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

<p>OMIMEX CANADA, LTD., Plaintiff,</p>	<p>Cause No. BDV-2004-288</p>
<p>v.</p>	<p><b>ORDER ON MOTIONS FOR SUMMARY JUDGMENT</b></p>
<p>STATE OF MONTANA, DEPARTMENT OF REVENUE, Defendant.</p>	

This matter is currently before the Court on cross-motions for summary judgment.

Omimex Canada, LTD (hereinafter Omimex), filed this action on April 14, 2004. Omimex contends that Defendant Montana Department of Revenue (hereinafter MDOR) has improperly centrally assessed Omimex's Montana properties pursuant to Section 15-23-101(2), MCA. Further, Omimex contends that ARM § 42.22.102(3) is invalid. This Court agreed with that position in its Order on Motion for Partial Summary Judgment dated August 9, 2005. Finally, Omimex contends that the MDOR's treatment of Omimex's property violates equal protection provisions and equalization requirements.

1 Standard of Review

2 Summary judgment is appropriate if "there is no genuine issue as to any  
3 material fact and that the moving party is entitled to judgment as a matter of law." Rule  
4 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine  
5 issues of material fact exist. Jobe v. City of Polson, 2004 MT 183, ¶ 10, 322 Mont.  
6 157, ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes no genuine issues of  
7 material fact exist, the burden shifts to the non-moving party opposing summary  
8 judgment to prove otherwise. Id. If the court determines no genuine issues of material  
9 fact exist, the court will determine whether the moving party is entitled to judgment as a  
10 matter of law. Id.

11 Factual Background

12 The property owned by Omimex subject to this case is located in Blaine,  
13 Chouteau, Glacier, Hill, Liberty, Phillips, Pondera, Toole, Teton, and Valley Counties,  
14 Montana. The properties were purchased by Omimex from Encana Energy Resources,  
15 Inc. (Encana), on April 1, 2003. Omimex's Montana properties generally consist of the  
16 following:

17 Cut Bank Area Properties

18 Cut Bank Gathering  
19 Cut Bank Gas Plant  
20 Big Rock Gathering  
21 Cut Bank Pipeline

Shelby Area Properties

Kevin Sunburst Gathering  
East Keith Gathering  
Utopia Gathering  
East Keith Pipeline

22 Bowdoin Properties

23 Bowdoin Field Gathering  
24 Whitewater Pipeline

Regan Properties

Regan Field Gathering

25 Battle Creek Properties

Battle Creek Gathering  
Chinook Pipeline

24 From these facilities, Omimex sells crude oil, butane, propane, and natural  
25 gas. The above properties consist of hundreds of miles of natural gas pipelines and

1 approximately 1,400 wells. The properties have always been transferred or sold as a  
2 business unit. (Donkin Expert Report, at 8, July 26, 2005.) In 1997, the Montana Power  
3 Company (hereinafter MPC) transferred these properties to its affiliate Entech. In  
4 2000, Entech sold much of the property in question to Encana. In prior years, the  
5 properties were subject to central assessment by MDOR. (Hofland Aff., ¶ 10, Sept. 30,  
6 2005.)

7 Omimex's corporate headquarters is in Fort Worth, Texas. The president  
8 and owner of Omimex, Naresh Vashisht, makes all key management decisions out of the  
9 corporate headquarters. It appears that Omimex's Montana properties are managed by its  
10 production foreman, Paul DeKaye, headquartered in Cut Bank, Montana. Omimex  
11 transports in its pipelines gas that it owns (equity gas), gas in which Omimex does not  
12 have an interest (third-party gas), and gas in which Omimex owns a working interest  
13 along with other owners.

14 The Cut Bank Pipeline crosses the county line between Glacier and Toole  
15 Counties. In addition, Omimex has a natural gas pipeline that crosses the international  
16 border between Montana and Alberta, Canada. Further, the East Keith Pipeline, near  
17 Shelby, runs from Hill County through Liberty County into Toole County. Omimex also  
18 operates the Whitewater Pipeline, which transports third-party gas to the United States-  
19 Canadian border crossing. The Chinook Pipeline also delivers gas to the United States-  
20 Canadian border crossing.

21 Omimex has a single gas marketing agreement with Wisconsin Public  
22 Services (hereinafter WPS). WPS apparently gets Omimex's natural gas from several  
23 sources. The gas coming out of the Battle Creek system is sold off the TransCanadian  
24 Pipeline; the gas from the Whitewater area is sold off the Northern Border Pipeline; and  
25 other gas of Omimex is transported in NorthWestern Energy pipelines. (Storms Dep., at

1 10-12, March 4, 2005.)

2 One hundred percent of the gas owned by Omimex and transported to  
3 market in Omimex pipelines involved in this case is sold under the WPS contract, with  
4 no reference to separate or individual Omimex pipelines or pipeline systems. (Donkin  
5 Expert Report, at 11.)

6 **Discussion**

7 MDOR has assessed Omimex's Montana properties pursuant to Section  
8 15-23-101(2), MCA, which provides, in part:

9 The department shall centrally assess each year:

10 (2) property owned by a corporation or other person operating a  
11 single and continuous property operated in more than one county or more  
12 than one state, including but not limited to telegraph, telephone,  
13 microwave, and electric power or transmission lines; natural gas or oil  
14 pipelines; canals, ditches, flumes, or like properties. . . .

15 Omimex contends that the property in question should be locally assessed.  
16 Locally assessed property, pursuant to Section 15-6-138, MCA, is considered Class  
17 Eight property and would be taxed at three percent of its market value. Centrally  
18 assessed property, on the other hand, is Class Nine property and, pursuant to Section 15-  
19 6-141, MCA, would be taxed at 12 percent of its market value.

20 The problem that arises in this case is that, when these properties were  
21 owned as part of the larger MPC system, they were physically tied into the MPC's  
22 transmission lines. Now, it appears that none of the various properties mentioned above  
23 are physically connected with each other.

24 Omimex makes a strong point that its properties are dissimilar to the  
25 examples given in Section 15-23-101(2), MCA, which are to be centrally assessed. The  
26 examples given by that statutory scheme describe properties that are physically  
27 connected to each other - telegraph, telephone, electric power or transmission lines,

1 natural gas or oil pipelines, canals, ditches, flumes, and like properties. The only  
2 example not having a physical connection is the example of microwave properties.  
3 Thus, it can be argued that the properties owned by Omimex and that are subject to this  
4 case do not fall into the type of properties the legislature thought should be centrally  
5 assessed pursuant to Section 15-23-101, MCA. When these properties were operated  
6 by MPC, they were centrally assessed because they were physically connected.  
7 However, when they were offered for sale to Omimex, they were marketed as separate  
8 and independent systems. (Davis Aff., at 7, March 8, 2005.)

9 MDOR has brought to the Court's attention the case of FPL Mont., LLC v.  
10 Dep't of Revenue, SFT-2002-4 and SFT-2002-6 (Mont. State Tax Appeal Bd., Feb. 15,  
11 2005.) In that case, PPL Montana (hereinafter PPL) purchased generation facilities  
12 formerly owned by MPC. These generation facilities were not physically connected to  
13 transmission lines owned by PPL. At one point, both the generation facilities and the  
14 transmission lines were owned by MPC. However, MPC sold both the generating  
15 facilities and the transmission lines, and it turns out that the two systems were bought by  
16 different entities. The Montana State Tax Appeal Board, despite the lack of a physical  
17 connection between the various PPL generating facilities, held that the facilities were  
18 operated as a single integrated property. Crucial to the State Tax Appeal Board's  
19 decision was the fact that, although PPL did not purchase the transmission lines, the  
20 purchase agreement whereby PPL bought the generating facilities from MPC included  
21 an interconnection agreement that permitted the generating facilities to continue to  
22 operate as a single, integrated property or unit. Id., at 28. The State Tax Appeal Board  
23 noted that, as a result of the interconnection agreement and FERC Order No. 888, PPL  
24 was given the right to access the transmission system currently owed by North Western  
25 Energy, as if PPL owned the transmission system. Id., at 29.

1                   For the reasons noted below, this Court does not feel it appropriate to  
 2 grant summary judgment to either party at this time. This Court has several areas of  
 3 concern that will be discussed below.

4                   First, as noted above, the properties here owned by Omimex were  
 5 marketed separately at the time Omimex purchased them and not as one operating unit.  
 6 Further, the examples given in Section 15-23-101(2), MCA, as to what types of property  
 7 should be centrally assessed do not appear to be similar to the Omimex operation.  
 8 While the PPL decision before the State Tax Appeal Board does support MDOR's  
 9 contentions, this Court sees several differences between the current arrangement  
 10 between Omimex and its customers and the PPL case. In PPL, there was a single  
 11 interconnection agreement that allowed PPL to operate its system as had MPC. Further,  
 12 PPL was allowed to use the transmission lines as if it owned them. Here, we do not have  
 13 a single interconnection agreement. Indeed, it appears that Omimex delivers its natural  
 14 gas to three different transmission systems (NorthWestern, Northern Border and Trans-  
 15 Canada). Also crucial to the PPL decision was the fact that PPL continued to operate its  
 16 generating facilities as did MPC when it owned them. Id., at 8. This Court is unsure  
 17 whether Omimex operates the property here in question the same way as when the  
 18 property was centrally assessed and owned by MPC.

19                   While it appears that the Omimex natural gas is entitled to open access to  
 20 the three natural gas pipeline systems mentioned above (Donkin 2nd Aff., at 3, Oct. 25,  
 21 2005), it is unclear whether Omimex is operating as if it owned the natural gas  
 22 transmission lines owned by the three companies mentioned above. Again, this was a  
 23 crucial factor in the PPL decision.

24                   Another factual issue remains. DOR's expert, George Donkin, suggests  
 25 that Omimex pipelines are not only gas gathering but also are transmission pipelines.

1 However, Omimex's expert, John Davis, suggests that "Omimex does not own any gas  
2 transmission pipelines in the state of Montana." (Davis Aff., at 2.)

3 It should be noted here that MDOR feels that John Davis is not qualified to  
4 render his opinions. However, the matters raised by MDOR are probably better left for  
5 cross-examination of an expert witness. This Court, on a motion for summary judgment,  
6 cannot be judging the believability of the various witnesses.

7 In his second affidavit, Donkin, on behalf of MDOR, indicates that  
8 Omimex operates its gas pipelines in Montana as a single and continuous property.  
9 (Donkin 2nd Aff., at 5.) Davis, however, indicates that the gathering systems are not  
10 continuous properties and operate independently of each other. (Davis Aff., at 7.)

11 Another concern raises itself, preventing the Court from entering  
12 summary judgment. The Court does not feel, at the present time, that it has an adequate  
13 grasp of all of the various properties owned by Omimex in Montana. The Court has  
14 noted above that a couple of the pipelines owned by Omimex cross county lines.  
15 However, it appears that most of the pipelines do not cross county lines. Further,  
16 MDOR is centrally assessing all of Omimex's properties in Montana, not just those  
17 pipelines that cross county lines. MDOR is also centrally assessing well equipment,  
18 compressors, the gas processing plant, office buildings, and the field offices. Whether  
19 these properties qualify for central assessment under Section 15-23-101(2), MCA, is  
20 not clear to this Court at this time. The Court would require further elucidation as to the  
21 actual properties owned by Omimex and how those properties are used in the Omimex  
22 operation.

23 In short, this appears to be a factually intensive case. Thus, the Court feels  
24 it inappropriate to decide such a matter on summary judgment.

25 ////

1 Equalization and Equal Protection

2 It is the burden of the taxpayer to prove that the Department has failed to  
3 equalize properties of taxpayers similarly situated. Dep't of Revenue v. State Tax Appeal  
4 Bd., 188 Mont. 244, 250, 613 P.2d 691, 694 (1980).

5 Here, for purposes of summary judgment, the Court finds that Omimex  
6 has failed to carry its burden. MDOR has determined that four other pipeline companies  
7 besides Omimex - WBI, NorthWestern, Havre Pipeline and Encana - were also subject  
8 to central assessment under Section 15-23-101, MCA. MDOR has also determined that  
9 Ranck Oil Company, Balko, Inc., Fulton Fuel Company, Klabzuba Oil & Gas, EnCore  
10 Operating, L.P., and Devon Energy did not fit within Section 15-23-101, MCA.  
11 (Hoffland Rebuttal Aff., Oct. 17, 2005.)

12 Since the Court is unable to determine, on a motion for summary  
13 judgment, whether Omimex should be centrally assessed or not, the Court cannot even  
14 begin to determine whether MDOR has equalized the properties of all taxpayers  
15 similarly situated. This is primarily because the Court is unsure, at this time, exactly  
16 where Omimex is legally situated.

17 Omimex's equalization argument is primarily based on the Charles  
18 Heringer affidavit. However, it is unclear if Heringer did any sort of review of the  
19 comparable properties. It is also unknown whether the comparable properties cross  
20 county lines or transport third-party gas, as does Omimex. Finally, Heringer admits that  
21 he is not familiar with the operations of Omimex. (Heringer Dep., at 78, l. 7, May 16-  
22 17, 2005.)

23 For the same reasons, the Court cannot grant Omimex's equal protection  
24 argument either. Primarily, as is the case with the equalization issue, since the Court  
25 cannot, at this stage of the proceedings, determine whether Omimex should be centrally

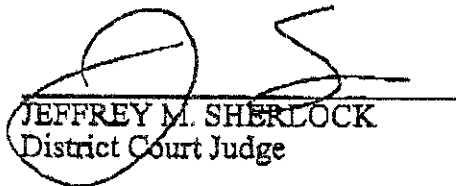
1 assessed, the Court cannot conduct an equal protection analysis to determine whether  
 2 MDOR'S classification of Omimex violates equal protection principles.

3 Finally, the Court notes that, although Omimex argues a commerce clause  
 4 claim, no such claim was pled in the complaint. Therefore, no relief will be granted on a  
 5 commerce clause claim.

6 **Conclusion**

7 On the basis of the above, the Court hereby ORDERS, ADJUDGES AND  
 8 DECREES that both parties' motions for summary judgment are DENIED, and this  
 9 matter will proceed to trial.

10 DATED this 17 day of January, 2006.

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 12   
 13 JEFFREY M. SHERLOCK  
 District Court Judge

14 pcs: James P. Sites  
 Charlena Toro

15 T/TMS/OMIMEX V MDOR ORD MOTS SUMM J.WFD

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