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16 MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

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

Cause. No. DV-11-424
Dept. No. 3

20 Plaintiffs,)
vs.)

**PLAINTIFFS' BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION**

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

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I. INTRODUCTION

1
2 Plaintiffs submit this brief in support of their motion to preliminarily
3 enjoin the Montana Department of Transportation ("MDT") from issuing
4 special permits ("32-J permits") to Imperial Oil/Exxon Mobil ("IO") for the
5 Kearsarge Module Transport Project ("KMTP") and encroachment permits for
6 construction of permanent highway infrastructure modifications. The KMTP
7 is a project for the overland transport of 207 over-dimensional (height, width,
8 length and weight) loads through Montana from the Montana-Idaho state line
9 at Lolo Pass in Missoula County to the United States-Canada international
10 border at Sweet Grass, Toole County, Montana. The KMTP is proposed by
11 IO for the transportation of industrial equipment to be used in the tar sand
12 mining and production process in northeastern Alberta, Canada, a process
13 that significantly contributes to global warming, habitat destruction, and
14 environmental injustice to Canada's First Nations' people.

15 In their Complaint, Plaintiffs allege that MDT failed to consider the
16 impacts of the KMTP, failed to prepare relevant information and allow
17 comment, failed to prepare an Environmental Impacts Statement ("EIS")
18 when impacts may significantly impact the human environment, failed to
19 adequately consider alternatives to the KMTP, and failed to demonstrate
20 that issuance of KMTP 32-J permits would be in the public interest. Plaintiffs
21 allege that these failures result in violations of: the Montana Environmental
22 Policy Act (MEPA), MCA § 75-1-201 *et seq.*; MDT's regulatory guidance for
23 implementing MEPA, ARM §§ 18.2.201-18.2.261; Montana Constitution
24 Article II, Sections 8 and 9; and statutory and regulatory guidance for
25 issuance of 32-J permits, MCA § 61-10-101 *et seq.*, ARM §§ 18.8.101 *et*
26 *seq.*

27 Plaintiffs seek preliminary relief pending resolution of this lawsuit and
28 until MDT considers the direct, secondary and cumulative impacts of the

1 KMTP and considers reasonable alternatives to the KMTP as required by
2 MEPA, and ensures compliance with the Constitution and the agency's
3 statutes and regulations. Accordingly, to prevent irreparable harm to the
4 Plaintiffs' and the public's protected interests in wildlife conservation, safe
5 communities, healthy river ecosystems, recreation, a vibrant Montana
6 economy, minimizing human-induced climate change/global warming, and
7 because Plaintiffs are likely to succeed on the merits of their Complaint,
8 Plaintiffs respectfully ask this Court to enjoin MDT from issuing permits or
9 otherwise allowing the project to proceed pursuant to the KMTP Finding of
10 No Significant Impact, February 2011, pending resolution of Plaintiffs'
11 challenges on the merits.

12 **A. Description of the KMTP**

13 On April 8, 2010, MDT approved the KMTP environmental assessment
14 ("EA"), opening a public comment period with a closure date of May 14,
15 2010. Exh. 1,¹ *KMTP EA*, signature page (the Exhibits are provided to the
16 Court as pdf formatted documents on the attached CD). Published with the
17 EA, and incorporated by reference, was the *Imperial Oil Resources Ventures*
18 *Limited Module Transport, Montana Transportation Plan* ("*Transportation*
19 *Plan*") generated by Mammoet Canada Western Ltd., including twelve
20 appendices. Exh. 2, *Transportation Plan*. On February 7, 2011, MDT
21 published the KMTP FONSI. Exh. 3, *KMTP FONSI*, signature page. The
22 KMTP FONSI is a final agency decision approving the KMTP and
23 determining that the KMTP will have no significant impact on the human
24 environment. *Id.*

25 ¹ Exhibits 1-34 are attached hereto in pdf document format on the attached CD; Exhibits
26 25 and 27, MDT Director Jim Lynch presentations to the Montana Legislature's Interim
Revenue and Transportation Committee, are attached as separate DVDS; all original
affidavits referred to herein are attached to this brief with pdf document format copies
included on the attached Exhibit CD. Paper copies of exhibits provided upon request.

1 The KMTP modules will be manufactured in South Korea, shipped to
2 the Port of Vancouver and barged up the Columbia and Snake Rivers to
3 Lewiston, ID. *KMTP EA*, p. S-1. The equipment will be then transported
4 overland through Idaho and up US Highway 12 along the Clearwater and
5 Lochsa Rivers, over Lolo Pass and into Montana, down from the pass along
6 Lolo Creek, through Missoula, along the Blackfoot River and over Roger's
7 Pass, then north along the Rocky Mountain Front Range to the Canada
border. *Id.*

8 Including modules, trailers, and push and pull tractors, the units will be
9 210 feet or longer in length, up to 30 feet high, 24 feet wide and weigh up to
10 641,866 pounds. *Transportation Plan*, Appendix 7. Up to two modules per
11 day will be moved over a period of twelve months, negotiating narrow and
12 winding two-lane Montana roads and crossing two mountain passes, at
13 night, during all seasons, with the return of unloaded trailers during daylight
14 hours. *KMTP EA*, pp. 11-12. The Montana Highway Patrol has privately
15 contracted with IO to escort each load with two state troopers, and pilot
vehicles will precede and follow each load. *Id.*, p. 14.

16 To facilitate passage of such massive loads along Montana's two-lane
17 highways, the FONSI permits IO to modify highway infrastructure including:
18 raising or burying utility lines at 572 locations; modifying or installing 33
19 traffic structures (traffic signals, street lights, signs); building 54 new highway
20 turnouts and expanding 21 existing turnouts; some re-surfacing of roads in
21 Glacier County; and tree trimming. *Id.*; p. S-1; *KMTP FONSI*, p. 22. Some
22 of these construction activities require the issuance of permits from federal,
23 state and tribal agencies. *Id.* at p. 3, Table 2. The EA states that
24 construction of the project will need additional permits, including a special
25 use permit from the USDA Forest Service ("USFS") for utility modifications
26

1 within existing right-of-way on certain USFS lands. *Id. at p. 3, pp. 61-64;*
2 *KMTP FONSI*, pp. 8, 22.

3 MDT determined that "due to the volume of the proposed modifications
4 [including the 572 utility relocations], the need for analysis to determine if the
5 actions could cumulatively adversely impact the natural or human
6 environment and the desire to ensure appropriate public involvement, MDT
7 concluded that the preparation of an EA was the appropriate means to
8 demonstrate compliance with MEPA." *KMTP EA*, pp. 2-3. Notwithstanding
9 this statement, upon information and belief, most of the "raising or burying
10 utility lines at 572 locations" necessary for the KMTP was completed prior to
11 completion of the MEPA environmental review process.

11 **B. Plaintiffs' Participation in the KMTP EA Comment Period**

12 As early as April 29, 2010, Plaintiffs' staff and members attended
13 hearings on the KMTP and expressed their objections to the narrow scope
14 of environmental issues considered by MDT, including MDT's failure to
15 consider the possibility of accident scenarios involving the units, adverse
16 impacts to emergency response, adverse impacts on Montana's outdoor
17 recreation-based economy, and impacts to Montana of facilitating tar sands
18 development in northeastern Alberta, Canada. On or about May 12-14,
19 2010, Plaintiffs submitted written public comments to MDT objecting to the
20 KMTP. *KMTP FONSI*, pp. D-373, D-386, D-633.

21 With the FONSI, MDT released an amended *Transportation Plan*
22 including an *Incident Specific Emergency Response Plan* ("ERP"), generated
23 by IO's transport contractor after close of the public comment period. Exh.
24 4, ERP. The ERP identifies four scenarios that may arise during the
25 transport of the KMTP modules: Jack-Knifing of the Transporter; Load
26 Sliding Partially Off the Trailer; Overturning of the Load and Transporter in
Water; and Private Vehicle in an Emergency Situation. *ERP*, §§ 3.0-6.0.

1 In the ERP, MDT purports to assess KMTP impacts. The public,
2 however, had no opportunity to review the ERP and comment on the level of
3 significance assigned to the impacts or the efficacy of proposed mitigation
4 measures and response actions.

5 II. ARGUMENT

6 A. Preliminary Injunction Standard of Review

7 A preliminary injunction is not intended to resolve the merits of a case
8 but rather "prevents further injury or irreparable harm by preserving the
9 status quo of the subject in controversy pending an adjudication of its
10 merits." *Four Rivers Seed Co. v. Cir. K Farms, Inc.*, 303 Mont. 342, 345, 16
11 P.3d 342 (2000). In reviewing a request for a preliminary injunction, "the
12 court has a duty to balance the equities and minimize potential damage." *Id.*
13 A District Court is vested with a high degree of discretion to maintain the
14 status quo through injunctive relief. *Schammel v. Canyon Resources Corp.*,
15 2003 MT 372, ¶12, 319 Mont. 132, ¶12, 82 P.3d 912, ¶12. A preliminary
injunction may be granted under the following circumstances, quoted in
pertinent part:

- 16 (1) when it appears that the applicant is entitled to the relief
17 demanded and the relief or any part of the relief consists in
18 restraining the commission or continuance of the act complained
of, either for a limited period or perpetually;
- 19 (2) when it appears that the commission or continuance of some
act during the litigation would produce a great or irreparable
injury to the applicant;
- 20 (3) when it appears during the litigation that the adverse party is
21 doing or threatens or is about to do or is procuring or suffering to
22 be done some act in violation of the applicant's rights, respecting
the subject of the action, and tending to render the judgment
ineffectual . . .

23 Mont. Code Ann. § 27-19-201.

24 These provisions are disjunctive, "a party seeking an injunction must
25 establish a basis for relief under only one subsection." *Pinnacle Gas*

1 *Resources v. Diamond Cross, LLC*, 2009 MT 12, ¶23, 349 Mont. 17, ¶23,
2 201 P.3d 160, ¶23. An applicant for a preliminary injunction must establish
3 a prima facie case "or show that it is at least doubtful whether or not he will
4 suffer irreparable injury before his rights can be fully litigated." *Porter v. K &*
5 *S Partnership*, 192 Mont. 175, 181, 627 P.2d 836 (1981).

6 In deciding whether an applicant has established a prima facie case, a
7 court should determine "whether a sufficient case has been made out to
8 warrant the preservation of the property or rights in the status quo until trial,
9 without expressing a final opinion as to such rights." *Id.*

10 The United States Supreme Court enunciated a standard for
11 irreparable harm and injunctive relief in cases involving environmental
12 protection: "[I]f such injury is sufficiently likely, . . . an injunction to protect the
13 environment" is usually favored. *Amoco Production Co. v. Village of*
14 *Gambell*, 480 U.S. 531, 545 (1987). While irreparable damage may not be
15 automatically presumed in these cases, "[e]nvironmental injury, by its nature,
16 can seldom be adequately remedied by money damages," and therefore
17 injunctive relief is usually appropriate. *Id.* Environmental harm warrants
18 injunctive relief when a state's environmental review documents are
19 insufficient and therefore arbitrary. *Friends of the Wild Swan v. Department*
20 *of Natural Resources*, 2000 MT 209, 301 Mont. 1, 6 P.3d 972.

21 In the present case, Plaintiffs can establish a prima facie case that
22 they are reasonably likely to succeed on the merits and that, absent
23 injunctive relief, irreparable injury to Plaintiffs' interests is likely to occur. To
24 maintain the status quo and ensure MDT has the opportunity to analyze all
25 the potential impacts of this project, MDT should be enjoined from issuing
26 permits or otherwise allowing the project to go forward. If no injunction is
issued, this litigation may well not be resolved until the KMTP construction is-

1 completed and IO modules are moving, resulting in many of the impacts
2 described herein.

3 In this case, the Court will ultimately determine whether MDT violated
4 MEPA, the agency's 32-J permitting statutes and regulations, and the
5 constitutional rights of the public to know and participate. Granting a
6 preliminary injunction will maintain the status quo, "minimize potential
7 damage" (*Four Rivers Seed Co., supra*), and is therefore appropriate.

8 **B. Plaintiffs are Likely to Prevail on the Merits.**

9 **1. MEPA Background and Standard of Review.**

10 MEPA is intended to implement "preventative and anticipatory"
11 constitutional environmental rights and imposes proactive obligations on the
12 government to protect the environment. MCA § 75-1-102; *Montana*
13 *Environmental Information Center v. Department of Environmental Quality*,
14 988 P.2d 1236, 1246 (1999); Montana Constitution Article IX, Section 1;
15 *Cape-France Ent. v. Estate of Lola Peed*, 2001 MT 139, 305 Mont. 513, 29
16 P.3d 1011.

17 Article II, Section 3 of the Montana Constitution establishes an
18 inalienable individual right to a clean and healthful environment while Article
19 IX, Section 1 requires the State and each person to maintain a clean and
20 healthful environment for present and future generations. The rights in
21 Article II, Section 3 and Article IX, Section 1 are conjoined, providing
22 substantive constitutional rights and duties.

23 MEPA is a principal tool through which the State seeks to ensure
24 constitutional guarantees are recognized and integrated into every decision
25 affecting the environment. MEPA also effectuates Montana Constitution's
26 Article II, Sections 8 and 9 rights to participate and know, containing
procedural requirements for disclosure of environmental impacts and

1 participation by citizens, including the right to comment on actions before
2 final decisions are made.

3 Modeled after the National Environmental Policy Act (NEPA), MEPA
4 requires all agencies of the Montana state government to take a "hard look"
5 at the consequences of their actions on the environment through the
6 preparation of EIS's for major actions, and either environmental
7 assessments or categorical exclusions for lesser actions. See MCA § 75-1-
8 101 *et seq.*, *Ravalli County Fish and Game Association v. Montana Dept. of*
9 *State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (Mont. 1995).
10 Because MEPA is modeled on NEPA, Montana courts find federal case law
11 persuasive in analyzing whether MEPA requirements are met. *Id.* 273 Mont.
12 at 377. As an agency of the State of Montana, MDT has a legal
responsibility to comply with the requirements of MEPA.

13 A court reviews agency decisions under MEPA to determine whether
14 such decisions are arbitrary or capricious. *North Fork Preservation*
15 *Association v. Department of State Lands*, 238 Mont. 451, 465, 778 P.2d
16 862, 871 (1989); *Montana Environmental Information Center v. Montana*
17 *Department of Transportation*, 298 Mont. 1, par. 12, 994 P.2d 676, par. 12.
18 An agency decision is "arbitrary or capricious" if the agency did not consider
19 a relevant factor, and when there is a "clear error of judgment." *Id.* An
20 agency must "articulate a satisfactory explanation for its action including a
21 'rational connection between the facts found and the choice made,'" and the
22 court should "consider whether the decision was based on a consideration of
23 the relevant factors and whether there has been a clear error of judgment."
24 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463
25 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983)(citations omitted); see also
26 *Nat'l Wildlife Fe'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th
Cir. 2004). An agency does not satisfy the "hard look" requirement by

1 including "narratives of expert opinions" or "conclusory" statements about
2 the level or absence of impacts from a project. *Klamath-Siskiyou Wildlands*
3 *Center v. Bureau of Land Management*, 387 F.3d 989, 995-96 (9th Cir. 2004)
4 (holding EAs inadequate where EA did not consider degree that each factor
5 would be impacted, and included conclusory statements that impacts would
6 be significant). While the ultimate standard of review is a narrow one, the
7 court's review into the agency's decision must "be searching and careful."
8 *MEIC v. MDT*, 298 Mont. 1, par. 12, 994 P.2d 676, par. 12 (citing *Marsh v.*
9 *Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104
L.Ed.2d 377)(1989).

10 **2. The EA Fails To Adequately Identify and Consider Potential** 11 **Impacts**

12 MEPA and its implementing regulations require the agency to examine
13 the direct, secondary and cumulative impacts of a proposal, including effects
14 on terrestrial and aquatic life and habitats; water quality, quantity, and
15 distribution; geology; soil quality, stability, and moisture; vegetation cover,
16 quality and quantity; aesthetics; air quality; unique, endangered, fragile, or
17 limited environmental resources; historical and archaeological sites; and
18 demands on environmental resources of land, water, air, and energy. Admin.
R. Mont. 18.2.239(3)(d).

19 Secondary impact is defined as "a further impact to the human
20 environment that may be stimulated or induced by or otherwise result from a
21 direct impact of the action." Admin. R. Mont. 18.2.236(18). Cumulative
22 impact means "the collective impacts on the human environment of the
23 proposed action when considered in conjunction with other past and present
24 actions related to the proposed action by location or generic type." Admin.
R. Mont. 18.2.236(7).

1 While an EA must include mitigation measures and appropriate
2 description thereof (A.R.M. 18.2.239(3)(g)), that mitigation discussion does
3 not obviate the requirement that MDT discuss direct, secondary and
4 cumulative impacts, as required by 18.2.239(3). MDT's analysis of
5 environmental impacts "must be more than perfunctory; it must provide a
6 'useful analysis of the cumulative impacts of past, present, and future
7 projects.'" *Ocean Advoc. v. U.S. Army Corps of Eng.*, 402 F.3d at 868 (9th
8 Cir. 2005).

8 **a. Economic Impacts**

9 According to Dr. Steve Seninger, Ph.D., a senior research professor at
10 the Bureau of Business and Economic Research at the University of
11 Montana, the "EA is inadequate and incomplete by professional standards of
12 economic impact and cost analysis" and "contains inadequate information
13 and documentation for making the major decision that the Kearl Module
14 Transport Project represents." Exh. 5, Affidavit of Steve Seninger, Ph.D., at
15 ¶ 5.

16 In Section 3.6 of the KMTP EA, by describing IO's costs of
17 implementing the KMTP as "Direct Value," MDT improperly conflates IO's
18 costs of implementing a project undertaken for its own economic benefit with
19 alleged benefits to the people of Montana. *KMTP EA*, § 3.6, pp. 24-34;
20 Table 15; p.26. As stated by Dr. Seninger,

21 Counting costs as benefits is an invalid economic measure
22 resulting in misleading conclusions on the economic value of the
23 KMTP to Montana and Missoula County.

24 * * *

25 These various modifications have not been identified by the
26 State of Montana, to my knowledge, as projects necessary for
highway safety or ease of travel for the general public but are
proposed solely to facilitate the KMTP and thus to enhance the
profitability of Imperial Oil/Exxon-Mobil's tar sands operations in
northern Alberta, Canada.

1 *Id.* at ¶ 7, 8.

2 The KMTP may result in a limited number of part-time jobs with no
3 guarantee that Montanans will be employed in those jobs. *Id.* at ¶ 9. But
4 MDT also counts all of IO's costs of the KMTP, including supplies,
5 equipment, and overhead outsourced to other states or countries, as
6 benefits to Montanans. *KMTP EA*, Table 15, fn. 1. MDT compounded this
7 error by entirely failing to identify and analyze actual and identifiable
8 economic costs to Montana that may result from the KMTP, including:

- 9 • Job and business revenue losses in Missoula County's travel, outdoor
10 recreation and tourism industry; *Id.* at ¶¶ 10-17;
- 11 • Costs to Missoula County and Montana taxpayers due to potential
12 accidents during transport, traffic delays encountered by routine users
13 and costs associated with disruption of emergency services; *Id.* at ¶¶
14 19-23;
- 15 • Costs for MDT review, supervisory and road maintenance
16 expenditures for the project. *Id.* at 24.

17 A credible economic benefits analysis would consider the potential
18 costs of a project, weighed against actual benefits. Absent such an
19 accounting "these costs are ultimately paid for by Montana taxpayers . . . the
20 omitted costs to Montana taxpayers represent a subsidy to IO's tar sand
21 operations in Canada." *Id.*

22 Many Missoula County businesses utilize the KMTP route and turnouts
23 along the route regularly to access rivers, biking, hiking and horse trails.
24 Their business uses will likely be negatively impacted by the KMTP, but
25 such impacts were not analyzed and disclosed by MDT. Affiant SuzAnne
26 Miller owns and manages Dunrovin Ranch. Exh. 6, Affidavit of SuzAnne
Miller, ¶ 2. Among other services, Dunrovin Ranch offers:

[G]uest accommodations, equestrian training, outdoor recreation
activities such as horseback riding, fishing, canoeing, hiking,
dancing, roping, and historical and cultural tours. [They] also
offer multiple day horseback and educational trips across
Montana.

1
2 *Id.* ¶ 3. Dunrovin Ranch heavily utilizes US Highway 12 to access the Lolo
3 National Forest for guided day trips, regularly using the wider turnouts that
4 can accommodate stock trailers for parking and turnarounds, and turnouts at
5 Montana Mile Posts 3.5, 6.9, 8.4, 15.4 and 27.9. *Id.*, ¶¶ 5-6. Dunrovin
6 Ranch's operations are not restricted to Missoula County, as they utilize
7 highways 200, 287, and 89 for access to trailheads, regularly stopping at
8 large turnouts located along the route. *Id.*, ¶ 8. Further,

9 [o]ne of Dunrovin Ranch's most popular expeditions, The Big
10 Sky at Night, takes clients accompanied by a University of
11 Montana astronomer to an old Forest Service lookout for a night
12 of sky viewing through a large telescope. The lookout, the West
13 Fork Butte Lookout, is located along the Montana and Idaho
14 border, looks over nearly the entire route of highway 12 along
15 Lolo Creek, and can be access only via highway 12. This trip has
16 been written up in tourism magazines, been donated to local non
17 profits for auctions, and has generated considerable business for
18 Dunrovin beyond the actual trip. This trip requires night time use
19 between the hours of 11:00PM and 3:00AM of highway 12
20 between Mile Post 13.5 and the intersection with highway 93 at
21 Mile Post 32.5.

22 *Id.*, at ¶ 7.

23 Affiants Roberta and Barry Bartlette operate the Lolo Square Dance
24 Center and Campground. Exh. 7, Affidavit of Roberta and Barry Bartlette, ¶¶
25 1-2. They serve "square dancers and non-dancers
26 traveling in an assortment of rigs, from bicycles to large motorhomes," who
"choose Highway 12 because it is scenic, less traveled and offers
recreational opportunities that the interstate system may not offer." *Id.*, ¶ 5.

Affiant Justin Walsh owns and operates Bearpaw River Expeditions, a
Missoula based outfitting business that hosts river trips for people from all
over the state, the country and the world "to specifically access and enjoy
the attractions of our state – the mountains, rivers, and lakes that surround

1 both Idaho and Montana's Highway 12 and Montana's Hwy 200." Exh. 8,
2 Affidavit of Justin Walsh, ¶¶ 1-2.

3 Bearpaw River Expeditions and many other outdoor recreation
4 businesses heavily utilize the highways and turnouts along the KMTP route.
5 They depend on the shared use and predictable accessibility of those
6 turnouts. Any impacts of the KMTP that degrade the habitat values of these
7 rivers, their predictable accessibility, or the wild beauty, rich history, and
8 abundant wildlife accessed by these roads would detrimentally impact their
9 businesses. *Id.* at ¶¶ 2-4. Potential interference with presently existing uses
10 of the KMTP route and turnouts, and the long-term impacts on this vital
11 sector of the Missoula County and Montana economy were not adequately
12 addressed in the KMTP environmental review. Exh. 5, Seninger Affidavit, ¶¶
13 6, 10-17.

14 In the KMTP EA, MDT also purports to estimate the economic impact
15 to "commercial traffic" of serial 10-minute delays to be permitted through the
16 KMTP. MDT described an estimated "value of wait times for night-time
17 commercial traffic" through the following analysis:

18 A maximum delay of 10 minutes per modules [sic] was used in
19 the analysis for both oncoming and following traffic. It was also
20 assumed that commercial traffic would encounter delays from all
21 200 modules. This indicated that the maximum cost impact on
22 commercial traffic would be less than \$100,000 spread over the
23 duration of the module movements.

24 *KMTP EA*, p. 32. There is no analysis in the EA, FONSI or Transportation
25 Plan describing or justifying this \$100,000 estimate and the EA lacks any
26 basis for this "cost impact" of the time-value of vehicle delay during
27 construction and movement of modules.

28 "There are a total of 123 traffic clearing locations that would be
29 utilized" for the KMTP. *KMTP EA*, p.11. Assuming that the KMTP feasibly
30 will limit delays to 10 minutes, each load passing through Montana will result

1 in a delay to other highway users of almost 21 hours. See Exh. 9, Affidavit
2 of Greg Robertson, ¶ 11. For the 207 loads of the KMTP, the cumulative
3 delay to other highway users will be almost six months. If delays affect more
4 than one vehicle per turnout, the actual delay time encountered by other
5 highway users would be much higher.

6 Entities receiving 32-J permits "shall not delay traffic in excess of 10
7 minutes. The applicant shall make every possible effort to keep other traffic
8 moving at all times." ARM 18.8.1101(6). MDT's Bridge Bureau approval of
9 the KMTP requires compliance with "DW-21" conditions which refer to
10 restrictions imposed on 32-J permittees for safely crossing structures,
11 including bridges. ARM 18.8.602(4). Due to mathematical errors,
12 unsupported assumptions, and a failure to incorporate in the Transportation
13 Plan the time needed to comply with ARM 18.8.602(4), MDT failed to even
14 demonstrate the feasibility of compliance with Montana's 10-minute delay
15 rule. Exh. 9, Robertson Affidavit, ¶ 12.

16 MDT is permitting IO to cumulatively delay traffic for many months
17 over the course of the KMTP. This is a consequence of permitting this
18 necessarily exclusive use of narrow mountain roads. The EA, however, fails
19 to identify even the costs of fuel for multiple idling vehicles for six months,
20 and provides no analysis of other economic costs that could result as a
21 consequence of the time-value of the delays.

22 The costs on individuals for work trips, travel for recreation, and
23 for shopping can be significant over the one year period of the
24 project and are standard items included in any economic
25 evaluation of major transportation projects (Federal Highway
26 Administration, US Department of Transportation,
<http://www.fhwa.dot.gov/infrastructure/>).

Exh. 5, Seninger Affidavit, ¶ 21.

In the discharge of its MEPA obligations, "Article IX, Section 1 of our
Constitution clearly and unambiguously imposes upon the State the

1 obligation to 'maintain and improve a clean and healthful environment in
2 Montana for present and future generations.'" *Hagener v. Wallace*, 309
3 Mont. 473, 490, 47 P.3d 847, 858 (Mont. 2002). MEPA requires that an
4 agency be informed when it balances preservation against economic
5 benefits. ARM 18.2.238(1)(c) requires MDT to consider the "growth-
6 inducing or growth-inhibiting aspects of the impact, including the relationship
7 or contribution of the impact to cumulative impacts." The flawed economic
8 analysis and failure to discuss the detrimental impacts of this proposal on
9 local residents and users of the highways, outfitters, river guides, the tourism
10 industry and recreationalists prevented MDT from making an informed
11 decision regarding the impacts of this project.

11 **b. Impacts to the Provision of Emergency Services, to
12 Travelers, and to Area Residents**

12 In the event of fires, medical emergencies, traffic accidents, or other
13 emergent situations, effective provision of emergency services depends on
14 many factors, but key in the provision of these services is the availability of a
15 clear route to the site of the emergency, or the availability of a clear route to
16 a hospital. In the case of a medical emergency, many people do not call
17 911 and request ambulance assistance, but instead drive themselves or
18 their friends and family to the hospital. As stated by Dr. Georgia Milan:

19 Often in rural settings, patients are "self delivered," either driving
20 themselves or family/friends for medical help. In the face of an
21 emergency situation, people often feel they can reach medical
22 help faster in private vehicles than waiting for the response of an
23 ambulance or other personnel.

24 Exh. 10, Affidavit of Dr. Georgia Milan, M.D., ¶ 2.

25 Along much of the KMTP route on narrow, two-lane Montana
26 highways, exclusive use of these roads is being granted to IO and the free
flow of normal traffic will necessarily be serially interrupted during travel of
the KMTP modules. Medical emergency situations, however, will continue

1 to arise for area residents and travelers on the KMTP route during times that
2 KMTP modules make exclusive use of the highways.

3 After close of the public comment period on the KMTP EA, MDT and
4 IO recognized the unavoidable significant impacts of delaying a "private
5 vehicle in an emergency situation," concluding that such a private vehicle
6 "may be impacted." *ERP*, Section 6.5, Table 6-1, p. 30. Following her
7 review of the ERP, Dr. Milan was:

8 concerned and surprised that the opinion showed no significant
9 risks to people being transported by private vehicles on Montana
10 highways in the face of predictable and unpredictable delays. In
11 medical emergencies, time is always of the essence. Sometimes
12 "minutes" can have a significant impact on outcome and survival.

13 Exh. 10, Milan Affidavit, ¶ 3. Dr. Milan describes a few of the many medical
14 emergency situations in which an avoidable delay in treatment may result in
15 catastrophic consequences, and affiants Jean Belangie-Nye and Sara
16 Boyett, who live along the KMTP route, provide specific descriptions of
17 medical emergencies they have encountered. *Id.*, ¶¶ 4-6; Exh. 11, Affidavit
18 of Jean Belangie-Nye; Exh. 12, Affidavit of Sara Boyett.

19 The ERP proposes a "Mitigative and Preventative Measure," an
20 "Emergency Response," and "Recovery" measures in an attempt to address
21 this unavoidable significant impact. *ERP*, §§ 6.6-6.8, pp. 31-34. As set forth
22 in the ERP and as summarized by Dr. Milan,

23 the plan is for the driver of the self delivery vehicle to get the
24 attention of a member of the transport crew. This person would
25 notify the transport supervisor who would notify the drivers. They
26 would then decide if it was possible for the vehicle to go around
the trucks or if the trucks would proceed to the next turn out and
let the private vehicle pass at that point.

Exh. 10, Milan Affidavit, ¶ 7; *ERP* §§ 6.7-6.8, pp. 32-34. This plan does not
mitigate the potentially devastating impacts of this scenario. Again, as
stated by Dr. Milan:

1 Therefore, even in the best possible scenario, there could be
2 significant, even life threatening, delays. The procedure for
3 dealing with a private vehicle in an emergency situation is
4 incomplete, at best. The driver of a private vehicle in an
5 emergency may be unable to clearly make his or her needs
6 known, and may be unwilling to wait while communication
7 passes up the chain of command and the decision filters back
8 down. The driver of a private vehicle is by definition not
9 professionally trained and will not necessarily incorporate
10 themselves smoothly in the minimalist procedure outlined in the
11 Mammoet ERP.

12 Exh. 10, Milan Affidavit, ¶ 7.

13 The ERP also considers two crash scenarios that may significantly
14 impact the provision of emergency services and the ability of private vehicles
15 to self-transport to a hospital. These scenarios are "Jack-Knifing of the
16 Transporter" and "Load Sliding Partially Off the Trailer." ERP §§ 3.0-4.0.
17 For a jack-knifing transporter, IO states that the "road may be blocked up to
18 4 hours," and in the case of load sliding partially off the trailer, IO states that
19 "road may be partially blocked for an extended period of time." If either of
20 these scenarios are encountered during any of the 207 loads of the KMTP,
21 impacts to local residents and others could be significant, particularly when
22 reasonably non-circuitous detours to bypass the accident sites are not
23 available along much of the KMTP route. See, e.g., Exh. 11, Belangie-Nye
24 Affidavit; Exh. 12, Boyett Affidavit. Again, as with "Overturning of the Load
25 and Transporter in Water," no objective evaluation of the risk of these events
26 was undertaken by MDT, and the lack of data and explanation for the
conclusions cannot satisfy MDT's MEPA duty to take a "hard look" at the
impacts of its project. *Klamath-Siskiyou*, 387 F.3d at 995-96.

27 **c. Impacts to the Environment.**

28 Underlying the environmental impacts section of the KMTP EA
29 (Section 3.0) is the premise that because "all of the proposed activities

1 (construction and transportation) on highways in Montana would occur within
2 the existing right-of-ways" there will be no environmental impact. *KMTP EA*,
3 p. 40, *KMTP FONSI*, pp. 14,40. There is no scientific, legal, or logical basis
4 in this assumption. Numerous environmental impacts may occur as a result
5 of the project, including impacts to the water resources immediately adjacent
6 to the proposed corridor and impacts to protected wildlife and other
7 environmental resources. A 100-foot buffer from turnout construction to the
8 stream will likely not prevent waterways from increased sedimentation,
9 particularly where slopes are steep and/or vegetative cover is lacking, and
10 wildlife may be adversely impacted by the lights and noise of the caravans of
modules traveling at night.

11 MDT purports to list Best Management Practices ("BMPs") in Appendix
12 D of the *KMTP EA*. *KMTP EA*, p.40. The guidelines in Appendix D are not,
13 in fact, BMPs. Exh. 13, Affidavit of Peter Nielsen, ¶ 8.h. Nor does reliance
14 on BMPs alone, without more project-specific analysis, satisfy MEPA's hard
15 look requirement. See, *Blue Mountains Biodiversity Project v. Blackwood*,
16 161 F.3d 1208, 1214 (9th Cir. 1998) (in interpreting NEPA, reliance on
17 BMPs was not a "hard look" where the USFS did not account for the
18 different soil conditions between sites). Simply stating that impacts to water
resources will not occur and that BMP's will be used does not satisfy
MEPA's "hard look" requirement.

19 Nor does the *KMTP EA* identify the potential impacts to water
20 resources from any additional sanding and application of de-icing chemicals
21 that may be required in winter months for transport of *KMTP* modules. Due
22 in part to sedimentation caused by US Highway 12 road traction sanding
23 materials and poorly vegetated cut and fill slopes, the West Fork of Lolo
24 Creek is an "impaired" stream pursuant to Section 303(d) of the Federal
25 Clean Water Act. Exh. 13, Nielsen Affidavit, ¶¶ 5,6. The EA fails to

1 acknowledge Lolo Creek's impaired status and fails to address how the
2 KMTP may contribute further to the cause of impairment, including
3 sedimentation from erosion and sanding materials or creation of cut and fill
4 slopes along US Highway 12. *Id.*, ¶¶ 8 a-i, 9, 13.

5 In the Blackfoot Watershed along MT Highway 200, eighteen streams
6 are listed as impaired on the 303(d) list. *Id.*, ¶ 8.j. The EA does not
7 describe these impaired streams or identify their location relative to the
8 proposed project, or assess potential impacts to any of these impaired
9 streams as a result of the project. *Id.*

10 To minimize or mitigate impacts to water resources, the Montana or
11 National Pollution Discharge Elimination System (MPDES and NPDES)
12 require MDT to prepare a Stormwater Pollution Prevention Plan for road
13 construction activities. *KMTP EA* at S-3. Although MDT acknowledges that
14 pollution discharge permits may be required, the EA concludes, without
15 further discussion of any potential impacts, that "[n]o additional effect on
16 water is expected from the turnouts and road modifications than is already
17 occurring from the highway and adjacent land uses." *KMTP EA* at p. 40,
18 Section 3.9.2.1. The EA further concludes in its cumulative impacts analysis
19 (which consists of two sentences) "[a]s there are not expected to be any
20 impacts on water resources from any of the activities associated with the
21 KMTP . . . there would be no cumulative impacts on water." *KMTP EA* at p.
22 42, Section 3.9.2.7.

23 Impacts to wetlands are also inadequately identified and addressed in
24 the EA. Exh. 13, Nielsen Affidavit, ¶¶ 10-15. The KMTP EA states
25 "[f]loodplains would not be affected by turnout construction or road
26 modification because none of these activities are located in floodplains," and
that site locations "will be adjusted or mitigation applied to avoid impacts on
wetlands if necessary." *KMTP EA*, p. 39-40. These statements are not

1 substantiated with floodplain or wetland surveys or delineations. Such
2 studies are foundational bases for concluding that no impacts will occur.

3 Exh. 13, Nielsen Affidavit ¶¶ 10,12,14.

4 Plaintiffs do not stand alone in their concerns about environmental
5 impacts of the KMTP. The Montana Department of Fish, Wildlife and Parks
6 ("FWP") Region 2 submitted written comments on the EA identifying specific
7 concerns with the KMTP. *FONSI*, pp. 39-40. FWP identified the following
8 concerns:

- 9 • Potential impacts to Lolo Creek and Blackfoot River drainages;
- 10 • Potential conflicts between modules and recreationists using
11 turnout locations;
- 12 • New turnouts facilitating public access to sensitive areas;
- 13 • Concerns about specific turnout locations;
- 14 • Potential impacts to birds from raising utility crossings,
15 specifically raptors and trumpeter swans;
- 16 • Recently identified eagle nest locations; and
- 17 • Future use of the route by oversized loads.

18 *Id.*

19 Crash scenarios described in the ERP could have significant impacts
20 on water resources, wildlife, and wildlife habitat, yet MDT offers only
21 conclusory statements to assert that impacts will be insignificant. The ERP
22 identifies several impacts of the scenario of a load overturning and a
23 transporter falling in water, including: water quality; fish and fish habitat;
24 aquatic mammals and habitat; water flow; soil quality; plant and plant
25 communities; birds; terrestrial mammals; health care services; transportation
26 infrastructure; other community resources; community health; community
27 safety; traditional harvesting and land use (fishing or rafting); and protected
28 areas. *ERP* § 5.0, Table 5-1, p. 24.

29 Despite identification of these impacts in the ERP, MDT concludes
30 that:

1 the risk of a specific incident or accident event is minimal and not
2 reasonably foreseeable. As a result, MDT does not consider the
3 potential for serious accident/event to present a significant
4 impact or a significant safety risk.

4 *KMTP FONSI*, p. 12, "Response to Common Comment H2." MDT
5 undertakes no assessment of this "risk," limiting its discussion to a recitation
6 of eight "Mitigation and Preventative Measures," including "drive at
7 appropriate speeds," "comply with HSE guidelines, rules, regulations, codes
8 of practice and industry best practice standards," and ensuring "the load is
9 properly lashed and secured to the transporter." *ERP*, § 5.6, p. 21. These
10 measures, however reassuring, are not an assessment of risk. The
11 administrative record, including the EA, FONSI, Transportation Plan and
12 ERP contain no objective assessment of the risk of an accident through
13 even a minimal examination of accident history of similar projects. This
14 narrative and the conclusory statements about the absence of risk are
15 insufficient and do not satisfy MEPA's "hard look" requirement. *Klamath-*
Siskiyou, 387 F.3d at 995-96.

15 MDT concludes that since this unexamined risk is "minimal," it is
16 reasonable that the public should bear the burden of the identified harms
17 resulting from an accident and MDT is therefore absolved from any
18 responsibility to thoroughly examine the significant impacts such an accident
19 would cause. To rely on luck, to make the unreasonable assumption that an
20 accident will not happen, not only reflects on the inadequacy of the impacts
21 analysis in the KMTP and insufficiency of proposed "mitigation" measures,
22 but clearly demonstrates a threat of irreparable harm if the KMTP is allowed
23 to proceed, as discussed *infra* in Section II.C.

23 **d. Climate Change Impacts**

24 The KMTP may contribute substantially to increased greenhouse gas
25 (GHG) emissions and thus the impacts of accelerated climate change,
26

1 making such impacts relevant to the project analysis. MDT's failure to
2 analyze and disclose such impacts is arbitrary and capricious. *North Fork*,
3 238 Mont. at 465; *MEIC*, 298 Mont. at par. 12 (decisions are arbitrary or
4 capricious when agency does not consider all relevant factors).

5 Courts are increasingly recognizing the importance of climate change
6 and GHG emissions to environmental protection and analysis, and requiring
7 agencies to analyze these impacts in their environmental review
8 documents. See, e.g., *Massachusetts v. Environmental Protection Agency*,
9 127 S. Ct. 1438, 1459-60 (2007)(acknowledging reality of global climate
10 change, and noting the "enormity of the potential consequences associated
11 with [human-caused] climate change"); *Center for Biological Diversity v.*
12 *National Highway Traffic Safety Administration*, 538 F.3d 1172, 1217 (9th
13 Cir. 2008)(the "impact of greenhouse gas emissions on climate change is
14 precisely the kind of cumulative impacts analysis that NEPA requires
15 agencies to conduct"); *Mid States Coalition for Progress v. Surface*
16 *Transportation Board*, 345 F.3d 520, 548-50 (8th Cir. 2003)(requiring
17 evaluation of CO2 emissions and other pollutants from increased coal
18 consumption that would result from approval of new and upgraded rail
19 lines); *Border Power Plant Working Group v. Department of Energy*, 260
20 F.Supp. 2d 997, 1028-29 (S.D. Cal. 2003)(requiring evaluation of CO2
21 emissions from power plants that would result from approval of
22 transmission line project).

23 To address concerns about global climate change and its specific
24 impacts on Montana's short and long-term future, in December 2005
25 Montana Governor Brian Schweitzer directed the Montana Department of
26 Environmental Quality ("MDEQ") to establish a Climate Change Advisory
Committee ("CCAC"). Exh. 14, December 13, 2005 letter of Gov. Brian
Schweitzer. This group was specifically tasked to examine the impacts of

1 climate change on "agriculture, forestry, energy, government and other
2 sectors of our state." *Id.* In November, 2007, the CCAC published a
3 "Climate Change Action Plan, Final Report of the Governor's Climate
4 Change Advisory Committee." Exh. 15, CCAC Final Report, Nov. 2007.

5 Through the work of the CCAC, MDEQ states that global climate
6 change is affecting Montana now and will continue to do so into the future.
7 Exh. 16, Statement of MDEQ Director Richard Opper. As stated by the
8 CCAC, "[r]egional models indicate these possible impacts in Montana [of
9 climate change]:

- 10 • As climate changes, this could cause some plants and animals
11 to go extinct, some to decline or increase in population, and
12 others migrate to areas with more favorable conditions.
- 13 • Diseases and pests that thrive in warmer climates could
14 spread into Montana, such as the West Nile virus that used to be
15 confined to the Mid-East and only recently has spread to the
16 United States.
- 17 • Crops and tress that need cooler climates may not grow as
18 well in Montana.
- 19 • More severe storms and droughts could affect crop production,
20 pests and growth rates.

21 Exh. 15, CCAC Report.

22 Director Opper further states that:

23 Climate change will affect all of Montana's major economic
24 sectors: agriculture, forestry, transportation and tourism, and
25 energy supply. We may be challenged with decreased crop
26 yields, longer forest fire seasons, reduced snowpack, and
declining hydropower. The environmental costs may include
reduced wildlife habitat and diminished water quality and stream
flow. It is imperative that we all begin to do what we can to
address this crucial issue for our own sake and the sake of the
generations of Montanans to come.

Exh. 16, Opper Statement.

1 On July 16, 2010, the U.S. Environmental Protection Agency
2 ("USEPA") submitted comments to the U.S. Department of State on the
3 adequacy of a draft EIS for the "Keystone XL" pipeline project, pipeline
4 planned to transport petroleum products from northern Alberta to refinery
5 facilities in the United States. Exh. 17, July 16, 2010 USEPA letter. In this
6 letter, the USEPA recommended "that the discussion of GHG emissions be
7 expanded to include, in particular, an estimate of the extraction-related GHG
8 emissions associated with long-term importation of large quantities of oil
9 sands crude from a dedicated source." *Id.*, p. 2. This recommendation was
10 based on "a reasonably close causal relationship between issuing a cross-
11 border permit for the Keystone XL project and increased extraction of oil
sands crude in Canada intended to supply that pipeline." *Id.*, p. 3.

12 MEPA's "hard look" requirement, including the requirement that MDT
13 consider direct, secondary and cumulative impacts of its decisions,
14 demands analysis and disclosure of the critical impacts of increased GHG
15 emissions and contributions to climate change that may result from the
16 KMTP project. See MCA §§ 75-1-201, 75-1-208(11), ARM
17 18.2.236(7),(18), 18.2.237(2)(e). MDT failed to analyze and disclose the
18 impacts of the KMTP on climate change and the environment resulting from
19 construction, the transport itself, and facilitating further development of the
tar sands in Alberta.

20 KMTP construction will necessarily cause GHG emissions, as will the
21 slow-moving modules themselves and idling vehicles waiting for the loads
22 to reach turnouts. Just as the federal court in *CBD* required analysis of
23 GHG emissions based on the proposed light truck emissions standards,
24 MDT here should calculate and disclose the amount of GHG emissions that
25 would be caused by the KMTP infrastructure work, transport, and idling
26

1 delayed traffic, and analyze the impacts of these contributions on climate
2 change and the environment. *CBD*, 538 F.3d at 1180-81,1217.

3 Moreover, producing tar-sands oil generates 82% more GHG
4 emissions than producing the average barrel refined in the U.S. Exh. 17,
5 USEPA letter; Exh. 13, Affidavit of Peter Nielsen, ¶¶ 29-31. The KMTP is
6 designed to facilitate IO's and likely other future companies' transportation
7 of equipment to the tar sands in order to further develop and process this
8 non-traditional oil source that contributes vastly to GHG emissions and the
9 associated impacts of climate change. Similar to USEPA's concerns about
10 the Keystone XL project, the KMTP bears a "reasonably close causal
11 relationship" to extraction of tar sands petroleum in Canada. Just as the
12 courts in *Mid States* and *Border Power* required analysis of GHG emissions
13 for activities facilitated by the projects under consideration, MDT here must
14 consider the GHG emissions and resultant impacts on climate change and
15 the Montana environment from implementing a project that will directly
16 facilitate further tar sands development. *Mid States*, 345 F.3d at 548-50;
17 *Border Power*, 260 F.Supp. 2d at 1028-29.

18 MDT's failure to analyze and disclose *any* GHG emissions, the
19 emissions' contribution to climate change, the facilitation of tar sands
20 development, or the impacts of accelerated climate change on Montana's
21 environment is arbitrary and capricious.

22 **3. EA Fails to Describe and Consider Reasonable Alternatives**

23 MEPA requires that agencies prepare a "description and analysis of
24 reasonable alternatives to a proposed action whenever alternatives are
25 reasonably available and prudent to consider and a discussion of how the
26 alternative would be implemented." Admin. R. Mont. 18.2.239(3)(f). MDT
must consider "realistic and technologically available" alternatives that would
"appreciably accomplish the same objectives or results as the proposed

1 action." Admin. R. Mont. 18.2.239(3)(f). Alternatives that would avoid or
2 minimize the adverse environmental effects of the proposed action must be
3 considered. 40 C.F.R. § 1500.2(e). MEPA alternatives analyses are
4 reviewed under the same standards that federal courts apply to NEPA
5 analyses. See, *Montana Wilderness Assoc. v. Bd. of Natural Res. and*
6 *Conservation*, 648 P.2d 734, 741-42, 200 Mont. 11 (1982).

7 Consideration of alternatives is the "heart" of the environmental review
8 process, and "should present the environmental impacts of the proposal and
9 the alternatives in comparative form, thus sharply defining the issues and
10 providing a clear basis for choice among options by the decisionmaker and
11 the public." *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 768 (9th Cir.
12 1986) (quoting 40 C.F.R. § 1502.14). An agency must look at every
13 reasonable alternative within the range dictated by the project's purpose and
14 need that "is sufficient to permit a reasoned choice." *Alaska Wilderness*
15 *Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

16 The duty to examine alternatives applies even where the
17 environmental consequences of the proposed actions require preparation of
18 an EA rather than an EIS. ARM 18.2.239(3)(f); *Bob Marshall Alliance v.*
19 *Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988).

20 MDT's alternatives analysis is wholly inadequate. A "no action"
21 alternative is addressed in one paragraph, (*KMTP EA*, Section 2.2.2, p. 14)
22 and each of four "Alternatives Considered but Eliminated" is summarily
23 addressed in section 2.3 of the EA. *Id.*, Section 2.3, pp. 14-15.

24 The alternatives "considered but eliminated" include four Canadian
25 highway routes and one US Interstate Highway Transportation System
26 route. There is no identification of the US Interstates for this alternative, and
no way for the public to meaningfully examine that route, locate it on a map,
or verify the assertion that it is infeasible. *Id.*, section 2.3.2, p. 14. The two

1 page alternatives discussion neither describes nor analyzes reasonable
2 alternatives, and does little to define the issues or provide a basis for choice.
3 Admin. R. Mont. 18.2.239(3)(f).

4 Subsequent to the publication of the EA, MDT received "32-J permit
5 applications indicating the Imperial Oil will be hauling greater than 50 loads
6 along Interstates 90 and 15 from the Idaho border to the Port of Sweetgrass
7 [sic]. . . . The proposed loads are different weights and dimensions than
8 those included in the KMTP." *KMTP FONSI*, p. 28. A number of these
9 loads "are different weights and dimensions than those included in the
10 KMTP" only because IO is modifying at least sixty of the KMTP modules at
11 the Port of Lewiston, ID, originally slated to travel the KMTP selected
12 alternative route. Exh. 18, Affidavit of Ken Johnson, March 2, 2011. By
13 letter dated March 11, 2011, MDT submitted comments to Mr. Johnson on
14 this "Interstate Route." Exh. 19, 3/11/11 MDT letter and attached comments.
15 MDT states in comments to this letter that "if any modules from the 208
16 modules identified in the KMTP EA/FONSI use alternate route(s), such as
17 entering western Montana at I-90, **MDT will need to re-evaluate the KMTP
EA/FONSI.**" *Id.*, Attachment 1, second bullet point under "1. Environmental
Services" (*emphasis added*).

18 IO has clearly demonstrated that an alternative "considered but
19 eliminated" was, in fact, "realistic and technologically available," Admin. R.
20 Mont. 18.2.239(3)(f). The alternatives analysis does not satisfy MDT's
21 obligations, neither defining the issues nor providing a clear basis for a
22 reasoned choice, and fails to satisfy MEPA on this basis alone.

23 Additionally, the EA briefly describes impassable barriers encountered
24 along each of the "considered but eliminated" routes, but makes no mention
25 of construction that might make the barriers passable. *KMTP EA*, pp. 14-15.
26 The EA devotes many pages to a detailed description of extensive

1 construction necessary to make the Montana route feasible, yet there is no
2 discussion of whether similar construction measures would also make
3 alternative routes feasible or, importantly, whether the modules could be
4 reduced in size. Without such a discussion, MDT cannot claim it considered
5 reasonable alternatives before rejecting them.

6 From the summary treatment of the alternatives discussed in the EA,
7 prior to publication of the FONSI, it was impossible to determine whether
8 any of the "considered but rejected" alternatives constitute a "realistic or
9 technologically available" alternative. Since publication of the EA, IO has
10 demonstrated that at least one of the alternatives "considered but rejected"
11 constitutes a "realistic or technologically available" alternative and MDT has
12 admitted that it is required to "reevaluate the EA/FONSI." Without disclosure
13 of the technological availability of an alternative, and some comparative
14 discussion of the potential costs of implementing construction measures to
15 bypass restrictions on any of these alternate routes, the alternatives analysis
16 in the EA does not comply with MEPA. By its own admission, and due to the
17 additional deficiencies of the alternatives analysis, MDT should be required
18 to cure these deficiencies through additional MEPA environmental review.

19 **4. MEPA Requires MDT to Prepare an EIS**

20 "A determination that significant effects on the human environment will
21 in fact occur is not essential.... If substantial questions are raised whether a
22 project may have a significant effect upon the environment, an EIS must be
23 prepared." *Ravalli County*, 273 Mont. at 381, 903 P.2d at 1369.; *quoting*
24 *Foundation for North Am. Wild Sheep v. U.S. Dep't of Agriculture* (9th
25 Cir.1982), 681 F.2d 1172, 1177-78. The standard for determining "if an
26 action will significantly affect the quality of the human environment is
whether the plaintiff has alleged facts which, if true, show that the ... [action

1 (or inaction)] may significantly degrade some human environmental factor."
2 *Id.* (citing *Sierra Club*, 843 F.2d at 1193).

3 Where substantial questions have been raised concerning potential
4 adverse effects requiring preparation of an EIS, "the [agency's] decision not
5 to do so was unreasonable." *Ravalli County*, 273 Mont. at 381, quoting
6 *Sierra Club*, 843 F.2d at 1195. Where an agency failed to consider factors
7 necessary to determine whether significant impacts would occur, "its
8 decision was not 'fully informed and well-considered.'" *Id.* (citations omitted)."

9 Here, in its determination that no significant impacts will occur, MDT
10 failed to consider impacts of the well-understood fact that construction of
11 permanent highway infrastructure modifications will facilitate future
12 shipments of other oversize industrial loads through scenic, mountainous,
13 rural Montana. MDT's decision was therefore neither fully informed nor well-
14 considered:

15 Direct contact between MDT personnel and IO began on April 22,
16 2009, with regular meetings, conversations and tours occurring over the next
17 few months. Exh. 20, MDT email exchange, 4/22/09 – 5/12/09; Exh. 21,
18 MDT email exchange, 5/15/09 – 5/27/09; Exh. 22, MDT email exchange,
19 6/15/09. MDT staff generated a briefing memo in June 2009 advising
20 Director Lynch of the "Pros & Cons" of the KMTP. Exh. 23, MDT email,
21 Maes, 5/26/09; Exh. 24, MDT email exchange, 5/26/09 – 5/27/09; Exh. 25,
22 MDT email, Tierney, 6/1/09. On July 1, 2009, Mr. Lynch briefed the
23 Montana Interim Legislative Revenue and Transportation Committee on the
24 KMTP ("July 2009 RTC"); Exh. 26², *July 2009 RTC* recording; Exh. 27, *July*
25 *2009 RTC* powerpoint slides. Mr. Lynch described the KMTP and the effect
26 of permanently modifying Montana highways as follows:

² Exhibit 26, the July 1, 2009 Jim Lynch presentation to the RTC is attached hereto as a separate DVD. Mr. Lynch's presentation begins at minute 17:40 of the disc and ends at minute 1:00:15.

1 We're not talking about one load. We're talking about an
2 operation for an extended period of time. It's a major impact on
3 the state. We are actually setting the stage for a high/wide
4 corridor through the State of Montana to be used probably for
5 things we haven't even imagined yet. . . . It will probably lend
6 itself more to an EIS than an EA.

7 *July 2009 RTC*, Minute 30:00. Mr. Lynch further stated that the project
8 would "be a major impact to activities that are currently operating on this
9 corridor..." *Id.*, Minute 23:38. Mr. Lynch also recognized that "there are
10 numerous companies with leases from Alberta to develop areas of the Kearl
11 Oil Sands," and there is "considerable potential for impacts" from the KMTP.
12 Exh. 27, slides 3, 12. Throughout the presentation, Mr. Lynch emphasized
13 his many concerns, including the fact that due to the nature of the route,
14 there are no alternative routes for travelers to avoid these big rigs along this
15 corridor, the size of the turnouts, and the "major impact on the state." *Id.*,
16 Minute 42:50.

17 Mr. Lynch again addressed the Montana Interim Legislative Revenue
18 and Transportation Committee on September 18, 2009. Exh. 28³,

19 "*September 2009 RTC*" recording. Mr. Lynch stated:

20 I'm a little bit amazed that if they started this process two years
21 ago why did they just come to us this summer. We're talking
22 about a long route, can it be done, right now we don't have the
23 information to justifiably tell the state of Montana that it can.

24 *Id.*, Minute 30:35. Despite this statement, and the fact that the EA was not
25 yet complete, Mr. Lynch had determined the impacts of the project would be
26 minimal, stating that:

under the entire moves from Lolo to Sweet Grass we feel that
there are impacts, we don't have the information to feel that they
are significant. So we feel as they go through the environmental

³ Exhibit 28, the September 18, 2009 Jim Lynch presentation to the RTC is attached
hereto as a separate DVD. Mr. Lynch's presentation begins at minute 00:25 of the disc
and ends at minute 43:15.

1 impacts, they'll be able to demonstrate to the department that the
2 environmental impact is minor and they may have a very small
3 environmental assessment to prepare for us before we can issue
a permit and that an EIS would not be required.

4 *Id.*, Minute 8:12.

5 In this address, Mr. Lynch also determined that because IO did not like
6 the term "corridor", he would stop using it:

7 I'm also going to turn back from the use of the term 'corridors.'
8 The originators of these proposals decided that they don't want
9 to establish a high wide corridor, they want to look at this as a
move over an 18 month to 24 month period of time with a
number of loads.

10 *Id.*, Minute 3:45. Dwane Kailey subsequently communicated this directive to
11 MDT staff:

12 Let's try not to refer to this proposal as a high wide corridor.
13 That could create some challenges for these companies. I know
we have all done, but let's try to curb that practice for the future.

14 Exh. 29, MDT email, Kailey, 12/7/09. Michael Tierney passed Mr. Kailey's
15 order on to MDT personnel. Exh. 30, MDT email, Tierney, 12/7/09.

16 In addition to MDT Director Jim Lynch's earlier recognition that this
17 would become a permanent high/wide corridor that would have potential for
18 significant impacts, MDT personnel continued to express concerns about the
19 failure to consider impacts of the creation of a permanent high/wide corridor.
20 For example, Tom Martin, MDT's Environmental Services Bureau Chief,
21 clearly stated the need to analyze the impacts of establishing a permanent
high/wide transportation corridor in Montana:

22 ...leaving the turnouts in place does promote more of a
23 permanent high-wide route. This coupled with utility and
24 sign/light pole adjustments creates features that have been
designed to allow high-wide loads – one of very few in the state.
25 This has not been analyzed or disclosed in the last draft e-doc.
It needs to be. However, I think it will be difficult to do so. It

1 could be a weakness that savvy litigators look to if an e-doc
2 challenge is pursued.

3 Exh. 31; MDT email exchange, 1/27/10 – 1/29/10.

4 Other MDT Environmental Services personnel similarly warned:

5 I always thought that the turnouts would be permanent since
6 Page 4 of the draft Environmental Review stated "These
7 turnouts, traffic structures, and utility relocations would be
8 permanent." **The cumulative impacts section needs to
address the long term consequences (good and not so
good) of these features.**

9 *Id.*, Kilcrease email, 4:33 pm (emphasis added).

10 By leaving the infrastructure (turnouts, traffic structures, and
11 utility relocations) in place, does this send a message to the
12 "world" that Montana is open to permitting high wide loads? Will
13 leaving the infrastructure make this route more appealing to
14 future use? **Perhaps we need to analyze these questions in
the cumulative impacts section of the environmental
documentation.**

14 *Id.*, Thunstrom email, 2:31 pm (emphasis added).

15 During the KMTP EA public meetings and comment period, MDT
16 received several thousand public comment letters and emails, a vast
17 majority of which requested that MDT prepare an EIS to look at impacts of
18 the KMTP not considered in the EA. *KMTP FONSI*, App. C,D. In addition to
19 concerns expressed by Plaintiffs, MDT personnel, the general public, and
20 the Montana Department of Fish, Wildlife and Parks (see *FONSI*, pp. 29-30,
21 discussed *infra* at p. 20), Lolo National Forest Supervisor Deborah L. R.
22 Austin advised MDT of a number of USFS concerns with the KMTP, stating:
23 "My concerns are not simply based on the size of the loads, but the volume
24 and the precedent MDT's approval may set for the future of the US Highway
25 12 corridor." Exh. 32, Sept. 8, 2010 letter of Deborah Austin. Clearwater
26 National Forest Supervisor Rick Brazell communicated similar concerns

1 about the KMTP to the Idaho Department of Transportation on September
2 10, 2010. Exh. 33, Sept. 10, 2010 letter of Rick Brazell.

3 The purpose of the KMTP is "for Imperial Oil to improve Montana
4 infrastructure to facilitate a safe and efficient movement of over-dimension
5 loads through Montana to the Canadian border and return trailers through
6 Montana to the Idaho border." *KMTP EA*, p. 1. The KMTP FONSI states
7 that:

8 it is anticipated that these improvements would improve safety
9 and reduce delays for future transportation of oversize materials
10 and freight in comparison to transports that occurred prior to the
11 improvements by Imperial. Because the KMTP route traverses
12 from Idaho to Alberta, Canada, any changes to the transportation
13 of freight, positive or negative, would be limited to freight
14 traveling between these two points.

15 *KMTP FONSI*, p. 14. MDT identified as a "Present and Reasonably
16 Foreseeable" activity the issuance of "[f]uture 32-J permit loads using any
17 portion of the proposed route similar to this project." *KMTP EA*, p. 16. The
18 EA and FONSI also state, "the Department believes it is reasonably
19 foreseeable that additional oversized loads would want to use the route . . ."
20 *KMTP EA*, p. 24, *KMTP FONSI*, p. 14. Future uses of the KMTP route
21 facilitated by the KMTP not only needed to be considered in the impacts
22 analysis for the project, but they trigger the EIS requirement as they cause
23 impacts that may significantly affect the human environment.

24 Other than asserting that "[t]hese types of loads would be governed
25 under the same applicable regulations and laws as the proposed KMTP," the
26 KMTP EA and FONSI do not address the impacts from permanently
modifying Montana highway infrastructure for the KMTP. Once the road and
utility modifications are in place, it is doubtful that the Department will
elevate the environmental review for the issuance of 32-J permits for similar
high and wide loads to even the cursory environmental assessment that has

1 been required of IO for this project. The time to consider the impacts of
2 creating a highway route designed for transport of industrial equipment to
3 the tar sands fields in Alberta, Canada, is now, in the environmental analysis
4 of the project that will create that route through permanent infrastructure
5 modifications. Whether this is a permanent corridor or only used for this one
6 transportation project, Plaintiffs have, at the very least, "raised substantial
7 questions" that the project will have significant effects.

8 **5. Authorization of the KMTP is Not in the Public Interest.**

9 MDT may issue 32-J permits allowing IO to transport its oversized
10 loads only if issuing the permits is in the public interest, and MDT has not
11 demonstrated that the KMTP is in the public interest. MCA § 61-10-121.
12 MDT failed to adequately examine impacts and make any determination that
13 the project will serve the public interest.

14 As discussed in section II.B.2.a. of this Brief, *supra*, MDT has not
15 demonstrated the feasibility of IO's compliance with the 10-minute delay
16 rule, so the traveling public may be delayed well beyond regulatory
17 requirements during transport of each module. Exh. 9, Affidavit of Greg
18 Robertson, ¶¶ 11, 12; ARM 18.8.1101(6). If the KMTP permits are granted,
19 MDT would thereby allow IO to cumulatively delay other vehicles for six
20 months or more, even assuming that each individual delay is limited to 10
21 minutes. See Exh. 9, Robertson Affidavit, ¶11. MDT has not explained how
22 the potential delays of more than 10 minutes and a six-month or more
23 cumulative delay to the traveling public would be in the public interest. MDT
24 has not explained how nighttime travel of the loads is in the "best interests of
25 the traveling public" given increased safety concerns of nighttime travel, and
26 other public uses of the route during the night. Exh. 9, Robertson Affidavit, ¶
7; see also Exh. 6, Affidavit of SuzAnne Miller; ARM 18.8.1101(13)(g).
Neither has MDT stated a sufficient justification for allowing KMTP loads to

1 occupy highway right-of-way clear zone during daytime storage, an
2 additional undisclosed hazard of the Transportation Plan. Exh. 9, Robertson
3 Affidavit, ¶ 5.

4 Further, without demonstrating full compliance with MEPA and fully
5 analyzing all potential impacts (such as impacts on emergency response,
6 water resources and fisheries, businesses and residents along the route,
7 highway infrastructure wear and tear, etc.), MDT cannot make a
8 determination whether the project will indeed be in the public interest, and
9 thus its decision to implement the project and issue the 32-J impacts is
10 invalid.

11 **6. MDT violated Article II, Sections 8 and 9 of the
12 Montana Constitution and MEPA's Public Information
13 and Participation Requirements**

14 Article II, Section 8 of the Montana Constitution provides the public has
15 a right to expect a "reasonable opportunity" to participate in government
16 operations *before* a final decision is made. *Jones v. County of Missoula*,
17 2006 MT 2, ¶14, 330 Mont. 205, ¶14, 127 P.3d 406, ¶14 (citing *Sonsteli v.*
18 *Board of Trustees for School District No. 10, Flathead County* (1983), 202
19 Mont. 414, 418, 658 P.2d 413, 415). Article II, Section 9 provides the public
20 a right to examine documents and observe deliberations of public bodies
21 and state agencies. These are both "fundamental rights", *Butte Community*
22 *Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311, and
23 according to at least one member of the Montana Supreme Court, they are
24 "among the most important guarantees that Montanans enjoy." *Yellowstone*
25 *County v. Billings Gazette*, 2006 MT 218, ¶ 37, 333 Mont 390, ¶37, 143 P.3d
26 135, ¶ 37 (Nelson, J., concurring). Fundamental rights must trigger the
highest level of scrutiny and protection by the courts. *Walker v. State*, 2003
MT 134, ¶74, 316 Mont. 103, ¶ 74, 68 P.3d 872, ¶ 74; *Wadsworth v. State*
(1996), 275 Mont. 287, 302, 911 P.2d 1165, 1174.

1 The rights to know and to participate are companion provisions that
2 have an "inextricable association." *Bryan v. Yellowstone County Elementary*
3 *School District No. 2*, 2002 MT 264, ¶ 31, 312 Mont. 257, ¶ 31, 60 P.3d 381,
4 ¶ 31. As such, they require MDT to provide all relevant information and
5 public documents to the public while an opportunity still exists for the public
6 to comment or otherwise participate in the decision-making process.
7 Anything less turns "what should have been a genuine interchange into a
8 mere formality." *Id.* at ¶46.

9 In *Bryan*, the Montana Supreme Court voided a school district's
10 decision to close three schools, because the decision-making board had not
11 provided to the public all relevant information - specifically a spreadsheet
12 comparing the schools and the closure options - *before* public comment and
13 the board's decision. *Id.* at ¶¶ 6, 12, 14, 55. The Court held such failure to
14 provide the document left the plaintiff to participate "under a distorted
15 perspective", unable to point out "serious flaws and errors" in the previously
16 undisclosed analysis, and violated her right to participate. *Id.* ¶¶ 39, 45, 46.

17 Here, MDT induced the same "distorted perspective" during the
18 decision-making process, by failing to provide full information about the
19 project, and releasing new documents only after the final decision was
20 made. *Bryan* at ¶ 45. MDT failed to disclose in the EA that a similar project
21 using portions of the KMTP route was under concurrent consideration at
22 MDT. *KMTP FONSI*, p. 27. Rather than disclosing this information in the EA
23 accepting public comment on the cumulative impacts of this separate
24 project, after close of the public comment period "MDT considered the
25 proposed action individually and cumulatively in conjunction with Emmert
26 International's proposed actions, and concluded that no significant adverse
27 impact would result." *KMTP FONSI*, p. 9, "Response to Common Comment
28 C2." Such conclusory statements render the decision arbitrary and

1 capricious, and cannot cure the failure to provide the information to the
2 public while an opportunity to respond and influence the decision still
3 existed.

4 In another distortion, MDT "considered but eliminated" a vaguely-
5 described "US Interstate Highway System Transportation Route" in the EA.
6 *KMTP EA*, pp. 14-15. Since publication of the EA, IO has voluntarily reduced
7 the size of a number of the KMTP modules. As stated by IO KMTP Project
8 Manager Ken Johnson,

9 [d]uring the past two years as engineering design progressed,
10 the height of about 60 of the 200 overlegal loads was reduced.
11 This gave the transport carrier the flexibility to transport these
12 loads either over the original planned route or the interstate
13 highway system.

14 (Exh. 18, Johnson Affidavit, ¶ 3, March 2, 2011. Rather than admitting that
15 MDT failed to disclose a "realistic and technologically available" alternative
16 in the EA, MDT states now that "[t]he proposed loads are different weights
17 and dimensions than those included in the KMTP." *KMTP FONSI*, p. 28.
18 This failure to disclose accurate information distorted the public's perception
19 of the project and alternatives, and rendered participation less meaningful.
20 And MDT has since admitted a need to "re-evaluate the EA/FONSI" on the
21 basis of this new information. Exh. 19.

22 A third significant omission of the EA resulting in further distortion of
23 MDT's decision-making process was MDT's post-EA release of the ERP,
24 including its discussion of four accident scenarios, analysis of impacts, and
25 proposed response actions. *ERP (Transportation Plan, "new" Appendix 14)*;
26 *KMTP FONSI*, p. 26. Some of this new information contains "serious flaws
and errors" that the plaintiffs would have pointed out if MDT had released
the information while plaintiffs still had an opportunity to participate. *Bryan* at
¶ 45.

MDT's failure to provide full information to the public and plaintiffs until after the final decision was made violates Plaintiffs' fundamental rights to know and to participate, and MEPA's provisions which effectuate the constitutional protections and are intended to provide for information-sharing between the public and MDT, and for meaningful public participation.

C. Plaintiffs will be Irreparably Harmed if Injunctive Relief is not Granted.

In section II.B.2 of this brief, Plaintiffs argue that MDT's failure to identify and evaluate environmental impacts of the KMTP is one of the bases of establishing Plaintiffs' likelihood of success on the merits. If the Court concludes that Plaintiffs are likely to succeed on the merits of this argument, the Court may grant an injunction on that basis alone.

"Irreparable damage is presumed to flow from a failure to properly evaluate the environmental impacts" of an action. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir., 1985); see also *Friends of the Wild Swan*, 2000 MT 209 (injunctive relief warranted when environmental review documents insufficient and therefore arbitrary). Thus, MDT's failure to identify and analyze impacts (discussed supra, Section II.B.2) also supports the irreparable injury prong of the preliminary injunction test.

The threat of great or irreparable injury to Plaintiffs' members, the general public, and the environment posed by the KMTP is also direct and substantial. The Plaintiffs' members are individuals who live, recreate and work in the area affected by the KMTP. They are concerned with maintaining the economic viability of Montana's outdoor recreation opportunities and economy, the safety of travel, access to emergency services and the conservation of irreplaceable natural resources.

As set forth in Section II.B.2.c, *supra*, along much of the KMTP route on narrow two-lane Montana highways, exclusive use of these roads is

1 being granted to IO and the free flow of normal traffic will necessarily be
2 serially interrupted during travel of the KMTP modules, including the
3 passage of private vehicles in medical emergency situations. A
4 consequence of this is delay in reaching a hospital in a private vehicle. If the
5 risk of death or disability results from delay in obtaining treatment for
6 cardiovascular disease, significant trauma, childhood appendicitis, difficult
7 childbirth, or any myriad other medical emergencies that arise (see Exh. 10,
8 Milan Affidavit, ¶¶ 4-6), allowing the KMTP to proceed during the litigation
9 would produce a great or irreparable injury to the Plaintiffs' members and the
10 general public.

11 Also as previously described *supra*, MDT proposes mitigation and
12 response actions for three crash scenarios in the ERP, generated after close
13 of the public comment period on the KMTP EA. ERP, §§ 3.0-5.0. While it is
14 unclear from the ERP, these scenarios appear to rely on the availability of a
15 crane of sufficient capacity to assist in recovery operations. A listing of
16 mobile cranes is attached to the ERP, and for all cranes listed, several hours
17 to days will be required for a crane, if available, to be transported to the site
18 of the accident and mobilized. ERP, Appendix 4. If a crash results in partial
19 or full blockage of the highway during recovery efforts, significant delays to
20 traffic or circuitous detours to bypass the accident will exacerbate impacts to
21 the traveling public. Recovery efforts involving the deployment of a crane
22 could irreparably impact water quality, floodplains, wetlands and other
23 environmental amenities.

24 Where a plaintiff articulates a project's impact on its interests, such as
25 its ability to "view, experience and utilize . . . [areas and resources] in their
26 undisturbed state", irreparable harm is sufficiently likely to support granting a
preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, ---F.3d---,
2011 WL 208360 *8 (9th Cir. 2010). Plaintiffs' members here have

1 articulated impacts to their recreational, aesthetic, safety and other interests
2 that are likely to be irreparably impacted if the KMTP goes forward before
3 the merits of Plaintiffs' claims are resolved.

4 For example, a member of the Montana Chapter of the Sierra Club
5 states that he uses many areas along the KMTP route and that it is
6 "important to [him] that these unique and pristine areas remain visually
7 appealing and as undisturbed as possible." Exh. 34, Standing Affidavit of
8 John Wolverton, ¶¶ 5-6. He also states that he "thoroughly enjoy[s]
9 recreating in the wild, scenic and remote areas" and expresses his dismay
10 that these areas would be transformed by IO through infrastructure changes
11 and the transport of massive industrial equipment. *Id.* at ¶ 10. Mr.
12 Wolverton further indicates that he is concerned about both the climate
13 change related impacts of the project, and other local environmental impacts
14 of the KMTP, and that it is important to him to be fully informed about
15 agency plans and to be afforded an opportunity to participate. *Id.* at ¶¶ 6, 7-
16 9, 10-11. Absent an injunction, these interests will be irreparably harmed
17 when the KMTP proceeds without adequate environmental review and
18 against the public interest such as those identified by Mr. Wolverton.

19 Other irreparable environmental harms are likely to occur, such as
20 increased sedimentation in waterways and the associated impacts to
21 fisheries, from construction and subsequent maintenance of highways and
22 turnouts for KMTP use. Exh. 13, Nielsen Affidavit. Wildlife species and
23 habitat could also be irreparably impacted, if a crash into a waterway
24 occurred (particularly in bull trout critical habitat), or simply from the
25 disruptions caused by the lights and noise associated with the KMTP travel.
26 *Id.*

27 Not only do many Missoula County residents rely on the free flow of
28 traffic for their access to medical care, food, and other necessities, but

1 outdoor recreation and education businesses rely on free-flowing traffic on
2 US Highway 12 and Montana Highway 200, and the turnouts along these
3 routes, as the exclusive means for access to rivers, mountains and forests of
4 western Montana. See § II.B.2.a. *supra*. Destruction of environmental
5 amenities and exclusive use of highway turnouts that may result from the
6 KMTP could irreparably impact the basis of western Montana's economy
and all who make a living thereby.

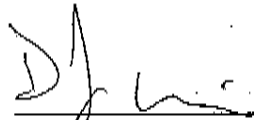
7 If preliminary relief is not granted, all of these interests of Plaintiffs'
8 members will be harmed. Their interests in protecting water quality and
9 wildlife will further be harmed by the road maintenance sanding and de-icing
10 necessary for the KMTP loads and environmental harms posed by climate
11 change. Conservation of wildlife and habitat, at risk due to climate change,
12 is in the public's interest and, absent preliminary relief, harm to the public
13 interest will be significant. Moreover, because some of the wildlife species
14 whose habitat will be affected by the KMTP are wide-ranging, and because
15 the impacts of global warming span state and international borders,
16 Plaintiffs' members' wildlife-related interests elsewhere in Montana, Idaho,
17 and Canada may be adversely affected by the KMTP. Based on MDT's
18 failure to evaluate impacts of the KMTP and the specific irreparable harms
19 herein described, Plaintiffs will be irreparably harmed if injunctive relief is not
granted.

20 III. CONCLUSION

21 Based upon the arguments contained herein, Plaintiffs request that
22 this Court issue a preliminary injunction enjoining the issuance of any
23 permits and any other project activities pursuant to the KMTP FONSI
24 pending MDT's full compliance with MEPA, Montana oversize load
permitting law, and the Montana Constitution.

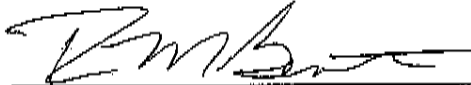
1 RESPECTFULLY submitted this 7th day of April, 2011.

2 *For Plaintiff Missoula County*

3 

4 D. James McCubbin, Deputy County Attorney

5 *For Plaintiffs MEIC, MT Chapter Sierra Club*

6 

7 Robert M. Gentry

8 *For Plaintiff National Wildlife Federation*

9 

10 Thomas France, Esq.

11
12
13
14 CERTIFICATE OF SERVICE

15 This is to certify that a true and correct copy of the foregoing was
16 mailed, postage prepaid first class, this 7th day of April, 2011, to:

17 Timothy J. Reardon
18 Montana Department of Transportation
19 2701 Prospect Avenue
20 PO Box 201001
21 Helena, MT 59620-1001

22 [courtesy copy to IO counsel]
23 Stephen R. Brown
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