

COMPLAINT AND PETITION FOR JUDICIAL REVIEW

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MONTANA SIXTH JUDICIAL DISTRICT COURT, SWEET GRASS COUNTY

WILD EAGLE MOUNTAIN RANCH, LLC,
a Montana limited liability company; ROCK
CREEK RANCH I LTD. LP, a limited
partnership; ENGWIS INVESTMENT
COMPANY, LTD, and R.F. BUILDING
COMPANY, LLP,

Plaintiffs and Petitioners,

v.

STATE OF MONTANA, *ex rel.*
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION,

Defendant and Respondent.

Cause No. DV 2010-09

COMPLAINT AND PETITION FOR
JUDICIAL REVIEW

WILLIAMS SWANDAL

Filed this 19th day of
March 20 10
at 3:02 'clock P M
By Deanna Novotny, Clerk of Court
DEANNA NOVOTNY
Clerk / Deputy

Plaintiffs and Petitioners Wild Eagle Mountain Ranch, LLC, Rock Creek Ranch I Ltd. LP, Engwis Investment Company, Ltd, and R.F. Building Company, LLP, (collectively, "Plaintiffs") allege their claims and causes of action against Defendant and Respondent State of Montana, acting through the Department of Natural Resources and Conservation as follows:

I. INTRODUCTION

1. Plaintiffs Wild Eagle Mountain Ranch, LLC, a Montana limited liability company ("Wild Eagle"), Rock Creek Ranch I Ltd., LP ("Rock Creek"), and Engwis Investment Company, Ltd./R.F. Building Company, LLP (collectively, "Engwis") seek judicial review of the Montana Board of Land Commissioners' ("Land Board") decision to lease 640 acres of state trust land located in Section 36, Township 1 North, Range 12 East (the "Project Area") in Sweet Grass County to Coyote Wind, LLC ("Coyote Wind") for purposes of constructing and operating a number of wind energy turbines (the "Project").

2. Plaintiffs contend that the Montana Department of Natural Resources and Conservation ("Department") acted arbitrarily in issuing a Final Environmental Impact Statement ("FEIS") that did not meet the minimum standards of the Montana Environmental Policy Act ("MEPA"), Montana Code Annotated § 75-1-101, *et seq.* Plaintiffs also contend that the lease prepared by the Department and approved by the Land Board failed to meet standards required by Montana law.

3. As a result of the Department's failure to prepare an adequate FEIS and to prepare a valid lease, the subsequent decision of the Land Board to authorize the lease of the Project Area to Coyote Wind for the Project was improper and must be overturned.

A. Parties

4. Wild Eagle owns and operates a ranch operation on land it owns directly adjacent and to the north of the proposed Project Area. Wild Eagle also owns property on the

Yellowstone River approximately one mile south of the proposed Project area.

5. Wild Eagle uses its property for livestock purposes and also derives value from its open vistas, wildlife habitat and other attributes typical of a large Montana ranching operation.

6. Wild Eagle also holds numerous water rights, which are appurtenant to its property.

7. Given these values and its proximity to the Project, Wild Eagle has a direct and substantial interest in the negative environmental effects and the negative property value effects that will result from the Department's improper authorization of the Project.

8. Engwis owns and operates a ranch operation on land it owns directly adjacent and to the east of the proposed Project area. The Engwis property consists of elevated grazing land, as well as river-bottom property, which fronts on the Yellowstone River for a distance of approximately three (3) miles.

9. Engwis uses its property for livestock purposes and also derives value from its open vistas, wildlife habitat and other attributes typical of a large Montana ranching operation. Engwis also holds numerous water rights, which are owned or appurtenant to its property.

10. Given these values and its proximity to the Project, Engwis has a direct and substantial interest in the negative environmental effects and the negative property value effects that will result from Department's improper authorization of the Project.

11. Rock Creek owns and operates a ranch adjacent to and west of the proposed Project area. Rock Creek's property consists of grazing land, crop ground and river bottom property which fronts the Yellowstone River and has numerous artesian and hot springs. The historic Hunter Hot Springs is located on the Rock Creek property.

12. Rock Creek uses its property for farming and ranching, and determined some time ago to restore Hunter Hot Springs for a bed and breakfast and resort. Rock Creek derives value

from the property's scenic viewshed, open vistas, wildlife habitat, naturally occurring springs and other attributes of the land.

13. Rock Creek owns 111 water rights appurtenant to the property and used for livestock, irrigation, fish and wildlife, and domestic and commercial purposes.

14. Given these property values and water rights and its proximity to the Project, Rock Creek has a direct and substantial interest in the negative environmental effects and the negative property value effects that will result from the Department's improper authorization of Project.

15. Each of the Plaintiffs will be adversely affected by the construction and operation of the Project. Specifically, each Plaintiff owns water rights in Duck Creek and other nearby waterways that will be used as part of development and operation of the Project. Each Plaintiff uses rural county and other roads that will be affected by development and operation of the Project. Each Plaintiff's property provides habitat for avian, riparian and upland wildlife that will be adversely affected by the development and operation of the Project. Through adverse visual impacts, noise, dust, light pollution, the spread of noxious weeds, environmental degradation, and other effects which have not been fully evaluated, each Plaintiff's property values will be adversely affected by the development and operation of the Project. Each Plaintiff has identified other likely impacts to the use and enjoyment of their properties in the comments that are part of the administrative record for this matter, which comments are incorporated herein by this reference.

16. The Department of Natural Resources and Conservation (the "Department") is an administrative agency of the State of Montana, charged with management of state lands, including state trust land. The Department is the agency authorized by the Land Board to enter into the lease with Coyote Wind.

17. Coyote Wind is the proposed lessee of the Project Area. Coyote Wind is owned by Enerfin Energy Company and Alternity Wind Power. Coyote Wind is not a party to this lawsuit.

B. Jurisdiction and Venue

18. This court has jurisdiction pursuant to Mont. Code Ann. § 75-1-201(6)(a)(i) (MEPA).

19. Venue is proper in this district court pursuant to Mont. Code Ann. § 75-1-108, as the activity that is the subject of the action that is proposed to occur in Sweet Grass County, Montana.

II. BACKGROUND FACTS AND PROCEDURE

A. Chronology of Events

20. In 2005, the Department issued a Request for Proposals (“RFP”) to develop wind power on approximately 640 acres of land described as Section 36, Township 1 North, Range 12 East in Sweet Grass County. The Project Area is state trust land administered by the Department.

21. Coyote Wind submitted a bid to the Department in response to the RFP.

22. According to its bid, Coyote Wind proposed to build 6 to 10 wind turbines on the Project Area as part of a larger wind development project that also included development on adjacent private land owned by third parties. Coyote Wind’s proposal did not disclose information about the intensity of development on private lands.

23. At some point in time, the Department determined that the Coyote Wind response to the RFP was the successful bidder.

24. Following the Department's selection of Coyote Wind as the successful bidder, the Department held a scoping period for the environmental analysis procedure from May 12 to June 13, 2008.

25. Plaintiffs Engwis and Rock Creek submitted comment letters during the scoping period, which are included in the administrative record of this case, and are incorporated herein by this reference.

26. After scoping, the Department produced a Draft Environmental Impact Statement ("DEIS") on August 10, 2009. The DEIS showed the Coyote Wind Project, as proposed, would consist of 36 turbines on private land and 8 turbines on state trust land.

27. Comments on the DEIS were taken during comment period which ended on Sept. 11, 2009. Each Plaintiff, through its respective legal counsel, submitted objections and comments. Plaintiff Wild Eagle also offered oral testimony at one of the public hearings on the DEIS.

28. Plaintiffs' comments raised numerous deficiencies in the DEIS, including but not limited to the following: (a) failure to adequately consider the adverse effect of the Project on wildlife; more particularly, the decrease in raptor population, decrease in raptor food sources, destruction of burrowing owl habitat and loss of nesting areas for migrating and song birds; (b) failure to adequately consider the increase in noxious weeds caused by the Project; (c) devaluation of surrounding private lands; (d) potential violations of the Migratory Bird Treaty Act (16 U.S.C. §§ 703-712) and the Bald and Golden Eagle Protection Act (16 U.S.C. §668); (e) failure to consider other, more suitable locations; (f) failure to provide adequate financial and economic data; (g) failure to adequately consider the destruction of the rural landscape/ environment, including noise, dust, light pollution, and unsightliness; (h) failure to adequately

consider or explain the impact of ice throws; (i) failure to present a transportation/road plan; (j) failure to address aviation lighting requirements; and (k) other issues as set forth in the administrative record for this case.

29. The concerns raised by each of the Plaintiffs were unique to each Plaintiff due to each Plaintiff's immediate proximity to the Project Area and the great likelihood that each Plaintiff will suffer particularized harm if the Project is constructed and becomes operational on the Project Area.

30. On November 13, 2009, the Department issued the final EIS for the Project. Despite detailed concerns raised by each of the Plaintiffs in written comments, the Department did not significantly change any of its analysis from the DEIS.

31. The Department issued a Record of Decision ("ROD") on December 1, 2009, recommending approval of the Project with up to eight wind turbines on the state trust land.

32. On January 19, 2010, the Land Board authorized the Department to enter into a lease (the "Lease") with Coyote Wind. For purposes of Mont. Code Ann. § 75-1-201(6)(a)(ii), the Land Board's January 19, 2010 action was a final agency action.

33. As of the date of this Complaint, Coyote Wind has not commenced construction work on the Project Area.

34. Construction of the Project is expected to begin in 2010 or 2011.

B. Deficiencies with MEPA Analysis

Inadequate No Action Alternative

35. MEPA requires the Department to consider a no action alternative, even if the alternative may not be within the jurisdiction of the agency to implement. The no action alternative should provide an environmental baseline by which to truly measure the environmental effects of a project.

36. The no action alternative considered in the DEIS assumed that there would be wind development on private land even if there was no wind development on the state trust land.

37. In response to this assumption, numerous parties, including the Plaintiffs, submitted comments to the effect that the no action alternative identified in the DEIS was not properly identified or evaluated.

38. In the FEIS, the Department attempted to respond to a the comments about the no action alternative by stating:

Deficient alternatives analysis Several comments stated that the No Action Alternative should have considered the alternative that no development would occur on either private or state land. One comment said less intensive development or different turbine configurations on state land should have been considered, and another stated the alternative of sale of the state parcel should also have been considered. Department has established a precedent of considering the development on private land as part of the No Action Alternative when evaluating projects such as the proposed Coyote Wind Project.

(FEIS 6.)

39. Department is obligated to consider whether the project would be viable on private land if no action is taken on public land. The Department recognized the actions on the private land will affect the public land. For instance, the substation which will collect the power generated on state trust land and place that power "on the grid" is located on the adjacent private land. Since the infrastructure necessary to make power generation on the state trust land economically viable is located on adjacent private land, there is an undeniable direct and intertwined relationship between the Project as conceived on both the state trust and private lands, and in light of this cooperative relationship, analysis of the Project's impact on both state trust and private lands is appropriate.

40. Despite the concerns raised in the DEIS comments, the FEIS continued to assume that development will occur on private land. By simply stating the action on private land will occur whether or not the action on state land occurs gives no consideration of the economics of the Project, and also stifles the impact of public comment regarding the merits of the Project because the private portion of the Project is presented by the Department as being inevitable.

41. The cornerstone of MEPA is to promote citizen involvement in decisions which impact State lands. By suppressing public comment during the DEIS comment period, and ignoring public comment made regarding the DEIS during preparation of the FEIS, the Department has thoroughly undermined this important public policy.

42. By failing to properly identify and consider a proper no action alternative, the Department has acted arbitrarily by not considering whether the No Action Alternative will prevent the entire Project from occurring and what the environmental baseline would be in that case.

43. The Department also fails to adequately analyze less intensive development or alternative configurations of the turbines. It states:

If the analysis identified issues or concerns with the proposed turbine configuration on the state parcel, alternate configurations were considered in development of the FEIS and lease agreement (e.g., changing the location of turbine CT-4 as described in sections 2.7 and 2.8 below). The existing configuration was designed to avoid sensitive resources (e.g., prairie dog town, wetland features, tops of ridges).

(FEIS 6.)

44. The Department refers to considering only one turbine relocation. It does not mention less intensive development or what other configurations were considered and how those configurations compare to the proposed action.

45. Department acted arbitrarily by not considering less intensive development or discussing the environmental impacts of other turbine configurations considered. As a result, the FEIS is inadequate.

Inadequate Cost-Benefit Analysis

46. The FEIS is inadequate because it lacks a proper cost benefit analysis.

47. An EIS must have a description of the costs and benefits of the proposed action. Admin. R. Mont. 36.2.529(4).

48. The Board has a duty to provide income to the state. Mont. Code Ann. § 77-1-202. It cannot discharge this duty if the true costs and benefits are not known to it.

49. The Department acknowledges that the fees in the Request for Proposal to Coyote Wind are based on fees charged by other wind projects and were set by "anecdotal" information given by those other projects, not on what the fees need to be for the Project to be profitable.

50. The FEIS does not delineate the true costs and benefits of the Project in a systematic way so that the Land Board and the public can understand the profit the state will make from the Project. Instead, it only lists estimated income. (DEIS 101.)

51. Lack of profit for the state is a reason to order a new EIS. Thus, by not providing systematic costs-benefits analysis, the Department acted arbitrarily in issuing the FEIS.

52. The Department arbitrarily lists only factors to consider in how the project will affect property values. (DEIS 44.) Responding to public comment, the FEIS states:

Section 4.6.1.2 of the DEIS presents results from Hoen (2006), who examined the impacts of proximity to wind turbines on the property values of 280 properties. That analysis revealed that there was not a statistically significant relationship between proximity to, or visibility of the wind farm and the sale price of homes.

(FEIS 18.)

53. The study referenced by the Department was set in Madison County, New York. The Department did not examine the effects of wind farms on property value in the rural west. Instead, it arbitrarily relied on a study in New York State, thousands of miles from Sweet Grass County.

Inadequate Analysis of Wetlands

54. The Department arbitrarily decided there are no jurisdictional wetlands at issue in the Project, stating:

Section 3.7.2.1 of the DEIS states that the wetlands are not *likely* jurisdictional because they have no connections to Waters of the US. However, the entire drainage was not walked. Therefore, the FEIS will be edited to state that there do not appear to be any connections to waters of the US. It is true that the Corps of Engineers has the ultimate decision as to what constitutes a jurisdictional wetland, however, given that the wetlands in the state parcel are not likely connected to Waters of the US, and that they would not be affected by the Project, this is not relevant to the proposed Project.

The FEIS amended the DEIS by coming to the following conclusion: "It is likely that none of the wetlands are jurisdictional because they do not appear to have connections to waters of the U.S. (FEIS 38).

55. The U.S. Army Corps of Engineers has the authority to decide whether wetlands are jurisdictional waters for the purposes of the Clean Water Act.

56. The Department claims the project will not affect the waters because the nearest feature is 500 feet from wetlands. The Department acted arbitrarily in failing to submit the question of jurisdictional waters to the Corps of Engineers.

Inadequate Analysis of Bat and Bird Mortality

57. The Department acted arbitrarily in its consideration of bird and bat mortality at the proposed Coyote Wind Project.

58. The DEIS recognizes that 13.4 bats die per MW at the Judith Gap Wind Farm.

(DEIS 108.) This finding was not corrected in the FEIS.

59. Judith Gap is the closest wind farm to Coyote Wind. An extensive study of the Judith Gap wind farm exists. This paper states:

Bat deaths [at Judith Gap] surprised everyone. Although the EA predicted that 2.5 bats would be killed/MW, post-construction studies revealed that 8.9 bats/MW were dying, or 1,206 bats per year. Interestingly, both species of bats killed - hoary and silver-haired bats - are generally found in the forests of Alberta. It appears that Judith Gap is a migration corridor for these little-understood animals, with most of the dead bats found in August and September, during their migration and breeding season. Because of the high number of bat deaths, Invenergy has agreed to do additional bat research to determine if the bats deaths were either a 1-year phenomena or if a situation exists that should be addressed through mitigation.

Montana Audubon, About *Wind Farms, Birds & Bats*,

http://mtaudubon.org/issues/energy/documents/Wind%20_10-08_JEllis.pdf.

60. Given the fairly widespread reporting of the unexpectedly high numbers of bat deaths at Judith Gap, the FEIS should have evaluated this issue in far more detail than to simply conclude that not enough information exists to make a fair comparison.

Inadequate Consideration of Reasonably Foreseeable Connected Actions

61. Even though it received comments or otherwise became aware of new information, the Department failed to consider the environmental effects of reasonably foreseeable connected actions, including but not limited to the number of oversized vehicles that will be required to obtain permits from the Montana Department of Transportation.

Inadequate Cumulative Impacts Analysis

62. The cumulative impacts analysis contained in the DEIS is inadequate in a number of respects.

63. Department failed to consider the cumulative impacts on bats of the Judith Gap, Coyote Wind, and a proposed wind farm near Martinsdale. Rule 36.2.529(4)(b), ARM, clearly states that the EIS shall contain a description of the cumulative effects and does not allow, as the Department suggests, mere analysis implicit within the EIS.

64. The public is not benefited by reviewing an EIS, which does not explicitly set forth the actual cumulative impacts analysis and the facts, which form the basis for the analysis. The bats have a known north to south migration pattern and the Department failed to take into account the cumulative effects of these foreseeable concurrent projects on bats under Montana Code Annotated § 75-1-208(11).

65. The Department also fails to adequately address the cumulative effect that the loss of Bald and Golden Eagles may have on the biodiversity of the project area. The DEIS acknowledges that the Project is proposed in an area frequented by Bald and Golden Eagles, which are federally protected species under the Bald and Golden Eagle Protection Act.

66. Studies at other wind projects have documented concerns about Golden Eagle deaths as a result of wind projects. A study conducted at the Altamont Pass wind project in California indicated that 23 of 179 golden eagles equipped with radio transmitters were killed by wind turbine strikes during a three-year study.

67. The same study concluded that collision mortality could have resulted in overall Golden Eagle population decline in that area.

68. According to the FEIS, the proposed Project will be located in an area of significant importance to Golden Eagles and other raptors. The FEIS acknowledged that a number of these birds of prey would be killed every year once the Project becomes operational. Despite these acknowledgements and comments from Plaintiffs, the FEIS wholly fails to consider the cumulative impacts of eagle and other raptor deaths in connection with the overall

biodiversity of the area. The lack of any analysis arbitrarily ignores the cumulative impacts of the Project.

69. The Department also arbitrarily dismissed a cumulative impacts analysis of oil and gas leases issued to Devon Energy Production Company LLC on the same parcel as Coyote Wind LLC.

70. The mineral estate is the dominant estate in Montana. Although the Department claims that because oil and gas development is not “reasonably foreseeable” on this parcel because “there was a previous oil and gas lease that was not developed,” it ignores the fact that a company purchased a lease on the land, knowing it had not been developed before. Neither the DEIS or FEIS addresses the extent of exploration that has occurred on the parcel. Because the mineral estate is the dominant estate, the holder of the lease could begin exploration for oil at any time the lease is valid. The Department arbitrarily ignored the cumulative impacts of the possibility of oil and gas development on the tract.

71. The cumulative impacts analysis also failed to properly consider the overall size of the Project, including the private land. The inclusion of the state trust land parcel in the overall Project would effectively double the width footprint of the Project when measured from north to south. The proposed action alternative effectively exposes twice as much of the local environment to all of the negative impacts being assessed, including, without limitation, dust, spread of noxious weeds, noise pollution, light pollution and visual interference. The widening of the combined project to double its eastern boundary warrants further assessment under the cumulative impacts section of the FEIS.

72. The FEIS also failed to consider the environmental effects and cumulative impacts of changes to water rights that will be necessary to use water for the construction and operation of the Project. There are no known industrial water rights on Duck Creek or other

nearby waters. To construct the Project, the Project developer will need to obtain water rights and change the water rights on both the state trust land parcel and on neighboring private land. The DNRC water rights change process requires an environmental analysis that should have been contained in the DEIS. This analysis should have considered the cumulative impacts of such a change, and the impacts on water rights held by other neighboring landowners, including each of the Plaintiffs.

73. DNRC also acted improperly by giving its tacit approval to a proposed water right change by stating the, "Coyote Wind has agreements to use water per private landowners' water rights" (FEIS 14).

74. The Department must safeguard that any change to water rights causes no adverse impact to other water right users; by presupposing that a change to the "private landowners' water rights" is appropriate for the Project, the Department has deviated from its statutory mandates.

Inadequate Analysis of Road Impacts

75. The FEIS omits any specific discussion of road impacts, which will result from the Project. Daniel Abelson, project manager for Enerfin was quoted in the *Big Timber Pioneer* stating:

"I know we are missing the roads from the draft EIS," he said. "We are waiting on a contract with the supplier of the turbines and don't know what the road specs for them will be." "Wind farm eyed at west end of County," *Big Timber Pioneer*, September 3, 2009. The Enerfin representative alluded to this omission during the public hearing, but stated that road/bridge issues would be addressed, and told the audience, "Don't worry about it."

76. The reconstruction of bridges and roads between the Springdale I-90 exit and the Project site is one of the most direct and significant impacts the Project will have on Plaintiffs and local citizens. For example, the FEIS failed to evaluate whether the main street of

Springdale through town will need to be widened or if the corner radius of curves will need to be increased. Citizens along the County Roads need to know how the roads will be altered, and how this will affect their surrounding properties.

77. Plaintiffs and other citizens have a right to know if their private lands will be condemned in order to accommodate large radius curves and/or road widening. An honest assessment of travel delays needs to be made. And most of all, citizens need to know that all construction activities and use of the roads during and after development will occur in a safe manner.

78. An environmental impact statement that fails to consider all material impacts of a proposed project that is subject to MEPA review is legally deficient.

79. The FEIS is incomplete, and does not provide adequate basis for public comment due to the omission of a road impacts analysis.

80. By failing to adequately address road impacts, the FEIS fails to comply with MEPA.

Inadequate Analysis of FAA Lighting Requirements

81. The FAA lighting plans in the FEIS illustrate the lighting required for FAA compliance. However, the developer has only recently submitted the required notices and, as of the date of the FEIS, had not received a response. Accordingly, it cannot know the final requirements for lighting and marking.

82. The blinking aerial lights affixed at the top of the 262-foot high towers must undoubtedly be one of the most offensive aspects of the Project. The EIS describes the FAA lighting requirements as follows:

FAA rules require lights that flash white during the day and twilight, and red at night to be mounted as high as possible on wind turbine nacelles. Lights should flash simultaneously and be

placed so they are visible from 360 degrees. The FAA's obstruction marking and recommendations on marking and/or lighting structures to facilitate aircraft safety can vary depending on the terrain, number and layout of turbines, weather patterns and geographic location. Lighting recommendations recognize that not all of the turbines within an installation would require illumination. Instead, the advisory circular specifies the importance of defining the periphery of turbine array, and not within the array no unlighted gap greater than one-half statute mile should be present (FAA, 2007).

83. While the FEIS identifies the need to meet FAA requirements, it does not provide a detailed explanation of the actual lighting plan for the Project.

84. The omission of detailed explanation of FAA lighting requirements from the FEIS renders the document incomplete in that it does not provide adequate information for informed public comment. Accordingly, the FEIS does not comply with MEPA requirements.

FIRST CLAIM FOR RELIEF

(MEPA)

85. Plaintiffs reallege paragraphs 1 through 84.

86. Prior to making a decision to enter into a lease with Coyote Wind, the Department was required to comply with all applicable provisions of MEPA.

87. MEPA and the Department's rules implementing MEPA require that the Department prepare an EIS that complies with all applicable MEPA provisions before the Department takes action.

88. The FEIS prepared by the Department is deficient in numerous material respects, including but not limited to some or all of the following: (a) failing to provide a meaningful response to all comments, (b) failing to identify and consider a correct no action alternative, (c) failing to properly evaluate the cumulative and secondary impacts on the physical environment, (d) failing to properly evaluate the cumulative and secondary impacts on the human population

(including the Plaintiffs and their owners, families, and employees), (e) failing to properly define or consider the economic and environmental costs and benefits of the proposed action, (f) failing to evaluate a proper range of alternatives, (g) failing to properly discuss the reasons for the selection of the preferred alternative, and (h) failing to consider other MEPA factors required by law.

89. As a result of the Department's failure to comply with MEPA, the Department's action to issue the FEIS and the ROD were arbitrary, capricious and not in accordance with applicable law.

90. As a result of the Department's arbitrary, capricious and legally insufficient action, the Board lacked authority to enter into the Coyote Wind Lease and, therefore, the Board's action to approve the lease is invalid.

SECOND CLAIM FOR RELIEF

(Violation of Mont. Code Ann. § 77-1-904)

91. Plaintiffs reallege paragraphs 1 through 90.

92. Commercial leasing of state trust land is governed by Mont. Code Ann. Title 77, Chapter 1, Part 9.

93. The lease between the Department and Coyote Wind is a "commercial lease" for purposes of Mont. Code Ann. § 77-1-904 because it involves a contract to use state trust land for a commercial purpose.

94. Pursuant to Mont. Code Ann. § 77-1-904, the state trust land only may be leased for "an annual rental rate equal to the full market value of the land."

95. The Board has not adopted rules to establish the determination of fixing an annual rental rate for wind leases on state trust land.

96. The lease violates Mont. Code Ann. § 77-1-904 because it does not include an annual rental rate.

97. The further violates Mont. Code Ann. § 77-1-904 because the “fee” provisions are not based upon the full market value of the land.

98. Based upon these violations of law, the lease is illegal and should be terminated.

THIRD CLAIM FOR RELIEF

(Injunction)

99. Plaintiffs reallege paragraphs 1 through 98.

100. As a result of the Department’s failure to comply with MEPA and the failure of the lease to comply with applicable provisions of law, the Department lacks legal authority to authorize use of the Property.

101. Pursuant to Mont. Code Ann. § 27-19-105, an injunction is proper to prevent any actions on the Property until full compliance with applicable law occurs.

PRAYER FOR RELIEF

1. That the Court find the Department’s action in issuing the FEIS and ROD arbitrary, capricious and not in compliance with applicable provisions of MEPA.

2. That the Court declare the lease between Coyote Wind and the Department invalid.

3. That the Court enjoin the lease and any activity on the Project Area.

4. For such other relief as the Court may determine proper.

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DATED this 19 day of March, 2010.

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By  _____
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DATED this 18th day of March, 2010.

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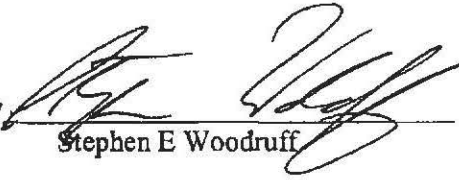
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By



Stephen E Woodruff

ORDER OF SUMMARY JUDGMENT

1 Hon. John C. McKeon
2 District Judge
3 17th Judicial District
4 P.O. Box 470
5 Malta, MT 59538
6 Telephone: (406) 654-1062

Filed this 6th day of
October 2011
at 1:10 'clock P M
By Deanna Novotny, Clerk of Court
Barbara Sumner
Clerk / Deputy

8 MONTANA SIXTH JUDICIAL DISTRICT COURT, SWEET GRASS COUNTY

9 WILD EAGE MOUNTAIN RANCH,
10 LLC, a Montana limited liability
11 company; ROCK CREEK RANCH I
12 LTC. LP, a limited partnership; ENGWIS
INVESTMENT COMPANY, LTD, and
R.F. BUILDING COMPANY, LLP,

13 Petitioners,

14 -vs-

15 STATE OF MONTANA, *ex rel.*
16 DEPARTMENT OF NATUREAL
17 RESOURCES AND CONSERVATION,

18 Respondent.

No. DV-2010-09

ORDER OF SUMMARY JUDGMENT

RECEIVED

OCT 07 2011

D.N.R.C.

19 On March 19th of 2010, Petitioners Wilde Eagle Mountain Ranch ("Wild Eagle"),
20 Rock Creek Ranch I Ltd. ("Rock Creek"), Engwis Investment Co. ("Engwis"), and R.F.
21 Building Co. (collectively "Petitioners") brought an action against the Montana Department of
22 Natural Resources and Conservation (the "DNRC"). In this action, Petitioners allege DNRC
23 failed to issue a Final Environmental Impact Statement ("FEIS") that complies with the
24 Montana Environmental Policy Act, M.C.A. § 75-1-101, *et seq.* ("MEPA"). Based on
25 alleged deficiencies, Petitioners ask this Court to enjoin a lease of state trust land to a wind
26 power company, Coyote Wind LLC ("Coyote Wind").
27
28

1 Pending before the Court are cross motions for summary judgment. The submitted
2 record includes 1,060 pages of administrative records (AR). Parties submit the pending
3 motions for ruling without hearing. After due consideration, the Court finds issues the
4 following opinion.
5

6 Contentions.

7 Petitioners allege the DNRC violated MEPA by (1) failing to properly adopt the FEIS;
8 (2) failing to appropriately consider alternatives; (3) failing to give rational consideration to
9 certain environmental impacts; (4) failing to properly consider cumulative impacts; and (5)
10 failing to consider significant new information.
11

12 DNRC argues that (1) MEPA does not apply due to statutory exceptions found at
13 M.C.A. §§ 77-1-121 and 77-1-122; (2) that should MEPA apply, some of Petitioners' claims
14 are barred a statute of limitations in MCA, § 75-1-201(6) and as to remaining claims, the
15 DNRC adequately complied with procedural requirements of MEPA; and (3) that there is no
16 material and significant new information but if the same did exist, MEPA does not allow
17 consideration in judicial review of an agency decision.
18

19 Factual Overview.

20 From the submitted record, the Court finds the following:
21

22 In 2005, the DNRC issued a request for proposals to develop wind power on
23 approximately 640 acres of state trust land described as Section 36, Township 1 North, Range
24 12 East in Sweet Grass County (the "State Parcel"). AR 1-20. Coyote Wind submitted a
25 proposal to build 6 to 10 wind turbines on the State Parcel as part of a larger project that
26 included development on adjacent private land. In total, Coyote Wind's proposal would
27 involve the State Parcel and approximately 2,400 acres of private land (collectively the "Total
28

1 Project Area"). AR 21-64, 191. Thus, the State Parcel constitutes less than 33% of the Total
2 Project Area.

3 Coyote Wind was successful bidder on DNRC's request for proposals. The DNRC
4 then held a scoping period for an environmental analysis from May 12 to June 13, 2008.
5 Engwis and Rock Creek were among those submitting comments during this scoping period.
6

7 On October 9, 2008, the Montana Board of Land Commissioners ("State Land Board")
8 entered into an Oil and Gas Lease with Pacer Energy LLC that included the State Parcel (the
9 "Oil and Gas Lease"). AR 117-121. Under the Oil and Gas Lease, the lessee agreed to pay
10 \$105,320 during the first year, \$960 for each year thereafter, and a royalty of 16.67% on any
11 oil and gas production. This lease explicitly required further permitting and approval before
12 the lessee could occupy the surface. It also required the lessee to drill for oil under certain
13 circumstances.
14

15 The DNRC produced a Draft Environmental Impact Statement ("DEIS") in August,
16 2009. AR 145-551. The DEIS describes Coyote Wind's intent to build 8 wind turbines on the
17 State Parcel and an additional 36 turbines on the adjacent private land. AR 153, 191. The
18 DEIS included an analysis of two possibilities – the proposed action alternative and a no
19 action alternative. The no action alternative assumed that the turbines would not be built on
20 the State Parcel but that the development on private land would continue according to Coyote
21 Wind's plan. For both possibilities, the DEIS set forth impact analysis to the Total Project
22 Area, not just the State Parcel. AR 153-156, 190-205, 262-325.
23

24 In the DEIS, the DNRC analyzed the potential impact to raptors, other birds, and bats.
25 It acknowledged that wind towers have caused fatalities to avian life in the past and would be
26 likely to cause them in this instance. The DEIS included a study of the wildlife present in the
27
28

1 area surrounding the State Parcel. It also included an analysis of the potential impact to non-
2 avian wildlife. AR 158-59, 230-49, 284-294. The DEIS listed a Potential Impact Index¹ of
3 162 for the State Parcel, which it described as “moderate.” AR 231, 448, 450. Further, it
4 included a section regarding the potential spread of noxious weeds and possible mitigation.
5 AR 282-84.

7 As part of the DEIS, the DNRC conducted an analysis of property values and
8 concluded that the effect of the project on area property values would be “negligible in a
9 downward direction.” This analysis of property values acknowledged a degree of uncertainty,
10 stating that “[t]here are very few studies available that examine the impacts on property values
11 of siting a wind farm nearby. The...results suggest that the impacts of wind turbines on
12 property values can be positive, negative or neutral.” AR 276. The DEIS cites two studies,
13 one which showed a positive impact based on “rudimentary statistical analysis” and one
14 which indicated no significant relationship. AR 276-77.

17 The DEIS also addressed other potential socioeconomic impacts on the region. It
18 stated that approximately 400 jobs would be created during the construction phase, but only
19 four long-term employees would be needed. AR 275, 280. The DEIS included a noise study
20 for the proposed project and simulated photographs of how the towers would affect certain
21 views in the area. AR 252-56, 258, 260, 297-98, 300, 302-322. It stated that there would be a
22 short-term increase in traffic on local roads, but that this increase would not cause a
23 significant impact to the local road system’s capacity. AR 272, 274. The DEIS concluded
24 that it is now “unknown” whether improvements would be needed to I-90 and that
25

27 ¹ The Potential Impact Index is a numerical score developed by the Montana Fish and Wildlife Service to
28 measure the risk to wildlife from development in a given area. The cutoff between a “high” ranking and a
“moderate” ranking is 160; the score for the State Parcel as calculated in the DEIS is 162.

1 improvements would be needed to some local roads. However, the nature and location of
2 these improvements to local roads were also unknown. AR 273. The DEIS stated that Coyote
3 Wind would assume the cost of any needed road construction and that the “net impact” on
4 local roads was expected to be “positive.” AR 161, 272.

6 In describing the economic value of the State Parcel, the DEIS stated that the Pacer Oil
7 and Gas Lease provided \$960 in annual rent, but it did not disclose the royalty payments or
8 the larger first-year payment. AR 223, 275, 280. The DEIS did not include any analysis of
9 the cumulative impacts of the Oil and Gas Lease.

11 The comment period for the DEIS ended on September 11, 2009. Petitioners
12 submitted comments during the comment period. In total, 177 written and verbal comments
13 were received from 21 people. AR 838-965. Substantive issues included:

- 14 • adverse effects of the project on wildlife;
- 15 • potential increase in noxious weeds;
- 16 • devaluation of private lands;
- 17 • potential violations of the Migratory Bird Treaty Act (16 U.S.C. §§ 703-712)
and the Bald and Golden Eagle Protection Act (16 U.S.C § 668);
- 18 • changing the number or configuration of the wind turbines/towers as an
alternative;
- 19 • alleged inadequacy of provided financial data;
- 20 • changes to the rural landscape and environment;
- 21 • damage due to ice throws;²
- 22 • aviation and lighting requirements;
- 23 • the lack of a detailed road and transportation plan;
- 24 • selling the State Parcel as an alternative; and
- 25 • that the no action alternative was not a meaningful no action analysis for the
26 purposes of MEPA.

27 ² Ice throws occur when wind turbines collect ice fragments, which they then shed because of gravity and the
28 mechanical forces of the rotating blades. The ice lands with sufficient force to potentially cause damage to
persons, wildlife, vehicles, or buildings.

1 On November 12, 2009, the DNRC adopted as its FEIS the DEIS with some additions
2 and modifications. This FEIS also included response to the substantive issues of the 177
3 comments stating it “does not require additional scientific analysis.” AR 740-839. The FEIS
4 corrected the Potential Impact Index from “moderate” to “high” after comments pointed out
5 the error, stating that this index is only a “first cut indicator” and that a “high rank does not
6 preclude development.” AR 771-72.

8 Regarding land values, DNRC stated within the FEIS that “[c]onducting a full hedonic
9 pricing analysis for properties within the view shed of the proposed action alternative is
10 beyond the scope of the DEIS. This type of analysis is not feasible to conduct as it would not
11 yield statistically robust estimates given the very small number of properties in question.” AR
12 763.

14 The DNRC created additional simulated pictures for the FEIS in response to
15 comments regarding views in the area. AR 801-812. The FEIS also stated that these
16 simulations, as well as those included in the original DEIS, were based on lighting that would
17 comply with the Federal Aviation Administration’s (“FAA”) general requirements. However,
18 it was also stated that, at the time of the FEIS, Coyote Wind was waiting to hear back from the
19 FAA regarding the final lighting requirements. AR 777.

22 A brief discussion of ice throws was added to the FEIS. The discussion explained ice
23 throws, stating that they are “likely to be extremely rare,” and identified possible mitigation.
24 AR 755-56. In regard to the insufficient road comments, the FEIS stated “no decision has
25 been made by Coyote Wind regarding the specific route(s) from I-90 to the project site that
26 would be used during construction, and no detailed studies have been performed to define
27 requirements for road and/or bridge improvements, repair, or maintenance.” AR 761. The
28

1 FEIS also stated that Coyote Wind will be required to submit a transportation plan and have it
2 approved by the two affected counties prior to beginning the project. AR 819-20.

3 Following the FEIS, the DNRC issued a Record of Decision on December 1, 2009. Its
4 decision was to recommend approval of Coyote Wind's bid. On January 19, 2010, the State
5 Land Board followed this recommendation and authorized DNRC to enter into the wind
6 power lease with Coyote Wind. On February 8, 2010, DNRC signed the lease of the State
7 Parcel with Coyote Wind as the lessee. AR 1030-1060. The Coyote Wind lease does not
8 state that it is subject to further permitting.
9

10 Petitioners Wild Eagle, Engwis, and Rock Creek Ranch each currently own land
11 adjacent to the State Parcel. The land is used primarily for ranching. These Petitioners also
12 have water rights which run appurtenant to their respective properties. Additionally, Wild
13 Eagle owns property on the Yellowstone River located approximately one mile south of the
14 State Parcel.
15

16 Summary Judgment Standard of Review.
17

18 Summary Judgment is appropriate when there is no genuine issue of material fact and
19 the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). A party
20 seeking summary judgment has the burden of showing a complete absence of any genuine
21 issue as to all facts considered material in light of the substantive principles that entitle the
22 moving party to judgment as a matter of law. All reasonable inferences are to be drawn in
23 favor of the party opposing summary judgment. *Sunset Point Partnership v. Stuc-O-Flex*
24 *Intern., Inc.*, 1998 MT 42, ¶ 13; *Sherrard v. Prewett*, 2001 MT 228, ¶ 8.
25

26 The nonmoving party has no obligation to establish that genuine issues of fact exist
27 until the moving party has shown an absence of such issues of fact. Unless that initial burden
28

1 is met by the moving party, the nonmoving party may rest on its pleading. *Clover Leaf Dairy*
2 *v. State*, 285 Mont. 380, 385, 948 P.2d 1164, 1167 (1997).

3 Once the moving party has met its burden, the opposing party must present material
4 and substantial evidence, rather than mere conclusory or speculative statements, to raise a
5 genuine issue of material fact. *Sherrard*, ¶ 8. Disputed facts are material if they involve the
6 elements of the cause of action or defense at issue to an extent that necessitates resolution of
7 the issue by a trier of fact. *Motarie v. Northern Montana Joint Refuse Disposal Dist.*, 274
8 Mont. 239, 907 P.2d 154, 156 (1995). Material issues of fact are identified by looking to the
9 substantive law which governs the claim. *Spinler v. Allen*, 1999 MT 160, ¶ 15.

10
11
12 MEPA Overview.

13 MEPA is generally set forth in Montana Code Annotated, Title 75, chapter 1, parts 1
14 and 2. The legislature enacted MEPA to prevent or eliminate environmental damage as well
15 as to protect the right to use and enjoy private property free from undue governmental
16 regulation. MEPA requires that state agencies conduct environmental reviews when state
17 action will significantly affect the quality of the human environment. Those environmental
18 reviews include environmental impact statements (“EIS”) to examine the impact of a
19 proposed government action on the quality of the human and physical environment. Under
20 MEPA, the state agency takes procedural steps established to assure informed decisions
21 regarding the proposed government action. Government action encompasses a state agency’s
22 issuance of a lease or other entitlement for use or permission to act. MCA (2009), §§75-1-
23 102, 75-1-103, 75-1-220(4); ARM, 17.4.607, 17.4.603(1); *Pompeys Pillar Historical Ass’n v.*
24 *Mont. DEQ*, 2002 MT 352, ¶ 17.

1 MEPA requires that state agencies comply with its terms “to the fullest extent
2 possible.” The EIS must recite a detailed statement of the environmental impact of the
3 proposed action, any adverse environmental affects that cannot be avoided, and reasonable
4 alternatives to the proposed action, including a “meaningful no action alternative analysis.”
5 The EIS must also include an analysis of the regulatory impact on private property rights,
6 short-term and long-term beneficial effects, and the economic advantages and disadvantages
7 of the proposed action. MCA (2009), §75-1-201(1).
8

9 MEPA is modeled after the National Environmental Policy Act (“NEPA”). Federal
10 cases interpreting NEPA are then considered persuasive, although not technically binding.
11 Both Federal and State courts have held that these acts (MEPA and NEPA) require a “hard
12 look” at governmental action impacting the environment. However, these acts are essentially
13 procedural statutes and do not require any particular policy outcome. Still, it is clearly
14 recognized that an agency must examine the relevant data and articulate a satisfactory
15 explanation for its action, including a rational connection between the facts found and the
16 choice made. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Clark*
17 *Fork Coalition v. Mont. Dep’t of Environmental Quality*, 2008 MT 407, ¶ 47, 197 P.3d 482,
18 492-93; *Ravalli County Fish & Game Ass’n v. Mt. Dep’t of State Lands*, 273 Mont. 371, 377-
19 378, 903 P.2d 1362, 1367 (1995).
20
21
22

23 Court action may be filed to challenge the adequacy of an agency’s EIS and if so filed,
24 the burden of proof is on the person challenging the agency’s decision. MCA (2009), §75-1-
25 201(3)(a) & (6)(a). In said action, the court’s review is limited to the administrative record.
26 The court looks closely at whether the agency has taken a hard look at the question presented.
27 The court does not take a hard look itself but requires that the agency does so. The court’s
28

1 focus is on the validity and appropriateness of the agency's decision making process without
2 intense scrutiny of the decision itself. *Clark Fork Coalition*, ¶ 47; *Pompeys Pillar*, ¶ 20.

3 Except in certain limited situations involving new, material and significant evidence or
4 issues, a court may not consider any issue or evidence that was not first presented to the
5 agency prior to the agency's decision. A court may set aside the agency's decision on finding
6 that there is clear and convincing evidence that the decision was arbitrary or capricious or not
7 in compliance with law. MCA (2009), § 75-1-201(3)(a). If the agency has not adequately
8 complied with MEPA or the record does not properly support the agency action, the Court can
9 enjoin the agency decision and again remand for additional investigation and report. *Ravalli*
10 *County*, 273 Mont. at 382.

13 Under MEPA, the court review is in two parts – one, whether the agency action was
14 “unlawful” and two, whether it was “arbitrary or capricious.” An agency action is unlawful if
15 it violates an applicable statute or administrative rule. *Ravalli County*, 273 Mont. at 377. An
16 agency decision is “arbitrary or capricious” where there is no rational consideration of
17 relevant factors and there has been “a clear error of judgment.” *Clark Fork*, ¶ 27; *North Fork*
18 *Preservation Ass'n v. Department of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871
19 (1989).

21 The criteria for making a final decision under MEPA are established by certain
22 administrative rules. ARM 36.2.521. The agency must discuss each impact of the proposed
23 action in a level of detail that is proportionate to its significance. ARM 36.2.528(2). The
24 FEIS must include agency response to substantive comments, including an evaluation of each
25 comment and disposition of the issue involved. ARM 36.2.531(3).
26
27
28

1 A. *Statutory Exceptions.*

2 In the case of state lands, Montana statute allows for two exceptions to MEPA
3 compliance. MCA (2009), § 77-1-121 states in part:
4

5 (1) Except as provided in 77-1-122 and subsection (2) of this section, the
6 department and board are required to comply with the provisions of Title 75,
7 chapter 1, parts 1 and 2, when implementing provisions within this title *only if*
8 *the department is actively proposing* a sale or exchange or to issue a right-of-
9 way, easement, placement of improvement, lease, license, or permit or is acting
10 in response to an application for an authorization for a proposal.

11 (2) The department and board are *exempt* from the provisions of Title 75,
12 chapter 1, parts 1 and 2, *when issuing any lease or license that expressly states*
13 *that the lease or license is subject to further permitting under any of the*
14 *provisions of Title 75 or 82.* (Emphasis added)

15 The exception of MCA (2009), § 77-1-121(1) does not apply. The record clearly
16 shows that DNRC actively sought out and requested bids for a wind power project that
17 ultimately resulted in the Coyote Wind lease.

18 The exception of MCA (2009), § 77-1-121(2) also does not apply. The record clearly
19 shows that the Coyote Wind lease does not include a provision for further permitting.

20 The other statutory exception, MCA (2009), § 77-1-122, directly relates to energy
21 development projects on state lands and states:

22 (1) Except as provided in subsection (2), the scope of any environmental
23 review under Title 75, chapter 1, parts 1 and 2, for a proposed action on state
24 land is limited to the impacts of the proposed action within the boundaries of
25 the state land parcel or parcels in which the proposed state action is taking
26 place if the:

27 (a) board or the department, pursuant to this title, is proposing a sale or
28 exchange or to issue a right-of-way, easement, placement of improvement,
lease, license, or permit or if the department or board is acting in response to an
application for an authorization for a proposal; and

1 (b) state action is part of a larger energy development project that includes
2 private or federal land that is not subject to permitting or certification under
3 Title 75 or Title 82.

4 (2) If more than 33% of the total land area physically occupied by the
5 proposed energy development project provided for in subsection (1) is state
6 land, then the scope of the environmental review under Title 75, chapter 1,
7 parts 1 and 2, for the proposed action must include the total land area,
8 including federal and private land, that will be occupied by the proposed
9 energy development project.

10 This statutory exception was enacted in April of 2009 and, by its enacting terms,
11 applies to environmental reviews "initiated on or after" April 16th, 2009. 2009 Mont. Laws
12 239, §§ 4-5. The scoping period for the DEIS began on May 12th, 2008. The DEIS was
13 completed on August 10th, 2009. Although some of the review occurred after April 16th,
14 2009, it is apparent that the environmental review process was "initiated" prior to this date.
15 The exception in MCA (2009), § 77-1-122 is also inapplicable.

16 *B. Statute of Limitations.*

17 MEPA provides that a challenge to a "final agency action" that involves claims of
18 inadequate compliance must be brought within 60 days of the challenged act. MCA
19 (2009), § 75-1-201(6)(a)(ii). The term, "final agency action," is defined in MEPA as "the date
20 that the board of land commissioners or the department of natural resources and conservation
21 issues a final environmental review document under this part or the date that the board
22 approves the action that is subject to this part, whichever is later." MCA (2009), § 75-1-
23 201(6)(a)(iii).

24 In this action, the final agency action occurred on January 19, 2010, the date the State
25 Land Board under its authority in Montana Code Annotated, Title 77, parts 1 and 2 and MCA,
26 §77-1-301 directed DNRC to enter into the Coyote Wind lease. Petitioners commenced this
27
28

1 action on March 19, 2010. This MEPA challenge action is not time barred by MCA
2 (2009), § 75-1-201(6)(a)(ii). Said challenge includes a challenge to DNRC's procedural steps
3 leading up to the final agency action.

4
5 *C. Adopting an FEIS.*

6 Petitioners claim that DNRC improperly adopted the DEIS under ARM 36.2.530. In
7 order to adopt the DEIS as its FEIS, DNRC would have to timely consider the substantive
8 comments to the DEIS and follow a notification procedure. ARM 36.2.530. This rule
9 provides in pertinent part:

10
11 ADOPTION OF DRAFT ENVIRONMENTAL IMPACT
12 STATEMENT AS FINAL. (1) Depending upon the substantive comments
13 received in response to the draft EIS, the draft statement may suffice. The
14 agency shall determine whether to adopt the draft EIS within 30 days of the
15 close of the comment period of the draft EIS.

16 (2) In the event the agency determines to adopt the draft EIS, the
17 agency shall notify the governor, the environmental quality council, the
18 applicant, if any, and all commenters of its decision and provide a statement
19 describing its proposed course of action. This notification must be
20 accompanied by a copy of all comments or a summary of a representative
21 sample of comments received in response to the draft statement, together with
22 at a minimum, an explanation of why the issues raised do not warrant the
23 preparation of a final EIS. ...

24 In this case, the DNRC in issuing the FEIS states that it is adopting the DEIS as the
25 FEIS "with amendments made in response to public comments." AR 745. The FEIS then
26 includes a Chapter 2 entitled "Analysis of Comment," a Chapter 3 entitled "Changes to Draft
27 Environmental Statement," a Chapter 6 entitled "Revised and New Figures" and a Chapter 7
28 entitled "Comment Summary." AR 749-837. Further, attached to the FEIS is Appendix A
listed as "Written comments received by DNRC during the public comment period" and

1 Appendix B identified as "Transcripts of oral comments made at public hearing." AR 838-
2 965. These four chapters and appendixes are additions to the DEIS.

3 Further, in the introductory to Chapter 2, the DNRC states that:
4

5 Where appropriate, section numbers, page numbers, or figure and table
6 numbers from the DEIS as published by DNRC, have been included to assist
7 the reader. These page numbers refer to the locations of any changed text,
8 figures or tables in the DEIS, or direct the reader to places in the DEIS used to
9 address a comment. New tables and text are accompanied by a reference to an
10 approximate insertion point in the DEIS and are contained in section 3 of this
11 FEIS. Introductory material sufficient to allow this document to stand alone as
12 a summary of the changes to the DEIS has been included. However, the FEIS
13 does not replace the DEIS which contains the bulk of the analyses used to
14 evaluate the alternatives. AR 749. (Emphasis added)

15 Although the DEIS is incorporated by a reference, the manner of reference also
16 reflects changes to the DEIS and an intent to not repeat analysis that remains applicable to the
17 FEIS. The FEIS then shows numerous replacement language for language in the DEIS,
18 including the following: addition to section 3.8.3.6 relative to golden eagle, mountain plover,
19 burrowing owl; replacement to section 3.10.2 relative noise production; replacement to
20 section 4.5.1.1 relative to traffic volumes; replacement to section 4.5.2.4 relative to mitigation
21 (transportation); replacement to section 4.6.1.2 relative to property values; replacement to
22 4.6.1.2 relative to property tax revenue; replacement to section 4.8.1.1 relative to birds;
23 replacement to table 4.10-2 relative to predicted noise levels, no action alternative;
24 replacement to table 4.10-4 relative to predicted noise levels, proposed action alternative; and
25 insertion to section 4.13 relative to ice throws. AR 783-789.

26 In addition, Chapter 6 of the FEIS shows 14 revised and new figures created in
27 response to the written and oral comments. AR 798-813. Many of those figures include
28 daytime and night visual simulations of the landscape under the No Action and the Proposed

1 Action alternatives. The comment summary in Chapter 7 includes not only the nature of
2 comment but a response summary and the location where the issue is addressed within FEIS.
3 AR 815-837.

4 The FEIS is sufficient to comply with content requirements of ARM 36.2.531. By
5 reference, it contains a summary of the DEIS's major conclusions and supporting information.
6 Nothing in the statute or administrative rules precludes this manner of referring to those
7 conclusions and supporting information. The FEIS also includes a list of those providing
8 written and oral comment to the DEIS and, where practical, the text of the comment. It
9 contains the agency's evaluation and direct response or a response by reference to each
10 substantive comment and the identification of changes to the DEIS including any data,
11 information and explanation obtained subsequent to the DEIS.
12

13
14 ARM 36.2.530 does not apply. FEIS did not merely adopt the DEIS as the FEIS.
15 Rather, it issued the FEIS under ARM 36.2.531.
16

17 *D. Alternatives.*

18 MEPA requires that each agency "to the fullest extent possible" include in an EIS
19 "alternatives to the proposed action." MCA (2009), §§ 75-1-201(1) and 75-1-
20 201(1)(b)(iv)(C). In this regard, the agency must complete "a meaningful no-action
21 alternative analysis" to include "the projected beneficial and adverse environmental, social,
22 and economic impact of the project's noncompletion." MCA (2009), § 75-1-
23 201(1)(b)(iv)(C)(IV).
24

25 The agency must also consider "reasonable" action alternatives. The term,
26 "reasonable," is defined as the alternative must be achievable under current technology and
27 the alternative must be economically feasible as determined solely by the economic viability
28

1 for similar projects having similar conditions and physical locations ..." MCA (2009), § 75-1-
2 201(1)(b)(iv)(C)(I).

3 An EIS need only set forth alternative sufficient to permit "a reasoned choice." Action
4 alternatives do not need to be considered if their effects cannot reasonably be determined, or if
5 their implementation is "deemed remote and speculative." The reasonable alternative
6 requirement is not "to be employed as a crutch for chronic faultfinding." Substantial
7 compliance with this MEPA requirement is sufficient as long as the agency has an
8 environmental disclosure detailed enough to aid it in the substantive decision on whether to
9 proceed with the proposed action. *State ex rel. Montana Wilderness Ass'n v. Board of*
10 *Natural Resources and Conservation of State of Mont.*, 200 Mont. 11, 24-25, 648 P.2d 734,
11 741-42 (1982).

14 1. *No-Action Alternative.* The no-action alternative "allows policy makers and the
15 public to compare the environmental consequences of the status quo to the consequences of
16 the proposed action." It is meant to "provide a baseline" against which the proposed action is
17 evaluated. *Ctr. For Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir.
18 2010).

20 In the DEIS and FEIS, the no-action alternative that DNRC considered called for no
21 wind development on the State Parcel, but full wind development on the adjacent private
22 lands even though no wind development had yet occurred there. This consideration is not a
23 true no-action alternative because it is not representative of the status quo. As a result, there is
24 a failure to produce a baseline from which to make comparison of the environmental
25 consequences. By failing to consider no wind development associated with the entire Coyote
26 Wind project, DNRC failed to consider a proper no-action alternative. *Friends of Yosemite*
27
28

1 *Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (finding agency no-action
2 alternative invalid when it “assumed the existence of the very plan being proposed.”).

3
4 In the FEIS, DNRC says that it relied on legal counsel’s opinion when including the
5 development on private property as part of its no-action alternative. AR 750. However,
6 DNRC fails to recite in the FEIS any legal analysis behind that opinion. Further, the
7 statement ignores a crucial fact, namely, the status quo is that no such private property
8 development yet exists.

9
10 Whether Coyote Wind’s larger project would be economically viable without
11 including development on the State Parcel is a disputed factual question that cannot be
12 resolved by summary judgment. However, it is a question not material to the issue currently
13 before the Court. The fact that an agency does not have the jurisdiction, power, or ability to
14 implement a particular alternative does not excuse analysis of the alternative. ARM
15 36.25.529(5).

16
17 2. *Range of Action Alternatives.* In the DEIS, DNRC states that it did not consider
18 other action alternatives because they would not “meet the purpose and benefits of the
19 proposed action.” AR 190. This reference necessarily relates back to DNRC’s request for
20 proposal and its acceptance of Coyote Wind’s bid. The objectives stated in this request are
21 leasing the State Parcel “for wind exploration and new commercial scale wind facilities,”
22 generating income reflective of “fair market value of the use of trust lands for wind energy
23 development” and achieving commercial operation of wind projects “as soon as possible, with
24 minimal impacts on the environment.” AR 5, 181. DNRC acknowledged the Coyote Wind
25 bid was part of a larger wind power development project consisting of 44 turbines, 8 of which
26 are located on the State Parcel. AR 21-64, 180-181, 191. The foregoing assumes DNRC’s
27
28

1 “reasoned choice” in the DEIS and FEIS included a detailed analysis of action alternatives for
2 “minimal impacts to the environment.” Yet, the record does not reflect that level of analysis.

3 The DEIS fails to specify any action alternative. Comments to the DEIS suggest at
4 least two similar action alternatives, less intensive development or different turbine
5 configuration. AR 682. In the FEIS response, DNRC states “alternatives evaluated comply
6 with MEPA.” AR 816. Said response is conclusory only. In the FEIS analysis section,
7 DNRC states an alternate configuration was considered resulting in the move of one turbine
8 and that “the existing configuration was designed to avoid sensitive resources (eg, prairie dog
9 town, wetland features, top of ridges).” AR 750. This analysis does not reflect consideration
10 of the comment for less intense development. Further, it does not show consideration of
11 economic viability of these suggested action alternatives as required by MCA (2009), § 75-1-
12 201(1)(b)(iv)(C)(I).

13 DNRC argues the FEIS is an analysis of “up to” eight turbines and that this qualifier
14 means the analysis includes any alternative resulting in less than eight turbines on the State
15 Parcel. The problem with this argument is that it assumes any number of lesser turbines, even
16 down to a single turbine, has the same environmental impact without giving any explanation
17 for that assumption.

18 Reasonable action alternatives are the “heart” of an EIS. As such, an EIS cannot leave
19 unexamined economically viable alternatives. *Ctr. For Biological Diversity*, 623 F.3d at 642.
20 Likewise, an agency cannot fail to examine otherwise practical alternative suggestions for
21 economic viability and determination of reasonableness. Failure to do so violates procedural
22 requirements of MEPA.
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1 Some comments mention the possibility of selling the State Parcel. AR 828-829, 834,
2 892. The DNRC, in response, stated that it did not consider this a “reasonable alternative”
3 since it would lose long-term control over the property. AR 828. This response sufficiently
4 distinguishes this proposed alternative. Sale of the State Parcel is not a “similar project
5 having similar conditions.” MCA (2009), § 75-1-201(1)(b)(iv)(C)(I). As a matter of law,
6 DNRC is not required to further analyze this alternative.
7

8 *E. Other Environmental Impacts/Adequacy of Comment Responses.*

9 1. *Wildlife Impacts.* The DEIS includes extensive analysis of wildlife in the Total
10 Project Area, as well as the possible adverse effects to wildlife and methods available to
11 mitigate the harm. AR 158-59, 230-249, 284-294. The FEIS adjusted the Potential Impact
12 Index from “medium,” as erroneously listed in the DEIS, to “high” after comments pointed
13 out the error, and further stated that “a high rank does not preclude development.” AR 771-
14 72. The FEIS includes post-construction monitoring of bird and bat fatalities to provide data
15 in addition to that currently available. It describes negative consequences to bird and bat life
16 stemming from operation of the proposed project, including expected fatalities. Whether
17 these consequences outweigh the benefits of the project is debatable, but this weighing is a
18 matter of policy and beyond this Court’s review. DNRC made adequate compilation and
19 rational analysis of relevant data with regard to the concerns raised in the comments over
20 wildlife. *Clark Fork Coalition*, ¶ 47.
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23 2. *Noxious Weeds.* A similar analysis applies to the FEIS’s treatment of comments
24 regarding noxious weeds. Although the DEIS’s analysis of this issue is not as extensive as its
25 analysis of wildlife issues, the issue is addressed and means of mitigation are discussed. AR
26 282-84. The FEIS responded adequately to comments by re-emphasizing required mitigation.
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1 AR 767. In the FEIS, DNRC acknowledges that there is some potential for the project to
2 cause the spread of noxious weeds.

3 3. *Property Values.* With regard to property values, the DEIS states that few studies
4 are available but does conclude that the effect on property values would most likely be
5 “negligible in a downward direction.” AR 277. In response to comments, the FEIS referred
6 to its conclusions in the DEIS and stated that conducting a full analysis is not feasible and
7 unlikely to yield statistically robust data because of the small sample size. AR 763.

8
9 Petitioners do not dispute the lack of available pre-existing data and this Court cannot demand
10 an on-the-ground analysis where the agency has reasonably determined that the data gathered
11 would not be statistically robust.
12

13 4. *BGEPA and MBTA.* In response to comments concerning the Bald and Golden
14 Eagle Protection Act (“BGEPA”) and Migratory Bird Treaty Act (“MBTA”), the FEIS states
15 that the Montana Bald Eagle Management Plan’s guidelines were used in placing the turbines.
16 AR 789. It also states that no other eagle management plans are available that describe
17 specific buffer zones. The FEIS lists that the closest turbine to a known eagle nest would be
18 in Zone III, which includes any suitable foraging habitat within 2.5 miles of a nest site. The
19 FEIS added a table giving distances between “sensitive resources for raptors” and the nearest
20 turbines. The FEIS also states that the Fish and Wildlife Service would be involved in the
21 post-construction monitoring plan. AR 768-69. Although the FEIS does not include any legal
22 analysis of whether the project would comply with the MBTA or BGEPA, or even a direct
23 assertion that MBTA and BGEPA are not being violated, the response here represents rational
24 consideration to the primary concern behind the MBTA and BGEPA-related comments.
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1 5. *Noise and View Shed Impacts.* The DNRC received comments regarding noise and
2 changes to the view shed. The DEIS included simulated pictures of area views with and
3 without the proposed windmills, as well as a thorough noise analysis. AR 252-56, 258, 260,
4 297-98, 300, 302-322. In response to comments, the FEIS expanded the noise analysis and
5 included simulated pictures for additional areas. AR 801-812. The response to comments on
6 these points was adequate.
7

8 6. *Ice Throws.* Although no discussion of ice throws is present in the DEIS, the FEIS
9 adds a section describing the problem of ice throws and possible means of mitigation. AR
10 755-56. The DNRC's responses to ice throw related comments showed rational
11 consideration.
12

13 7. *FAA Lighting Requirements.* In response to comments regarding FAA lighting
14 requirements, the FEIS states that "the DNRC lease would require adherence to FAA
15 guidelines." AR 777. The FEIS also states that the simulated pictures of the towers show
16 compliance with the FAA's general requirements, although Coyote Wind had not heard back
17 from the FAA regarding their proposed layout at the time of the FEIS. Given the status of the
18 matter, the treatment of this comment was also adequate.
19

20 8. *Road and Transportation Impacts.* Road construction, road closures, and increases
21 in traffic volume can each constitute a significant impact on the quality of the human
22 environment, especially when multiple instances of the above are concentrated in a small area.
23 The DNRC does not dispute this type of impact. Although the DEIS strongly implies that
24 road improvements (and resulting construction noise, dust, and delays) would be required as
25 part of the project, it contains only vague projections of the nature of such improvements, and
26 no information at all regarding their duration or location. It is also "unknown" whether
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1 construction on I-90 would be required. AR 271-74. In response to comments raising
2 concerns over the lack of a clear transportation plan, the FEIS states that no decision has been
3 made regarding Coyote Wind's specific route and that Coyote Wind will need to have a
4 transportation plan approved by any involved counties. AR 761, 819-20.
5

6 In some instances, analysis of environmental impacts before the fact may be
7 impossible because of limited data, especially in quickly developing fields or in cases
8 involving technology that has not been previously used in a geographically similar area. In
9 those situations, analysis after the project has begun is preferable to no analysis at all.
10

11 Analysis of road improvements and traffic is not one of those situations.

12 The need for later county approval of a transportation plan does not negate the need to
13 include impacts of such transportation in the FEIS. By deferring any detailed analysis of the
14 issue, a major component of the impact on the human environment could be allowed to escape
15 EIS review entirely. An appropriate response to the transportation comments could
16 reasonably have included the impacts to a finite number of likely possibilities. The DEIS
17 refers to "two available routes to the area." AR 272. An analysis of the road impacts to those
18 two routes could be done, at least in a preliminary manner, with existing information,
19 especially given that the approximate size and number of vehicles that will need to use the
20 route is known. DNRC's decision to not analyze within the FEIS the available relevant
21 transportation factors was arbitrary and capricious.
22
23

24 *F. Cumulative Impacts.*

25 An EIS must include analysis and description of the cumulative impacts. MCA
26 (2009), § 75-1-201(1)(b)(iv); ARM 36.2.529(4)(b). Cumulative impacts are defined as "the
27 collective impacts on the human environment of the proposed action when considered in
28

1 conjunction with other past, present, and future actions related to the proposed action by
2 location or generic type.” MCA (2009), § 75-1-220(3). The term includes “other past and
3 present actions related to the proposed action by location or generic type,” as well as related
4 future actions when they are “under concurrent consideration by any state agency.” ARM
5 36.2.522.
6

7 In a case involving the DNRC, the Montana Supreme Court focused on the public’s
8 benefit when indicating approval of the District Court’s findings stating:

9 The purpose of allowing public involvement in environmental decision-making
10 is frustrated if an EIS does not accurately describe the impact of proposed
11 action in the context of past, present and future proposed action. The average
12 member of the public must rely on DNRC's expertise, and therefore, DNRC
13 must give sufficient information so that the public can make a meaningful
14 evaluation of the proposed action. To do so, a thorough analysis and
discussion of cumulative impacts is necessary. The legislature recognized as
much, making a cumulative impacts analysis mandatory.

15 *Friends of the Wild Swan v. Department of Natural Resources & Conservation*, 2000
16 MT 209, ¶ 34, 6 P.3d 972, 977-78.

17 Just as District Court found in the *Friends of the Wild Swan*, a thorough analysis of
18 cumulative impacts is lacking here.

19
20 1. *Oil and Gas Lease*. Other government action on the State Parcel is part of the
21 “cumulative impacts.” The other government action includes the Oil and Gas Lease. The
22 FEIS included a response to comments concerning the cumulative impacts of the Oil and Gas
23 Lease by stating that “[o]il and gas development on the state parcel is not considered
24 ‘reasonably foreseeable.’” AR 817. The DNRC also argues that the lessee under the Oil and
25 Gas Lease has no right to occupy the surface without further permission from the agency.
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1 The Oil and Gas Lease explicitly states that it is subject to further permitting. AR 120.
2 This statement exempts the issuance of the lease itself from the requirement for an EIS.
3 MCA § 77-1-121(2); *North Fork Preservation Ass'n*, 238 Mont. at 461. However, it does not
4 exempt the Oil and Gas Lease from a cumulative impacts analysis. Any drilling under the
5 terms of this lease would constitute a future action “related to the proposed action by
6 location.” MCA § 75-1-220(3).

8 It may well be the case that future drilling under the terms of the Oil and Gas Lease is
9 not reasonably foreseeable; however, the FEIS makes this conclusion without explanation.
10 There is also no obvious explanation why drilling is not now reasonably foreseeable when,
11 based on the terms of the Oil and Gas Lease, both parties considered it foreseeable at the time
12 the lease was signed.³

14 Further, for issues not involving significant impact, the EIS analysis can be “limited to
15 a brief presentation of the reasons why they will not significantly affect the quality of the
16 human environment.” ARM 36.2.527. Here, no reasons are presented.

18 Without either an analysis of the cumulative impacts of future action under the
19 existing Oil and Gas Lease or presentation of reasons the DNRC does not consider such
20 developments reasonably foreseeable, the cumulative impacts analysis is insufficient as a
21 matter of law.

23 2. *Other Wind Projects*. Other regional wind projects are part of the “cumulative
24 impacts.” In response to comments asking for an analysis of the cumulative impacts of
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26 ³ Not only did Pacer Energy pay over \$100,000 for a lease that supposedly does not even provide the right to
27 occupy the surface, but the Oil and Gas Lease contains provisions penalizing the lessee and allowing cancellation
28 by the lessor if no wells are drilled within five years, and calls for the lessee to “promptly and diligently drill” if
necessary to offset drilling on adjacent lands. AR-119.

1 multiple regional wind projects; the FEIS states that “such analysis would be speculative and
2 provide no useful information for mitigation.” The Petitioners do not dispute that at the time
3 of the FEIS, there was “very little data” from one nearby project conducting post-construction
4 monitoring and none from another project scheduled for construction in 2011. AR 769.

5
6 However, Petitioners argue that the DNRC should “collect the missing information from other
7 regional wind projects, or at the very least, projections that fill in any information gaps, and
8 perform a rigorous analysis of that information.” Petitioner’s Motion for Summary Judgment
9 and Brief in Support at 14-15.

10
11 The DNRC maintains that information from other wind projects was not available and
12 that the Petitioners have not made any showing otherwise. Additionally, DNRC argues that
13 the FEIS’s statement represents a conclusion that an analysis involving projections would “be
14 speculative and provide no useful information for mitigation.”

15
16 Regarding the usefulness of such an analysis, it is appropriate here to defer to the
17 agency’s expertise. Unlike the analysis of road impacts, little data is available and allowing
18 for post-construction monitoring is necessary. Given the lack of available data, the DNRC is
19 not required to conduct a cumulative impacts analysis of other wind farms as a matter of law.

20
21 *3. Economic Value.* The description of the economic value of the State Parcel includes
22 the payment of \$960 per year under the Oil and Gas Lease. It does not include the up-front
23 payment of \$105,320 during the first year or the royalty of 16.67%.⁴ Members of the public
24 should be able to rely on the FEIS to provide a complete picture of the State Parcel’s value.
25 Both the large payment up-front and the royalty provisions are necessary to understand the

26
27 ⁴ Had the EIS included reasons that future oil and gas development were not foreseeable, it could have been
28 sufficient to refer to those reasons rather than attempting to project revenue that could be collected as royalties.

1 true value of the lease to the State as well as the State's potential liability if the lease is
2 broken.

3 Although nothing in the FEIS's description of the State Parcel's value is factually
4 inaccurate, it deceives through omission. The omission makes the Oil and Gas Lease appear
5 less valuable. In order to give the public an accurate understanding of the value of the State
6 Parcel, the up-front payment and royalties should have been disclosed. Failure to do so
7 showed a lack of rational consideration of relevant factors and clear error in judgment.
8 DNRC's omission here was arbitrary and capricious.

9
10
11 *G. New Information.*

12 Petitioners took the deposition of Bryan Bedrosian ("Bedrosian") and allege that
13 Bedrosian identified multiple nesting sites which were not identified in the DEIS and FEIS.
14 DNRC argues Bedrosian's deposition testimony is improper new evidence. Additionally, they
15 argue Bedrosian's testimony primarily involves a dispute over methodology and it is not
16 apparent that Bedrosian's findings involve the State Parcel or Total Project Area.
17

18 Petitioners also contend that the DNRC should have considered changes made in
19 November 2009 to the Montana Department of Transportation's procedures for permitting of
20 oversized vehicles, since the project would require the permitting of several such vehicles.
21 The DNRC argues that consideration of over-sized loads is beyond the scope of an EIS
22 because it is not an environmental impact to the State Parcel.
23

24 New evidence is not always excluded with judicial review under MEPA. While the
25 focal point for judicial review should be the pre-existing administrative record, new evidence
26 may be considered under four circumstances: "(1) if necessary to determine whether the
27 agency has considered all relevant factors and has explained its decision, (2) when the agency
28


1 has relied on documents not in the record... (3) when supplementing the record is necessary to
2 explain technical terms or complex subject matter,” and (4) when there is a showing of bad
3 faith on the part of the agency. *Inland Empire Public Lands Council v. Glickman*, 88 F.3d
4 697, 703-04 (9th Cir. 1996). Federal Courts interpreting NEPA have held that a “battle of the
5 experts” over methodology will not be permitted when the agency’s methodology is
6 reasonable; however, they have not excluded the possibility that an expert may be used to
7 question the factual results of agency tests or point out flaws in the methodology. *Wildwest
8 Institute v. Bull*, 468 F.Supp.2d 1234, 1248 (D.Mont.2006).

11 Nonetheless, this Court need not resolve these issues. Petitioners have already shown
12 by clear and convincing evidence that DNRC’s decision to issue the Coyote Wind lease was
13 arbitrary and capricious and not in compliance with law. That decision must be set aside and
14 the matter remanded back to DNRC for further investigation and report. MCA (2009), § 75-
15 1-201(3)(a).

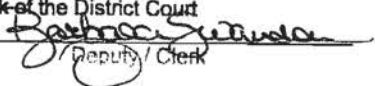
17 Based on the foregoing, **IT IS HEREBY ORDERED** that:

- 18 1. DNRC’s Motion for Summary Judgment is DENIED.
- 19 2. Petitioner’s Motion for Summary Judgment is GRANTED. The Coyote Wind
20 lease is set aside. This matter is remanded back to DNRC for additional
21 investigation and report under MEPA.
- 22 3. The Clerk shall forthwith forward copies of this Order to Counsel.

24 DATED this 5th day of October, 2011.



John C. McKeon
District Judge

26 I Hereby certify that I have mailed a true
27 copy of this document to:
~~Stephen P. Brown, Denise Copock;~~
~~Stephen M. Adruff; Tommy H. Butler;~~
28 by depositing same in the U.S. Mail this
6th day of October
2011
Clerk of the District Court
By 
Deputy Clerk