plaintiffs fault the Department's decision by arguing that virtually all of the evidence establishes that when contact occurs between wild sheep and domestic sheep, the wild sheep die. Plaintiffs also argue that no evidence exists that the mitigation measures contained in Alternative 6 will prevent contact. The fact that experts may disagree is not enough to invalidate an EA.

National Rifle Ass'n v. *Kleppe*, 425 F.Supp. 1101, 1111 (D.C. Cir. 1976), *aff'd* 571 F.2d 674 (1978). Even so, the experts cited by both the Department and Plaintiffs agree that nose-to-nose contact is necessary in order for the domestic sheep to contaminate the wild sheep. The difficulty the Department faced in its evaluation is that virtually all of the studies done to date have been done under controlled artificial conditions where the domestic and wild sheep have been placed in pens together such that contamination was guaranteed. In addition, the experts pretty much agree that the stress of being penned up significantly lowers the wild sheep's resistance to disease. Absent any studies whatsoever which would indicate the potential for nose-to-nose contact in natural conditions as are present on the state lands at issue, or documented evidence that contact actually occurred on the state lands, either in the absence of, or the presence of, the mitigation measures proposed in Alternative 6, Plaintiffs' contention that the Department has failed to consider relevant expert testimony and evidence is without merit. MEPA does not specify the quantum of information that must be in the hands of the decision maker; nor does it impose a requirement of perfection or require that all environmental impacts be known. *Lake Erie Alliance* v. *United States*, 526 F.Supp. 1063, 1069-70 (W.D.Pa. 1981), *aff'd* 707 F.2d 1392, *cert. den.* 104 S.Ct. 277 (1983). The Department had more than enough of the information that is available on the subject upon which to evaluate the issue, and this Court cannot say that the Department's decision that an EIS was not required was arbitrary and capricious, especially in light of the fact that the purpose of the Revised EA was to evaluate mitigating measures to conditions which already existed as a result of a private individual's actions and not to evaluate the significant impacts of proposed state action.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that, as to all claims asserted, summary judgment is GRANTED in favor of Defendants Montana Department of State Lands, Montana Board of Land Commissioners, and George R. Madden, Jr., and DENIED as to Plaintiffs Ravalli County Fish and Game Association, Inc., Montana Wildlife Federation, Inc., Skyline Sportsmen Club, Inc., and Anaconda Sportsmen Club, Inc., and this judicial review is hereby ordered DISMISSED.

DATED this 8th day of August, 1994.

JEFFREY H. LANGTON, District Judge

cc: Jack Tuholske, Esq.
John North, Esq. and Tom Butler, Esq.
Patrick G. Frank, Esq. and W. Carl Mendenhall, Esq.

DECISION

Citation/Title
903 P.2d 1362, 273 Mont. 371, Ravalli County Fish and Game Ass'n, Inc. v. Montana Dept. of State Lands, (Mont. 1995)

*1362 903 P.2d 1362

273 Mont. 371, 104 Ed. Law Rep. 488

RAVALLI COUNTY FISH AND GAME ASSOCIATION, INC., Montana Wildlife Federation, Inc. Skyline Sportsmen Club, Inc., and Anaconda Sportsmen Club, Inc., Plaintiffs and Appellants,

v.

MONTANA DEPARTMENT OF STATE LANDS, Montana Board of Land Commissioners and George Madden, Defendants and Respondents.

No. 94-564.
Supreme Court of Montana.
Decided Sept. 29, 1995.
Rehearing Denied Oct. 26, 1995.

Opponents of grazing permit holder's change from grazing cattle to grazing domestic sheep brought action against Department of State Lands (DSL), and against holder, alleging violations of Montana Environmental Policy Act (MEPA). The Twenty-First Judicial District Court, Ravalli County, Jeffrey H. Langton, J., granted summary judgment for defendants, and opponents appealed. The Supreme Court, Leaphart, J., held that DSL failed to satisfy its MEPA duties when it rendered decision without adequately considering significant impacts of its actions in allowing change of grazing use adjacent to bighorn sheep range in face of evidence that such change in use might adversely affect bighorn.

Reversed and remanded.

Gray, J., filed dissenting opinion in which Turnage, C.J., joined.

1. APPEAL AND ERROR ⚭893(1)
30 ----
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In general.
Mont. 1995.
Supreme Court views summary judgment orders de novo.

2. HEALTH AND ENVIRONMENT ⚭25.15(10)

903 P.2d 1362, 273 Mont. 371, Ravalli County Fish and Game Ass'n, Inc. v. Montana Dept. of State Lands, (Mont. 1995)

199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.15 Judicial Review or Intervention
199k25.15(6) Scope of Inquiry or Review
199k25.15(10) Impact statement issues.

Mont. 1995.

Supreme Court reviews Montana Environmental Policy Act (MEPA) decisions to determine whether record establishes that agency acted arbitrarily, capriciously or unlawfully. MCA 75-1-101 et seq.

3. HEALTH AND ENVIRONMENT ⚷25.15(10)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.15 Judicial Review or Intervention
199k25.15(6) Scope of Inquiry or Review
199k25.15(10) Impact statement issues.

Mont. 1995.

To evaluate lawfulness of actions of Department of State Lands (DSL), Supreme Court looks to laws and regulations governing DSL's Montana Environmental Policy Act (MEPA) process. MCA 75-1-101 et seq.; Mont. Admin. R. 26.2-641 et seq.

4. STATUTES ⚷226
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k226 Construction of statutes adopted from other states or countries.

Mont. 1995.

Because Montana Environmental Policy Act (MEPA) is modeled after National Environmental Policy Act (NEPA), when interpreting MEPA, Supreme Court finds federal case law persuasive. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-101 et seq.

5. HEALTH AND ENVIRONMENT ⚷25.10(2.1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(2.1) In general.

903 P.2d 1362, 273 Mont. 371, Ravalli County Fish and Game Ass'n, Inc. v. Montana Dept. of State Lands, (Mont. 1995)

Mont. 1995.
NEPA requires that agency take hard look at environmental impacts of given project proposal. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

6. HEALTH AND ENVIRONMENT ⚿25.10(1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(1) In general.
Mont. 1995.
NEPA is essentially procedural; it does not demand that agency make particular substantive decisions. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

7. HEALTH AND ENVIRONMENT ⚿25.10(4)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(4) Relation between projects; ongoing projects.
Mont. 1995.
Although state actions significantly affecting quality of human environment generally require analysis under Montana Environmental Policy Act (MEPA), where license renewal or assignment of grazing lease merely maintains status quo, renewal or assignment is ministerial action that requires no environmental analysis; absent change in use or condition which significantly affects quality of human environment, renewal or assignment is generally ministerial act that does not trigger MEPA analysis. MCA 75-1-201(1)(b)(iii), 77-6-205(1), 77-6-208; Mont. Admin. R. 26.2.642(1), 26.2.643(5).

8. HEALTH AND ENVIRONMENT ⚿25.10(3)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(3) Major action with significant effect.
Mont. 1995.
If changed use or condition under state lease or permit significantly affects

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quality of human environment, then state's allowing that change in use or change in condition is "major state action" pursuant to Montana Environmental Policy Act (MEPA), triggering MEPA review process. MCA 75-1-201(1)(b)(iii); Mont. Admin. R. 26.2.642(1), 26.2.643(5).

See publication Words and Phrases for other judicial constructions and definitions.

9. HEALTH AND ENVIRONMENT ⚭25.10(3)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(3) Major action with significant effect.
Mont. 1995.

If agency does not have affirmative statutory duty to act, failure to act does not trigger NEPA, but if agency's duty to avoid environmental harm is mandatory, then agency's inaction constitutes "action" for NEPA purposes. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

10. HEALTH AND ENVIRONMENT ⚭25.10(4)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(4) Relation between projects; ongoing projects.
Mont. 1995.

When Department of State Lands (DSL) is made aware of changes in existing conditions or uses relating to operation under lease or permit, and those changes have potential to significantly affect quality of human environment, then DSL must, pursuant to Montana Environmental Policy Act (MEPA), evaluate those changes for significant impacts; DSL has duty to manage agricultural, grazing and other surface leased land to protect best interests of state, under multiple use concept, which necessarily includes considering consequences to wildlife and environment. MCA 75-1-201(1)(b)(iii), 77-1-203, 77-6-201(2), 77-6-205(1), 77-6-206, 77-6-208, 77-6-210; Mont. Admin. R. 26.2.642(1),

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26.2.643(5).

11. HEALTH AND ENVIRONMENT ⚿25.10(4)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(4) Relation between projects; ongoing projects.
Mont. 1995.

Department of State Lands (DSL) failed to sufficiently explain and substantiate its decision to allow holder of grazing permits to continue grazing sheep, rather than cattle, adjacent to bighorn sheep range ***1362** without proceeding with environmental impact statement (EIS), and failed to sufficiently evaluate significance of impacts that domestic sheep would cause to bighorn; substantial questions remained as to what impact grazing domestic sheep would have on bighorn population. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-201(1)(b)(iii), 77-1-203, 77-6-201(2), 77-6-205(1), 77-6-206, 77-6-208, 77-6-210; Mont. Admin. R. 26.2.642(1), 26.2.643(5).

12. HEALTH AND ENVIRONMENT ⚿25.10(4)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(4) Relation between projects; ongoing projects.
Mont. 1995.

Department of State Lands (DSL) acted arbitrarily and capriciously and unlawfully when it concluded that changes to grazing permit holder's grazing plan reduced probable significant impact to bighorn sheep of grazing domestic sheep, as DSL did not in first instance adequately determine and consider significance of impacts associated with grazing domestic sheep on lands adjacent to bighorn. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-201(1)(b)(iii), 77-1-203, 77-6-201(2), 77-6-205(1), 77-6-206, 77-6-208, 77-6-210; Mont. Admin. R. 26.2.642(1), 26.2.643(5).

13. HEALTH AND ENVIRONMENT ⚿25.10(2.1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General

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199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(2.1) In general.
Mont. 1995.

Department of State Lands (DSL) was not excused from engaging in significant impacts analysis regarding impact of grazing domestic sheep adjacent to bighorn sheep range on theory that DSL was doing voluntary, as opposed to mandatory, environmental assessment (EA); no provisions in Montana Environmental Policy Act (MEPA), administrative rules or case law provided for partial compliance with law when compliance with law was purportedly voluntary. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-102, 75-1-201(1)(b)(iii); Mont. Admin. R. 26.2.644(1).

14. HEALTH AND ENVIRONMENT ⚷25.10(3)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(3) Major action with significant effect.
Mont. 1995.

Given potential adverse impact on bighorn sheep, change from grazing cattle to grazing sheep adjacent to bighorn range altered existing grazing permit to such extent that allowing change constituted "major state action" and, thus, Montana Environmental Policy Act (MEPA) was triggered by Department of State Lands' (DSL) awareness of change. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-102, 75-1-201(1)(b)(iii), 77-6-205(1), 77-6-208; Mont. Admin. R. 26.2.644(1), 26.2.642(1), 26.2.643(5).

See publication Words and Phrases for other judicial constructions and definitions.

15. HEALTH AND ENVIRONMENT ⚷25.15(12)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.15 Judicial Review or Intervention
199k25.15(12) Judgment or order; relief.
Mont. 1995.

Appropriate remedy for failure of Department of State Lands (DSL) to engage in significant impact analysis under Montana Environmental Policy Act (MEPA) in connection with grazing permit holder's change from grazing cattle to grazing

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sheep adjacent to bighorn sheep range was to remand matter for preparation of environmental impact statement (EIS). National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; MCA 75-1-102, 75-1-201(1)(b)(iii); Mont. Admin. R. 26.2.644(1).

16. HEALTH AND ENVIRONMENT ⚿25.10(2.1)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(2.1) In general.
Mont. 1995.

Implicit in requirement of Montana Environment Policy Act (MEPA) that agency take hard look at environmental consequences of its actions is obligation to make adequate compilation of relevant information, to analyze it reasonably and, perhaps most importantly, not to ignore pertinent data. MCA 75-1-101 et seq.

17. HEALTH AND ENVIRONMENT ⚿25.15(3.3)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.15 Judicial Review or Intervention
199k25.15(3.3) Proceedings for review; pleading; record.
Mont. 1995.

It is particularly important that Department of State Lands (DSL) establish full and complete record on review.

18. HEALTH AND ENVIRONMENT ⚿25.10(3)
199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(3) Major action with significant effect.
Mont. 1995.

Even after fully complying with Montana Environmental Policy Act (MEPA) procedure, agency may determine that action will result in significant impacts and then, nonetheless, approve action under MEPA, though agency is then accountable for its decision. MCA 75-1-101 et seq.

19. HEALTH AND ENVIRONMENT ⚿25.10(2.1)

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199 ----
199II Regulations and Offenses
199k25.5 Environmental Protection in General
199k25.10 Environmental Impact Statement
199k25.10(2) Necessity for Statement
199k25.10(2.1) In general.

Mont. 1995.

Goal of maximizing income derived from school trust lands does not exempt Department of State Lands (DSL) or any agency from complying with applicable environmental laws; income is "a" consideration, not "the" consideration regarding school trust lands, and maximizing income is not paramount to exclusion of wildlife or environmental considerations in Montana Environmental Policy Act (MEPA) context. MCA 75-1-102, 75-1-103(2), 75-1-105, 77-6-209.

***1365** Jack R. Tuholske, Missoula, for appellants.

Patrick G. Frank, W. Carl Mendenhall, Worden, Thane & Haines, Missoula, Tommy H. Butler, Special Ass't Attorney General, Helena, for respondents.

Thomas France, Debbie Musiker, Missoula, for National Wildlife Federation.

John E. Bloomquist, Doney, Crowley & Shontz, Helena, for Montana Stockgrowers Assoc., Montana Woolgrowers Assoc. and Bitterroot Stockgrowers.

Alan L. Joscelyn, Helena, for Seeley Lake Elem. School Dist. and Brady Combined School Dist.

LEAPHART, Justice.

The Ravalli County Fish And Game Association, Inc., Montana Wildlife Federation, Inc., Skyline Sportsmen Club, Inc., and Anaconda Sportsmen Club, Inc. (collectively, the Sportsmen) appeal from a Twenty-First Judicial District Court, Ravalli County, order granting the Montana Department Of State Lands' (DSL), Montana Board Of Land Commissioners', and George Madden's (Respondents) motion for summary judgment in a Montana Environmental Policy Act (MEPA) action. We reverse.

FACTUAL BACKGROUND

Bighorn sheep (bighorn) are native to much of Montana but, with the settlement of the west, they were eliminated from most of their former ranges. In response to their diminished numbers, efforts have been made to reintroduce

the bighorn to some of their former ranges. One such area is the Sula State Forest (Sula) and adjacent lands near the East Fork of the Bitterroot River. The presence of the bighorn adds ecological, aesthetic and economic values to the areas and communities adjacent to bighorn ranges. Along with its suitability as bighorn habitat, the Sula has a long history of livestock grazing. At issue is an alleged conflict between the grazing of domestic sheep and the health and survival of the bighorn on the adjacent range.

Until the beginning of 1991, Ralph Shoberg maintained grazing permits with the DSL on trust lands within the Sula. Shoberg grazed cattle on his permit areas. In January 1991, Shoberg transferred his permits to George R. Madden (Madden). Madden subsequently changed from grazing cattle to grazing domestic sheep. A public controversy arose regarding Madden's grazing ***1366** of domestic sheep upon trust lands because of the potential adverse affects on the bighorn. Evidence in the record suggests that mixing domestic sheep and bighorn can decimate the bighorn population through the spread of pneumonia and/or other diseases to the bighorn. On October 31, 1991, under the threat of a lawsuit, the DSL agreed to prepare an environmental review of the permits pursuant to MEPA. Prior to 1991, the DSL had not prepared an environmental assessment (EA) or environmental impact statement (EIS) on Madden's cattle grazing permits.

The DSL issued an EA on July 17, 1992 which included six alternatives. Appellants, private parties and state entities, submitted comments to the DSL about the EA. On September 30, 1992, the DSL issued a revised EA. On December 30, 1992, DSL commissioner Dennis Casey issued a decision notice which ended the EA process and allowed Madden's grazing leases to remain in effect until 1999, the leases' existing renewal date. With the intent to reduce the threat of transferring disease from the domestic sheep to the bighorn, the decision notice required certain measures, such as sheep dogs and grazing dates. Because Casey approved the revised EA, MEPA requirements were satisfied and no EIS was required.

On May 12, 1993, the Sportsmen filed the instant action in the District Court. On August 20, 1993, Respondents moved to dismiss the Sportsmen's claims pursuant to Rule 12(b)(6), M.R.Civ.P., for failure to state a claim upon which relief could be granted. On November 23, 1993, the District Court stated that it intended to treat this motion as a Rule 56, M.R.Civ.P., motion for summary judgment. On August 10, 1994, the District Court granted Respondents' motion for summary judgment on all counts. This appeal followed.

The Sportsmen present three issues for review:

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1. Did the District Court err in holding that the DSL complied with MEPA?

2. Does the DSL have a fiduciary duty towards Montana's wildlife which, under the facts of the instant case, requires the protection of the bighorn by implementing license conditions to protect the bighorn?

3. Did the District Court improperly refuse to consider affidavits, exhibits, and depositions submitted by the Sportsmen in support of their claims that the DSL unlawfully and arbitrarily violated MEPA and its trust duties toward wildlife?

STANDARD OF REVIEW

[1] We review summary judgment orders de novo. *Spain-Morrow Ranch Inc. v. West* (1994), 264 Mont. 441, 444, 872 P.2d 330, 331-32.

Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. The initial burden is on the moving party to establish that there is no genuine issue of material fact; and once met, the burden shifts to the party opposing the motion to establish otherwise.

Spain-Morrow Ranch, 872 P.2d at 331-32 (citations omitted).

[2] We review MEPA decisions to determine "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." *North Fork Preservation Assoc. v. Dept. of State Lands* (1989), 238 Mont. 451, 458-59, 778 P.2d 862, 867. In *North Fork* we divided our review into two parts: Whether the agency acted unlawfully, and whether the agency acted arbitrarily or capriciously. *North Fork,* 778 P.2d at 867.

[3] [4] To evaluate the lawfulness of the DSL's actions, we look to the laws and regulations governing the DSL's MEPA review process. *North Fork,* 778 P.2d at 867. We therefore review §§ 75-1-101 et seq., MCA, and §§ 26.2.641 et seq., ARM. Because MEPA is modeled after the National Environmental Policy Act (NEPA), when interpreting MEPA, we find federal case law persuasive. *Kadillak v. Anaconda Co.* (1979), 184 Mont. 127, 137, 602 P.2d 147, 153.

***1367** DISCUSSION

[5] [6] NEPA requires that an agency take a "hard look" at the environmental impacts of a given project or proposal. *See Kleppe v. Sierra Club* (1976), 427

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U.S. 390, 410, n. 21, 96 S.Ct. 2718, 2730, 49 L.Ed.2d 576, 590. NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions. *Stryker's Bay Neighborhood Council v. Karlen* (1980), 444 U.S. 223, 227-28, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433, 437. MEPA requires that an agency take procedural steps to review "projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment" in order to make informed decisions. Section 75-1-201(1)(b)(iii), MCA; *See* § 26.2.643, ARM.

[7] Both parties ask us to determine whether an environmental review document is necessary for the renewal or assignment of a grazing lease. Pursuant to § 77-6-205(1), MCA, a grazing lease holder:

> who has paid all rentals due the state or who has voluntarily terminated a lease under 77-6-116 is entitled to have the lease renewed for a period not to exceed the maximum lease period provided in 77-6-109 at any time within 30 days prior to its expiration or within 30 days following voluntary termination if no other applications for lease of the land have been received 30 days prior to the expiration of the lease or within 30 days following voluntary termination. The renewal must be at the full market rental rate established by the board[, taking into account recommendations of the state land board advisory council,] for the renewal period and subject to any other conditions at the time of the renewal imposed by law as terms of the lease.

Section 77-6-208, MCA, provides for assignment of leases to state lands. The DSL rules regarding the general requirements of the environmental review process state that:

> (5) The agency is not required to prepare an EA or an EIS for the following categories of action:
>
> ....
>
> (e) ministerial actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner....

Section 26.2.643(5), ARM. The Sportsmen correctly argue that the renewal and assignment of a lease, permit, license, etc., pursuant to § 26.2.642(1), ARM, involves state action. Generally, state action significantly affecting the quality of the human environment requires MEPA analysis. *See* § 75-1-201(1)(b)(iii), MCA. However, where a license renewal or assignment

merely maintains the status quo we conclude that the renewal or assignment of a grazing lease pursuant to § 77-6-205(1), MCA, is a ministerial action that requires no environmental analysis. *See NRDC v. Berklund* (D.C.Cir.1979), 609 F.2d 553, 558. Absent a change in use or condition which significantly affects the quality of the human environment, the renewal or assignment of a grazing lease or permit is generally a ministerial act and does not trigger MEPA analysis.

[8] However, if a changed use or condition under a state lease or permit significantly affects the quality of the human environment, then the state's allowing that change in use or change in condition is a major state action pursuant to MEPA, triggering the MEPA review process. The United States Supreme Court has observed that "major federal actions" include the "expansion or revision of ongoing programs." *Andrus v. Sierra Club* (1979), 442 U.S. 347, 363 n. 21, 99 S.Ct. 2335, 2344, 60 L.Ed.2d 943, 955; *citing* S.Rep. No. 91-296, p. 20 (1969). "[I]f an ongoing project undergoes changes which themselves amount to 'major Federal actions,' the operating agency must prepare an EIS." *Upper Snake River Chapter of Trout Unlimited v. Hodel* (9th Cir.1990), 921 F.2d 232, 234.

[9] [10] The DSL correctly argues that if an agency does not have an affirmative statutory duty to act, the failure to act does not trigger NEPA. *Defenders of Wildlife v. Andrus* (D.C.Cir.1980), 627 F.2d 1238, 1248-50. *1368 However, if an agency's duty to avoid environmental harm is mandatory, then the agency's inaction constitutes an action for NEPA purposes. *See Sierra Club v. Hodel* (10th Cir.1988), 848 F.2d 1068, 1090-91. Based on the requirements of §§ 77-6-201(2), -206 and -210, MCA, the DSL has the duty to manage agricultural, grazing, and other surface leased land to protect the best interests of the state, under the multiple use concept, which necessarily includes considering consequences to wildlife and the environment. *See* § 77-1-203, MCA. When the DSL is made aware of changes in the existing conditions or uses relating to an operation under a lease or permit, and those changes have the potential to significantly affect the quality of the human environment, then the DSL must, pursuant to MEPA, evaluate those changes for significant impacts. In the instant case substantial questions remain as to what impact grazing domestic sheep will have on the bighorn population.

> The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared.
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> ***LaFlamme v. Federal Energy Regulatory Commission*** (9th Cir.1988), 852 F.2d

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389, 397.

[11] [12] Particularly in light of MEPA's statutory goal of promoting efforts which will prevent or eliminate damage to the environment, § 75-1-102, MCA, and the conflicting evidence in the record, the DSL failed to sufficiently explain and substantiate its December 30, 1992 decision to allow Madden to continue grazing sheep adjacent to the bighorn range without proceeding with an EIS. Further, it failed to sufficiently evaluate the significance of the impacts that domestic sheep would cause to the bighorn. Both the revised EA and the DSL's brief to this Court concede that the revised EA did not address the significance of impacts. An EIS must be prepared for state actions that significantly affect the quality of the human environment. Section 75-1-201(1)(b)(iii), MCA. "In order to implement [MEPA], the agency *shall determine the significance of impacts* associated with a proposed action." Section 26.2.644(1), ARM. The Sportsmen correctly point out that the DSL did not complete MEPA's mandatory "significant impacts" analysis. Because the DSL did not in the first instance adequately determine and consider the significance of the impacts associated with grazing domestic sheep on lands adjacent to bighorn, the DSL acted arbitrarily and capriciously and unlawfully when it concluded that changes to Madden's grazing plan reduced the probable significant impact to the bighorn.

[13] The District Court was incorrect in agreeing with the DSL that it was not required to engage in a significant impacts analysis on the theory that it was doing a voluntary as opposed to a mandatory EA. Based on our above holding, full compliance with MEPA is mandated in this case. Furthermore, we find no provisions in MEPA, the administrative rules, or case law providing for partial compliance with the law when compliance with the law is purportedly voluntary.

[14] [15] [16] We do not here decide whether grazing domestic sheep adjacent to the Sula bighorn range is appropriate or not, but rather, whether the DSL's environmental review was sufficient. In the instant case, given the potential adverse impact on the bighorn, the change from grazing cattle to grazing sheep altered the existing permit to such an extent that allowing the change constituted a major state action. Thus, MEPA was triggered by DSL's awareness of the change from grazing cattle to grazing sheep adjacent to bighorn range. *See Andrus*, 442 U.S. at 363 n. 21, 99 S.Ct. at 2344 n. 21. Since the DSL failed to engage in a significant impacts analysis, the matter must be remanded for preparation of an EIS. *See Sierra Club v. U.S. Forest Service* (9th Cir.1988), 843 F.2d 1190. In *Sierra Club*, the Forest Service decided not to prepare an EIS with regard to certain timber sales. The plaintiffs challenged that decision because the environmental assessment did not adequately discuss

the relevant ***1369** criteria in the federal regulations. The Ninth Circuit held that the standard for determining "if an action will significantly affect the quality of the human environment is whether the plaintiff has alleged facts which, if true, show that the ... [action (or inaction)] may significantly degrade some human environmental factor." *Sierra Club,* 843 F.2d at 1193; *quoting Foundation for North Am. Wild Sheep v. U.S. Dep't of Agriculture* (9th Cir.1982), 681 F.2d 1172, 1177-78. "A determination that significant effects on the human environment will in fact occur is not essential.... If substantial questions are raised whether a project may have a significant effect upon the environment, an EIS must be prepared." *Id.; quoting Foundation,* 681 F.2d at 1178. The *Sierra Club* court concluded:

> Because substantial questions have been raised concerning the potential adverse effects of harvesting these timber sales, an EIS should have been prepared.... The Forest Service's decision not to do so was unreasonable.... It failed to account for factors necessary to determine whether significant impacts would occur. Therefore its decision was not "fully informed and well-considered." [*Friends of*] *Endangered Species* [*v. Jantzen*] [(9th Cir.1985)], 760 F.2d [976], 986 (quoting *Vermont Yankee* [*Nuclear Power v. Natural Resources Defense Council, Inc.* (U.S.Dist.1978)], 435 U.S. [519], 558, 98 S.Ct. [1197], 1219). [Other citations omitted.]

Sierra Club, 843 F.2d at 1195. Although the standard is now arbitrary and capricious rather than "reasonable," the Ninth Circuit's remedy of remanding for an EIS is still appropriate. The DSL's own records evidence the potential harm in changing from cattle to sheep in this particular area. Based on this record of conflicting evidence, substantial questions remain and the DSL must comply with the requirements of MEPA and complete an EIS. It must look further at the grazing license and grazing practices to determine the significance of allowing a change from grazing cattle to grazing sheep. Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably and, perhaps most importantly, not to ignore "pertinent data." *See Sierra Club v. United States Army Corps of Engineers* (2nd Cir.1982), 701 F.2d 1011, 1029. The DSL did not follow MEPA's implicit mandate that it take a hard look by completing a significant impacts analysis: The District Court therefore erred in granting summary judgment to Respondents.

[17] It is particularly important that the DSL establish a full and complete record on review. The United States Supreme Court has addressed an agency's failure to create an adequate record:

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> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Florida Power and Light Co. v. Lorion (1985), 470 U.S. 729, 744, 105 S.Ct. 1598, 1607, 84 L.Ed.2d 643, 656. Along these lines, the *Hodel* court concluded that:

> [w]ithout an administrative record, courts are left to rationalize the agency's decision--a form of review which abandons standards in favor of predilections. "This kind of speculation regarding the basis for an agency's decision not to prepare an EIS is precisely what NEPA was intended to prevent."

Hodel, 848 F.2d at 1093; *quoting LaFlamme v. F.E.R.C.* (9th Cir.1988), 842 F.2d 1063, 1070. Due to the lack of a proper significant impacts analysis, the record does not uphold the DSL's decision. The record essentially consists only of the revised EA and Decision Notice. This put the District Court in the untenable position of basing its review on a meager administrative record.

Madden suggests that if we adopt the Sportsmen's argument we will be imposing a requirement that a full EIS be completed "on ***1370** every renewal and assignment of every license and lease of state land." We are not here imposing such a requirement with regard to lease renewals or assignments. Under the facts of this case, it is not the lease renewal or assignment that triggers MEPA analysis. Rather, it is the DLS's awareness of Madden's change of use from grazing cattle to grazing sheep adjacent to bighorn range in the face of evidence that such a change in use may adversely affect the bighorn. An EIS is required only when there is a substantial question as to whether the change of use may have a significant effect upon the human environment. We conclude that once the DSL became aware of this change in use, the DSL's allowing the change of use constituted a major governmental action and its duty to fully comply with MEPA was triggered. In the instant case, the DSL failed to satisfy its MEPA duties when it rendered a decision without adequately considering the significant impacts of its actions in accordance with § 75-1-201, MCA. MEPA does not require that agency actions not impact the human environment. MEPA *does* require that agencies assess their actions so as to make an informed decision. A corollary to an informed decision is public education and input.

[18] Even after fully complying with MEPA procedure, an agency may determine

that an action will result in significant impacts and then, nonetheless, approve the action under MEPA. The agency, however, is then accountable for its decision.

> An "agency must supply a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. F.E.R.C.* [9th Cir.1985], 759 F.2d [1382,] 1393. While it is true that mitigation measures can justify an agency's conclusions that a project's impact is not significant, an agency must explain exactly how the measures will mitigate the project's impact. *Id.* at 1394; *Jones v. Gordon* [(9th Cir.1986)], 792 F.2d [821], 829.
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> *LaFlamme,* 852 F.2d at 399.

In the instant case, the DSL did not engage in "significance of impacts" analysis. Accordingly it was unable to take the requisite hard look and it is impossible for this Court or the District Court to determine whether the adverse impacts have been compensated for or not.

[19] Finally, the goal of maximizing income derived from school trust lands does not exempt the DSL or any agency from complying with applicable environmental laws. The DSL strenuously argues that its ability to modify the leases (FN1) at issue is limited by its state land trust duty to maximize the income derived from trust lands. In addition, the Seeley Lake and Brady School Districts and the Montana Stockgrowers, Woolgrowers, and Bitterroot Stockgrowers Associations, filing as *amicus curiae* in support of the DSL, conclude that the state's trust obligation to secure the greatest dollar value for school trust lands is predominant. School trust lands need not be used exclusively for grazing or agriculture. *See* Title 77, Chapter 1, Part 4, § 77-6-209, and Title 77, Chapter 6, MCA. For instance, the Sportsmen suggest that there is precedent for the DSL and the Department of Fish, Wildlife, and Parks to agree to a plan whereby a portion of Sula bighorn hunting permit fees could go to the school trust. This would generate funds for the school trust and, assuming such hunting is ecologically sound, protect the bighorn herd. Finally, we note that neither the DSL nor the *amicus curiae* suggest why or how domestic sheep grazing generates more money for the school trust than cattle grazing. The Sportsmen and the record (sparse as it is) suggest that alternative uses to grazing may increase the value earned for the trust. Income is "a" consideration--not "the" consideration regarding school trust lands: Maximizing income is not paramount to the exclusion of wildlife or environmental considerations in the MEPA context. Sections 75-1-102, -103, and -105, MCA.

> [i]t is the continuing responsibility of the state of Montana to use all practicable ***1371** means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources to the end that the state may: (a) fulfill the responsibilities of each generation *as trustee of the environment* for succeeding generations.

Section 75-1-103(2), MCA (emphasis added). The DSL, and not this Court, is in the best position to consider alternatives as part of its MEPA analysis.

MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands. The DSL may not, as here, reach a decision without first engaging in the requisite significant impacts analysis. The record in its present form, convinces us that the DSL by not first conducting an appropriate analysis under MEPA, arbitrarily, capriciously and unlawfully allowed Madden to change use from grazing cattle to grazing sheep adjacent to bighorn range. Therefore, we conclude that the DSL must complete an EIS to comprehensively review the environmental impacts resulting from this change of use adjacent to bighorn range.

Because of our holding in this issue, we need not consider issues two and three.

Reversed and remanded to the District Court for an order requiring preparation of an EIS.

HUNT, NELSON and TRIEWEILER, JJ., concur.

GRAY, Justice, dissenting.

I must respectfully dissent from most of the Court's opinion and from the result it reaches. My main problems with the opinion are its overbreadth and its lack of clarity concerning which MEPA statutes or regulations the Court determines DSL actually violated here. If the Court made even a passing analysis of Montana law in resolving this case in favor of appellants, I undoubtedly would join in the opinion; I cannot do so as the opinion is written.

I agree that the standard of review of the MEPA decision at issue in this case is the "unlawful or arbitrary and capricious" standard set forth in *North Fork*. Unfortunately, the Court does not clearly apply that standard in resolving this case.

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I also agree that, in *Kadillak*, we stated that it was appropriate to look to federal interpretations of NEPA in interpreting MEPA. However, nothing in *Kadillak* or any other source authorizes this Court to dispense altogether with applying Montana law and merely apply broad statements from selected federal cases to the factual scenario before us without any discussion of how and why those statements are applicable here. The result of this approach by the Court is a lack of analysis regarding which particular provisions of MEPA and the controlling regulations have been violated and a total lack of guidance to state agencies attempting to comply with the critically important MEPA and to state courts attempting to ensure such compliance. I cannot agree.

The lack of specificity in the opinion makes it difficult to craft an appropriate dissent. Thus, I offer only the following concerns and questions about the authorities on which the Court relies in resolving this case.

The Court's primary thesis about MEPA appears early in--and permeates--its opinion. According to the Court, the guiding premise of MEPA is that "[g]enerally, state action significantly affecting the quality of the human environment requires MEPA analysis." Section 75-1-201(1)(b)(iii), MCA, is cited for this proposition. The problem with the Court's approach is that "generalizing" about this pivotal statute is both misleading and erroneous.

The statute actually says that, "to the fullest extent possible[,] ... all agencies of the state ... shall include in every recommendation or report on proposals for projects, legislation, and other major actions of state government significantly affecting the quality of the human environment" a detailed statement regarding environmental impacts and effects. Section 75-1-201(1)(b)(iii), MCA. ***1372** The Court does not analyze the meaning of "to the fullest extent possible." More importantly, nowhere does the Court establish that any "recommendation or report on a proposal" for a major action of state government is at issue in this case.

Most important of all, the Court never bothers to apply the definition of "action," vis-a-vis § 75-1-201(1)(b)(iii), MCA, which is found in § 26.2.642(1), ARM, to DSL's "allowing" of a change of use after a grazing permit is in place and the change of use has occurred. An "action," insofar as it is relevant here, is "a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act" by the agency. Section 26.2.642(1), ARM. As the Court concedes, no activity involving the issuance of a lease is at issue here. Thus, this straightforward definition simply does not support the Court's conclusion that "if a changed use or condition ... significantly affects the quality of the human environment,

then the state's allowing that change in use or change in condition is a major state action pursuant to MEPA, triggering the MEPA review process." Nor does the Court provide any other support--under MEPA or otherwise--for this proposition.

Instead, the Court cites to one United States Supreme Court case and one Ninth Circuit Court of Appeals case which it apparently believes support its conclusion. Neither case does so even through the broad language quoted, much less through an actual application of those cases to the facts presently before us.

It is true that in *Andrus v. Sierra Club* (1979), 442 U.S. 347, 99 S.Ct. 2335, 60 L.Ed.2d 943, the United States Supreme Court observed that major federal actions include the "expansion or revision of ongoing programs;" it did so in the context of resolving the issue of whether appropriation requests constitute "proposals for major federal actions" under NEPA. It concluded that appropriation requests were requests to fund action already proposed, rather than proposals for major government actions to be taken in the future. *Sierra Club*, 442 U.S. at 361-63, 99 S.Ct. at 2343. *Sierra Club* has no direct applicability here; it leaves unanswered, as does this Court, the specific question of what constitutes an expansion or revision of an ongoing program. *Sierra Club* does point out, however, that the "proposal" language in NEPA--like that in MEPA--is intended to have some meaning, a meaning never addressed by this Court in the present case. Indeed, this Court's purpose in quoting from *Sierra Club*--other than to insert broad and inapposite language--remains a mystery.

Similarly, the Court's reliance on *Upper Snake River Chapter of Trout Unlimited v. Hodel* (9th Cir.1990), 921 F.2d 232, is misplaced. While that opinion does state that "if an ongoing project undergoes changes which themselves amount to 'major Federal actions,' the operating agency must prepare an EIS," the Ninth Circuit was referring to the definition of "major Federal action" contained in NEPA. Whatever the definition under NEPA, the case before us is governed initially by the specific definition of "action" contained in § 26.2.642, ARM. Even accepting the Ninth Circuit's broad language, however, this Court does not apply the quoted language to the facts before us. It does not specify *how*, in this case, a change in an ongoing project exists, much less how such a change amounts to state action as "action" is defined in § 26.2.642(1), ARM, or to "major" state actions as the term is used in § 75-1-201(1)(b)(iii), MCA.

Moreover, I note that in *Upper Snake River*, the Ninth Circuit concluded,

applying the NEPA definitions, that the Bureau of Reclamation's reduction of the flow of water from the Palisades Dam on the South Fork of the Snake River in Idaho was *not* a major federal action. *Upper Snake River,* 921 F.2d at 234. It reached that conclusion in advance of any consideration of whether the action at issue had a significant effect on the environment and, indeed, declined to reach the "significant effect" issue "because the reduction does not constitute a 'major Federal action' ***1373** within the meaning of the statute." *Upper Snake River,* 921 F.2d at 234. Thus, to the extent *Upper Snake River* has any application here, it clarifies that a court must *first* determine whether the action at issue comes within the controlling definitions of "major action;" only when that question is answered in the affirmative may the court proceed to questions involving the significance of any impacts or effects from the action at issue. In the case before us, the Court essentially turns the questions around and becomes mired in the "significance" questions prior to having applied the controlling definitions to determine whether the "action" at issue triggers MEPA analysis at all.

Finally, with regard to *Upper Snake River,* I reiterate that the Ninth Circuit concluded that the Bureau of Reclamation's substantial reduction in water flow from the Palisades Dam did not constitute a major federal action under NEPA. How, then, even assuming identical controlling definitions, can DSL's "nonaction" in this case constitute a major action of state government? The Court does not explain.

The Court notes its agreement with DSL's argument that, if an agency does not have an affirmative duty to act, the failure to act does not trigger NEPA or, presumably, MEPA. It then quotes from *Sierra Club v. Hodel* (10th Cir.1988), 848 F.2d 1068, for the proposition that "if an agency's duty to avoid environmental harm is mandatory, then the agency's inaction constitutes an action for NEPA purposes." The Court does not explain how the case relates to the situation before us and it is my view that the case is, like those referenced above, inapplicable here.

In *Sierra Club,* the agency's mandatory environmental duty did not spring from NEPA itself. There, the Tenth Circuit determined that the Secretary's nondegradation duty toward wilderness study areas was mandatory under the Federal Land Policy Management Act of 1976. *Sierra Club,* 848 F.2d at 1075. In addition, the court determined that, even if the Secretary's activity amounted to "nonaction" under the language of NEPA § 102(2)(c), requiring an EIS in advance of "major Federal actions," a Council on Environmental Quality (CEQ) regulation specifically made the Secretary's failure to act a "major federal action" for NEPA purposes. *Sierra Club,* 848 F.2d at 1091.

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No regulation corresponding to the CEQ regulation at issue in *Sierra Club*--which made the "nonaction" a major federal action triggering NEPA--is involved in this case. Thus, I cannot see how *Sierra Club* has any application here or how it supports in any way the Court's conclusion that "[w]hen the DSL is made aware of changes in the existing conditions or uses relating to a lease or permit, and those changes have the potential to significantly affect the quality of the human environment, then the DSL must, pursuant to MEPA, evaluate those changes for significant impacts."

Under the Court's decision in this case, what are state agencies or district courts to make of the clear thrust of the regulations implementing MEPA which focus on MEPA being triggered for "proposed actions"? What, for example, is the meaning of § 26.2.641, ARM, captioned *Policy Statement Concerning MEPA Rules*, which states that in order to fulfill the statutorily-stated purpose of MEPA, agencies must conform to the rules at §§ 26.2.642 et seq., ARM, "prior to reaching a final decision on *proposed actions* covered by MEPA"? Or the definition of an EA at § 26.2.642(9), ARM, as an analysis of a "*proposed* action to determine whether an EIS is required" or to serve one of the other purposes described in § 26.2.643(2), ARM? Or the general requirements of the environmental review process set forth in § 26.2.643, ARM, which repeatedly specify "proposed action"? Or, critically, the requirement in § 26.2.644, ARM, setting forth the criteria to be used in determining "the significance of impacts associated with a *proposed* action." How and when does a nonaction or a nondecision after a change of use in a state grazing permit come within the "proposed action" language which permeates the controlling regulations and the legislative policy statement in § 75-1-201(1)(b)(iii), MCA? The Court never explains, and I submit that the Court's decision today provides state agencies with no basis for evaluating when, under ***1374.** MEPA and the controlling regulations, MEPA will be triggered.

Finally, I feel compelled to comment on the ease with which the Court concludes not only that MEPA was triggered, but also that an EIS must be prepared. Again, the Court relies for its conclusion on broad statements from United States Courts of Appeal decisions holding that an EIS is required whenever a person alleges facts which, if true, show that the action/inaction "may" significantly degrade some human environmental factor. Again, no Montana statutes or regulations are cited or applied. Specifically, for example, the Court does not explain how the cases upon which it relies square with the clear language in § 75-1-201, MCA, that a detailed environmental statement is required for proposals for major state actions "*significantly affecting* the quality of the human environment." Nor does it address in any way the criteria set forth in § 26.2.643, ARM, for when a state agency must prepare an EIS, in particular

the mandate that an EIS is required when "the proposed action is a major action of state government *significantly affecting* the quality of the human environment." Section 26.2.643(1)(b), ARM. How does the "significantly affecting" language in the Montana statute and regulation support the Court's conclusion that an EIS is required whenever an action (or, according to the Court, inaction) *may* significantly affect the environment? Are state agencies to totally disregard MEPA statutes and regulations hereafter? The Court does not explain.

I close by restating here what I stated at the outset: the troubling aspects of the Court's opinion in this case are its lack of analysis of Montana statutes and regulations and the resulting lack of guidance for all concerned in these important matters involving our cherished environment. If a case *can* be made under MEPA for the Court's decision here, the Court has not made it. For that reason, I cannot join in the Court's opinion. I dissent.

TURNAGE, C.J., joins in this foregoing dissent.

FN1. The real issue here is not whether the DSL can modify a lease but rather can the DSL, without conducting a significant impacts analysis, allow a lessee to unilaterally change the use from cattle to sheep adjacent to bighorn range.