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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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SUSAN WICKLUND, M.D.; JAMES H.
ARMSTRONG, M.D.; SUSAN CAHILL, P.A.;
INTERMOUNTAIN PLANNED
PARENTHOOD; PLANNED PARENTHOOD
OF MISSOULA; CLAYTON McCracken,
M.D.; and YELLOWSTONE VALLEY
WOMEN'S CLINIC, INC., on behalf of
themselves and their patients,

Plaintiffs,

v.

STATE OF MONTANA, JOSEPH P.
MAZUREK, Attorney General in his official
capacity,

Defendants.

Cause No. ADV 97-671

ORDER ON SUMMARY
JUDGMENT

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Presently before the Court is Plaintiffs' motion for summary judgment. The motion has been fully briefed and is submitted for decision.

The chronology of this case has been set forth in an earlier ruling and need not be repeated here. This lawsuit challenges the constitutionality of the Parental Notice of Abortion Act (the Act), Sections 50-20-201 to 215, MCA. A preliminary injunction

1 was issued by this Court on February 13, 1998, enjoining the enforcement of the Act
2 pending final resolution of the issues raised in the complaint.

3 Plaintiffs have moved for summary judgment on the ground that the Act
4 violates Montana's constitutional guarantee of equal protection, Article II, Section 4,
5 Montana Constitution. The motion and briefs are supported by affidavits, depositions,
6 published articles and other discovery materials.

7 Legal Standard

8 This Court cannot grant a motion for summary judgment if a genuine issue
9 of material fact exists. Rule 56, M.R.Civ.P. Summary judgment encourages judicial
10 economy through the elimination of unnecessary trial, delay, and expense. *Wagner v.*
11 *Glasgow Livestock Sales Co.*, 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); *Clarks*
12 *Fork Nat'l Bank v. Papp*, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); *Bonawitz*
13 *v. Bourke*, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977).

14 Summary judgment, however, will only be granted when the record
15 discloses no genuine issue of material fact and the moving party is entitled to judgment
16 as a matter of law. See Rule 56(c), M.R.Civ.P.; *Cate v. Hargrave*, 209 Mont. 265, 269,
17 680 P.2d 952, 954 (1984).

18 Equal Protection under the Montana Constitution

19 A statute is presumed to be constitutional and will be upheld on review
20 except when proven to be unconstitutional beyond a reasonable doubt. *State v. Lilburn*,
21 265 Mont. 258, 262, 875 P.2d 1036, 1039 (1994), citing *City of Billings v. Laedeke*, 247
22 Mont. 151, 154, 805 P.2d 1348, 1349 (1991).

23 Article II, Section 4, of the Montana Constitution provides that "[n]o person
24 shall be denied the equal protection of the laws." The purpose of this provision is to
25 ensure that citizens are not subject to arbitrary and discriminatory state action. *Davis v.*

1 *Union Pacific R.R. Co.*, 282 Mont. 233, 937 P.2d 27, 32 (1997), citing *Godfrey v. State*
2 *Fish and Game Comm'n.*, 193 Mont. 304, 306, 631 P.2d 1265, 1267 (1981). The
3 constitutional guarantee of equal protection requires all persons to be treated alike under
4 like circumstances. *White v. State*, 203 Mont. 363, 368, 661 P.2d 1272, 1274 (1983).

5 The United States District Court has upheld Montana's parental notification
6 statute under the United States Constitution's Equal Protection Clause. However, a
7 statute, even though constitutional under the federal constitution, is not necessarily
8 constitutional under analogous provisions of a state constitution, which may be interpreted
9 by the state courts to provide heightened and expanded rights. *Butte Community Union*
10 *v. Lewis*, 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986).

11 Analysis of constitutionality of legislation under an equal protection
12 challenge requires the court to review the legislation under one of three recognized levels
13 of scrutiny. The "strict scrutiny" standard, the highest level of scrutiny, is used when an
14 action complained of infringes upon the exercise of a fundamental right or discriminates
15 against a suspect class. *Davis*, 282 Mont. at 241, 937 P.2d at 31, citing *Gulbrandson v.*
16 *Carey*, 272 Mont. 494, 502, 901 P.2d 572, 579 (1995). Strict scrutiny requires the
17 government to show a compelling state interest for its action. *Id.*, citing *Butte*
18 *Community Union*, 219 Mont. at 430, 712 P.2d at 1311.

19 The next level of scrutiny is used in limited situations, such as where the
20 rights at issue have some origin in the Montana constitution, but are not found in the
21 Declaration of Rights. This middle tier of scrutiny requires the state to demonstrate that
22 its classification is reasonable and that its interest in the classification is greater than that
23 of the individual's interest in the right infringed. *Id.*, at 241, 937 P.2d at 31-32.

24 The lowest level of scrutiny is applicable to examination of rights not
25 determined to be fundamental under the Montana constitution, and not worthy of middle

1 tier scrutiny. This test requires the government to show that the objective of the statute
2 is legitimate and bears a rational relationship to the classification used by the legislature.
3 *Id.*, citing *Cottrill v. Cottrill Sodding Service*, 229 Mont. 40, 43, 744 P.2d 895, 897
4 (1987).

5 Applying Equal Protection Analysis to this Case

6 The first step in this analysis is to identify the classes involved and
7 determine whether they are similarly situated. *In re C.H.*, 210 Mont. 184, 198, 683 P.2d
8 931, 938 (1984). Plaintiffs assert that the Act creates a class of pregnant minors who want
9 to obtain an abortion and a class of pregnant minors who do not want an abortion. For
10 purposes of equal protection analysis, both of these classes are composed of persons who
11 are similarly situated, i.e., minors who are pregnant.

12 The next step is to determine whether a suspect classification is involved.
13 *Id.* A suspect class is one “saddled with such disabilities, or subjected to such a history
14 of purposeful unequal treatment, or relegated to such a position of political powerlessness
15 as to command extraordinary protection from the majoritarian political process. *Id.*, citing
16 *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The class of minor pregnant
17 women is not a suspect class.

18 The next step is to determine whether the individual interest affected is a
19 fundamental right, triggering a strict scrutiny analysis. *In re S.L.M.*, 287 Mont. 23, 33,
20 951 P.2d 1365, 1371 (1997). This question is resolved by the Montana Constitution itself.
21 Article II, Section 10, entitled **Right of Privacy**, provides: “The right of individual
22 privacy is essential to the well-being of a free society and shall not be infringed without
23 the showing of a compelling state interest.”

24 This constitutional right of privacy explicitly protects individual privacy,
25 which includes personal autonomy privacy, as a fundamental right by its placement in the

1 Declaration of Rights. *Gryczan v. State*, 283 Mont. 433, 450-51, 942 P.2d 112, 123
2 (1997).

3 Article II, Section 15, entitled Rights of Persons Not Adults, provides:
4 "The rights of persons under 18 years of age shall include, but not be limited to, all the
5 fundamental rights of this Article unless specifically precluded by laws which enhance the
6 protection of such persons."

7 Thus, minors, including pregnant minors, have a fundamental right of
8 individual privacy that includes personal-autonomy privacy, and, as this Court previously
9 ruled in its order granting preliminary injunction, the constitutional right of privacy
10 encompasses a woman's right to decide whether to terminate her pregnancy.

11 The next question is whether the challenged legislation infringes pregnant
12 minors' rights to privacy.

13 Plaintiffs assert that the Act invades the privacy rights of those minors who
14 want to obtain an abortion. Defendants contend that it does not. The Court has been
15 provided with much evidence concerning adolescent women faced with the consideration
16 of abortion. That evidence provides undisputed facts material to the issue of whether
17 pregnant minors who want to obtain an abortion are infringed of their privacy rights by
18 the Act.

19 With respect to pregnant women in general, some refuse to tell their partner
20 or parents about the pregnancy and/or decision to have an abortion because of their fear
21 of disapproval. Nancy E. Adler, *Abortion: A Social-Psychological Perspective*, 35 J.
22 Social Issues 100, 104 (1979).

23 The younger the minor, the more likely it is that she will involve her parents.
24 Minors who chose not to tell their parents about their pregnancy tended to be more
25 financially independent and more likely to live alone. Minors who chose not to tell their

1 parents about their pregnancy often had good reason for doing so. Nancy E. Adler, et al.,
2 *Abortion among Adolescents, in The New Civil War* 285, 290 (Linda J. Beckman & S.
3 Marie Harvey eds., 1998). In a study by Stanley K. Henshaw and Kathryn Kost, 30
4 percent of the young women who did not tell their parents had experienced domestic
5 violence, feared it would occur, or were fearful of being forced to leave home. Sometimes
6 the pregnancy is the result of incest, making it difficult, impractical or dangerous for the
7 parents to know about the pregnancy. Stanley K. Henshaw and Kathryn Kost, *Parental*
8 *Involvement in Minors' Abortion Decisions*, 24 *Family Planning Perspectives* 196
9 (1992). Minors are often accurate in their prediction of their parents' reactions.
10 (Henshaw Aff.)

11 In that same study, 39 percent of minors who had an abortion did not tell a
12 parent. The vast majority of these women were older adolescents, many of whom were
13 independent in various respects: they were employed, living apart from parents, already
14 had a child, or had previously had an abortion. A study by Henshaw and Kost revealed
15 that very few women under the age of 15 did not tell a parent about the pregnancy.
16 Henshaw and Kost, *supra*, at 200. Minors who did not obtain parental involvement all
17 had discussions with friends, relatives or others not a parent. *Id.*; Adler, *Abortion among*
18 *Adolescents, supra*, at 291.

19 Older adolescents are more concerned with protecting their privacy and thus
20 are less likely to desire parental involvement. Immature minors, on the other hand, are
21 often more financially and emotionally dependent on their parents. As a result, they are
22 more inclined to seek their parents' advice and support. Adler, *Abortion among*
23 *Adolescents, supra*, at 291-92.

24 In one study, pressure from parents finding out about the pregnancy against
25 the minor's wishes and from a source other than the minor had significant consequences.

1 Eighteen percent of the minors were forced or pressured by the parent to have an abortion
2 against the minors' wishes, and another six percent reported other serious consequences
3 such as physical violence or being forced from the home. Henshaw and Kost. *Parental*
4 *Involvement in Minors' Abortion Decisions*. *supra*: Henshaw Aff.

5 The intended effects of parental notification/consent laws and judicial
6 bypass requirements are to assure adequate guidance of adolescents and to promote
7 parental involvement, but they have negative consequences as well. Adolescents who fear
8 telling their parents, and who may have a basis for concern about their parents' response,
9 may not feel comfortable in trying to obtain a judicial bypass of the consent/notification
10 laws. They may be intimidated by the court system and may not know how to go about
11 obtaining legal approval. Adler, *Abortion among Adolescents*, *supra*, at 293. Minors
12 have significant difficulties in arranging for the judicial bypass. For example, they may
13 not have an opportunity for a confidential telephone conversation. Additionally, these
14 women may have no access to a private phone for return calls pertaining to the bypass
15 procedure. Many minors still live at home and go to school. The bypass procedure places
16 additional burdens on them to arrange legitimate excuses from school and home, while
17 maintaining privacy and confidentiality. Many of these women have no transportation to
18 and from court, and those who can arrange rides, may have to do so through a parent or
19 friend of the family, jeopardizing the privacy of the minor. Many adolescents are not
20 acquainted with the location of the courthouse, or with the procedures involved. While
21 attempting to defend and maintain their privacy, they are compelled to tell their stories to
22 the judge, a stranger. Some of the women fear breach of confidence in smaller
23 communities, where court personnel may know their families. Adler. *Abortion among*
24 *Adolescents*. *supra*, at 293: Jamie Sabino Aff.

25 Based on this information, the Court finds that the Act infringes on the

1 privacy rights of pregnant minors who wish to terminate their pregnancies.

2 The next step is the determination of whether there is a compelling state
3 interest sufficient to justify the Act's infringement on the class' fundamental right to
4 privacy. *Davis*, 282 Mont. at 241, 937 P.2d at 31; *In re C.H.*, 210 Mont. at 198, 683 P.2d
5 at 938.

6 The Act itself declares what the compelling state interests are:

- 7 (a) protecting minors against their own immaturity;
8 (b) fostering family unity and preserving the family as a viable social unit;
9 (c) protecting the constitutional rights of parents to rear children who are
10 members of their household; and
11 (d) reducing teenage pregnancy and unnecessary abortion.

12 Section 50-20-202(2), MCA.

13 With respect to subsections (a) and (b), the following undisputed facts, in
14 addition to those already described above, are material.

15 The literature addressing adolescents and abortion includes studies involving
16 parental consent laws as well as parental notification laws. Both have the same effect on
17 pregnant minors. (*Sabino Aff.*)

18 Medical risks for abortion in the first trimester are low. Mortality risks are
19 20 times greater for pregnancy and childbirth than for abortion for women 15 to 19 years
20 of age. Adler, *Abortion among Adolescents*, *supra*, at 286; *Mark Miles Aff.*

21 There is little basis for the assertion that abortion leads to severe
22 psychological consequences among women in the general population. Research directly
23 focused on adolescents does not show them to be particularly vulnerable to serious
24 negative responses following abortion. Studies, including those by the American
25 Psychological Association, have concluded that legal abortion of an unwanted pregnancy
in the first trimester does not pose a psychological hazard for most women. Adler.

1 *Abortion among Adolescents, supra*, at 286. Studies following adolescents one and two
2 years post-abortion found no substantial psychological effects, and even found the
3 abortion to have been a positive experience in some of the women. *Id.* at 287. A study
4 of African-American adolescents under the age of 17 indicated low rates of psychological
5 effects on those who obtained abortions when compared to those who received negative
6 pregnancy test results and those who carried their pregnancy to term. That study found
7 negative psychological effects related to subsequent pregnancies in the women, and that
8 the women who had obtained abortions had the lowest rates of subsequent pregnancy.
9 The women who had abortions also fared better economically, emotionally and
10 educationally than the other women in the study. *Id.*; Nancy E. Adler et al., *Psychological*
11 *Responses after Abortion*, 248 *Science* 41 (1990).

12 Abortion is generally experienced as a stressful event. Much of the stress
13 is associated with the discovery and acknowledgment of an unwanted pregnancy and the
14 need for a decision about whether to continue or terminate it. Women generally report
15 that the greatest distress is between the discovery that they are pregnant and the abortion.
16 Thus, evaluations of psychological stress must be viewed as caused by the pregnancy
17 itself as well as the abortion. Adler, *Abortion: A Social-Psychological Perspective*,
18 *supra*, at 112. Immediate post-abortion responses were more positive when there was
19 greater social support for the abortion, suggesting that one source of stress on the woman
20 is known or anticipated disapproval of partners or parents. The social climate, disdaining
21 abortion, contributes significantly to the stress on the woman in addition to the process of
22 abortion itself. Many women choose not to tell their partner or parents about the
23 pregnancy and intention to have an abortion because of the fear of disapproval. *Id.*, at
24 104.

25 The studies addressed in Adler's articles indicate that adolescents do not

1 seem to be at a substantial risk of negative psychological responses up to two years
2 following abortion: that adolescents who had abortions compared with those who either
3 carried to term and those who discovered that they were not pregnant, showed a more
4 favorable psychological profile over time; and that there were no measurable differences
5 in psychological responses among women under 18 compared to those 18 to 21. The
6 studies provide no compelling rationale for restrictive legislation for adolescents based on
7 their degree of risk of adverse effects.

8 Studies reveal that the younger the adolescent, the more likely it is that she will
9 involve her parents in her decision about an abortion. Adolescents who do not tell their
10 parents tend to be older than the ones who do. More mature adolescents are more
11 concerned with protecting their privacy, and thus are less likely to desire parental
12 involvement. Immature minors, on the other hand, are often more financially and
13 emotionally dependent on their parents. Thus, they are more inclined to seek their
14 parents' advice and support. Adler, *Abortion among Adolescents*, *supra*, at 291-92.

15 Adolescents who choose not to tell their parents about their pregnancy often
16 have good reasons for doing so. They are often accurate in their predictions of their
17 parents' reactions. (Henshaw Aff.)

18 Judicial bypass procedures accomplish little, if any, protection for
19 adolescents, primarily because virtually all requests for judicial bypass are granted. Adler,
20 *Abortion among Adolescents*, *supra*, at 293. In Massachusetts, for example, 98 percent
21 of judicial bypasses have been granted. Those women who were forced to experience the
22 judicial bypass procedure were subjected to needless stress, anxiety, delay and breaches
23 of confidentiality. (Sabino Aff.; Henshaw Aff.)

24 The judicial bypass procedure poses additional health risks to adolescents
25 by causing added delays in obtaining an abortion. Minors tend to seek abortions later in

1 the pregnancy than do adults. A greater percentage of minors than adults have abortions
2 after the first trimester. Adler, *Abortion among Adolescents, supra*, at 293; Henshaw Aff.
3 Such delays are due to a variety of reasons, including the fact that the minors may not be
4 aware of pregnancy symptoms as readily as adults are, they may have more difficulty
5 arranging for pregnancy tests and abortions, and they may simply be less willing to
6 acknowledge their pregnancy for many weeks. When judicial bypass is added, more
7 minors may get pushed into second trimester abortions. Adler, *Abortion among*
8 *Adolescents, supra*, at 293. In addition, those women who make arrangements to go out
9 of state for an abortion to avoid parental notification or consent requirements are delayed
10 in obtaining abortions, sometimes beyond the first trimester. *Id.*

11 The added risks of a delayed abortion and the experience of judicial bypass
12 may themselves be stressful and anxiety provoking for minors. *Id.*

13 Studies indicate no evidence that adolescents are incompetent in their
14 decision-making to have an abortion, although their decision-making may be based on
15 different biases from those generally possessed by adults. *Id.*, at 292-93. Although there
16 are conflicting findings concerning whether younger adolescents are less capable than
17 older adolescents of competent reasoning in general, in the specific domain of reasoning
18 about abortion, findings are more consistent and show little evidence that adolescents lack
19 the capacity to reason effectively about this decision. In studies comparing adolescent
20 women with adult women, there were no significant differences between adolescents and
21 adults in their hypothetical reasoning about abortion, and no differences in reasoning when
22 the studies conducted assessments of legal competence. Adolescents in every age group
23 were as competent as adults in considering abortion. *Id.* at 290-93.

24 In Massachusetts, there is no evidence that parental consent/notification
25 laws have increased the rate of parental involvement or enhanced minors' decision-

1 making processes. The laws have driven many minors to leave the state to obtain
2 abortions. (Sabino Aff.)

3 With respect to subsection (d) of the Act's compelling state interests,
4 "reducing teenage pregnancy and unnecessary abortion." the following undisputed facts
5 are material.

6 Studies found an increase in late abortions and in out-of-state abortions in
7 Missouri after the enactment of parental consent/notification laws in that state, although
8 similar studies in Minnesota were less clear. The study focused on first trimester
9 abortions, and any decrease in first trimester abortions in Minnesota may have been the
10 result of more second trimester abortions, caused by delay from the laws. Adler, *Abortion*
11 *among Adolescents, supra*, at 294. Women who make arrangements to go out of state for
12 an abortion to avoid those laws may also be delayed in obtaining an abortion. *Id.*

13 In Massachusetts, the parental consent/notification laws have driven many
14 minors out of state to obtain abortions, but the abortion rate has remained the same.
15 (Sabino Aff.) The parental consent laws in Mississippi have had little or no effect on the
16 abortion rate in that state. (Henshaw Aff.) Statistics provided by the Defendants with
17 respect to the effect of consent and notification statutes in other states indicated no
18 significant changes in abortion rates.

19 Montana is particularly difficult in availability of abortion providers. Thirty
20 percent of women seeking abortions have to travel at least 100 miles, due to geographical
21 distances and scarcity of abortion providers. Burdens on adolescents are much greater
22 than on adults for traveling such distances. (Henshaw Aff.) The added burdens on these
23 minors create greater risks of delayed abortions and consequential medical problems.

24 With respect to the Act's compelling state interest of "protecting the
25 constitutional rights of parents to rear children who are members of their household,"

1 when the Court balances the fundamental privacy right of the minor against the rights of
2 the parents that are allegedly enhanced by the Act, the right to privacy prevails over the
3 unsubstantiated rights claimed to be enhanced by the Act. As previously noted, the
4 undisputed evidence before this Court indicates that the majority of pregnant minors
5 involve a parent in decision-making about whether to obtain an abortion, and those minors
6 who do not involve their parents often have a legitimate reason for not doing so. In those
7 cases parental involvement is not in the minors' best interests.

8 The last step of the analysis is to determine whether the Act complies with
9 the mandates of Article II, Section 15, of the Montana Constitution, which allows the
10 legislature to limit the fundamental rights of minors, if the exception enhances the
11 protection of such minors. *In re S.L.M.*, 287 Mont. at 21-22, 951 P.2d at 1372-73.

12 In addition to stating compelling state interests, the Act also provides a
13 statement of purpose:

14 (a) immature minors lack the ability to make fully informed choices
15 that take into account both immediate and long-range consequences;

16 (b) the medical, emotional, and psychological consequences of
17 abortion are sometimes serious and can be lasting, particularly when the
18 patient is immature;

19 (c) the capacity to become pregnant and the capacity for mature
20 judgment concerning the wisdom of an abortion are not necessarily related;

21 (d) parents ordinarily possess information essential to a physician in
22 the exercise of the physician's best medical judgment concerning the minor;

23 (e) parents who are aware that their minor daughter has had an
24 abortion may better ensure that the daughter receives adequate medical care
25 after the abortion; and

(f) parental consultation is usually desirable and in the best interest
of the minor.

22 Section 50-20-202(1), MCA.

23 The undisputed evidence contradicts the compelling state interests and
24 statements of purpose expressed in the Act. As discussed above, studies show that
25 adolescents are as competent as adults in considering abortion. Medical risks for abortion

1 are considerably lower than for pregnancy and childbirth. and, in general, adolescents
2 show no substantial psychological effects from abortion. In fact, the consequences of
3 deciding to continue the pregnancy can be considerably greater than of terminating it.
4 Adolescent mothers are particularly vulnerable to severe and adverse social and economic
5 consequences of bearing and raising children. Many do not complete high school and end
6 up in poverty and on welfare. Children of adolescents are more likely to be born
7 prematurely and to be of low birth weight, increasing their risk of health problems.
8 (Henshaw Aff.) Most pregnant minors do consult a parent about the decision, and those
9 who did not obtain parental involvement did have discussions with friends or relatives.
10 For those minors who choose not to tell a parent about their decision to obtain an abortion,
11 the judicial bypass procedure provides little, if any, protection and, in fact, increases
12 stress, delay and potential medical complications. The Court concludes that the Act does
13 not enhance the protection of minors.

14 Moreover, the Act's stated interests and purposes create unequal and unfair
15 application to pregnant minors who want to terminate their pregnancy, when compared
16 with the class of pregnant minors who choose not to do so. Minors can obtain
17 contraception without parental involvement. Minors who choose to continue their
18 pregnancy are free to do so without any requirement of parental notification. They can
19 obtain any medical treatment, including surgical procedures, for the pregnancy, for the
20 birth, and for the baby without being required to notify their parent(s). Sections 41-1-402,
21 403, MCA. They can relinquish their babies for adoption without having to notify their
22 parent(s). Section 42-2-405, MCA. Nor are there any legal requirements for minors to
23 involve their parents in the care and rearing of their children.

24 Thus, the minor who is presumed by the Act to be too immature to decide
25 to have an abortion will, if she continues her pregnancy, become the mother of an infant.

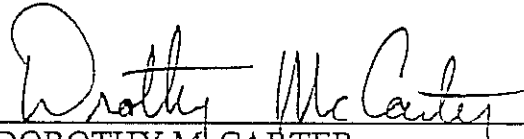
1 fully responsible for its life and for decisions about its medical and other care, without
2 statutory requirements for parental involvement.

3 Based on the undisputed material facts presented, the Court concludes that
4 the Defendants have not shown a compelling state interest in requiring parental
5 notification of a minor's intent to terminate her pregnancy. Furthermore, the Act does not
6 enhance the protection of minors. Plaintiffs are entitled to judgment as a matter of law on
7 the issue of the Montana constitutional guarantee of equal protection.

8 Summary judgment is GRANTED to Plaintiffs in accordance with this
9 decision.

10 Let judgment be entered accordingly.

11 DATED this 11 day of February 1999.

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14 _____
DOROTHY McCARTER
District Court Judge

15 pc. Simon Heller
16 Dara Klassel
17 Roberta Anner-Hughes
Joseph P. Mazurek/Clay R. Smith

18 T\DMC\WICKLUND.OSJ