

MEIC v. Department of Environmental Quality and Continental Energy Services, Inc.  
Cause No. BDV-2002-474, 1st Judicial District  
Judge Sherlock  
Decided 2002

This case involved an administrative appeal by the Montana Environmental Information Center to the BER for the DEQ approval of an air quality construction permit for a proposed 500 megawatt gas fired power plant. The petition for the appeal charged that the permit was approved in violation of the state and federal Clean Air Acts and MEPA. The petition challenged the adequacy of the EIS that was produced for the project. The petition requested that the BER stay the approval of the permit until it either holds a contested case hearing on the appeal or assigns the case to an hearing examiner.

Judge granted defendant's motion to dismiss.

ORIGINAL

PER. 002-02 P.V.

PETER MICHAEL MELOY  
MELOY LAW FIRM  
80 S. WARREN  
HELENA, MT 59601  
TELEPHONE: (406) 442-8670  
FAX: (406) 442-4953

**RECEIVED**  
**MAR 29 2002**  
BOARD OF  
ENVIRONMENTAL REVIEW

Before the Board of Environmental Review,  
Department of Environmental Quality,  
State of Montana.

In Re: Permit Applicant Continental  
Energy Services, Inc. Silver Bow  
Generation Plant (Permit No. 3165-00)

**AFFIDAVIT AND  
PETITION FOR HEARING AND FOR  
STAY OF PERMIT ISSUANCE**

Montana Environmental  
Information Center

STATE OF MONTANA            )  
  ):ss  
COUNTY OF LEWIS AND CLARK    )

This matter arises from the proposed issuance by the Montana Department of Environmental Quality ("DEQ") of Air Quality Permit #3165-00 to Continental Energy Service, Inc. Silver Bow Generation Plant to construct a natural gas fired power plant outside Butte, Montana. The permit will become effective March 30, 2002, unless a party requests a hearing and challenges the permit. The undersigned individual on behalf of Montana Environmental Information Center ("MEIC"), having first been duly sworn, deposes and says the following, in support of his challenge to the Permit and request for hearing pursuant to § 75-2-211, M.C.A.:

## MEIC'S STANDING

1) Petitioner MEIC is a Montana non-profit public benefit corporation pursuant to 35-2-101, *et. seq.*, MCA, with over 4,000 members state - and nation-wide, and at all times pertinent hereto has had its principal office in Helena, Lewis and Clark County, Montana. MEIC has been in existence for over twenty eight years, and strives to protect the air, water and lands of Montana from pollution and to preserve Montana's quality of life. MEIC has been active in lobbying the legislature and executive branch agencies and educating the citizens of Montana about protection of Montana's air quality.

This action is brought on MEIC's own behalf and on behalf of its members. Members reside and work in Silver Bow and Deer Lodge Counties in the vicinity of Continental Energy's proposed Silver Bow Generation Plant. MEIC members use and enjoy the area because of its aesthetic qualities, lifestyle opportunities, and environmental amenities and have an interest in preserving them. MEIC and its members are actively involved in environmental issues in the Butte area and throughout the state, including issues relating to energy development, power generation and air quality. MEIC and its members are thus directly and adversely affected by the issuance of Air Quality Permit # 3165-00 by the DEQ and will sustain actual injury if the proposed action is carried forth without adequate environmental review, testing and disclosure and compliance with all existing laws. MEIC and its members have a further interest in participating in governmental decisions, in disseminating relevant information about those decisions to the general public and in insuring that all laws and procedures are complied with. ~~Those interests are directly and adversely~~ affected by the failures of the Department as alleged herein. MEIC and individual members of MEIC commented in, or otherwise participated in, the

environmental review and permitting process for the Silver Bow Generation Project.

### REQUEST FOR A HEARING

2) MEIC requests a hearing pursuant to 75-2-211 (10) M.C.A., in that MEIC represents individuals who are adversely affected by the Department's decision. Said persons, as well as MEIC, participated in the public comment process.

### ALLEGATIONS AND BASIS FOR REQUESTED RELIEF

3) As set forth in the following paragraphs, MEIC alleges that the Permit was approved in violation of the Clean Air Act of Montana and regulations promulgated thereunder, the federal Clean Air Act and regulations promulgated thereunder, and the Montana Environmental Policy Act ("MEPA") and regulations promulgated thereunder. The decision to issue the permit was not in accordance with the procedures required by law, was arbitrary, capricious and an abuse of discretion.

4) Continental proposes to construct, and has sought an air quality permit for, a 500 megawatt (MW) electrical power generation facility to be located approximately 6 miles west of Butte, Montana. The facility will consist of two nominal 175 MW combined cycle natural gas combustion turbines (with two associated heat recovery steam generators including duct burners) and a 150 MW matched steam turbine (and associated power generator). In addition to the turbines and generators, the plant will have two emissions stacks, nine cooling towers, an electrical interconnection with transformers, and other equipment.

5) On July 20, 2001, DEQ received Continental's application for an air quality permit. In December, 2001, DEQ issued a draft air quality permit, along with a

draft environmental impact statement ("EIS"). The final EIS was issued in February, 2002. On March 12, 2002, DEQ issued its record of decision ("ROD") stating its intent to issue the permit.

6) Both the EIS and the ROD disclose that the plant will result in an increase in air pollution in the area, with adverse impacts to environmental quality.

Importantly, on page 9 of the ROD, DEQ states:

**"The No Action alternative**, which would be the denial of the air quality and MPDES permits and narrative standard authorizations, **is the environmentally preferred alternative**. Without the permits, the Silver Bow Generation Plant could not operate and likely would not be built. The environmental impacts associated with the Silver Bow Generation Plant and with the pipeline expansion would not occur."

The pollutants to be released into the Montana atmosphere include, but are not limited to, the following:

a) **Particulate matter: 235 tons per year; 227 tons per year at PM-10 (ten microns or less in diameter)**. These fine particulates are of special concern because of their ability to penetrate deep into the lungs. Such "inhalable" particles can lodge deep in the lungs for months or years. Particulates can lead to cancer, cause and aggravate cardiopulmonary problems, and have been linked to increases in Sudden Infant Death Syndrome. In addition to their health effects, particulates have aesthetic effects such as impaired visibility and coating of surfaces. Natural visual ranges of 80 to 100 miles have been reduced by pollution to averages of less than 20 miles in the eastern United States and 50 to 70 miles in the west.

Table 4-31 of the EIS shows that the regional background concentration of particulate matter is currently 30 micrograms per cubic meter. Modeling results indicate that the Silver Bow Generation Plant could increase this level to 100

micrograms per cubic meter bringing the area substantially closer to the 150 microgram standards. This is especially disturbing given the plant's proximity to the Class I airsheds of Yellowstone National Park and the Anaconda-Pintler Wilderness Area (just 25 miles to the west), as well as to the Butte PM Non-Attainment Area just six miles away. In its comments on the draft EIS, MEIC stated its concern that the EIS had failed to incorporate Butte PM monitoring data in its analysis. In responding to that concern, DEQ stated in the final EIS "The CES facility is proposed to be located approximately 6 miles west of Butte, Montana. The predominant winds in this area are from the Northwest. Thus, the majority of the time CES would have little influence on the PM10 nonattainment area." It is common meteorological knowledge that prevailing Northwesterly winds could easily impact an area located just 6 miles to the east. By failing to consider and account for the available monitoring data, neither the EIS nor Continental's air quality permit properly reviews and assesses the air quality impacts of the facility and fails to meet the requirements of state and federal law.

b) **Sulfur oxides (SO<sub>x</sub>): 10.7 tons per year.** SO<sub>2</sub> contributes to particulate levels through the formation of sulfate particles and acid aerosols and is the primary cause of acid precipitation. Acid rain is harmful to both terrestrial and aquatic environments (particularly forests, lakes, and streams) and can damage buildings, monuments, and other structures as well. In addition to tree and fish mortality, human health, livestock, crops, and wildlife can all suffer adverse effects from acid rain.

c) **Nitrogen oxides (NO<sub>x</sub>): 168 tons per year.** Nitrogen oxides (NO<sub>x</sub>) include both nitric oxide (NO) and nitrogen dioxide (NO<sub>2</sub>). NO<sub>2</sub> is a brownish

gas that reacts with volatile organic compounds (VOC) in the presence of sunlight to create photochemical smog (of which the main component is ground-level ozone). While ozone is critically important in the upper atmosphere as a shield against the sun's high-energy ultraviolet radiation, it is itself a very reactive and harmful gas, both for humans and vegetation (including crops). Like SO<sub>2</sub>, NO<sub>x</sub> leads to higher particulate levels (nitrate particles) and contributes to acid rain.

d) **Volatile organic compounds (VOCs): 94.2 tons per year.** Volatile organic compounds are carbon containing compounds that can contribute to the formation of smog.

e) **Carbon monoxide (CO): 732 tons per year.** CO is an odorless and colorless gas which is released into the atmosphere when carbon in fuels doesn't burn completely. The gas can become dangerous if it is inhaled excessively.

f) **Ammonia (NH<sub>4</sub>): 272 tons per year.** Ammonia is a toxic gas that can be carried many miles before being deposited in lakes or streams. As a form of nitrogen, ammonia can act as a nutrient precursor that can lead to algal blooms, eutrophication, and fish kills.

DEQ failed to adequately disclose and evaluate the health and environmental effects of the discharge of the foregoing pollutants in both the permit and the EIS. DEQ has provided no site-specific monitoring data to justify its contention that existing ambient air quality is below NAAQS and MAAQS. Instead, the department states merely "It is ... believed that typical Montana background data is representative of the site with the possible exception of particulate and VOC." The basis for the department's belief is an unsubstantiated statement as to the levels of industrialization and population in

*Montana  
Permit  
2/2/01*

the area. If the baseline is incorrectly estimated, then the conclusions as to the compatibility with state and federal standards may be incorrect.

7) In addition, the EIS discloses that the plant will discharge approximately **2,375,720 tons of carbon dioxide (CO<sub>2</sub>)** into the air each year. The Permit and EIS provide no analysis of the health, environmental, and economic impacts of global climate change and provide no analysis to justify the statement that an additional release of 2,375,720 tons per year of CO<sub>2</sub> is insignificant. CO<sub>2</sub> is the most significant greenhouse gas emission caused by humans, and power plants are the leading source of CO<sub>2</sub> emissions globally, nationally, and in Montana. DEQ's own "Montana Greenhouse Gas Emissions Inventory" report (issued January 1997) states there is "virtual certainty" (defined as "nearly unanimous agreement among scientists, with no credible alternative views existing") that "Greenhouse gas concentrations in the atmosphere are increasing due to human activities" and that "Added greenhouse gases cause added heating." According to the same document, Montana's 1990 estimated total emission of CO<sub>2</sub> was 21,982,000 tons. Projected emissions from the Silver Bow Generation Plant represent an increase of 11% over that figure.

In addition to potentially severe economic, social, and political dislocations, global warming caused by greenhouse gases poses numerous environmental and public health concerns including increases in insect populations and the spread of infectious tropical diseases, a greater frequency of El Niño and extreme weather events (such as floods, droughts, and fires), the melting of glaciers and polar ice caps, rising sea levels, desertification, and general ecosystem disruption and extinctions caused by the rapid rate of change. Some of these effects, such as the disappearance of glaciers in Glacier National



Park in northwestern Montana, (which may be left "glacier-less" in as few as 33 years), are already dramatically evident.

In its comments on the draft EIS, MEIC noted that the amount of pollution issued from the Silver Bow Generation Plant would be not only absolutely but proportionately greater than the amounts released by NorthWestern's permitted "Montana First Megawatts" power plant in Great Falls. DEQ responded in the final EIS that the two plants were of different design and that the NorthWestern facility should be considered a 160 MW, not 240 MW plant. DEQ's response ignores NorthWestern's stated plans to convert the facility from simple cycle to combined cycle and to increase its final capacity to 240 MW (see page 4 of the Application of NorthWestern Generation I, LLC for Comment and Findings on a Power Purchase and Sales Agreement with the Montana Power Company on file with the Montana Public Service Commission). Given that capacity, the release of pollutants by Silver Bow Generation Plant will significantly exceed the release of pollutants from the NorthWestern plant both in absolute terms and also relative to the amount of electrical energy produced. DEQ failed in its analysis of Best Available Control Technology by stating, for example, that carbon monoxide catalysts or other controls were cost-prohibitive / economically unfeasible despite NorthWestern's commitment to incorporate such technology in its Great Falls plant. The Silver Bow Generation Plant should not be given a competitive advantage because of less stringent pollution controls.

8) MEPA, § 75-1-101, *et seq*, MCA, and DEQ's implementing regulations require that the final EIS be based on complete and accurate information and to fully inform the public and the decision maker of the potential effects, including cumulative effects, of the proposed action. In this case, DEQ's failure to conduct

such a review and its failure to follow procedures as required by law was arbitrary, capricious, an abuse of discretion and a violation of MEPA and its implementing regulations. In particular, the shortcomings of the EIS include, but are not limited to the following:

a. As mentioned above, the EIS failed to discuss or evaluate the impact of increased greenhouse gas emissions caused by the proposal, and may have incorrectly modeled the impacts of other air pollutants.

b. The EIS failed to adequately analyze reasonable alternatives to the proposed action, in violation of MEPA and A.R.M. 17.4.617 (5). According to the final EIS, "The purpose of the Proposed Action is to permit activities that provide additional electricity to meet increased demand for power within the western United States." DEQ dismissed "alternative sources of energy" as an alternative to the proposal, despite the enormous potential for renewable energy development in Montana at prices competitive with gas turbine technology. The draft EIS listed "alternative sources of energy" as one of six alternatives to the generation plant that were considered but eliminated from detailed study. It was the only alternative that was dismissed without explanation. MEIC noted in its comments to DEQ that given the selection criteria listed in the draft EIS, renewable energy should have qualified as a legitimate alternative for analysis. In the final EIS, DEQ responded that an alternative energy source does not bear a logical relationship to a gas-fired power plant. In fact, alternative energy sources can be employed to fulfill the same purpose as the proposed action and have been shown to be feasible, cost-effective, and environmentally-preferred. By "alternative energy sources," MEIC means not only supply-side renewable resources such as wind power, but also demand-side resources such as energy

conservation and energy efficiency. Since the EIS was deficient in its analysis of alternatives, the decision maker had no means of making a reasoned and fully informed decision about the proposed project and the issuance of the air quality permit.

The final EIS also failed to conduct any analysis of the "upstream" environmental impacts associated with the plant's fuel requirements. The plant's **natural gas demand of 85 million cubic feet per day represents an increase of 55% over the total current consumption in the state of Montana.** Such a massive demand for natural gas cannot be met without impacts to the environment. As stated by MEIC in its comments, some of North America's most prized wild areas such as Montana's Rocky Mountain Front are continually threatened by the prospect of oil and gas exploration and drilling. The final EIS argues that an analysis of potential impacts to these sensitive areas would be speculative, because the source of gas for the plant has yet to be definitively determined. DEQ is itself speculating by considering impacts about which it currently has no information to be non-existent. DEQ cannot legally abdicate its responsibility to study the full range of impacts associated with the project. **To the contrary, until the source of gas has been selected and the impacts analyzed, the EIS remains incomplete.** MEPA requires DEQ to fully analyze the environmental impacts associated with its decision to grant an air quality permit to Continental. As acknowledged in the Record of Decision, without the granting of such permits, the Silver Bow Generation Plant would not become operational and the environmental impacts associated with the plant would be avoided. Therefore, the decision to grant the air quality permit is directly responsible (a necessary

condition) for the power plant's need to acquire 31 billion cubic feet of natural gas per year.

The final EIS also erroneously dismisses the likelihood of development along the Rocky Mountain Front because of a current, temporary moratorium. But recent statements and proposals made at the federal level by President George W. Bush, Senator Conrad Burns, USDA Secretary Ann M. Veneman, and others indicate that the Rocky Mountain Front is a high priority for additional exploration and development (see, for example, "Veneman says Rocky Mountain Front not off limits to oil and gas exploration," Great Falls Tribune, March 29, 2002).

9) MEIC incorporates by reference the public comments submitted by MEIC as well as all written comments and issues raised by the public and other materials in the agency file. MEIC reserves the right to add additional grounds for appeal during the contested case hearing requested herein, if additional issues or information become available during that process.

#### **RELIEF REQUESTED BY MEIC**

MEIC requests the following relief:

- a) That the Board order an in-person contested case hearing before the Board of Environmental Review in Helena, Montana, or a duly appointed hearing examiner, for purposes of challenging the validity of the Permit.
- b) That the Board stay the Department's decision pending the hearing and adoption of a final decision by the Board of Environmental Review as required by law.

c) That the Board provide any and all other relief that the it determines to be appropriate in this case.

Dated this 29<sup>th</sup> day of March, 2002.

Peter Michael Meloy  
Attorney for MEIC

James D. Jensen  
James D. Jensen  
on behalf of Montana Environmental Information Center

STATE OF MONTANA            )  
  ):ss  
COUNTY OF LEWIS AND CLARK    )

On this 29<sup>th</sup> day of March, 2002, before me the undersigned Notary Public, personally appeared James D. Jensen, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Notary Public for the State of Montana  
Residing at: Helena, MT  
My Commission Expires: AP 21, 2002

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, first class, this 29 day of March, 2007, to:

CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW  
P.O. BOX 200901  
HELENA, MT 59601

and was hand delivered, on the same date, to:

CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW  
1520 6<sup>TH</sup> AVE.  
HELENA, MT 59601

BY. 



**At. Environmental Center v. Dept. of Environmental Quality**

**Decided Dec. 17, 2002**

**by Judge Sherlock**

**First Judicial District**

**Docket No. BDV-2002-474**

**2002 ML 3836 (1st Jud. Dist.)**

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

MONTANA ENVIRONMENTAL INFORMATION

CENTER,

Plaintiff,

MONTANA DEPARTMENT OF ENVIRONMENTAL

QUALITY, and CONTINENTAL ENERGY

SERVICES, INC.,

Defendant.

Cause No. BDV-2002-474

**ORDER ON MOTION TO DISMISS**

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1 Before the Court is the Defendants' motion for dismissal.

**Background**

2 Plaintiff Montana Environmental Information Center (MEIC) brought this action to permanently enjoin the construction of a 500 megawatt energy facility, known as the Silver Bow Generation Plant (the Plant), approximately six miles west of Butte, Montana. MEIC claims that the Air Quality Permit issued by Defendant Department of Environmental Quality (DEQ) to Defendant Continental Energy Services (Continental) to build the Plant was issued in violation of the Montana constitutional right to a clean and healthful environment.

3 In its complaint, MEIC claims that the Plant, if built, is expected to produce significant quantities of air pollution linked to cancer, acid rain, harmful gasses and other deleterious effects on the environment. MEIC's members who live and work in the area will be harmed by the pollution caused by the Plant. Furthermore, MEIC alleges that there are reasonable alternatives to building the Plant which would provide the advantages of the Plant without the adverse environmental effects.

**Standard of Review**

4 A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the claimant can prove no set of facts which would entitle the claimant to relief. *Dubray v. Farmers Ins. Exch.*, 2001 MT 251, ¶ 8, 307 Mont. 134, ¶ 8, 36 P.3d 897, ¶ 8. A motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all wellpleaded allegations in the complaint. *Id.* In considering the motion, the complaint is construed in the light most favorable to the claimant, and all allegations of fact contained therein are taken as true. *Id.*

**Discussion**

5 Plaintiff's complaint consists of the following two counts:

6 1. That Defendant DEQ violated the right to a clean and healthful environment found in Article II, Section 3 and Article IX, Section 1 of the Montana Constitution by issuance of the permit to build the Plant.

2. That Continental's proposed construction and operation of the Plant violates the right to a clean and



healthful environment in Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.

MEIC does not allege that the issuance of the permit was in violation of the Montana Clean Air Act or any other Montana statute. Further, MEIC does not allege that the Montana Clean Air Act is unconstitutional on its face or as applied in the issuance of this permit.

7 Defendants brought this motion to dismiss the complaint for failure to state a claim upon which relief can be granted with the following two arguments:

8 1. Count One, for failure to state a claim upon which relief can be granted because the relief, if granted, would violate the separation of powers mandated by Article III, Section I of the Montana Constitution.

9 2. Count Two, for failure to state a claim upon which relief can be granted because there is no private right of action by a non-governmental party against another seeking to enforce the constitutional right to a clean and healthful environment. Implicit in each of these arguments is the dispositive issue, which the Court will address. Specifically, whether Plaintiff has properly alleged a violation of the Montana Constitution.

10 As noted above, MEIC is not alleging that the permit for the Plant was issued in violation of the Clean Air Act or any other statute. Furthermore, MEIC does not claim that the Clean Air Act violates the Montana Constitution. All legislative enactments, including the Clean Air Act, are presumed constitutional by the courts. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt. Henry v. State Compensation Ins. Fund, 1999 MT 126, ¶ 11, 294 Mont. 449, ¶ 11, 982 P.2d 456, ¶ 11. Therefore, unless MEIC alleges otherwise, the Court must presume that the Clean Air Act is constitutional.

11 Furthermore, DEQ, as an arm of the executive branch, is required to faithfully execute the laws of Montana. Merlin Adams Revocable Trust v. Yellowstone County, 2002 MT 201, ¶ 25, 311 Mont. 194, ¶ 25, 53 P.3d 1268, ¶ 25. MEIC does not allege that DEQ did anything other than execute the provisions of the Clean Air Act and its implementing regulations.

12 Plaintiffs have not alleged that DEQ's actions in issuing the permit violated the Clean Air Act or its implementing regulations, and have not alleged that the act or its regulations are unconstitutional facially or as applied. It is clear that plaintiffs have not properly alleged a constitutional violation.

13 MEIC suggests that it is the province of this Court to determine whether the agency's actions violate the constitution on a permit by permit basis while ignoring statutes duly enacted by the legislature. The system, they suggest, would be fraught with inconsistencies with no one able to determine whether they are acting within the laws of this state without a well fledged lawsuit. Furthermore, all decisions would be made by judges in courtrooms, rather than in an open process with public comment and expert input. If Plaintiffs believe that a permit can be issued without violating the Montana Clean Air Act but still be unconstitutional, the appropriate action is to challenge the statute or its implementing regulations as unconstitutional. They have not done so.

14 Therefore, Defendants motion to dismiss is hereby GRANTED.

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DATED this 17<sup>th</sup> day of December, 2002.

EFFREY M. SHERLOCK  
District Court Judge

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# MEIC to sue over Butte plans

BUTTE (AP) — A lawyer representing the Montana Environmental Information Center says the group plans to sue to stop Continental Energy Project's power plant on constitutional grounds.

"It is MEIC's position that the issuance of the (state) permit violates the guarantee of a clean and healthful environment," attorney Mike Meloy said Friday.

A lawsuit could mean further delays on the \$300 million, 500-megawatt gas-fired facility planned near Butte. Company officials said previously they hoped to break ground this fall.

The project won permit approval from the Department of Environmental Quality following an environmental impact analysis.

The MEIC initially stated its opposition to the project with an appeal of an air-quality permit to the Board of Environmental Review, but that appeal has been dropped in favor of a suit in District Court, Meloy said.

Jim Jensen, director of the MEIC, said he is hopeful an agreement with the company can be reached without going to court.

"We believe that MEIC has chosen to ignore work done by countless experts and proceed with their own agenda, which appears determined to stifle development that would otherwise provide new employment opportunities," said Dan Rapkoch, spokesman for Continental Energy Services.

Butte-Silver Bow Chief

Executive Judy Jacobson said the city has tried to work with the environmental group, as it did previously with Trout Unlimited and the Clark Fork Coalition on water issues, but failed.

"It sounds to me like they are using this as a test case," she said.

Jensen scoffed at suggestions MEIC is holding back the project or thwarting economic development.

"In fact, exactly the opposite is true," he said. Montana is hampered by its leaders' abilities and the way it conducts its affairs, he said.

MEIC has continually criticized the Butte facility, saying that it is unneeded, will pollute the environment and will generate electricity for out-of-state interests, not Montanans.

PS  
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## Power plant's MEIC lawsuit tossed out

By *Leslie McCartney of The Montana Standard*

Environmental group may appeal

A Helena District Court judge has dismissed a lawsuit brought by the Montana Environmental Information Center against the **Silver Bow Project**, a 500-megawatt, \$350 million electrical generation facility planned west of Butte.

In his order, Judge Jeffrey Sherlock released both **Continental Energy Services Inc.** and the Department of Environmental Quality from the lawsuit by siding with their motion to dismiss.

In July, Helena-based MEIC filed suit alleging that the gas-fired facility, which has enjoyed broad support in the Butte community, would violate the state Constitution's guarantee to a **clean and healthful environment**.

The judge disagreed, saying `` it is clear that plaintiffs (MEIC) have not properly alleged a constitutional violation."

**Sherlock** went further, saying that the MEIC has suggested that the court should determine if the state's action violated the Constitution on a permit-by-permit basis while ignoring statutes enacted by the Legislature.

`` The system, they suggest, would be fraught with inconsistencies with no one able to determine whether they are acting within the laws of this state without a full-fledged lawsuit," Sherlock wrote. If that were to be the case, judges in courtrooms would make all decisions, rather than in an open process with public comment and expert opinions, he continued.

Dismissal of the lawsuit paves the way for Continental, which has been stymied by the lawsuit and its uncertain outcome. All along, the Butte-based company has maintained that it has met all state requirements -- and gone beyond with a full-fledged environmental review which was not required -- in permitting the plant.

`` Continental has demonstrated its commitment to the environment throughout the permitting process," said Dick Cromer, president of

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Continental. "We performed an environmental impact statement to extensively evaluate all impacts associated with the Silver Bow Project. Our study resulted in air-quality permits that confirm the project will meet all state and federal laws."

The MEIC's Jensen, who is away for a month, was unavailable for comment Wednesday. However, MEIC Program Director Anne Hedges said the group will study the order and talk with its lawyers about how to proceed.

Calling Sherlock's decision "odd," she said it is unclear what he means in the three-page order.

"This case is of fundamental importance to Montanans and deserves to be reviewed at the highest level," Hedges said, referring to the state Supreme Court.

She added that the Constitution is fairly new, saying that it's common for a court to be uncertain how to proceed. "It isn't a huge shock, but I doubt it's the end of it either," she said.

Butte officials hope the matter has been decided.

"This is great news for Butte, assuming MEIC does not want to pursue an appeal. We hope they'll see the light and error of their ways and let this important project proceed," Butte Local Development Executive Director Evan Barrett said.

Butte-Silver Bow has spent many hours working with environmental groups in reference to issues such as water to be supplied to the plant. Those issues, brought by the Clark Fork Coalition and Trout Unlimited, have been successfully negotiated.

Continental officials pointed out that the plant employs the best available technology, including equipment that will minimize carbon monoxide emissions.

"The Silver Bow Project is the cleanest and most efficient thermal generation facility yet proposed in Montana," said Terry Webster, Continental's director of environmental compliance. "Our commitment to excellence means we will continue to work with the state and citizens of Montana to retain this distinction of environmental stewardship."

Chief Executive Judy Jacobson welcomed the dismissal as a good Christmas present.

"I'm just very pleased that we've gotten this far with it. I'd love to see them up and running," she said. She added that the plant is important to an industrial area west of Butte and could be used to further attract industry.

The project is expected to employ 900 workers during construction, and employ 25 full-time people after it opens.

-- Reporter Leslie McCartney may be reached via e-mail at [leslie.mccartney\(at\)mtstandard.com](mailto:leslie.mccartney(at)mtstandard.com).