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FILED

MAY 18 2010

MARILYN A. CRAFT Court Clerk
Deputy

7 **MONTANA FIFTH JUDICIAL DISTRICT COURT, JEFFERSON COUNTY**

8 JEFFERSON COUNTY, A political
9 subdivision of the State
10 of Montana, by and through
11 its Board of Commissioners,

12 Petitioner,

13 vs.

14 MONTANA DEPARTMENT OF
15 ENVIRONMENTAL QUALITY, an
16 agency of the State of Montana; STATE OF
17 MONTANA;

18 Respondents.

Cause No: *DV-2010-52*

WRIT OF MANDAMUS and
INJUNCTIVE RELIEF

19 **COMES NOW**, the Petitioner, Jefferson County, and pursuant to Mont. Code Ann. §§27-26-
20 101 et. Seq. (Mandamus); Mont. Code Ann. §§27-19-101 et. Seq. (Injunctive relief); and Mont. Code
21 Ann. §§75-1-101 et seq. (Montana Environmental Policy Act) and for its causes of action against
22 the State of Montana, and Montana Department of Environmental Quality (DEQ) hereby files the
23 following Petition for Writ of Mandamus and Injunctive Relief.

24 **I. INTRODUCTION**

25 1. Northwestern Energy (Northwestern), a regulated investor owned utility operating
26 within the State of Montana, proposes to build and operate a 500 kV electric transmission line from
27 Townsend, Montana to Shoshone, Idaho. The path, as proposed, would include crossing Jefferson
28 County, Montana. This project is the Mountain States Transmission Intertie (MSTI). In order to
proceed with MSTI, under Mont. Code Ann. §75-20-104(8), Northwestern was required to file an

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2 application for certificate under the Montana Facility Siting Act (MFSA) with the DEQ.

3 2. Currently, an Environmental Impact Statement (EIS) study is being conducted in
4 Montana and Idaho to determine a route for the MSTI project. Work on the EIS began in July 2008
5 when Northwestern submitted to the Bureau of Land Management (BLM) and the DEQ its
6 application for siting the MSTI project. The draft EIS is scheduled for release by the end of May
7 2010 or early June 2010 from the BLM and DEQ jointly.

8 3. DEQ is the lead agency in conducting the EIS as required by the Montana
9 Environmental Policy Act (MEPA). The BLM is the federal agency in charge of the federal study
10 through the National Environmental Policy Act (NEPA). The BLM is working with the DEQ on the
11 routing decision and will jointly issue a Record of Decision for the MSTI project.

12 4. DEQ is required under Mont. Code Ann. §75-20-217(4) to conduct an EIS under
13 MEPA and NEPA as department findings have provided compelling evidence that adverse
14 environmental impacts are likely to result due to the construction of the MSTI facilities.

15 5. The draft EIS is expected to be published by early June 2010. This draft will outline
16 the route for the MSTI line that allegedly creates the fewest impacts to human activities and the
17 environment. After submission of the draft EIS, the Major Facility Siting Act's authority can result
18 in approval of said project based upon the EIS.

19 6. Under the Major Facility Siting Act, Mont. Code Ann. §75-20-301, DEQ shall
20 approve a facility as proposed or modified or an alternative to a proposed facility if the Department
21 makes a series of findings including;

22 (c) That the facility minimizes adverse environmental impact, considering the state
23 of available technology and the nature and economics of the various alternatives,

24 (e) That the location of the facility as proposed conforms to applicable state and local
25 laws and regulations, except that the department may refuse to apply any local law
26 or regulation if it finds that, as applied to the proposed facility, the law or regulation
27 is unreasonably restrictive in view of the existing technology, of factors or cost or
28 economics, or of the needs of consumers, whether located inside or outside the
directly affected government subdivisions;

(f) That the facility will serve the public interest, convenience, and necessity;

2. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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2 (g) That the use of public lands for location of the facility was evaluated and public
3 lands were selected whenever their use is as economically practicable as the use of
4 private lands.

5 7. The Montana Environmental Policy Act (MEPA) is Montana's baseline
6 environmental law. MEPA requires state agencies to consider the environmental, social, cultural and
7 economic impacts of proposals including transmission lines before the project is approved.

8 8. The intent of MEPA under Mont. Code Ann. §75-1-102 is to declare a state policy
9 that will encourage productive and enjoyable harmony between humans and their environment, to
10 protect the right to use and enjoy private property free of undue government regulation, to promote
11 efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the
12 health and welfare of humans to enrich the understanding of the ecological systems and natural
13 resources important to the state, and to establish environmental quality council.

14 9. Pertaining to Policy under Mont. Code Ann. §75-1-103 of MEPA, it is declared that
15 it is a continuing policy of the State of Montana in cooperation with the federal government, local
16 governments, and other concerned public and private organizations, to use all practicable means and
17 measures, to create and maintain conditions under which humans and nature can coexist in
18 productive harmony, to recognize the right to use and enjoy private property free of undue
19 government regulation, and to fulfill the social, economic, and other requirements of present and
20 future generations of Montanans. Furthermore, Mont. Code Ann. §75-1-104 mandates that MEPA
21 does not affect the specific statutory obligations of any agency of the state to coordinate or consult
22 with any local government.

23 10. The requirements of EIS studies under Mont. Code Ann. §75-1-201 of MEPA shall
24 identify and develop methods and procedures that will ensure that the state government actions that
25 may impact the human environment are evaluated for regulatory restrictions on private property.
26 Further, under the EIS, the state shall make available to counties advice and information useful in
27 restoring, maintaining, and enhancing the quality of the environment.

28 11. More importantly, under Mont. Code Ann. §75-1-201(1)(c) of MEPA, prior to

3. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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2 making any detailed statement, the responsible state official shall consult with and obtain the
3 comments of any local government that may be directly impacted by the project.

4 12. Under Mont. Code Ann. §75-1-208, to the extent that the requirements of MEPA are
5 inconsistent with federal requirements, the requirements of this section do not apply to an
6 environmental review that is being prepared jointly by a state agency pursuant to this part and a
7 federal agency pursuant to the National Environmental Policy Act. Whereas, DEQ is conducting the
8 EIS jointly with BLM, DEQ is subject to the FPMA/NEPA requirements.

9 13. The Federal Land Policy and Management Act (FLPMA) governs planning
10 activities of the BLM. That Act, as 43 United States Code Section 1701(a)(2) declares that "The
11 national interest will be best realized if the public lands and their resources are periodically and
12 systematically inventoried and their present and future use projected through a land use planning
13 process coordinated with other federal and state planning efforts."

14 14. Section 1712 c-9 of 43 United States Code refers to the coordination status of a
15 county which is engaging in the land use planning process and requires that the Secretary of Interior
16 must coordinate the land use inventory, planning and management activities with the land use
17 planning and management programs of state and local governments in which their land is located.
18 Section 1712 also provides that the Secretary of Interior must assist in resolving, to the extent
19 practical, inconsistencies between federal and non-federal plans and gives preference to counties
20 engaging in the land use planning process. Further, the Secretary of Interior must provide
21 meaningful public involvement of state and local officials in the development of land use programs,
22 land use regulations, and land use decisions for public lands. This requirement provides that
23 counties should be involved throughout the planning and management cycle, not just at the end when
24 a draft plan or decision is issued. Finally, Section 1712 requirements provide that the Secretary must
25 assure that the BLM's plans be consistent with State and local plans to the maximum extent possible
26 under federal law.

27 15. NEPA also requires that all federal management agencies consider the impacts of
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their actions on the environment and on the preservation of the culture, heritage and custom of local government under 17 United States Code, Section 4331(a)(4). NEPA further requires that any study be conducted in cooperation with State and local governments. At 42 USC 4331(b), Congress has instructed an agency to carry out this mandate using all practicable means to improve and coordinate federal plans, functions, programs, and resources with State and local government.

16. Mont. Code Ann. §76-1-102 provides the purpose of a county planning board which is to improve the present health, safety, and convenience, and welfare of their citizens and to plan for the future development of their communities to the end that highway systems be carefully planned; that the new community centers grow only with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry, and business be recognized in future growth; that residential areas provide healthy surroundings for family life; and that the growth of the community be commensurate with and promotive of the efficient and economical use of public funds.

17. Mont. Code Ann. §76-1-106 provides the role of the planning board. The roles include ensuring the promotion of public health, safety, morals, convenience for the general welfare of communities, efficiency and economy in the process of community development, and the preparation of a growth policy. The planning board may also advise the County Commission by proposing policies for the development of public ways, public places, public structures, and public and private utilities.

18. The Jefferson County Board of Commissioners along with the county planning board regulate local land use planning. Their jurisdictional area as set forth by Mont. Code Ann. § 76-1-501 includes all of Jefferson County except the city boundaries of Boulder and Whitehall. Included in planning are considerations of preserving the culture and custom of the people of the County with its Growth Policy.

19. Mont. Code Ann. §76-1-601 provides authority for the Jefferson County Growth Policy. Per Mont. Code Ann. §76-1-605, Jefferson County must be guided by and give

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2 consideration to the general policy and pattern of development set out in the growth policy
3 authorization, construction, alteration, or abandonment of public ways, public places, public
4 structures, or public utilities.

5 20. Jefferson County has invested great time and effort into its planning to ensure that
6 the County's citizens, land, resources, and environment are protected from un-planned or unsolicited
7 growth. Jefferson County has developed a Growth Policy that is guided by the Jefferson County
8 Planning Board's goals to **I. Sustain and strengthen the economic well-being of Jefferson**
9 **County's citizens, II. Protect and maintain Jefferson County's rural character and the**
10 **community's historic relationship with natural resource development, and III Preserve and**
11 **enhance the rural, friendly and independent lifestyle currently enjoyed by Jefferson County's**
12 **citizens.** The Jefferson County Growth Policy is the guiding principle towards all planning inside
13 Jefferson County. Within this document, its planning board has emphasized that it is imperative that
14 communication exist between all levels of government and that the local planning process be
15 enjoined within state and federal planning too. The Growth Policy mandates the involvement and
16 interaction between local government and the state and federal government in all phases of planning.

17 21. Additional County planning includes lands within the Milligan Canyon/Boulder
18 Valley Zoning District, an area of Jefferson County that is proposed for MSTI project where there
19 are specific zoning regulations. Any impact upon this zoning district requires input at the local
20 planning level. Further, Jefferson County has passed a Resolution on the Right to Farm that was
21 developed by the planning board to provide a framework for which to minimize problems between
22 non agricultural and agricultural interests in the County and to integrate planning efforts to provide
23 for the retention of traditional and important agricultural lands in agricultural production.

24 22. By Jefferson County Commission Resolution 41-2008, dated November 25, 2008,
25 a copy of which is attached and made a part of this writ of mandamus, the Board has taken the
26 official step forward in the coordination process to be implemented between the State of Montana
27 Department of Environmental Quality and the Bureau of Land Management in relation to the
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2 proposed Mountain States Transmission Intertie (MSTI).

3 23. Resolution 41-2008 requires that all Federal and State planning and actions affecting
4 the County be coordinated with the County adopted plans, resolutions, and ordinances. Coordination
5 per this resolution recognizes that meaningful local government involvement requires more than the
6 timely exchange of information and places an additional responsibility on Federal and State agencies
7 to incorporate the goals, objectives and policies of local government into Federal and State plans and
8 decisions affecting any area under the County's jurisdiction.

9 24. Both the BLM and DEQ have been notified of Jefferson County's mandate that all
10 Federal and State planning and actions affecting the County be coordinated with the County adopted
11 plans, resolutions, and ordinances.

12 13 II. PARTIES

14 25. Petitioner incorporates the allegations set forth in Paragraphs 1 through 24 as set forth
15 above as though fully stated herein.

16 26. Petitioner, Jefferson County, is a political subdivision of the State of Montana.
17 Jefferson County is affected by the actions or inactions of DEQ in its environmental review of the
18 MSTI project under MEPA and the Major Facilities Siting Act as the MSTI project has proposed
19 routes that would traverse Jefferson County.

20 27. Respondent, DEQ, is an executive branch agency of the State of Montana
21 headquartered in Helena, Montana and is charged with the statutory and regulatory authority and
22 designation to conduct the EIS and Major Facility Siting Act for the MSTI project jointly with the
23 BLM including review within Jefferson County, Montana.

24 28. Respondent, State of Montana, is a state of the United States and has authority and
25 responsibility over the DEQ.

26 29. Petitioner has a direct interest in the actions undertaken by DEQ and the State of
27 Montana in regards to the MSTI project.

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7. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

III. JURISDICTION AND VENUE

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3 30. Petitioner incorporates the allegations set forth in Paragraphs 1 through 25 as set forth
4 above as though fully stated herein.

5 31. Jurisdiction is proper in this Court pursuant to Mont. Code Ann. §§27-26-101 et. Seq.
6 (Mandamus); and Mont. Code Ann. §§27-19-101 et. Seq. (Injunctive relief); the general original
7 jurisdiction of this Court under Mont. Code Ann. §3-5-302; the Montana Constitution Article II,
8 Section 3; and the inherent power of this Court to review state agency decisions and actions.

9 32. Venue is proper in Jefferson County in this matter because the proper place of trial
10 for an action against the State is in the county in which the claim arose, See Mont. Code Ann. §25-2-
11 126. The claim in this case where the State of Montana and DEQ have acted or failed to act is within
12 Jefferson County, Montana.

IV. CLAIMS FOR RELIEF

COUNT ONE - WRIT OF MANDAMUS

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15 33. Petitioner incorporates the allegations set forth in Paragraphs 1 through 32 as set forth
16 above as though fully stated herein.

17 34. Under the Major Facility Siting Act, Mont. Code Ann. §75-20-301, whereas DEQ is
18 required to make findings before approving the MSTI project, there is a clear legal duty to ensure
19 that the location of the MSTI project conforms to applicable Jefferson County regulations. This
20 includes its requirement to coordinate with State and Federal agencies on all planning issues and to
21 incorporate the goals, objectives and policies of Jefferson County into Federal and State plans and
22 decisions affecting the County's jurisdiction. This further requires that DEQ conform its review of
23 the MSTI Facilities Siting to other applicable planning regulations including placement of electrical
24 transmission lines upon public lands within Jefferson County and incorporating Jefferson County's
25 Growth Policy into the review of the MSTI project.

26 35. Under MEPA, Mont. Code Ann. §75-1-103, DEQ is conducting an EIS. There is a
27 legal duty that the State of Montana cooperate with local governments, including Jefferson County
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2 and use all practical means and measures to create and maintain conditions under which humans and
3 nature coexist in productive harmony, to recognize the right to use and enjoy private property free
4 of undue government regulation, and to fulfill the social, economic, and other requirements of
5 present and future generations of Montanans. MEPA further mandates under Mont. Code Ann. §75-
6 1-104 that MEPA does not affect the specific statutory obligations of any agency of the state to
7 coordinate or consult with any local government.

8 36. Further, under the process of conducting an EIS through MEPA, there is a legal
9 mandate under Mont. Code Ann. §75-1-201 that prior to making any detailed statement, the
10 responsible state official shall consult with and obtain the comments of any local government that
11 may be directly impacted by the project.

12 37. Jefferson County has requested at least three times in writing for DEQ and its
13 Director, Mr. Opper, to come to Jefferson County to coordinate and ensure that any proposed
14 transmission lines associated with the MSTI project that may traverse Jefferson County are in
15 compliance with County regulations and in accordance with all County planning. Mr. Opper and
16 other DEQ officials have refused Jefferson County's requests.

17 38. Because of the Respondents' failure to perform their legal duties, Petitioner is
18 required to seek from this Court mandamus relief directing Respondents to comply with Jefferson
19 County's request for coordination in compliance with the Major Facility Siting Act and MEPA
20 requirements. Further, Petitioner is required to seek from this Court mandamus relief directing
21 Respondents to comply with Jefferson County's request for coordination at the planning level prior
22 to continuing with any further study, planning, drafting, or approval of the MSTI project.

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24 **COUNT TWO - WRIT OF MANDAMUS IN THE ALTERNATIVE**

25 39. Petitioner incorporates the allegations set forth in Paragraphs 1 through 38 as set forth
26 above as though fully stated herein.

27 40. In the alternative, if the Court does not find a legal duty of DEQ to coordinate with
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2 Jefferson County prior to release of the EIS by MEPA and the Major Facility Siting Act, Jefferson
3 County alleges the that the requirements of the EIS and the Major Facility Siting Act are inconsistent
4 with federal requirements wherefore there is a legal duty requiring that DEQ comply with all federal
5 requirements of coordination.

6 41. Under Mont. Code Ann. §75-1-208, to the extent that the requirements of MEPA are
7 inconsistent with federal requirements, the requirements of MEPA do not apply to an environmental
8 review that is being prepared jointly by a state agency pursuant to this part and a federal agency
9 pursuant to the National Environmental Policy Act. Instead, DEQ is required to comply with the
10 requirements of federal agencies which include the requirement to coordinate with local government
11 jurisdictions. Wherefore there is a legal duty that DEQ coordinate with Jefferson County under
12 federal regulations.

13 42. Requirements of coordination for federal agencies are likewise required for DEQ as
14 it is working jointly with a federal agency, BLM. Coordination with local governments is required
15 of federal agencies under FLPMA and NEPA whereas Section 1712 c-9 of 43 United States Code
16 refers to the coordinated status of a county which is engaging in the land use planning process.
17 These Codes require that the BLM and likewise jointly DEQ must coordinate the land use inventory,
18 planning and management activities with the land use planning and management programs of state
19 and local governments in which their land is located.

20 43. Further, MEPA requirements are inconsistent with federal requirements for
21 coordination with local governments under FLPMA and NEPA as Section 1712 also provides that
22 BLM and DEQ jointly must assist in resolving, to the extent practical, inconsistencies between
23 federal and non-federal plans and gives preference to counties engaging in the land use planning
24 process. BLM and DEQ must also provide meaningful public involvement of state and local
25 officials in the development of land use programs, land use regulations, and land use decisions for
26 public lands. This requirement provides that counties should be involved throughout the planning
27 and management cycle, not just at the end when a draft plan or decision is issued.

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10. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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3 44. Whereas, NEPA also requires that BLM and DEQ jointly consider the impacts of their
4 actions on the environment and on the preservation of the culture, heritage and custom of local
5 government under 17 United States Code, Section 4331(a)(4). NEPA further requires that any study
6 be conducted in cooperation with State and local governments. At 42 USC 4331(b), Congress has
7 instructed an agency to carry out this mandate using all practicable means to improve and coordinate
8 federal plans, functions, programs, and resources with State and local government.

9 45. Wherefore, under the requirements Mont. Code Ann. §75-1-208, any deficiency in
10 requirements that DEQ coordinate with Jefferson County under State laws are overcome by federal
11 regulations. As a result, there is a clear legal duty that DEQ coordinate with Jefferson County on
12 its joint EIS with the BLM in regards to the MSTI project based upon NEPA and FLPMA as these
13 statutes require such coordination with Jefferson County by federal agencies.

14 46. Jefferson County has requested at least three times in writing for DEQ and its
15 Director, Mr. Opper, to come to Jefferson County to coordinate and ensure that any proposed
16 transmission lines associated with the MSTI project that may traverse Jefferson County are in
17 compliance with County regulations and in accordance with all County planning. Mr. Opper and
18 other DEQ officials have refused Jefferson County's requests.

19 47. Because of the Respondents' failure to perform their legal duties, Petitioner is
20 required to seek from this Court mandamus relief directing Respondents to comply with Jefferson
21 County's request for coordination in compliance with FLPMA and NEPA requirements in
22 accordance with DEQ jointly completing an EIS study on the MSTI project with BLM. Further,
23 Petitioner is required to seek from this Court mandamus relief directing Respondents to comply with
24 Jefferson County's request for coordination at the planning level prior to continuing with any further
25 study, planning, drafting, or approval of the MSTI project.

26 **COUNT THREE - WRIT OF MANDAMUS IN THE ALTERNATIVE**

27 48. Petitioner incorporates the allegations set forth in Paragraphs 1 through 47 as set forth
28 above as though fully stated herein.

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3 49. In the alternative, if the Court does not find a legal duty of DEQ to coordinate with
4 Jefferson County prior to release of the EIS by MEPA and the Major Facility Siting Act, Jefferson
5 County alleges that the requirements of the EIS and the Major Facility Siting Act are inconsistent
6 with federal requirements wherefore there is a legal duty requiring that DEQ comply with all federal
7 requirements of coordination.

8 50. Under MEPA requirements of Mont. Code Ann. §75-1-103, DEQ is conducting an
9 EIS. There is a legal duty that the State of Montana cooperate with local governments including
10 Jefferson County and use all practical means and measures to create and maintain conditions under
11 which humans and nature coexist in productive harmony, to recognize the right to use and enjoy
12 private property free of undue government regulation, and to fulfill the social, economic, and other
13 requirements of present and future generations of Montanans. MEPA further mandates under Mont.
14 Code Ann. §75-1-104 that MEPA does not affect the specific statutory obligations of any agency of
15 the state to coordinate or consult with any local government.

16 51. Further, under the process of conducting an EIS through MEPA, there is a legal
17 mandate under Mont. Code Ann. §75-1-201 that prior to making any detailed statement, the
18 responsible state official shall consult with and obtain the comments of any local government that
19 may be directly impacted by the project.

20 52. Jefferson County has requested at least three times in writing for DEQ and its
21 Director, Mr. Opper, to come to Jefferson County and meet with its Board of County Commissioners
22 to cooperate and use all practical means and measures to create and maintain conditions under which
23 humans and nature coexist in productive harmony, cooperate on the recognition of the right of
24 Jefferson County constituents to use and enjoy private property free of undue government
25 regulations, and to cooperate with Jefferson County to fulfill the social, economic, and other
26 requirements of present and future generations residents of Jefferson County. Jefferson County has
27 likewise requested that the responsible DEQ official consult with Jefferson County and obtain
28 comments from Jefferson County due to potential impacts of the MSTI project to no avail.

12. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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3 53. Because of the Respondents' failure to perform their legal duties, Petitioner is
4 required to seek from this Court mandamus relief directing Respondents to comply with Jefferson
5 County's request for coordination in compliance with FLPMA and NEPA requirements in
6 accordance with DEQ jointly completing an EIS study on the MSTI project with BLM. Further,
7 Petitioner is required to seek from this Court mandamus relief directing Respondents to comply with
8 Jefferson County's request for coordination at the planning level prior to continuing with any further
9 study, planning, drafting, or approval of the MSTI project. A writ of mandamus would ensure that
10 DEQ recognizes the right of Jefferson County residents to coordinate and ensure that any proposed
11 transmission lines associated with the MSTI project that may traverse Jefferson County are in
12 compliance with County regulations and in accordance with all County planning. Mr. Opper and
13 other DEQ officials have refused Jefferson County's requests.

14 **COUNT FOUR - PRELIMINARY INJUNCTION**

15 54. Petitioner incorporates the allegations set forth in Paragraphs 1 through 53 as set forth
16 above as though fully stated herein.

17 55. Petitioner is a political subdivision of the State of Montana whose rights are affected
18 by Respondent's lack of compliance with the Major Facility Siting Act, Mont. Code Ann. §75-20-
19 301, MEPA, and in its EIS study being conducted jointly with the BLM under the requirements of
20 federal statutes including FLPMA and NEPA.

21 56. Petitioner's ability and statutory right to plan and regulate land-use within Jefferson
22 County and its associated Growth Policy, resolutions and policies on planning and zoning are all
23 directly affected by Respondent's failure to comply with Respondent's mandatory obligations under
24 the Major Facility Siting Act, MEPA, FLPMA, and NEPA to coordinate with Jefferson County on
25 these issues.

26 57. The failure of DEQ to ensure that the location of the MSTI project conforms to
27 applicable Jefferson County planning and regulations severely and irreparably impacts Jefferson
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13. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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County's jurisdictional right to regulate and manage growth within Jefferson County. Any release of an EIS on the MSTI project which does not first include DEQ's conforming the EIS to Jefferson County regulations would irreparably harm Jefferson County ability to regulate through it's Growth Policy, planning resolutions and zoning. This would result in an EIS that is incomplete and incompatible with Jefferson County's jurisdictional and statutory rights.

58. The failure of DEQ to cooperate with Jefferson County and use all practicable means and measures to create and maintain conditions under which humans and nature coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans greatly impacts Jefferson County's jurisdictional right to regulate and manage growth within Jefferson County. Any release of an EIS on the MSTI project which does not include cooperation with Jefferson County on maintaining coexistence of nature and man, recognizing private property rights, and fulfilling social, economic, and other requirements of present and future generations irreparably harms rights granted to Jefferson County for planning and the right to regulate and manage these specific conditions.

59. The failure of DEQ to coordinate with Jefferson County on plans and functions of the MSTI project prior to the drafting of an EIS on the MSTI project; greatly impacts Jefferson County's jurisdictional right to regulate and manage growth within Jefferson County. Any release of an EIS on the MSTI project which does not include coordination on the plans and functions of the project with Jefferson County irreparably harms rights granted to Jefferson County for planning and the regulation and management of growth within its jurisdiction as the EIS would be incomplete without coordination with Jefferson County.

60. DEQ's refusal to have its responsible state official consult with and obtain the comments of Jefferson County on the MSTI project would severely impact Jefferson County's jurisdictional right to regulate and manage growth within Jefferson County. Any release of an EIS document on the MSTI project without consultation and obtaining comments of Jefferson County

14. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

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2 would result in an incomplete and deficient EIS which irreparably harms Jefferson County's right
3 to planning and the regulation and management of growth within its jurisdiction.

4 61. Any further work and the potential release of an EIS on the MSTI project without
5 fulfillment of DEQ's statutory obligations of coordination and consulting with Jefferson County
6 irreparably harms Jefferson County's Growth Policy, planning resolutions and zoning within
7 Jefferson County.

8 62. Respondent's violation of their legal obligation under statute is ongoing, and capable
9 of repetition. Further, commission of the release of an EIS on the MSTI project without adequate
10 statutory consultation and coordination with Jefferson County during this litigation on a writ of
11 mandamus would irreparably injure Jefferson County's ability to coordinate on the planning and
12 study of the proposed MSTI project. Wherefore, Jefferson County would be irreparably harmed.

13 63. This Court has the authority pursuant to Mont. Code Ann. §27-19-201 and §27-19-
14 314 to issue both a preliminary injunction and a restraining order to enjoin the Respondent from
15 further action on the EIS draft including its release to the public until such time as the Petitioner's
16 writ of mandamus is considered by this Court.

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18 **COUNT FIVE - ATTORNEY'S FEES AND COSTS**

19 64. Petitioner incorporates the allegations set forth in Paragraphs 1 through 60 as set forth
20 above as though fully stated herein.

21 65. Pursuant to Mont. Code Ann. §27-26-402, Petitioners are entitled an award of their
22 reasonable attorney's fees and costs as successful applicants for a writ of mandamus.

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24 **PRAYER FOR RELIEF**

25 WHEREFORE, Petitioner prays for judgment as follows:

26 1. For a writ of mandamus ordering Respondent to comply with the statutory obligations
27 of the Major Facility Siting Act, MEPA, FLPMA, and NEPA by fully coordinating with Jefferson
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15. WRIT OF MANDAMUS AND INJUNCTIVE RELIEF


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2 County on planning of the MSTI project before the completion of a final draft of the MSTI project
3 EIS. Said coordination shall include meaningful involvement by Jefferson County and assure that
4 DEQ's plans are consistent with Jefferson County's plans to the maximum extent possible.

5 2. For mandatory injunctive relief prohibiting the Respondent from further planning,
6 drafting, studying, and releasing of a draft EIS document pertaining to the MSTI project's Major
7 Facility Siting until such time as the DEQ follows its statutory obligations to fully coordinate with
8 Jefferson County on the MSTI project wherefore it impacts Jefferson County by ensuring meaningful
9 involvement by Jefferson County officials and assure that DEQ's plans are consistent with Jefferson
10 County's plans to the maximum extent possible. A preliminary injunction is warranted in the present
11 circumstances given that Respondent's actions in finalizing an EIS in the next two to four weeks,
12 if not enjoined, render moot the Petitioner's underlying claims in this case, thereby rendering any
13 judgment handed down by this court ineffectual; and Petitioner will likely suffer great and
14 irreparable injury should the Respondent be allowed to continue and carry out the EIS study and its
15 final draft without coordination with Jefferson County. These reasons constitute a basis for this
16 Court to grant a preliminary injunction and even a temporary restraining order until the writ of
17 mandamus may be heard.

18 3. For an award of the Petitioner's attorney fees and costs as provided by law and equity;
19 and;

20 4. For such other relief as this Court may deem just and proper.

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22 DATED this 18th day of May, 2010.

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25 
26 Mathew J. Johnson
27 Attorney for Petitioner
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Jefferson County wants voice in planning process

UPDATED: Lawsuit filed over MSTI, see court documents

By Nick Gevock of The Montana Standard | Posted: Thursday, May 20, 2010 6:00 pm

Jefferson County has filed a lawsuit against the state Department of Environmental Quality for alleging shutting the county out of planning for a proposed major power line.

"We've tried to get the DEQ to come down and sit down at the table with us, and we haven't been able to," said Dave Kirsch, county commissioner. "They're keeping us entirely in the dark."

The county filed the lawsuit Tuesday in Boulder district court that requests an injunction halting the Mountain States Transmission Intertie until the county is in on the planning. The 500-kV line is proposed by NorthWestern Energy to supply power to out-of-state markets and would run from near Townsend to Shoshone, Idaho. The line would cross through Jefferson County.

The line has been highly controversial, with some landowners saying it would come at their expense through loss of property value to benefit NorthWestern Energy.

Commissioners have repeatedly asked DEQ to coordinate with the county while drafting the required environmental impact statement on the proposal, Kirsch said.

But DEQ Director Richard Opper said his agency has not avoided Jefferson County. He said the county first contacted DEQ about a meeting late last month and agency officials have tried to schedule a meeting with them.

"It's not like we've been reluctant to meet with them," he said.

Kirsch contends the only involvement the county has had is through public meetings that give little insight into where the line will go. The county is requesting DEQ comply with a county policy that requires new lines supplying power out of state to go on public lands. And a county resolution requires coordination between state and federal agencies with the county to incorporate local regulations in the planning.

"They have to sit down and coordinate with us and try to figure out the best place for it to go and not just give it to us and say, "Here's where it's going to go," he said. "They haven't coordinated fully with Jefferson County in order to understand our policy and planning documents."

Matt Johnson, county attorney, said they've had far better cooperation with the Montana Department of Transportation when planning for road projects. That's what the county is seeking with DEQ.

Kirsch said the county is not trying to stop the line. But he said an existing line through the county passes almost entirely through public land and that's where the county would like to see it go.

He added the line could harm Montana power users by driving up rates.

"This line doesn't do anything for Montana, it's to send power out of the state to areas like California and Nevada," he said. "Our concerns is once they establish a market, say California, pretty soon we will be paying the same rate as California."

But Opper said DEQ is considering a route that would place MSTI on as much public land as possible, which is often preferable.

"All other factors being equal we'll choose public land, whether it be federal land or state land," he said. "That's part of state law."

However, while DEQ consults with local officials, much of what Jefferson County wants it can't do, Opper said. The agency never releases a draft copy of an EIS to anyone before it's done, which Jefferson County requested.

And under state law, DEQ is charged with planning major facilities like power lines for a reason.

"Several counties may have contradictory plans that would make it impossible to site a major linear facility like a power line," he said. "That's why the state is responsible for making the decision."

- Reporter Nick Gevock may be reached at nick.gevock@mtstandard.com

Next Document

DA 11-0048

IN THE SUPREME COURT OF THE STATE OF MONTANA

2011 MT 265

JEFFERSON COUNTY, a political subdivision
of the State of Montana, by and through
its Board of Commissioners,

Petitioner and Appellee,

v.

DEPARTMENT OF ENVIRONMENTAL
QUALITY, an agency of the State of Montana,

Respondent and Appellant,

and

NORTHWESTERN CORP, d/b/a
NORTHWESTERN ENERGY,

Intervenor and Appellant.

APPEAL FROM: District Court of the Fifth Judicial District,
In and For the County of Jefferson, Cause No. DV 10-52
Honorable Loren Tucker, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Ed Hayes (argued), John F. North; Special Assistant Attorneys
General; Helena, Montana (attorneys for Department of Environmental
Quality)

John K. Tabaracci (argued), Robert Erickson; Sullivan, Tabaracci &
Rhoades, P.C.; Missoula, Montana (attorneys for NorthWestern Energy)

For Appellee:

Mathew J. Johnson; Jefferson County Attorney; Boulder, Montana

Peter G. Scott (argued); Gough, Shanahan, Johnson & Waterman, PLLP;
Helena, Montana

Argued and Submitted: August 2, 2011

Decided: October 27, 2011

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 The Montana Department of Environmental Quality (DEQ) and Intervenor NorthWestern Energy (NorthWestern) appeal the Fifth Judicial District Court’s judgment in favor of Petitioner Jefferson County. Appellants argue the District Court erred in issuing a writ of mandamus, granting summary judgment to Jefferson County, and enjoining DEQ from releasing a draft environmental impact statement. We reverse the District Court and remand with instructions to dismiss this action. We restate the issues as follows:

¶2 *1. Whether the District Court properly granted a writ of mandamus requiring DEQ to consult with the Jefferson County Board of Commissioners under § 75-1-201(1)(c), MCA, before issuing a draft environmental impact statement on the Mountain States Transmission Intertie.*

¶3 *2. Whether Jefferson County’s action against DEQ is premature.*

FACTUAL AND PROCEDURAL BACKGROUND

¶4 To meet increasing demands for electricity in the western United States, NorthWestern proposed constructing an electric transmission line running from approximately five miles southeast of Townsend, Montana, to a midpoint station near Shoshone, Idaho. The project, known as Mountain States Transmission Intertie (MSTI), would affect six counties in Montana and require the participation of numerous state agencies with overlapping jurisdiction concerning various aspects of the project. In order to commence construction of the MSTI, NorthWestern must first file an application and receive a certificate under the Major Facilities Siting Act (MFSA). DEQ and the United States Bureau of Land Management (BLM) are the lead agencies charged with review of

the project. Under state law, DEQ decides whether to issue a certificate and, if issued, determines the route of the MSTI.

¶5 Before submitting its application, NorthWestern held public meetings in order to identify potentially affected resources, suggest routes, and discuss mitigation of any adverse effects of the MSTI. NorthWestern representatives also attended a meeting of the Jefferson County Board of Commissioners on June 12, 2007, at which they provided a presentation on the MSTI including a map showing possible routes. NorthWestern invited the commissioners to raise concerns or issues involving the alternative routes. NorthWestern attended a second meeting on June 17, 2008, and provided updated information and received further input from Jefferson County.

¶6 On June 30, 2008, NorthWestern submitted its application for a certificate from DEQ under the MFSA. NorthWestern incorporated Jefferson County's comments into its application. NorthWestern's application has been available for public viewing on DEQ's website since July 8, 2008. NorthWestern also mailed newsletters to individuals and other parties, including Jefferson County, related to the MSTI.

¶7 To determine the extent of their environmental review, DEQ and BLM sent scoping letters to interested parties on August 8, 2008, indicating NorthWestern had proposed three alternative routes and additional alternatives might be developed during the environmental review. DEQ sent these letters to, among others, Kenneth Weber, Jefferson County Commission Chair; Tom Lythgoe, Jefferson County Commission Vice Chair; and Chuck Notbohm, Jefferson County Commissioner. The letters encouraged recipients to offer written comments on the route alternatives, to raise issues that should

be considered, and to provide possible mitigation measures and any other relevant information. The recipients also were invited to attend public scoping meetings in Three Forks, Butte, and Dillon.

¶8 DEQ and BLM facilitated a separate scoping process for governmental agencies by sending letters dated August 20, 2008, to the Jefferson County Board of Commissioners, as well as to commissioners in the other five counties through which the line might pass. Those letters stated the purpose of the scoping process was to encourage involvement by interested stakeholders in a manner that allowed for early identification and resolution of environmental issues. The letters included a map depicting the various alternative routes identified in NorthWestern's application. Recipients were invited to attend scoping meetings for governmental agencies to be held on the same dates and in the same locations as the general public meetings but several hours before them.

¶9 Jefferson County Commission Chair Weber attended both the public scoping meeting and the agency scoping meeting in Dillon on September 11, 2008. The Jefferson County Commissioners then discussed the MSTI in three separate meetings on September 16, September 30, and October 7, 2008. In all three meetings, Weber noted the October 10 deadline for submitting comments to DEQ was fast approaching. On October 10, 2008, the Jefferson County Commissioners submitted their comments to DEQ by electronic mail. In the letter, the commissioners acknowledged the benefits of the MSTI but stated they "should be brought forward in a manner that impacts private property in the least amount possible." The commissioners indicated this could be done by taking Jefferson County's zoning ordinances into consideration. The commissioners

also requested DEQ give preference to the third alternative route proposed by NorthWestern because it would impact the lowest number of current and future homes in Jefferson County.

¶10 In the course of preparing a draft of the Environmental Impact Statement (EIS), DEQ obtained Jefferson County's land use plans. DEQ representatives contacted Jefferson County to inquire about any additional land use and zoning regulations. DEQ reviewed the documents and determined the MSTI as proposed complied with Jefferson County's land use plans.

¶11 DEQ did not hear from Jefferson County again until it received a letter dated April 22, 2010. The commissioners informed DEQ that the County was invoking its "coordination authority" under state and federal law. The commissioners cited eleven federal laws in which the word "coordinate" appears. The only state law the commissioners cited was § 75-1-104, MCA (2009),¹ which states the Montana Environmental Policy Act's (MEPA's) provisions do not affect specific statutory obligations of an agency of the state to coordinate or consult with any local government. Jefferson County also indicated it was in the process of delineating a land-use policy and it expected DEQ and BLM to comply with the policy in determining the MSTI route. Jefferson County did not cite the consultation requirement in § 75-1-201(1)(c), MCA, on which it rests its claim in this appeal.

¹ When this action was filed, the applicable law was the 2009 version of the MCA. Unless otherwise indicated, all citations to the Montana Code Annotated are to the 2009 version.

¶12 DEQ responded on April 30, 2010, explaining the agency had consulted and coordinated with Jefferson County. DEQ detailed the multiple times DEQ, BLM, and NorthWestern had met with Jefferson County officials. DEQ also stated the commissioners' request would be difficult to accommodate as it came at the eleventh hour, sixteen months after the comment period and just weeks before DEQ and BLM were expected to finalize and release the Draft EIS.

¶13 Jefferson County and DEQ exchanged several letters between April and May 2010 concerning the MSTI. On May 18, 2010, Jefferson County filed a Petition for Writ of Mandamus and Injunctive Relief against DEQ. Jefferson County sought an order requiring DEQ to comply with MFSA, MEPA, the Federal Land Policy and Management Act, and the National Environmental Policy Act. Jefferson County further requested DEQ be enjoined from "planning, drafting, studying and releasing" a Draft EIS. DEQ met with the commissioners on May 27, and with Commissioner Tom Lythgoe on June 3, 2010, to discuss and provide additional information on the MSTI.

¶14 The District Court granted NorthWestern's motion to intervene on June 16, 2010, and held evidentiary hearings on June 21, July 7, and July 28, 2010. Although the presentation of evidence still had not concluded, Jefferson County filed a motion for partial summary judgment for declaratory and injunctive relief on August 18, 2010. DEQ and NorthWestern opposed the motion. On September 8, 2010, the District Court ruled in favor of Jefferson County after determining DEQ had not satisfied its duty to consult with Jefferson County under MEPA and enjoined DEQ from releasing the Draft EIS until it had done so. The County filed notice of entry of judgment on December 22, 2010.

¶15 On January 11, 2011, Jefferson County filed a motion seeking “additional relief in the form of an order requiring DEQ to establish a reasonable budget so that Jefferson County can engage an expert to assist the County in formulating its input to the Draft EIS.” Jefferson County requested “an initial budget of \$30,000 to pay an expert selected by Jefferson County[.]” The District Court had not ruled on the motion when DEQ and NorthWestern filed notices of appeal on January 25 and February 4, 2011, respectively.

STANDARD OF REVIEW

¶16 The issuance of a writ of mandamus is a legal conclusion this Court reviews *de novo*. *Franchi v. County of Jefferson*, 274 Mont. 272, 275, 908 P.2d 210, 212 (1995). The writ is available only when the applicant is entitled to the performance of a clear legal duty against whom the writ is sought and there is no speedy and adequate remedy in the ordinary course of law. *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834. We review a district court’s grant of summary judgment *de novo* and apply the same standard as the trial court. *Redies v. Attys. Liab. Prot. Soc’y*, 2007 MT 9, ¶ 26, 335 Mont. 233, 150 P.3d 930. To uphold the ruling there must be no issues of material fact and the moving party must be entitled to judgment as a matter of law. M. R. Civ. P. 56. Where a district court issues an injunction based on conclusions of law, we review that order *de novo* to determine whether the interpretation of law is correct. *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 21, 341 Mont. 368, 178 P.3d 696.

DISCUSSION

¶17 *1. Whether the District Court properly granted a writ of mandamus requiring DEQ to consult with the Jefferson County Board of Commissioners under § 75-1-201(1)(c), MCA, before issuing a draft environmental impact statement on the Mountain States Transmission Intertie.*

¶18 MEPA requires agencies to prepare an EIS addressing the impacts of a proposed action that will significantly affect the quality of the human environment. Section 75-1-201(1)(b)(iv), MCA. Prior to preparing an EIS, agencies like DEQ are required to determine its scope by inviting interested parties, including local governments, other state agencies, and the public to assist in identifying issues the EIS will discuss. Admin. R. Mont. § 17.4.615. Next, DEQ prepares a Draft EIS which considers the comments received during scoping. The lengthy requirements for a Draft EIS include “the agency’s preferred alternative, if any and its reasons for the preference” along with “a section on consultation and preparation” including “a listing of other agencies, groups, or individuals who were contacted or contributed information.” Admin. R. Mont. § 17.4.617. DEQ then releases the Draft EIS for further review and comment from interested parties. If the Draft EIS generates substantial comment indicating a change in the analysis is necessary, DEQ drafts a supplemental Draft EIS, which is again released for comment. Admin. R. Mont. § 17.4.621. DEQ ultimately incorporates these comments into a Final EIS along with a recommendation on the action which triggered the environmental review. Admin. R. Mont. § 17.4.619.

¶19 Under § 75-1-201(1)(c), MCA, “prior to making any detailed statement . . . the responsible state official shall consult with and obtain the comments of . . . any local

government . . . that may be directly affected by the project.” The word “consult” is not defined in MEPA or the administrative rules. The District Court defined consult in its Conclusions of Law as “to seek advice or ask the opinion of.”

¶20 The District Court granted Jefferson County a writ of mandamus, ordering DEQ to consult with the County prior to issuing a Draft EIS. Specifically, the Court stated, “the parties are directed to develop and implement a reasonable process for consultation.” DEQ and NorthWestern contend the trial court’s order exceeded the directive imposed by the statute. Noting the District Court interpreted “consult” according to its dictionary definition, NorthWestern reasons that since interpretation was required, the legal duty was not clear. DEQ adds that because the court left it up to the parties to resolve how DEQ was required to consult with Jefferson County, there was no clear legal duty defined by law. Jefferson County responds that, although the statute does not spell out how the consultation is to be executed, there is no dispute it must be performed. Citing *In re “A” Family*, 184 Mont. 145, 602 P.2d 157 (1979), Jefferson County asserts there may be a clear legal duty even when a statute does not articulate the exact method of implementation.

¶21 Section 27-26-102, MCA, sets forth two requirements before a court may issue a writ of mandamus to compel an act: (1) the party applying for the writ must be entitled to the performance of a clear legal duty by the party against whom the writ is sought; and (2) there must be no speedy and adequate remedy in the ordinary course of law. *Best v. Police Dep’t of Billings*, 2000 MT 97, ¶ 14, 299 Mont. 247, 999 P.2d 334. It has long been established that mandamus will lie only where the claimant “has a specific right

and the public officer is acting ministerially and has no discretion in the matter[.]” *Smith v. County of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834 (quoting *State v. Cooney*, 102 Mont. 521, 529, 59 P.2d 48, 53 (1936)); *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 28, 66 P. 496, 498 (1901). An act is ministerial when “the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment[.]” *Smith*, ¶ 28.

¶22 Section 75-1-201(1)(c), MCA, only requires that consultation occur before a detailed statement is released; it does not prescribe what constitutes consultation, how it is to be performed, or when the consultation requirement is satisfied. The District Court could not define the duty absent a dictionary and, even after applying the definition, the court left it to the disputing parties to discern the meaning of “consult” and satisfy whatever it entailed. Mandamus will lie to compel action, but not to control discretion. *State ex rel. Scollard v. Bd. of Exam’rs for Nurses*, 52 Mont. 91, 98, 156 P. 124, 126 (1916). Because the statute does not specify how much consultation should occur, of what the consultation should consist, or with what frequency consultation should be undertaken, DEQ has at least some discretion as to how to perform the act; thus, the requirement to “consult” is not ministerial and does not define a clear duty.

¶23 Jefferson County argues the only reason the duty is unclear is because DEQ has failed to implement the legislature’s mandate by enacting rules that further explain what “consult” means. The County cites no statute expressly mandating such a rule. Assuming DEQ has authority to define a process for consultation, this would still be a discretionary act, rather than a ministerial one. Based on the language of § 75-1-

201(1)(c), MCA, and the District Court’s deferential approach to its exact meaning, we cannot conclude the requirement DEQ consult with Jefferson County establishes a ministerial task devoid of discretion.

¶24 Jefferson County’s reliance on *In re “A” Family* is misplaced. In that case, we distinguished mandamus from a mandatory injunction, noting that the former is an action at law, which “commands the performance of a particular duty” by the defendant, whereas a mandatory injunction requires “the undoing of injurious acts and restoration of the status quo[.]” *In re “A” Family*, 184 Mont. at 152-53, 602 P.2d at 162 (quoting 42 Am.Jur.2d 750 *Injunctions* § 19). Because the district court had upheld the findings of two administrative hearing officers and directed the defendant school district to place the plaintiffs’ child in a residential program under mandates imposed by federal law, we concluded the action was in the nature of mandamus, and accordingly an action at law for which the district court’s factual findings were subject to review for clear error. *In re “A” Family*, 184 Mont. at 152-53, 602 P.2d at 162. The issue in that case was the school district’s compliance with federal law governing “the education of handicapped persons”; the district disputed whether the evidence supported the district court’s conclusion that the child was severely emotionally disturbed and whether the local school district’s special education program was sufficient to meet his needs. *In re “A” Family*, 184 Mont. at 150, 602 P.2d at 160-61. We did not address whether the statute imposed a clear legal duty, the performance of which could be compelled by mandamus.

¶25 While a writ of mandamus may be granted to compel an agency to act, the District Court ordered more, directing DEQ to “consult with and obtain comments from Jefferson

County at all stages of the process.” The court supported its ruling by noting “[n]othing in the statute modifies or limits the consultation duty to a single event[.]” DEQ concedes there is no limitation in the statute but argues this only means it is free to consult with Jefferson County more than once, not that it is required to do so.²

¶26 We agree with DEQ that, at this stage in the process, it has not violated a clear legal duty to “consult with” the County and that the District Court erred in compelling the exercise of discretionary acts. Jefferson County contends it should be given an opportunity to play an active role in preparing the Draft EIS, but MEPA plainly applies to the review of “state actions” (§ 75-1-102(1), MCA) and calls for environmental review by “agencies of the state” (§ 75-1-201(1)(b), MCA). Further, under the MFSA, it is the province of DEQ, not the local government, to “commence an evaluation of the proposed facility and its effects, considering all applicable criteria listed in 75-20-301, and [to] issue a decision, opinion, order, certification, or permit[.]” Section 75-20-216(2), MCA. The only condition under § 75-1-201(1)(c), MCA, is that DEQ consult with Jefferson County “prior to making any detailed statement[.]” The statute does not mandate the county’s active participation in drafting the statement. Section 75-1-201, MCA.

¶27 The record reflects DEQ already has expended considerable effort to include Jefferson County in the environmental review process. After receiving NorthWestern’s

² DEQ does not contend, however, that seeking and obtaining comments alone satisfies its duty to consult. We note the agency’s acknowledgment in this regard gives meaning to every word in the statute, which includes the requirement to both consult with *and* obtain comment from affected local governments. Section 75-1-201(1)(c), MCA. *See Cal. Wilderness Coalition v. U.S. DOE*, 631 F.3d 1072, 1087 (9th Cir. 2011). DEQ’s administrative rules also reflect a distinction between consultation and comment during different points in the process. Admin. R. Mont. §§ 17.4.617(10), 17.4.618-17.4.619.

application, which incorporated recommendations from Jefferson County, DEQ sent Jefferson County several letters seeking input and requesting its attendance at scoping meetings. Jefferson County attended those meetings, discussed the MSTI, and provided its advice and comments to DEQ by letter. DEQ reviewed that letter and later obtained Jefferson County’s land use and zoning plans to insure compliance should DEQ opt for a MSTI route that would impact Jefferson County. DEQ has engaged in communication with Jefferson County in the form of in-person meetings, e-mails, and telephone conferences at several times during the process. DEQ also responded to Jefferson County’s letter invoking its “coordination authority” although the letter came well beyond closure of the comment period. Even after Jefferson County petitioned for mandamus and an injunction, DEQ continued meeting with the Jefferson County Commissioners concerning their request for coordination. During these meetings, DEQ answered the commissioners’ questions regarding the MSTI and discussed the alternatives being considered in the Draft EIS. Whatever may be the agency’s ultimate responsibilities in the MSTI application review, at this juncture in the process—prior to the issuance of even a Draft EIS—we cannot agree that DEQ has a clear legal duty to do more.

¶28 **2. *Whether Jefferson County’s action against DEQ is premature.***

¶29 Even if a clear duty was evident from the statute, a court is divested of the authority to issue a writ of mandamus if an adequate remedy exists in the ordinary course of law. *Newman v. Wittmer*, 277 Mont. 1, 12, 917 P.2d 926, 932 (1996). DEQ points to several remedies available to Jefferson County absent a writ of mandamus. First, MEPA

provides for a court challenge to an agency action for “failure to comply with or inadequate compliance with a requirement under this part[.]” Section 75-1-201(6)(a), MCA. Second, MFSA allows an administrative appeal and judicial review process at the request of “[a] person aggrieved by the final decision of the department on an application for a . . . permit under this chapter[.]” Section 75-20-223(1)(a), MCA.

¶30 Jefferson County argues those avenues of recourse are inadequate. To constitute an adequate remedy, the alternative “must be one that itself enforces the performance of the particular duty” rather than one which prohibits a harmful act. *State ex rel. Burkhartsmeyer Bros. v. McCormick*, 162 Mont. 234, 237, 510 P.2d 266, 268 (1973). Jefferson County contends the authorities cited by DEQ only provide a remedy for those injured by a final decision while the County’s injury stems from being excluded from the decision-making process. It asserts once a decision has been made that negatively impacts the County, there is no adequate remedy.

¶31 Jefferson County relies on *Cal. Wilderness Coalition*, in which the court held that harm caused by inadequate consultation is not remediated by the opportunity to offer comments after a decision has been made. 631 F.3d at 1093. Jefferson County overlooks the Ninth Circuit’s order that invalidated the government’s decision for failure to comply with procedural requirements of the review process:

Accordingly, as we have determined that § 216 required more than the notice-and-comment procedure adopted by DOE, and that DOE’s failure to consult with the affected States was not harmless error, precedent and reason require that we vacate the Congestion Study and remand for the DOE to prepare a Congestion Study ‘in consultation with the affected States.’

Cal. Wilderness Coalition, 631 F.3d at 1095. Under MEPA and MFSA, Jefferson County has the same remedies as the plaintiffs in *Cal. Wilderness Coalition* and the case therefore does not support its position. In a footnote to its brief, Jefferson County states a recent amendment to MEPA “limit[s] the remedy for MEPA non-compliance to agency remand and prohibit[s] judicial interference with any permit.” The new law makes clear, however, that any changes to MEPA are prospective and apply only “to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act].” 2011 Mont. Laws ch. 396, § 10. The amended statute was enacted on May 12, 2011, long after DEQ had initiated its environmental review process; therefore any limitations posed by the new law do not apply in this case and we express no opinion on the substance of the legislative changes.

¶32 MEPA provides “[a] challenge to an agency action under this part may only be brought against a final agency action[.]” Section 75-1-201(6)(a)(i), MCA. This language indicates a legislative preference for streamlining the environmental review process without the interruption of multiple court actions. The potential for undermining that policy is evident in this case where six separate counties and numerous state agencies may be impacted by the MSTI. The need for efficiency is further illustrated by § 75-20-216(4), MCA, which requires DEQ ordinarily to complete its environmental review and render a recommendation within nine months of accepting an application under the MFSA. This process is thwarted when any person or entity is allowed to challenge an action or inaction by the department before it renders a final decision. The statutory bar

until a final action is issued aims to avoid piecemeal litigation and micromanagement by the court in the environmental review process.

¶33 DEQ asserts, and Jefferson County does not dispute, that a final agency action in this context occurs only after DEQ issues, or declines to issue, a certificate under the MFSA. Section 75-20-223, MCA, supports this contention as it allows an aggrieved person to challenge the Department's "final permit decision." In this case, Jefferson County has an adequate legal remedy for any deficiencies in DEQ's permitting process. Given the express mandates of the law, it was premature for Jefferson County to bring an action against DEQ for failing to consult when DEQ has not yet released a Draft EIS, a potential supplemental Draft EIS, a Final EIS, or issued or denied a permit. DEQ has maintained throughout this litigation Jefferson County will have a continuing opportunity to consult with DEQ on its proposed action after a Draft EIS is released, and on a supplemental Draft EIS assuming significant new issues are raised relating to the MSTI. Even if Jefferson County is not afforded any additional opportunity to consult, DEQ may decide not to issue a permit to NorthWestern. The numerous contingencies present at this early stage of the review process further highlight why Jefferson County's claims are not ripe for review now.

¶34 The District Court's order granted both mandamus and injunctive relief. After concluding DEQ's consultation duty was ongoing, the District Court afforded Jefferson County an opportunity to participate during preparation of the Draft EIS and enjoined DEQ from releasing the Draft EIS until it properly had consulted the County. When a court issues an injunction based "upon its interpretation of a statute, no discretion is

involved and we review the district court's conclusion of law to determine whether it is correct." *Hagener v. Wallace*, 2002 MT 109, ¶ 12, 309 Mont. 473, 47 P.3d 847. Having concluded the District Court's legal rulings were erroneous, we likewise conclude its grant of injunctive relief was in error.

¶35 We reiterate Jefferson County is not without a remedy. Should DEQ issue a permit, Jefferson County may challenge that action if it has at that time a claim for a violation of MEPA or MFSA. However, mandamus and injunctive relief are not appropriate in this case and § 75-1-201(6), MCA, bars Jefferson County's suit until DEQ has rendered a final decision.

CONCLUSION

¶36 Although DEQ's statutory obligations have not been completely discharged at this stage in the environmental review process, it has not violated a clear legal duty to consult with Jefferson County prior to issuing its Draft EIS. Since Jefferson County has adequate legal remedies once DEQ renders a final agency action, the County is not entitled to mandamus or injunctive relief. Accordingly, we reverse the District Court and remand with instructions to dismiss this action without prejudice.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ MICHAEL E WHEAT
/S/ BRIAN MORRIS
/S/ PATRICIA COTTER
/S/ JAMES C. NELSON
/S/ JIM RICE