

Westview People's Action Association v. Montana Department of State Lands  
Cause No. 72690, 4th Judicial District  
Judge Harkin  
Decided 1990

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

Court Decision: No

FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

1 Douglas G. Harkin, District Judge  
2 Department 4  
3 Fourth Judicial District  
4 Missoula County Courthouse  
5 (406) 523-4774

Carolyn J. Wiegler

June 21 1990

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 WESTVIEW PEOPLE'S ACTION )  
10 ASSOCIATION, chapter of )  
11 MONTANA PEOPLE'S ACTION, )

Cause No. 72690 / 24

11 Plaintiff,

12 v.

13 MONTANA DEPARTMENT OF )  
14 STATE LANDS, )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
& ORDER

15 Defendant. )

16 Plaintiff's motion for preliminary injunction came on for  
17 hearing the 19th and 20th of June, 1990. Plaintiff Westview  
18 People's Action Association (Westview) and Defendant Montana  
19 Department of State Lands (State Lands) appeared and were  
20 represented by counsel. From the evidence and pleadings, the  
21 Court makes the following findings of fact:

22 FINDINGS OF FACT

- 23 1. The Court has jurisdiction of this matter.  
24 2. Westview is a homeowner's organization of Westview  
25 Trailer Park residents, which park is located in Missoula County  
26 adjacent to a gravel mining site now known as the Phillips Gravel  
27 Pit.

1           3.     State Lands is an agency of the State of Montana  
2 responsible for implementation and enforcement of the Opencut  
3 Mining Act (OCMA) § 82-4-401 et. seq. MCA and the Montana  
4 Environmental Policy Act (MEPA) § 75-1-101 et. seq. MCA.

5           4.     Western Materials Inc. (Western Materials) submitted an  
6 application in late 1989 and a reclamation plan in early 1990 to  
7 State Lands to mine the Phillips Gravel Pit near Missoula,  
8 Montana.

9           5.     The gravel mining operation will cover approximately 62  
10 acres and will excavate, crush and process into asphalt  
11 approximately 3,000,000 cubic yards of gravel. This operation  
12 will last for approximately 30 years.

13           6.     The gravel mining operation is across the street from  
14 Westview Trailer Park and adjacent to Grant Creek.

15           7.     Western Materials' application and reclamation plan were  
16 accepted as complete by State Lands. State Lands then entered  
17 into a contract with Western Materials which permitted Western  
18 Materials to begin the Phillips Gravel Pit operation. Western  
19 Materials is now in the initial phases of operation.

20           8.     On January 16, 1990, at a public hearing in Missoula,  
21 Montana, State Lands solicited public comment upon the draft  
22 Environmental Assessment (EA) that it had issued pursuant to  
23 NEPA.

24           9.     On February 1, 1990, Western Materials submitted its  
25 plan of operation for the proposed gravel operation which  
26 included a statement that annual progress reports would be  
27 submitted as required by ARM 26.4.206; that care would be taken

1 to prevent wildfires; a description of the seeding and planting  
2 for a suitable vegetative cover for wildlife, livestock, and  
3 retardation of erosion; information on the height of the  
4 groundwater; a map describing the current and post-mining  
5 topography; a description of the vegetation upon the permit area;  
6 and a statement that use of the permitted area by wildlife was  
7 minimal.

8 10. On February 6, 1990, State Lands issued its final EA,  
9 which concluded that with the imposition of several mitigation  
10 measures, no significant impacts would result to the environment.

11 11. On February 27, 1990, the Commissioner of State Lands  
12 issued a gravel mine reclamation contract (contract) under the  
13 OCMA to Western Materials for a gravel mining operation upon the  
14 subject lands provided that Western Materials comply with several  
15 mitigation measures.

16 12. On March 12, 1990, Westview requested a contested case  
17 hearing upon the issuance of gravel mine reclamation contract  
18 with Western Materials under the OCMA. On March 21, 1990, the  
19 commissioner of State Lands granted Westview's request for a  
20 contested case hearing and appointed W.D. Hutchison as hearing  
21 examiner. July 6, 1990 has been set as the date for the  
22 contested case hearing.

23 13. The EA notes that the proposed action could result in  
24 significant environmental harm but that mitigation measures will  
25 be used to mitigate the possible harm.

26 14. The request for a contested case hearing asks that the  
27 mitigation measures be incorporated into an amended plan of

1 operation so that there can be an assurance that the mitigation  
2 measures will be adopted.

3 15. It is possible that at some future stage of operations  
4 of the gravel operation that there could be an adverse effect  
5 upon the cutthroat trout population of Grant Creek. The EA does  
6 not directly discuss this situation.

7 16. There is no increase in the amount of traffic due to  
8 the gravel operation in any residential area in which members of  
9 Westview reside, because an alternative entrance to the gravel  
10 operation was chosen after public input as well as an alternative  
11 placement of operating facilities upon the permitted area.

12 17. The fence around the permitted area is a significant  
13 mitigation measure as proposed and built.

14 18. Through solicitation of public comment, and analysis of  
15 the impacts in State Lands' draft EA, State Lands imposed several  
16 mitigation measures which reduced the level of environmental  
17 impact of the proposed action such that no significant impacts  
18 would be imposed upon the environment, thus precluding the need  
19 for an EIS.

20 19. The mitigation measures (the construction of the  
21 vegetated berm, the planting of trees, the construction of the  
22 fence enclosing the permitted area, the air quality permit, the  
23 use of water bars on the crusher, and the paving of haul roads)  
24 are affirmative obligations which may be legally enforceable  
25 through the reclamation contract amendment executed by Western  
26 Materials.

27 20. State Lands' 60-day EA of the impacts and mitigation

1 measures to reduce those impacts were not arbitrary or capricious  
2 and the Court cannot find that State Lands erred when State Lands  
3 found: a) that the proposed action as mitigated would not result  
4 in any measurable increase in the sedimentation of Grant Creek;  
5 b) that wildlife use of the permitted area was minimal; c) that  
6 the taxable value of adjoining property would not be  
7 significantly affected; d) or that secondary impacts were  
8 incorrectly evaluated.

9 21. Mr. Bob Martin, an employee of the Missoula County  
10 Health Department, testified that there is a record of the  
11 prevailing winds at a site less than three miles from the  
12 proposed gravel pit. This record shows that the prevailing winds  
13 come from the west, which significantly reduces any deterioration  
14 of air quality from gravel operations occurring during such  
15 winds.

16 22. Mr. Martin testified that Western Materials' hours and  
17 months of operation had been limited in the air quality permit it  
18 has received from the Missoula County Health Department to 7:00  
19 a.m. to 6:00 p.m. daily and from March 1 through December 1 of  
20 each year. It was Mr. Martin's opinion that these limitations  
21 were important mitigation measures which reduced the air quality  
22 impacts of the proposed operation. It was his opinion that the  
23 Missoula County Health Department would never issue any air  
24 quality permit where it thought the public would be exposed to an  
25 air quality violation and that the air quality permit issued to  
26 Western Materials for the Phillips Gravel Pit was one of the most  
27 stringent air quality permits ever issued for a gravel pit in

1 Missoula County.

2 23. Nicholas Kaufmann, a land-use planning professional  
3 familiar with the development of gravel mining sites and their  
4 selection, testified that it would take more than 60 days to  
5 conduct an alternative sites analysis to determine where gravel  
6 of similar quantity, quality, and cost was available. He  
7 testified that it was not possible to determine what volumes of  
8 gravel were available at other sites without exploratory core-  
9 drilling of each site examined. The preferred site for a gravel  
10 mine was not wholly dependant upon gravel quantity, quality, or  
11 the cost of mitigating environmental impacts to adjoining lands,  
12 because the price of the gravel lease could be prohibitive. The  
13 most significant factor is the price of the gravel lease. If  
14 State Lands directed a permittee to mine a preferred gravel site,  
15 it would directly inflate the price of the gravel lease to the  
16 permittee.

17 24. Ms. Sandra Olsen, State Lands' Hard-rock Bureau Chief  
18 familiar with the preparation of environmental reviews under the  
19 Montana Environmental Policy Act, testified that an analysis of  
20 alternative mining sites in an EA under the OCHA would be neither  
21 reasonable nor prudent because "ore is where you find it." State  
22 Lands can designate and enforce alternative mining methods,  
23 processing methods, or reclamation techniques at a particular  
24 site. State Lands could not tell a permittee what mining site to  
25 specify in a reclamation contract under either the Montana  
26 Environmental Policy Act or the OCHA. It is not reasonable or  
27 prudent to look at alternative mining sites because: 1) State



1 Lands had no statutory authority to deny on the basis of  
2 alternative sites; and 2) the time required to conduct such an  
3 analysis would be greater than the 60-day period allowed to State  
4 Lands to review gravel mine applications.

5 25. Westview has presented evidence that the noise,  
6 vibration and dust emanating from the gravel operation will have  
7 a negative impact upon the residents of Westview Trailer Park.  
8 Conflicting evidence was presented on the question of the  
9 depreciation of property value in Westview Trailer Park.  
10 Offensive as these matters may be, they are considerations for  
11 the agency that decides whether to permit the gravel operation,  
12 are compensable by a lawsuit for money damages, or will provide  
13 the basis for an action to abate a public nuisance.

14 From the foregoing findings of fact, the Court makes the  
15 following conclusions of law.

#### 16 CONCLUSIONS OF LAW

17 1. Pursuant to Kadillak v. Anaconda Co., 184 Mont. 127, 602  
18 P.2d 147 at 152 (1979), since the Montana Environmental Policy  
19 Act (MEPA), § 75-1-201, et. seq. MCA, is modeled after the  
20 National Environmental Policy Act (NEPA), it is appropriate to  
21 look to the federal interpretation of the National Environmental  
22 Policy Act.

23 2. In Strycker's Bay Neighborhood Council v. Karlen, 444  
24 U.S. 223, 62 L.Ed.2d 433, 100 S.Ct. 497 (1980) the U.S. Supreme  
25 Court held that all the NEPA requires is some consideration of  
26 environmental consequences. It does not direct the discretion of  
27 any agency concerning the choice of action to be taken, or the

1 weight to be given any environmental factors. Fundamental policy  
2 decisions of an administrative agency are not reviewable under  
3 NEPA.

4 3. MEPA was designed to produce better-informed  
5 administrative decisions regarding impacts to the environment;  
6 not to prevent those decisions. The twin aims of MEPA are to:  
7 1) provide the administrative agency with information to aid in  
8 the decision whether to proceed with a project while considering  
9 its environmental consequences; and 2) allow public participation  
10 in the gathering of such information and inform the public of the  
11 environmental consequences. State ex rel. Montana Wilderness  
12 Association v. Board of Natural Resources and Conservation, 200  
13 Mont. 11, 648 P.2d 734 (1982).

14 4. Pursuant to ARM 26.4.643(3)(c), State Lands must only  
15 prepare an EA for reclamation contracts under the OCMA instead of  
16 an Environmental Impact Statement because the "statutory  
17 requirements do not allow sufficient time for the agency to  
18 prepare an EIS." This authority to limit environmental review is  
19 sanctioned by the statement of law in the Kadillak case where the  
20 Montana Supreme Court held that the 60-day period is a woefully  
21 inadequate period for the preparation of an EIS. The Montana  
22 Court held that under Flint Ridge Development Co. v. Scenic  
23 Rivers Assoc., 426 U.S. 776 (1976) no EIS need be prepared where  
24 an agency is under a time constraint to issue a permit which  
25 affords less than three months to consider the application. The  
26 Kadillak Court directed that MEPA is the general statute and  
27 resource regulatory statutes are specific and control the general

1 directions of MEPA in determining whether an EIS should be  
2 prepared.

3 5. Section 82-4-434, MCA, limits State Lands' ability to  
4 conduct an environmental review to a 60-day period of time, which  
5 is an insufficient amount of time in which to prepare an EIS.

6 6. Under MEPA, State Lands is justified in determining  
7 alternative methods of mining, processing, and reclamation as it  
8 did in the preparation of this EA, but it need not determine  
9 alternative mining sites themselves. ARM 26.4.204 sets out the  
10 criteria for approval or disapproval of an application for a  
11 reclamation contract. Failure to choose one mining site over  
12 several alternative mining sites is not a valid basis for denial  
13 of a reclamation contract.

14 7. Considering the level of impacts of this reclamation  
15 contract amendment, State Lands prepared an EA which adequately  
16 discussed the environmental impacts of the proposed reclamation  
17 contract amendment upon the environment as required by ARM  
18 26.2.645 and reasonable and prudent alternatives to the proposed  
19 action. The EA prepared by State Lands included: 1) a  
20 description of the proposed action including maps; 2) a statement  
21 of benefits and the purpose of the proposed action; 3) a listing  
22 of the state agency responsible for environmental review of the  
23 proposed action; 4) an adequate evaluation of the anticipated  
24 direct, secondary, and cumulative impacts upon the physical  
25 environment and the human population; and 5) a description and  
26 analysis of the reasonable alternatives to the proposed action  
27 which were reasonably and prudently available, as well as a

1 discussion of how the alternatives would be implemented.

2 8. State Lands held an appropriate public hearing regarding  
3 the draft EA as required by ARM 26.2.663.

4 9. Westview has failed to show that as a result of the  
5 actions of State Lands they will be irreparably damaged and have  
6 no adequate remedy at law. State Lands had properly reviewed the  
7 permit application of Western Materials for the Phillips gravel  
8 site. State Lands prepared an adequate environmental review  
9 prior to the issuance of the reclamation contract amendment.

10 10. A party may seek an injunction without exhaustion of  
11 their administrative remedies if there is a clear statutory or  
12 constitutional violation. Larson v. Dept. of Revenue, 166 Mont.  
13 449, 534 P.2d 854 (1985). With respect to the inclusion of the  
14 mitigation measures in the contract, Westview has not exhausted  
15 their administrative remedies and no clear statutory duty has  
16 been violated.

17 11. Once a reclamation plan is accepted in writing by the  
18 State Board of Land Commissioners, it shall become a part of the  
19 contract but is subject to annual review and modification by the  
20 board. § 82-4-434(1), MCA. If an environmental threat develops  
21 at some future time, such as in connection with the cutthroat  
22 trout, the annual review and modification provisions will permit  
23 appropriate action. No irreparable harm is threatened at this  
24 time.

25 12. The Opencut Mining Act, cases interpreting the Act, and  
26 legislature attempts to amend the Act, are a clear statement that  
27 the legislature believes that gravel operations have priority

1 over local planning and zoning laws. Missoula County v. American  
2 Asphalt, 216 Mont. 423, 701 P.2d 990 (1985). As long as the  
3 Montana Environmental Assessment Act is merely advisory in  
4 nature, if an Environmental Assessment is prepared that  
5 adequately reviews the significant environmental effects of a  
6 particular state action, within the time allowed, the governing  
7 statute (in this case the Opencut Mining Act) must prevail.

8 ORDER

9 Based upon the foregoing, Plaintiff's request for  
10 preliminary injunctive relief is denied.

11 DATED this 27<sup>th</sup> day of June, 1990.

12  
13   
14 DOUGLAS G. HARKIN  
15 District Judge

16 cc: Ann Hamilton  
17 Tommy H. Butler  
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