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COPY

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

17 COUNTY OF MISSOULA, NATIONAL)
18 WILDLIFE FEDERATION, MONTANA)
19 ENVIRONMENTAL INFORMATION)
20 CENTER, MONTANA CHAPTER OF THE)
21 SIERRA CLUB,)

Cause. No. DV-11-424

Dept. No. 3

John W. Larson

vs.

COMPLAINT

22 MONTANA DEPARTMENT OF)
23 TRANSPORTATION, an agency of the)
24 State of Montana, and JIM LYNCH, in his)
25 capacity as Director of Montana)
26 Department of Transportation,)
Defendants.)

I. INTRODUCTION

1
2 1. This is an action for declaratory and injunctive relief against the
3 Montana Department of Transportation ("MDT"). This matter arises from
4 MDT's decision to issue an environmental assessment ("EA") and Finding
5 of No Significant Impact ("FONSI") approving the Kearl Module
6 Transportation Project ("KMTP"), a project that includes encroachment and
7 oversize load transport permits to allow Imperial Oil Limited ("IO"), a
8 Canadian corporation, to conduct certain infrastructure modification
9 activities and move 207 oversized loads over Montana highways to Alberta,
10 Canada over the course of the next year.

11 2. IO seeks to haul loads of equipment to expand tar sands mining and
12 processing in northern Alberta at the Kearl Oil Fields. To accommodate
13 these oversize loads, IO would have infrastructure constructed or modified
14 along Montana's rural highways. The infrastructure changes would pave
15 the way for additional oversize industrial transports, and would have the
16 effect of creating a permanent oversize industrial transportation corridor. In
17 fact, other oil companies are already inquiring about using the corridor once
18 it is built.

19 3. MDT issued the FONSI and final EA on February 7, 2011, without
20 adequately identifying and analyzing all relevant impacts of the project and
21 without analyzing a reasonable range of alternatives as required by the
22 Montana Environmental Policy Act (MEPA), Montana Code Annotated
23 ("MCA") § 75-1-201 *et seq.* MDT also issued the FONSI and EA in
24 violation of MEPA's requirement to prepare an environmental impact
25 statement ("EIS") for state actions that may significantly affect the human
26 environment. § 75-1-201(1)(b)(i)(B). MDT further issued the decision
without providing, to the public, important, relevant items of information

1 during the decision-making process, thus the process employed by MDT
2 deprived citizens of their rights to know and to participate in government
3 actions, in violation of MEPA and Article II Sections 8 and 9 of the Montana
4 Constitution.

5 4. Based on the inadequate MEPA analysis, MDT authorized the
6 KMTP, which will include providing to IO special permits pursuant to MCA
7 §§ 61-10-121 through 61-10-125 and the Administrative Rules of Montana
8 (ARM) 18.8.509 ("32-J permits"). MDT is only authorized to issue such
9 permits if they are in the public interest. MCA § 61-10-121. MDT's
10 regulations place limitations on issuance of such permits, and the type of
11 travel impacts a project may cause, to protect the safety of the traveling
12 public and highway infrastructure. See ARM 18.8.602(4), 18.8.1101(6),
13 18.8.1101(13)(g). MDT approved the KMTP without adequately assessing
14 whether the project is within the public interest, and in the face of evidence
15 that the regulatory requirements will be violated and the project will have
16 adverse impacts to the public interest. MDT's approval of the KMTP thus
17 violates MCA 61-10-121, and implementing regulations.

18 5. Plaintiffs request that this Court declare the KMTP EA and FONSI
19 inadequate under MEPA, enjoin issuance of any permits for the project,
20 and declare any existing permits *void ab initio*, which includes permits for
21 construction or alteration of infrastructure necessary to transport the
22 oversize loads, as well as permits for the actual transportation of IO's Kearn
23 modules through Montana, until MDT prepares an analysis that adequately
24 recognizes and analyzes the environmental impacts of the KMTP and
25 reviews a reasonable range of alternatives.

26 6. Plaintiffs also request this Court declare the KMTP EA and FONSI
inadequate under MEPA, enjoin issuance of any permits for the project,

1 and declare any existing permits *void ab initio* until MDT prepares an EIS
2 for the KMTP.

3 7. Plaintiffs further request this Court declare the KMTP EA and
4 FONSI unlawful and set aside the decision, because the decision-making
5 process used by MDT deprived Montanans of their rights to know and to
6 participate in government decisions as required by the Montana
7 Constitution and MEPA.

8 8. Plaintiffs also request this Court declare the KMTP EA and FONSI,
9 and any associated permits unlawful as violative of MCA Sec. 61-10-121,
10 ARM 18.8.1101(6), and 18.8.1101(13)(g), and enjoin issuance of such
11 permits and declare any issued permits *void ab initio* because the project
12 and permits are not in the public interest and MDT has not demonstrated
13 that the permits are in the public interest or that its travel plan will ensure
14 compliance with highway safety regulations.

14 II. PARTIES

15 A. Plaintiffs

16 9. Missoula County ("County"), is a political subdivision of the State of
17 Montana. The KMTP will traverse the entire length of Missoula County
18 along U.S. Highway 12, U.S. Highway 93, Interstate 90, and Montana
19 Highway 200. The KMTP is of concern to Missoula County because of its
20 potential impacts to the people and environment of Missoula County.

21 10. The National Wildlife Federation ("NWF") is the nation's largest
22 conservation, advocacy, and education organization. In 1981, NWF opened
23 the Northern Rockies and Prairies Regional Center in Missoula, one of nine
24 regional offices. NWF's members visit and use the areas that the KMTP
25 impacts. In addition to the significant Montana impacts of the KMTP, NWF

1 is deeply concerned with the exploitation of the Alberta tar sands. The
2 interests of NWF's members will be adversely affected by the KMTP and
3 the expansion of tar sand petroleum production.

4 11. The Montana Environmental Information Center ("MEIC") is an
5 environmental organization with its headquarters in Helena, Montana.
6 MEIC is a Montana nonprofit corporation, founded in 1974, comprised of
7 approximately 3,000 members, most of whom live in Montana. MEIC's
8 members visit and use the areas that the KMTP impacts. Due to the
9 potential for economic, environmental, and community impacts along the
10 proposed route, MEIC's members will be adversely impacted by the KMTP.

11 12. The Sierra Club ("SC") was founded in 1892, and is the oldest and
12 largest non-profit environmental organization in the United States. The
13 Montana Chapter of the Sierra Club has approximately 1,900 members, all
14 of whom are also national SC members. The KMTP is of concern to the
15 SC because its members visit and use areas that the project will impact,
16 and because its end-goal of expanding development of the tar sands in
17 Alberta, Canada, is likely to adversely impact resident communities, wild
18 places, and the planet.

19 13. The County of Missoula, the National Wildlife Federation, the
20 Montana Environmental Information Center and the Montana Chapter of
21 the Sierra Club all submitted comments on the Draft EA for the KMTP, as
22 did individual citizens and members of each organization. These
23 comments generally expressed concerns about the impacts the KMTP
24 would have on the local economy and environment, criticized the adequacy
25 of the environmental analysis, and called for the preparation of a full
26 environmental impact statement.

1 B. Defendants

2 14. Defendant Montana Department of Transportation (“MDT”) is the
3 State agency in charge of the challenged environmental analysis, FONSI,
4 final decision, and permits for the KMTP.

5 15. Defendant Jim Lynch is the Director of the Montana Department of
6 Transportation, and, as such, directs all aspects of the Defendant MDT’s
7 operation. He is sued in his official capacity.

8 **III. JURISDICTION AND VENUE**

9
10 16. This Court has jurisdiction over Plaintiffs’ claims pursuant to MCA §
11 75-1-201(6)(a)(i) (MEPA challenge to agency action may be brought in
12 District Court); MCA § 2-4-704 (the Montana Administrative Procedures Act
13 (MAPA) standard of review for agency action); MCA § 27-19-101
14 (Preliminary Injunction); MCA § 3-5-302 (Original Jurisdiction of District
15 Courts); and the inherent power of this Court to review state agency
16 decisions and actions.

17 17. Venue is properly vested in this Court under MCA § 75-1-108
18 because a substantial part of the activity that will occur pursuant to the
19 challenged KMTP EA will occur in this district.

20 **IV. GENERAL LEGAL AND FACUTAL ALLEGATIONS**

21 A. Legal Framework

22 18. MEPA was adopted to fulfill the legislature’s “constitutional
23 obligations under Article II, section 3, and Article IX of the Montana
24 constitution,” (MCA § 75-1-102(1)), which articulate the inalienable right of
25 Montanans “to a clean and healthful environment and the rights of pursuing

1 life's basic necessities," and create the affirmative duty that "the state and
2 each person shall maintain and improve a clean and healthful environment
3 in Montana for present and future generations." MEPA further provides: " it
4 is the continuing responsibility of the state of Montana to use all practicable
5 means consistent with other essential considerations...so that the state
6 may (a) fulfill the responsibilities of each generation as trustee of the
7 environment for succeeding generations." MCA § 75-1-103(2)(a).

8 19. Modeled after the National Environmental Policy Act ("NEPA"),
9 MEPA requires all agencies of the Montana state government to take a
10 hard look at the consequences of their actions on the environment through
11 the preparation of environmental impact statements for major actions, and
12 either environmental assessments or categorical exclusions for lesser
13 actions. See MCA § 75-1-101 *et seq.*

14 20. MEPA and its implementing regulations require the agency to
15 examine the direct, secondary and cumulative impacts of a proposal, MCA
16 §§ 75-1-201, 75-1-208(11), ARM 18.2.236(7),(18), 18.2.237(2)(e), as well
17 as to analyze reasonable alternatives to the proposed action. ARM
18 18.2.239(3)(f).

19 21. Article II, Sections 8 and 9 of the Montana Constitution guarantee
20 Montanans the fundamental rights to be informed and to meaningfully
21 participate in government decisions. MEPA embodies these rights, by
22 requiring agencies to analyze and disclose information relevant to a
23 decision, and to involve the public in its decision-making process. To
24 ensure that state agencies make informed decisions, agencies must solicit
25 public and local government input, and provide the relevant information to
26 the public regarding the potential impacts a project may have. See e.g.
ARM 18.2.240(1)-(3)(EA is a public document that may be inspected upon

1 request, and public review must match level of public interest in project);
2 ARM 18.2.237 (EA may serve purpose of ensuring public review and
3 comment); 18.2.241 (scoping process to involve affected entities and
4 interested persons).

5 22. MCA §§ 61-10-121 through 61-10-125 and ARM 18.8.509 govern
6 how and when MDT may authorize, deny, limit, or set conditions upon
7 permits for oversize and overweight transport in Montana. MDT is only
8 authorized to issue such oversize and overweight permits when it is in the
9 public interest. MCA § 61-10-121.

10 23. ARM 18.8.1101(6) requires permittees not to delay traffic in excess
11 of ten minutes, and subsection (13)(g) authorizes travel only in daylight
12 hours, except where travel at other times is in the best interests of the
13 traveling public. ARM 18.8.602(4) sets forth restrictions on oversize
14 vehicles crossing bridges, requiring them to stop before crossing, and to
15 travel across the center of the bridge at a speed no higher than five miles
16 per hour.

17 B. Procedural Background

18 24. On April 8, 2010, MDT approved for distribution the first draft of the
19 KMTP EA ("Draft EA"). The Draft EA and a Transportation Plan generated
20 by the hauling company Mammoet Canada Western Ltd., including twelve
21 appendices, were released to the public on or about April 12, 2010. The
22 public comment period was open from April 12 to May 14, 2010. The Draft
23 EA is 185 pages long and the Transportation Plan, including appendices, is
24 411 pages long.

25 25. On February 7, 2011, MDT released its final decision approving the
26 KMTP EA and paving the way for granting construction and 32-J permits to
IO. Based on its EA, MDT found no significant social, economic or

1 environmental effects to any of the construction sites or for the KMTP as a
2 whole.

3 C. Description of the Project.

4 26. The equipment to be transported under the KMTP is manufactured
5 and assembled in South Korea and will be shipped across the Pacific
6 Ocean to the Port of Vancouver, Washington, then up the Columbia and
7 Snake Rivers to the Port of Lewiston, Idaho. The equipment is proposed to
8 be off-loaded in Lewiston and put on tractor-trailers and transported up US
9 Highway ("Hwy") 12, over Lolo Pass and into Montana and across about
10 300 miles of western Montana to the Canada border. The equipment is to
11 be shipped to Fort McMurray, Alberta for use in the Alberta Tar Sands strip-
mining operation.

12 27. The KMTP route through Montana follows U.S. Hwy 12 from Lolo
13 Pass to Lolo along Lolo Creek, north on U.S. Hwy 93 through Missoula to I-
14 90 east, then onto Hwy 200 at Bonner. From Bonner, the transport route
15 follows Hwy 200 east along the Blackfoot River through Lincoln and over
16 Roger's Pass to Highway 287. From the Junction of Hwy 200 and 287, the
17 transport route will follow Hwy 287 north, along the Rocky Mountain Front
18 Range, through Augusta and Choteau. From Choteau the transport route
19 follows Hwy 89 northbound until it turns east on Hwy 44 through the town of
20 Valier. From Valier, the transport route follows Hwy 358 and Hwy 2 to Cut
21 Bank. From Cut Bank, the transport route follows Hwy 213/214 to Sweet
22 Grass, MT at the US/Canada border.

23 28. The units – with modules, trailers, and push and pull tractors – will
24 be 210 feet in length or longer, and up to 24 feet in width and 30 feet in
25 height. The units will weight up to 641,866 pounds. Due to the size of the
26 loaded trailers, certain infrastructure must be built or modified to facilitate

1 passage of the loads including but not limited to: permanently raising or
2 burying utility lines at 572 locations; modifying or installing 33 traffic
3 structures (traffic signals, signs, street lights); permanently modifying 21
4 existing highway turnouts; building 54 new highway turnouts; road surface
5 work; tree trimming; and adding gravel infill to expand turning radii on
6 highways. This construction is to be undertaken by IO under construction
7 permits issued based on the KMTP FONSI and EA. The transport will
8 require 32J permits from MDT, as well as additional permits from the
9 Montana Department of Environmental Quality, the Montana Department of
10 Natural Resources and Conservation, the U.S. Environmental Protection
11 Agency, the U.S. Forest Service, the Blackfeet Nation, Pondera County,
12 MT, and the Federal Highway Administration. Some of the utility work and
13 tree trimming was completed after MDT issued the draft EA but before it
14 issued the FONSI.

15 D. The Potential Impacts of the KMTP have not been adequately
16 addressed in the EA and FONSI.

17 29. The KMTP will establish a permanent high/wide corridor along the
18 proposed route. The potential effects of this permanent corridor have not
19 been acknowledged and have not been adequately addressed in either the
20 EA or the FONSI.

21 30. The proposed project may have many impacts that were either not
22 analyzed or not adequately analyzed in the EA. Such impacts created by
23 the construction, transportation and other KMTP activities include, but are
24 not limited to:

- 25 a) adverse economic and environmental impacts to tourism and
26 associated businesses, from delays and limited access to sites along
the route, and from the perception of the scenic corridors as industrial

1 transportation corridors;

2 b) adverse impacts to emergency response, including private
3 transport of individuals with medical emergencies;

4 c) adverse impacts to the highway system such as increased wear
5 and tear to highways and bridges and other infrastructure, and the
6 increased costs to local taxpayers in the future;

7 d) adverse impacts to terrestrial wildlife from lights and noise
8 associated with the nighttime transport, and from other KMTP
9 activities;

10 e) adverse impacts to waterways, fisheries, and fish habitat due to
11 construction and increased salting and other maintenance activities for
12 the transport;

13 f) and other impacts to landowners, visitors, and the environment.

14 31. MDT has approved IO's development and use of the proposed route
15 for the purpose of transporting equipment to be used for tar sands mining
16 and processing in Alberta. MDT did so without disclosing or analyzing the
17 impacts to climate change and consequently to Montana's environment
18 from tar sands mining, and other activities of the KMTP. These effects
19 should have been thoroughly analyzed in the EA and FONSI as potential
20 impacts of the KMTP.

21 E. Alternatives to the Approved KMTP Route were not adequately
22 considered and analyzed in the EA and FONSI.

23 32. IO seeks to transport specialized equipment from Korea to Alberta,
24 Canada, as part of its "global execution strategy" to develop the Kearl
25 Project, a development in the tar sands of Alberta, Canada.

26 33. MDT only analyzed two alternatives in its EA – the proposed
alternative, and a no action alternative, and dismissed all other alternatives

1 as "infeasible." The total analysis of alternative routes consisted of five
2 brief paragraphs in the EA. MDT stated in its EA that IO had identified *only*
3 *one* feasible route to transport its equipment from Korea to Fort McMurray
4 in Alberta, Canada, and that was the proposed route.

5 34. Other routes exist for transporting equipment from Korea to the tar
6 sands in Alberta. Two other routes have been used for this purpose; one
7 from the Port of Houston, TX, to Alberta, and a Canadian route via Thunder
8 Bay and the St. Lawrence Seaway. MDT did not mention these existing
9 routes in the EA.

10 35. MDT mentioned but rejected from analysis other routes through the
11 U.S. and through Canada on the interstates. The routes were not identified
12 adequately enough to determine whether they are feasible and should have
13 been included as alternatives. MDT identified possible routes through
14 Canada by highway number, but did not even identify the potential
15 alternate U.S. routes by highway number, before rejecting them from
16 further consideration.

17 36. MDT rejected the other potential routes because of existing
18 overpasses and bridges identified as obstructions. However, MDT did not
19 analyze the cost or feasibility of reconstructing or modifying these
20 structures to accommodate the KMTP.

21 37. MDT also rejected other routes from consideration as alternatives,
22 and did not consider alternative configurations of the modules that may
23 have avoided the need for extensive infrastructure changes on the
24 alternate and selected routes, because it concluded the loads were
25 indivisible.

26 38. The EA and FONSI do not contain analysis of how the conclusion
was reached that the loads could not be downsized and that the only

1 feasible alternative was the proposed route with proposed infrastructure
2 changes. Despite MDT's conclusory assertions that no alternatives existed
3 because the loads could not be downsized, on February 16, 2011, IO
4 announced that it was dividing and downsizing several of its modules for
5 shipment on interstate highways.

6 F. Impacts of the Project on the Public Interest were not adequately
7 considered by MDT and the Project is not in the Public Interest.

8 39. MDT is only authorized to issue 32J permits if doing so is in the
9 public interest. MDT did not conduct any inquiry specifically regarding how
10 the project would impact the public interest, and did not include a finding or
11 conclusion in the FONSI or EA that the project is indeed in the public
12 interest.

13 40. Numerous adverse impacts to the public interest are likely to occur
14 if the KMTP proceeds. These adverse impacts include but are not limited
15 to: impacts to tourism and recreation along the route; impacts to
16 emergency response and access; increased wear and tear to the roads
17 and the associated expenses to local taxpayers that would likely accrue;
18 increased sedimentation to waterways and associated impacts to fisheries
19 and recreational uses; and other impacts.

20 41. Additionally, MDT's Travel Plan does not ensure IO will adhere to
21 regulatory requirements that the traveling public not be delayed in excess
22 of ten minutes, and does not justify the increased safety risks of nighttime
23 travel, and other regulatory concerns. See ARM §§ 18.8.1101(6),(13)(g),
24 18.8.602(4).

1 **V. VIOLATIONS OF LAW**

2 **COUNT ONE**

3 **MDT Violated and is Violating MEPA by Failing To Adequately**
4 **Consider and Disclose Impacts of the KMTP in its EA.**

5 42. Plaintiffs reallege and reassert all previous paragraphs as if set forth
6 in full herein.

7 43. MEPA requires MDT to take a "hard look" at the consequences of
8 proposed actions. MCA § 75-1-101 *et seq.* MDT's EA and FONSI did not
9 adequately analyze and disclose the direct, secondary and cumulative
10 impacts of the KMTP.

11 44. MDT failed to acknowledge or analyze impacts to emergency
12 response in the EA. In the FONSI, MDT added 35 pages of emergency
13 response plans addressing 4 separate emergency scenarios. These
14 emergency response plans do not adequately disclose or address potential
15 impacts of the included scenarios or other emergency scenarios that may
16 occur.

17 45. MDT also failed to analyze or disclose impacts associated with the
18 establishment of a permanent industrial transportation corridor. MDT
19 improperly failed to disclose and analyze direct, secondary and cumulative
20 impacts associated with the increased use, the likely permanency of the
21 changes to the corridor and its character, and other impacts likely to occur
22 as a result of creating a permanent high/wide industrial transportation
23 corridor.

24 46. MDT also failed to analyze or to adequately analyze and disclose
25 other relevant impacts, including but not limited to: facilitating accelerated
26 global climate change through increased development of tar sands mining
and processing in the Athabasca tar sands; impacts to rivers and streams

1 along the route from construction and additional maintenance and potential
2 crashes or other incidents; impacts to native and protected fish and wildlife
3 species and their critical habitat; adverse impacts to the economy
4 associated with traffic delays, and the altered character of the currently
5 scenic and recreational corridor; and other relevant impacts.

6 47. MDT thus failed to take the requisite "hard look" at all relevant and
7 potentially significant impacts, and its decision to approve the KMTP based
8 on the EA and FONSI is arbitrary and capricious and contrary to MEPA and
9 its implementing regulations.

10 **COUNT TWO**

11 **MDT Violated and is Violating MEPA by Failing to Consider a Full** 12 **Range of Reasonable Alternatives for the KMTP.**

13 48. Plaintiffs reallege and reassert all previous paragraphs as if set forth
14 in full herein.

15 49. MEPA requires that MDT include in its EA a full description and
16 analysis of reasonable alternatives to the proposed action. MCA §§ 75-1-
17 201 (1)(b)(i)(B). *See also* ARM 18.2.239(3)(f), and ARM 18.2.236(2).

18 50. MDT failed to consider reasonable alternatives in the KMTP EA,
19 including "reasonably available" alternatives and "realistic and
20 technologically available" alternatives that would "appreciably accomplish
21 the same objectives or results of the proposed action", as required by
22 MEPA and implementing regulations. ARM 18.2.239(3)(f); 18.2.236(2).

23 51. In failing to describe and analyze alternatives to the selected
24 alternative, MDT has prevented the public from providing meaningful
25 comment and violated MEPA's "hard look" requirement and acted
26 arbitrarily, capriciously, and unlawfully in issuing the KMTP EA and FONSI.

1 **COUNT THREE**

2 **MDT Violated and is Violating MEPA by Failing to Prepare an**
3 **Environmental Impact Statement for the KMTP.**

4 52. Plaintiffs reallege and reassert all previous paragraphs as if set forth
5 in full herein.

6 53. MEPA, MCA §§ 75-1-201 *et seq.*, and MDT's regulatory guidance
7 for implementing MEPA, ARM §§ 18.2.201-18.2.261, require preparation of
8 an EIS for "major actions of state government significantly affecting the
9 quality of the human environment." MCA § 75-1-201(b)(iv).

10 54. Information contained in the EA and FONSI, and the information
11 brought to MDT's attention but not analyzed and disclosed (or inadequately
12 analyzed and disclosed) indicates the project is likely to have significant
13 impacts on the human environment and thus requires MDT prepare an EIS
14 instead of an EA.

15 55. Potentially significant impacts include but are not limited to impacts
16 such as facilitating accelerated global climate change through construction
17 and transport activities and from increased development of tar sands
18 mining and processing in the Athabasca tar sands; impacts to rivers and
19 streams along the route from construction, increased sedimentation,
20 potential for accidents toppling the massive loads into a river or stream,
21 and other impacts; impacts to protected fish and wildlife species and their
22 critical habitat; impacts to cultural and historic resources along the route;
23 impacts to the economy associated with traffic delays, and the altered
24 character of the currently scenic and recreational corridor; impacts to
25 emergency response, public safety, and other relevant impacts. Each of
26 these impacts is likely to be significant, and thus requires preparation of an
EIS to adequately analyze and disclose the impacts of the project.

1 56. In addition to the above impacts which are likely to be significant as
2 a result of the development work and transport of the KMTP modules,
3 these and other impacts are likely to be amplified by the establishment of a
4 permanent high and wide industrial transport corridor. MDT did not analyze
5 and disclose the impacts of creating a permanent industrial corridor along
6 the KMTP route, despite other oil companies already seeking to use the
7 corridor after it is constructed through the KMTP. These direct, secondary
8 and cumulative impacts were not analyzed and are likely to be significant.

9 57. MDT violated MEPA by failing to prepare an EIS to take the
10 requisite "hard look" at the significant impacts of creating a permanent
11 industrial transport corridor through Montana's wild, scenic, and culturally
12 significant highway, river, and mountain corridors, and at the other likely
13 significant impacts associated with the KMTP, and its decision to issue a
14 FONSI instead of prepare an EIS is arbitrary, capricious and not in
15 accordance with law.

16 **COUNT FOUR**

17 **MDT Violated and is Violating the Public's Right to Know and to**
18 **Participate in the KMTP Decision under the Montana Constitution and**
19 **MEPA, by Failing to Provide the Public Important Information relevant**
20 **to the KMTP, and Depriving Citizens of Meaningful Participation.**

21 58. The previous paragraphs are realleged as though set forth in full
22 hereunder.

23 59. The Montana Constitution guarantees Montanans the right to
24 participate in their government, and to be fully informed of what their
25 government is doing. MEPA contains provisions to facilitate public
26 participation, in recognition of those fundamental constitutional rights.

1 Montana Constitution Article II, Sections 8 and 9; MCA § 75-1-101 *et seq.*;
2 ARM 18.2.236 *et seq.*

3 60. To meet the public information and participation requirements of
4 MEPA and the Montana Constitution, MDT must provide important pieces
5 of information relevant to the project to the public before a final decision is
6 made, and while the public has an opportunity to review and respond to
7 such information.

8 61. MDT failed to provide important pieces of information about the
9 project to the public during the public comment period on the draft EA, and
10 during the public hearings in April, 2010. Information MDT should have
11 provided for the public and local governments to review and comment upon
12 includes but is not limited to: emergency scenarios and emergency
13 response plans; other potential oversize transport using the same route
14 being discussed with MDT by other major oil companies; permits required
15 from the Federal Highway Administration, the USFWS, USFS, and any
16 other permits or approvals not disclosed in the EA; and potential impacts to
17 the rivers and streams from the construction, additional maintenance and
18 snow removal, deicing, and other activities.

19 62. MDT's failures to disclose and provide information to the public and
20 local governments until long after public comment was closed and the final
21 decision was made, deprived citizens of their rights to know and to
22 participate, in violation of the Montana Constitution and MEPA, and such
23 actions were arbitrary and capricious and not in accordance with law.

24 **COUNT FIVE**

25 **MDT Violated and is Violating MCA 61-10-101 to 61-10-106, 61-10-110,**
26 **and 61-10-121 and regulations by Approving the KMTP to Allow**

1 67. MDT's decision and the travel plan prepared by IO, does not take
2 into account time to stop at each bridge and cross at the low speed of five
3 miles per hour in calculating the delays IO's transportation under the KMTP
4 would cause to other traffic. Nor does MDT adequately explain how such
5 delays, and travel during nighttime hours will not adversely impact the
6 traveling public and public safety.

7 68. All the adverse impacts and concerns identified by the public
8 through comments and other means, and the impacts evident through the
9 EA and FONSI, indicate approval of the KMTP and the 32J permits
10 associated with it, is not in the public interest.

11 69. Consequently, MDT's action in approving the KMTP without
12 preparing an EIS to assess all the impacts to the public interest, and
13 approving the KMTP when evidence demonstrates it is not in the public
14 interest and the project will not adhere to regulatory mandates, is arbitrary,
15 capricious, unlawful, and not in the public interest.

16 VI. PRAYER FOR RELIEF

17 WHEREFORE, Plaintiffs respectfully request that, for each of
18 the claims plead herein, this Court:

19 1. Declare that MDT's decision to issue the EA and FONSI and
20 approve the KMTP is arbitrary, capricious, and unlawful, and set aside the
21 decision;

22 2. Declare that MDT's process and decision to issue the EA and
23 FONSI and approve the KMTP violates citizens' rights to know and
24 participate under the Montana Constitution and MEPA, and set aside the
25 decision;

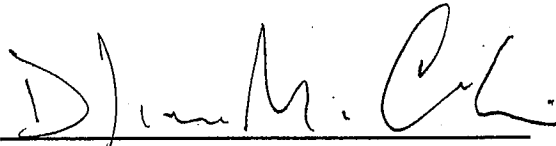
26 3. Issue an order instructing MDT to prepare an EIS for the KMTP;

1 4. Issue an order enjoining MDT from issuing permits, and/or declaring
2 any existing permits *void ab initio*, until such time as MDT complies with
3 MEPA, the Constitution, and statutes and regulations governing issuance
4 of such permits;

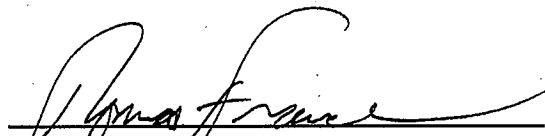
5 5. Award Plaintiffs their reasonable costs and attorney fees,
6 associated with this litigation; and

7 6. Grant any such further relief as this Court may deem just and
8 proper.

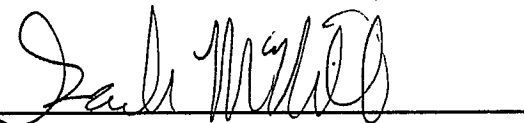
9 RESPECTFULLY submitted this 1ST APRIL day of ~~March~~, 2011.

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