HON. BRENDA R. GILBERT
District Judge
Sixth Judicial District
414 East Callender Street
Livingston, Montana 59047
406-222-4130

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

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PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION, Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and LUCKY MINERALS, INC., Defendants.	CAUSE NO. DV 17-126 **DECISION REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT FILED BY PLAINTIFFS AND DEQ**

Plaintiffs, Park County Environmental Council and Greater Yellowstone Coalition, filed their Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary Judgment. Defendant Montana Department of Environmental Quality filed its Cross-Motion for Summary Judgment and DEQ's Brief Opposing Plaintiff's Motion for Summary Judgment and Supporting DEQ's Cross-Motion for Summary Judgment. Defendant Lucky Minerals, Inc., filed its Response Brief in Opposition to Plaintiff's Motion for Summary Judgment. Plaintiffs filed

their Consolidated Brief in Response to Cross-Motions for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment. DEQ filed its Reply Brief in Support of DEQ's Cross-Motion for Summary Judgment.

Plaintiffs filed Declarations of four of Plaintiffs' members and the parties have further submitted excerpts from the Administrative Record, the entirety of which has been made part of the record herein.

The Court heard oral argument regarding the Motions for Summary Judgment on April 16, 2018, at which time the Motions were deemed submitted.

The Court has considered the Motions for Summary Judgment, the Briefs filed in support and in opposition to said motions, the Administrative Record and the other records and files herein, the argument of counsel, and applicable legal authority. Good cause exists for the following Decision.

DECISION

Factual and Procedural Background

This case involves the Plaintiffs' challenge of the decision made by Defendant Department of Environmental Quality (hereinafter "DEQ") to grant Defendant Lucky Minerals, Inc., (hereinafter "Lucky") an exploration license in the Emigrant Gulch area of the Absaroka Mountains. Plaintiffs are the Park County Environmental Council and the Greater Yellowstone Coalition.

Lucky's proposal is to drill 46 exploratory holes, each up to 2,000 feet deep, at 23 locations in Emigrant Gulch. AR 10, 29. Drilling would take place for nearly 24 hours a day over the course of two three-month field seasons. AR 25, 29. Lights similar to those used by highway construction crews would light the operation each night. AR 29. The project would require the use of a D-7

bulldozer, a G-12-14 grader, a JD 50 excavator or backhoe, two LF-70 drilling machines, three diesel or gas-powered water pumps, two service trucks, a four-by-four pick-up truck and two ATV's. AR 26.

DEQ chose to prepare an Environmental Assessment ("EA") with regard to Lucky's application for an exploration license. The Draft EA was released on October 13, 2016 for public comment and the DEQ issued its Final Environmental Assessment ("Final EA") on July 26, 2017, concluding that the project will not have significant environmental impacts and that an Environmental Impact Statement (EIS) is not required. AR 177. DEQ issued Lucky the exploration license on July 26, 2017 and the Plaintiffs filed this case challenging the agency decision on September 22, 2017. The cross-motions for summary judgment followed.

The Emigrant Gulch

Emigrant Gulch, the site of Lucky's proposed exploration, is within the Absaroka Mountains and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. AR 10, 14 (project location map), 130-131. The nearly 11,000-foot high Emigrant Peak is one of the most prominent mountain tops visible from the aptly named Paradise Valley, to the west. AR 1489. Emigrant Peak is flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the northeast and Six Mile Creek on the southwest, both of which are tributaries of the Yellowstone River. AR 14. The Absaroka Mountains, including Emigrant Peak and its adjacent valleys, are home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, and wolves. AR 51, 2327. The Absarokas also provide important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears, as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. AR 51-53, 62. As part of the Greater Yellowstone Ecosystem, these public lands constitute part of the

largest intact natural area in the lower-48 United States. See AR 2057 (describing Greater Yellowstone Ecosystem).

Emigrant Peak is one of the most popular year-round recreation destinations in Montana, including for hiking in the summer and backcountry skiing in the winter. AR 136. For over a hundred years, area residents and visitors have soaked in the natural mineral pools of Chico Hot Springs, which sits at the mouth of Emigrant Gulch. AR 2934-35. The creeks in Emigrant Gulch drain into the Yellowstone River, which hosts a world-renowned trout fishery. AR 2884. These features and the natural beauty of the area are also important to the local economy, supporting tourism that directly and indirectly employs large numbers of Park County residents. AR 176; 2883-84; 2937. According to a recent economic evaluation of Park County, "[t]he chief threat to area quality of life and economic well-being would be any large-scale activities that negatively impact area amenities and environmental attributes that are the foundation of the area's economic vitality." AR 2885; AR 3099. The economist concluded that "[l]argescale, highly visible, and environmentally disruptive activities-such as large-scale mining and heavy manufacturing – may pose the greatest threats, and could lead to long-term economic impairment and future economic stagnation." AR 2885; AR 3099.

On November 21, 2016, the U.S. Forest Service and Department of Interior announced a proposal to withdraw 30,000 acres of federal land in Paradise Valley – including National Forest System lands adjacent to Lucky's proposed project – from mineral exploration and development. See Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83, 867 (Nov. 22, 2016). The proposal had the immediate effect of preventing mining activity on the National Forest lands, subject to valid existing rights, for two years. Id. at 83, 867-68. If finalized, the withdrawal will prevent mining activity on these lands for as many as 20 years. Id. The withdrawal

is intended "to protect and preserve the scenic integrity, important wildlife corridors, and high-quality recreation values of the Emigrant Crevice area located in the Custer Gallatin National Forest, Park County, Montana." Id.

The federal mineral withdrawal does not include the patented mining claims on which Lucky now proposes mineral exploration. Id.

Standard of Review

This Court reviews the DEQ's analysis and decision under MEPA to determine whether or not it is "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality,* 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454. Under this standard, the Court determines, based on a careful review of the record, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* An agency is required to take a "hard look" at the environmental impacts of a project or proposal. *Clark Fork Coalition v. Montana DEQ,* 2008 MT 407, 197 P.3d 482, ¶47, 347 Mont. 197, ¶ 47.

Summary judgment is the appropriate mechanism for resolving a case where, as here, there are "no genuine issues of material fact" and the moving party is entitled to judgment as a matter of law. Rule 56 (c)(3), Mont. R. Civ. P. "Summary judgment is particularly appropriate where, as here, the review is on the administrative record". *Montana v. EPA,* 941 F. Supp. 945, 955 (D. Mont. 1996), aff'd, 137 F.3d 1135 (9th Cir 1998).

The Metal Mine Reclamation Act applies to applications for mineral exploration, pursuant to § 82-4-331(1) MCA. The Legislature adopted the Metal Mine Reclamation Act (MMRA) to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources" consistent with the state's obligations under the Montana Constitution's

environmental protections, Article II, Section 3 and Article IX. §82-4-301(2)(a). The Legislature intended the provisions of the MMRA to "mitigate or prevent undesirable offsite environmental impacts" of mineral exploration and development." § 82-4-302(1)(g), MCA.

> To secure an exploration license, pursuant to § 82-4-331(1) MCA, an applicant shall:
> . . .
>
> (c) submit an exploration plan of operations and a map or sketch in sufficient detail to locate the area to be explored as well as the actual proposed disturbances, and to allow the department to adequately determine whether significant environmental problems would be encountered. The plan of operations must state the type of exploration techniques that would be employed in disturbing the land and include a reclamation plan in sufficient detail to allow the department to determine whether the specific reclamation and performance requirements of ARM 17.24.104 through 17.24.107 would be satisfied.

Pursuant to § 82-4-332(1), MCA, the DEQ must issue an exploration license to a person that "agrees to reclaim any surface area damaged by applicant during exploration operations, as may be reasonably required by the department." The reclamation and performance standards are specified in ARM 17.24.104 through 107.

In addition, the general purpose provision of the MMRA, stated at § 82-4-301(2)(a) MCA is to "mitigate or prevent undesirable offsite environmental impacts." Though specific reclamation and performance standards are set forth in the pertinent ARMs, the general purpose provisions do require consideration of mitigation or prevention of undesirable offsite environmental impacts. The general purposes of the MMRA cannot be ignored, while the specific provisions of the ARMS must be considered in connection with each of the standards they address.

The Montana Environmental Policy Act was designed to "promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." § 75-1-102(2), MCA. MEPA was enacted to prevent or eliminate environmental damage. *Pompeys Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality,* 2002 MT 352, ¶ 17, 313 Mont 401, 61 P.3d 148. Another express purpose of MEPA is to protect the right to use and enjoyment of private property free from undue regulation. *Id.* Pursuant to § 75-1-102(2) MCA, MEPA requires DEQ to "take a 'hard look' at the environmental impacts of a given project or proposal." *Mont. Wildlife Fed'n v. Mont Bd. Of Oil & Gas Conservation,* 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; *see also* § 75-1-201(1)(b)(iv); ARM 17.4.609(3)(d). The DEQ must consider, among other things, reasonable alternatives to the proposed action, the direct, indirect, and cumulative environmental impacts of the action, and "the economic advantages and disadvantages of the proposal." § 75-1-201(1)(b)(iv) and (v), MCA; ARM 17.4.609(3). The DEQ must evaluate measures that will mitigate the project's impacts. ARM 17.04.609(3)(g). It must also "[e]xamine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Mont. Wildlife Fed'n.* ¶ 47, (quoting *Clark Fork Coal v. Mont. Dep't of Envtl. Quality,* 2008 MT 407, ¶47, 347 Mont. 197, 197 P.3d 482).

The DEQ must set forth its analysis in an Environmental Impact Statement (EIS) if the project it is considering will "significantly affect the quality of the human environment." ARM 17.4.607(1). The DEQ may approve the project without preparing an EIS only if it rationally determines, through preparation of an Environmental Assessment (EA), that the project's

impacts will not be significant, or that otherwise significant impacts can be mitigated below the level of significance. A.R.M.s 17.4.607(1)(b) and 17.4.607(4).

In determining whether the impacts of a proposed action will be significant, DEQ must consider the following criteria:

> (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
>
> (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
>
> (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
>
> (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
>
> (e) the importance to the state and to society of each environmental resource or value that would be affected;
>
> (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
>
> (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

A.R.M. 17.4.608(1)

In order to demonstrate that an EIS is required, a plaintiff challenging an agency decision, "need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." *Ravalli Cty. Fish & Game Ass'n,* 273 Mont. At 379, 903 P.2d at 1368. Where an uncertain impact of an agency action is potentially severe, DEQ may not deem it insignificant without "reasonable assurance…that the impact will not occur." ARM 17.4.608(1)(b)

Evaluation of Potential Impact to Wildlife

In the Draft EA, DEQ concluded that the road improvements attendant to the mineral exploration project would provide easier motor vehicle access into the Emigrant Creek drainage, causing harm to wildlife residing there:

> Improvements to the roads would lead to easier vehicle and human access to higher elevations and more remote habitat. Wildlife populations that are subjected to hunting and trapping may sustain higher mortalities as a result of better access (Jalkotzy et. al., 1997) . . . Further, because of the increased human presence under the Proposed Action, the harassment or poaching of wildlife may also increase.

AR 442.

The Draft EA predicted that improved access could be "detrimental" because "an increase in human disturbance may cause" female wolverines to abandon their dens." AR 445. The Record reflects the following regarding the Emigrant Gulch access road:

1. It is impassable to most passenger vehicles due to rockfall and other hazards. (AR 6632)
2. The existing road is comparable to a Jeep trail. (AR 3009-10)
3. "The lower portion of the road is not passible with hwy vehicles." (AR 6634)

The significance of the current state of the Emigrant Gulch access road is that Lucky proposes to make the road accessible to its equipment by grading, clearing rock and other debris from the road surface, and sloping the road to enhance draining and present channeling. AR 26. These improvements will "facilitate access for motorized use." (AR 2983).

Fish Wildlife & Parks (FWP) commented on the Draft EA, as follows:

> There is cause for concern over permanent changes to wildlife habitat that would result from the proposed road

> improvements, included in both the proposed Action and Agency Modified Alternative. . .The road improvements will facilitate access for motorized use in an area that presently is very remote and rarely disturbed. This will result in a potentially significantly increased level of disturbance and fragmentation of the habitat with higher traffic volume, higher traffic speeds, and increased human presence. The road improvements would represent a permanent change to the landscape, with long-term implications for habitat suitability and productivity of the area for wildlife. This is of greatest concern for those species that are most sensitive to human activity, such as wolverine, lynx, grizzly bears, and ungulates including elk, mule deer and moose that use this habitat for calving/fawning or migration.

AR 2983.

Numerous scientific studies that are part of the Administrative Record conclude that increased human development and activity in once remote areas would have a negative impact on wolverines. AR 2601; AR 1211-1912; AR 2535. Wolverines are already scarce in the Yellowstone region and wolverine populations are highly sensitive to habitat alteration. AR 2619; AR 2305; AR 2575.

Grizzly bear populations are also affected by the creation of human access into prime bear habitat. Increased bear mortality rates caused by improved access is a major concern for grizzly bear conservation. AR 2141-2142; AR 1908-1910 AR 2116. The proposed action, "increases the potential for human/bear conflicts to occur, possible leading to injury, direct harm, or secondary mortality of grizzly bears- as well as risks to human safety, particularly during the critical fall season." AR 73.

Plaintiffs argue that that the DEQ illogically abandoned its conclusion in the Draft EA that the proposed project would be detrimental to wildlife when it issued the Final EA. The Final EA states that, "DEQ has re-evaluated the impact on wildlife resulting from the proposed road

improvements and believes that the draft EA overstated the impacts." Plaintiffs argue that the DEQ offered "no reasoned analysis whatsoever in support of its conclusion –which is in direct conflict with the conclusion. . . of its sister agency, FWP." citing *W. Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 492-493 (9th Cir. 2011).

Lucky argues that Plaintiffs' assertion that modifications to the road will make it accessible by ordinary passenger vehicles is not supported by the record. Accordingly, Lucky takes issue with any of the Plaintiffs' concerns that stem from increased access to the area.

DEQ responds to Plaintiffs claims by admitting that it revised its analysis in the Final EA to acknowledge a marginal increase in access to the area and a marginal increase in impacts to wildlife. The Final EA states that:

> The public has no access to the base of the St. Julian Claim Block via Emigrant Creek Road. Therefore, the improvements to Emigrant Creek Road discussed above would not lead to access to higher elevations and more remote habitat than existed before. The removal of rocks and debris and localized grading of the approximately four-mile long Emigrant Creek Road may marginally make access to the area easier for hunters and may marginally increase higher mortality. . .Furthermore, because of the increase in human presence under the Proposed Action, the harassment or poaching of wildlife may also increase.

Final EA p. 63.

In response to the FWP comment expressing concern over the impacts resulting from the road improvements, DEQ revised its analysis as follows:

> DEQ has re-evaluated the impact on wildlife resulting from proposed road improvements and believes the draft EA overstated the impacts. DEQ has revised Section 3.4.4 accordingly.

> Vehicles would access the St. Julian Claim Block using the existing roads between East River Road and the St. Julian Mine Claim Block. The Proposed Action does not include any new road construction The approximate four-mile length of Emigrant Creek Road from Old Chico to the St. Julian Claim Block would be cleared of rock and debris within its original configuration, some of which would include hand picking. The road may be graded in localized areas in order to keep it serviceable for the type of vehicles that would be involved in the project. The clearing and localized improvements to Emigrant Creek Road, however, will not materially change its character of an unimproved forest road. The clearing and localized grading should not facilitate traffic on Emigrant Creek Road at appreciably higher speeds than the current traffic. (Final EA, p. 188)

In responding to a comment submitted on behalf of Park County Environmental Council, DEQ stated that the maintenance of the access roads would not continue after the two three-month exploration seasons and that road conditions would naturally return to pre-project conditions. The DEQ further opined that there would not be a genetic threat to wolverines as a result of the short-term improved access included in the Proposed Action as the temporal duration is far too short. (Final EA p. 308.)

The DEQ maintains that it did take a hard look at impacts to wolverines and grizzly bears. DEQ acknowledges that the activity and noise associated with localized road improvements and maintenance, drilling rigs and night lighting is likely to disturb any wolverines in the area and may cause den abandonment. DEQ goes on to conclude, in the Final EA, that the activity associated with the Proposed Action is limited spatially and temporally, allowing for avoidance of the area by wolverines.

The Final EA states that impacts of improved access to more remote areas may be detrimental to regional populations, but DEQ maintains that this was inadvertently not edited out of the document when DEQ changed its position from the Draft EA to the Final EA.

The DEQ maintains that it took a hard look at impacts to grizzly bears. It acknowledges that the local abundance of grizzly bears is likely to be reduced for the duration of the exploration project and that the use of lights during nighttime drilling may disrupt grizzly bear use of the area. The DEQ determined that because the impacts are temporary, this should not result in the bears permanently avoiding the area. The Final EA also acknowledges that the Proposed Action increases the potential for human/bear conflicts leading to risk of harm or mortality of grizzly bears as well as risks to human safety.

In the Final EA, DEQ again responded by stating that the bears would have a large amount of undisturbed habitat because the Proposed Action is limited spatially and temporally. DEQ also points to the stability of the grizzly bear population and the fact that the patented mining claims at issue here do not lie within the Primary Conservation Area identified in the Grizzly Bear Conservation Strategy.

In its Reply Brief, the DEQ argues that the impact from Lucky's project are transitory because the project is of a short duration. DEQ maintains that the Emigrant Gulch Road will return to its present state by the forces of nature and gravity.

The Court concludes that DEQ failed to take a hard look at the harm to sensitive wildlife that would follow from the improvements to the Emigrant Gulch Road. Though the Draft EA concluded that the road improvements would increase wildlife mortality, DEQ downgraded this risk in the Final EA, stating that, "the draft EA overstated the impacts." AR 197. This is so despite the comments of FWP, raising significant concerns about the impacts to wildlife. DEQ's downgrading of the risk, in

this manner, was not supported by the record. DEQ failed to "articulate . . .a rational connection between the facts found and the choice made." *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation,* 2012 MT 128, ¶43, 365 Mont. 232, 280 P.3d 877.

There is no basis for DEQ's claim that Lucky's plan to clear obstructions from the Emigrant Road will not improve public access to the area. The Final EA appears to acknowledge this by stating that the "[r]emoval of rocks and debris . . . may marginally make access to the area easier for hunters and may marginally increase higher [wildlife] morality." AR 72. DEQ offers no rational basis for downgrading the risk to sensitive wildlife where FWP's comments expressed concern that such increased human presence would have "long-term implications for habitat suitability and productivity of the area for wildlife" especially for "those species that are most sensitive to human activity," including wolverines and grizzly bears. AR 2983.

The DEQ violated MEPA in its treatment of this issue in the Final EA, by providing, "no reasoned analysis whatsoever in support of its conclusion, which conclusion directly conflicts with that of DEQ's sister agency, FWP. *W. Watershed Project v. Kraayenbrink,* 632 F.3d 472 492-93 (9th Cir. 2011). This is particularly so where wolverines are highly sensitive to human encroachment, and have been a confirmed presence near the project area. AR 2575 AR 2352-2353.

The DEQ stated in the Final EA that "the impacts of improved access to more remote areas may be detrimental to regional [wolverine] populations." AR 75. The DEQ explains in its briefing that this statement was an oversight that was meant to be edited out. That being the case, DEQ has not explained any logical basis for the change of its position in the Final EA. The statements of counsel interpreting what the DEQ may have meant must be disregarded by the Court. For example, it its Brief, the DEQ attempts to dismiss the impact to wolverine den sites by asserting that Lucky's

drilling session does not overlap with the wolverine denning season. This is not a basis relied upon in the EA. Moreover, the increased access to the upper reaches of the Emigrant Gulch Road, due to road improvements, will remain after the drilling project is concluded.

In the Final EA, DEQ has failed to consider and take a "hard look" at wolverine and grizzly bear impacts from increased human access to sensitive wildlife habitat that have the potential to persist beyond the two-year period of Lucky's exploration. The road will remain improved, for some unknown period of time, and the gradual lessening of accessibility of the road will be interrupted.

The DEQ's analysis did not include a "hard look" at grizzly bear and wolverine impacts from increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass'n,* 273 Mont. at 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the relevant data and articulating a satisfactory explanation for its action, its decision violated MEPA. *Montana Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation,* ¶ 43, quoting *Clark Fork Coal v. Mont. Dep't of Envtl. Quality,* ¶ 47. In revising its conclusion concerning the impacts of improved access to the Emigrant drainage, DEQ failed to examine the relevant data, including data submitted by FWP, that contradicts the conclusion reached by DEQ. The DEQ did not articulate a satisfactory explanation for its action that disregarded record evidence that road improvements would facilitate greater motorized access, an increased human presence, and a detriment to wildlife.

Evaluation of Water Quality Impacts

Plaintiffs maintain that DEQ failed to adequately consider water quality impacts due to contaminated flow from the drill holes contemplated by the project. The DEQ acknowledged that it is likely that Lucky would encounter artesian conditions during drilling. This means that

groundwater may flow freely from the drill holes before the holes are plugged following exploration. AR 127. Drilling fluid and groundwater that escape the drill pad under these conditions and enter ground or surface waters, "could contain contamination that is independent of the drill additives that are used," including dissolved metals and sulfuric acid which are extremely toxic to fish and other aquatic life. AR 1866-1867.

Plaintiffs rely upon studies in the agency record documenting that mining project proposals and analyses almost always predict that the potential for water contamination will be avoided or mitigated, while post-mining water quality exceeds acceptable water quality standards. See AR 1874-1875.

Plaintiffs further point to the Final EA setting forth nothing more than a "plan to make a plan" to address water contamination issues, as opposed to including concrete measures that could be evaluated in the EA process. The Final EA states that Lucky "would develop a mitigation plan to effectively contain flow from artesian boreholes during drilling… The procedures for artesian flow containment would be developed prior to commencing drilling operations, and any necessary equipment would be readily available onsite, if those conditions were encountered during drilling." AR 128.

Plaintiffs maintain that the water quality information relied upon by DEQ in the Final EA to dismiss potential impacts due to uncontrolled discharges from Lucky's artesian boreholes is unrepresentative and incomplete. Plaintiffs maintain that DEQ cherry picked water quality data from the Duval boreholes, which DEQ acknowledged "stand out" from data for other boreholes and seeps in the vicinity of Lucky's planned drilling. AR 100; DEQ Br. P. 11, (asserting that the Duval boreholes are "[t]he best predictor of artesian flow at the Lucky Project.") Plaintiffs maintain that

in the Final EA, DEQ described, but then arbitrarily disregarded, other pertinent water-quality data, including data gathered on the St. Julian Claim Block. These additional groundwater sources exhibit higher acidity and concentrations of metals and other pollutants than the Duval boreholes. AR 104, 110-111)

Though Lucky states in its Brief that "none of the existing artesian flows, seeps or springs, exceed applicable water quality standards. (Lucky Brief. P. 9), three-cold-spring seeps immediately adjacent to the Duval boreholes exhibit low to very low Ph and water quality exceedences for several metals, including zinc, cadmium, copper, aluminum, lead, and significantly elevated concentrations of sulfate,

Thus, Plaintiffs allege that DEQ selectively relied upon the Duval borehole data, while ignoring other data that undermines its conclusions that artesian discharges will not have a significant impact.

The Plaintiffs further allege that DEQ's analysis was misleading because the record demonstrates that the geology of the minerals Lucky proposes to probe is likely to produce harmful acid rock drainage. They are sulfides which according to the LaFave report, primarily relied upon by DEQ for its conclusions, produce acid rock drainage.

Lucky points out that it is required to ensure that any artesian flow from an exploration borehole is terminated by plugging the hole. ARM 17.24.105(7). Further, DEQ requires a containment plan be formulated and approved by DEQ prior to drilling. AR 31. Lucky maintains that the artesian flow is not expected to be excessive, and that DEQ was unable to discern any reason to require ground water from artesian flows be restrictively mitigated. AR 126.

The DEQ dismisses Plaintiffs' claims stating that the presence of sulfide minerals in the project area is "not supported by any analysis of available scientific information." DEQ Brief P. 10. However, the Final EA and Lucky's technical report both acknowledge that the ore body Lucky seeks to explore contains sulfide mineral deposits. AR 40.

DEQ suggests that the EPA report on acid mine drainage is an industry-wide report not relevant to Lucky's specific project. However, LaFave 2016, on which DEQ extensively relied, concluded that acid rock drainage near the project site occurs due to the presence of sulfide minerals.

Finally, the Final EA states that the "water quality in the East fork [of Emigrant Creek] degrades along the gulch, primarily due to inputs from ground water and surface discharge from springs and seeps. AR 99. According to the Montana Bureau of Mines and Geology, "[t]he effects [of the discharges] on ground water are unknown and may be of some concern. AR 8063.

In its Reply Brief, the DEQ points out that Plaintiffs do not take into consideration that Lucky is required to plug its drill holes prior to removing the drill rigs. The DEQ takes issue with Plaintiffs' concern about acid rock drainage. The DEQ maintains that the quality of the groundwater on the slope north of the East Fork that has been impacted by locally intense pyrite alteration is not representative of the quality of the groundwater to the south of the East Fork where Lucky's mineral exploration activity has been approved. DEQ emphasizes that the Duvall boreholes are in close proximity and elevation to the project area.

The Court concludes that the DEQ did not take the requisite "hard look" at the relevant data regarding water quality issues for the following reasons:

1. The Final EA provides only for a plan to make a plan to address water quality issues, which is insufficient analysis for a Final EA.
2. The DEQ selectively relied upon the Duval bore hole data and ignored other pertinent water quality data that undermines its conclusion that artesian discharges will not have a significant environmental impact.
3. The record contradicts DEQ's prediction that Lucky's artesian discharges will not harm surface or groundwater.
4. The DEQ ignored or dismissed the acid rock draining near the project site which occurs due to the presence of sulfide minerals, where the minerals Lucky seeks to explore for are sulfide minerals.

In doing so, DEQ failed to adequately consider pertinent data and failed to examine the relevant data. *Mont. Wildlife Fed'n.*, ¶ 43, *Clark Fork Coal, ¶47, National Audubon Soc'y v. Dept. of Navy,* 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole data was arbitrary and ignored other pertinent water-quality data to the detriment of the EA process. *Ravalli Cty. Fish & Game Ass'n,* 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues in the EA did not meet the requirements of MEPA.

Consideration of Impacts from Mine Development on Federal Lands

Plaintiffs maintain that DEQ's MEPA analysis is flawed because it failed to consider the potential that Lucky's exploration project could facilitate full-scale mining, particularly if Lucky were to use the exploration to obtain a vested right to develop minerals underlying adjacent National Forest lands. Plaintiffs point to ARM 17.4.609(3)(d) which requires DEQ to evaluate a

project's direct and secondary environmental impacts, including "further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action." *Id.*

Plaintiffs rely on *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality,* 2017 MT 222, ¶ 25, 388 Mont. 453, 401 P.3d 712 for the proposition that an agency's review must include all impacts for which there is '"reasonably close causal relationship' between the subject government action and the particular environmental effect." Plaintiffs argue that such a causal relationship exists in this case because Lucky could attempt to use information it gains from its exploration activities to establish a vested right to mine a much larger body of minerals underlying National Forest lands.

Under the 1872 Mining Law, which governs mining on federal lands, an individual may establish a 'valid existing right" to exploit federal minerals if he can demonstrate a reasonable prospect of success in developing a valuable mine, given market conditions and relevant operating costs. Mining companies have established such a right based upon "geologic inference" where "[g]eologic information is used to determine the reasonable likelihood of the persistence of similar mineralization beyond the areas actually sampled or exposed." *Wilderness Soc'y v. Dombeck,* 168 F.3d 367,375 (9TH Cir. 1999).

Plaintiffs maintain that Lucky's exploration raises the prospect that it may attempt to infer a valid existing right to minerals not only on its own lands, by also on its unpatented mining claims on federal lands, using information gained under this exploration permit. Plaintiffs believe Lucky may seek to meet the "valid existing rights standard" by angle-drilling into such federal minerals

from Lucky's patented mining claims on adjacent lands. The drill holes would be either vertical or angled holes that could extend 1,000 to 2,000 feet from the ground surface. AR 44.

If such valid existing rights were established, the unpatented mining claim is a property right in the full sense. *McKown v. United States,* 908 F. Supp. 2d 1122, 1124 (E.D. Cal. 2012). Plaintiffs maintain that granting of an exploration license reflects the "go/nogo" point in the development of federal minerals, or an "irretrievable commitment of resources" under MEPA. Plaintiffs maintain that if Lucky were able to establish a valid existing right to federal minerals by its exploration, DEQ would be unable to prevent the development of those minerals, but could only place reasonable conditions on an operating permit to mitigate environmental impacts.

Thus, Plaintiffs argue, that contrary to MEPA, DEQ failed to provide "reasonable assurance" that the severe environmental effects of mine development on National Forest lands will not occur. ARM 17.4.608(1)(b). Because there are "substantial questions" about whether Lucky's exploration project will cause such impacts, Plaintiffs argue, an EIS was required.

Lucky denies that the DEQ was obligated to evaluate the potential of mining taking place on National Forest lands. Lucky maintains that Plaintiffs failed to raise this issue during scoping and are precluded from arguing it now. Lucky emphasizes that it did not submit an application for a mine operating permit, it simply requested an exploration permit for a very minor project. Lucky maintains that DEQ was obligated to issue the license to Lucky upon payment of the statutory fees and posting of the reclamation bond. §82-4-332, MCA. Lucky dismisses Plaintiffs' claims to the contrary as speculative and contrary to legal precedent.

DEQ responds by maintaining that it properly confined its environmental review to the proposed exploration program. DEQ also contends that Plaintiffs are raising this issue without

having first raised the issue by way of comment from the Plaintiffs on the Draft EA. Though there were a significant number of comments on the Draft EA that presumed the action under review was the permitting of a mine, no comment was submitted regarding the issue of whether Lucky's establishment of a vested right to mine under federal law would preclude DEQ's environmental review of the mine. Thus, DEQ contends, this Court is precluded from considering the issue. under § 75-1-201(6)(a)(ii), MCA.

DEQ denies that the environmental impacts from potential mining are secondary impacts to Lucky's mineral exploration activity. DEQ argues that Plaintiffs inconsistently state that Lucky's ability to develop a full-scale mine based upon its exploration license is uncertain, and, at the same time, argue there is a causal link between the exploration program and the environmental impacts that may result from mining under adjacent Forest Service land. DEQ emphasizes that any potential future mining would be the subject of another environmental review under MEPA.

DEQ asserts that there is no causal relationship between the information Lucky would gain from exploration and a vested right to mine under adjacent Forest Service Land. DEQ disagrees with Plaintiffs' reliance on *Bitterrooters for Planning and White Tanks Concerned Citizens, Inc. v. Stock*, to support its position that environmental impacts resulting from any future mining must be evaluated in this review regarding Lucky's exploration project. In those cases, the issue was whether an agency's action should be considered a cause of an environmental effect even when the agency has no authority to prevent the effect. DEQ maintains those cases are not analogous to the instant case because DEQ has regulatory authority over any future mining that may be conducted by Lucky.

DEQ argues that the instant case is analogous to *North Fork Preservation Ass'n v. Dept. of State Lands,* 238 Mont. 451, 778 P.2d 862(1989). In that case, State Lands issued an approval allowing Cenex to drill one exploratory well under an oil and gas lease, and determined that an EIS was not required. The district court determined that full-field development required preparation of an EIS. The Supreme Court disagreed and determined the district court was incorrect in concluding that full development of oil and gas "was a matter of successive steps set into irreversible motion by the issuance of the lease". The Court was not to assume that State Lands would not comply with its MEPA obligations at a later stage of development and full-field development was not the proposed action before the Department of State Lands. *Id. 463-64.*

DEQ maintains that Plaintiffs' reliance on *Cal. Coastal Com. v. Granite Rock Co.,* 480 U.S. 572 (1987) is misplaced. In that case, DEQ emphasizes, the Supreme Court held that Forest Service regulations were devoid of an expression of intent to pre-empt state laws regulating unpatented mining claims in national forests, but rather appear to assume that those submitting plans of operation will comply with state laws. The Court found that the state's laws were not pre-empted.

In their Reply, Plaintiffs initially maintain that they adequately alerted the DEQ to this issue. Numerous commenters requested that DEQ evaluate the impacts of full scale mining that might occur as a result of the exploration. Plaintiffs' comments gave notice that Lucky's plan for angle drilling "raises the question of the Proposed Action intersecting minerals that lie underneath public lands that are subject to the segregative effects of a withdrawal notice, "and that drilling of federal minerals requires a determination of "valid existing rights' to such minerals, "including those that may be accessed via angled drilling from private land." AR 3023; See also AR 3022.

Plaintiffs go on to reiterate that DEQ was required to evaluate the impacts of mining underneath National Forest lands because if Lucky demonstrates valid existing rights to such minerals based on its exploration project, DEQ would be unable to prohibit their development. DEQ contests this position and argues that DEQ has all of its regulatory authority over future mining, notwithstanding any demonstration of valid existing rights. However, Lucky disagrees with DEQ's position and states that "DEQ does not possess the authority to prevent mining." Lucky's Brief, p. 12.

The crux of the issue in this case is that Lucky may establish valid existing rights with respect to minerals on adjacent federal lands by conducting its exploration under the exploration license at issue here. If Lucky were able to establish such valid existing rights, they would amount to a possessory interest, under federal mining law, that would entitle them to extract all minerals from the claim. *McMaster v. United States,* 731 F.3d 881, 885 (9th Cir. 2013). Though DEQ could regulate such mining, it could not prohibit it altogether without violating the claimant's rights under federal law. The holding in *Cal Coastal Comm'n v. Granite Rock Co.,* 480 U.S. 572, 586-589 (1987) is in accord by finding that state regulation of mining was not preempted, "where it does not seek to prohibit mining of the unpatented claim on national forest land."

The application of federal law to DEQ's right to regulate a valid existing right as to minerals underlying federal lands, takes the inquiry out of the realm of *North Ford Preservation Association, supra.* This is so because DEQ would lack the ability to deny the mining of minerals underlying federal lands and would be relegated to regulating, rather than being able to preclude the mining operation. In *North Fork Preservation Association,* the Court affirmed that the key question in determining whether further resource development must be anticipated and evaluated in the

initial stage of agency approvals is whether the agency's actions entail an 'irretrievable commitment of resources.' *N. Fork Pres. Ass'n v. Dept of State Lands,* 238 Mont. 451, 461-462, 778 P.2d 862, 868-869 (1989).

The Court in *North Fork Preservation Association* relied upon *Connor v. Burford,* 848 F.2d 1441, 1449 (9th Cir. 1988) for the proposition that "an irretrievable commitment of resources is reached when the agency no longer has "the absolute right to prevent all surface-disturbing activity." The *Conner* Court explained that, "[t]he 'heart' of the EIS—the consideration of reasonable alternatives to the proposed action—requires federal agencies to consider seriously the "no action" alternative before approving a project with significant environmental effects." *Id.* at 1451. "The government's right to regulate, rather than preclude, surface disturbing activities" is an insufficient basis for the agency to avoid examining such activities in an EIS before the initial authorization. *Id.* at 1449. The Court in *Conner* explained,

> . . . an EIS must be prepared as long as "substantial questions" remain as to whether the measures will completely preclude significant environmental effects. *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986); *Foundation for North Am. Wild Sheep v. United States*, 681 F.2d 1172, 1180-81 (9th Cir. 1982). Thus, even if there is a chance that regulation of surface-disturbing activities will render insignificant the impacts of those activities, that possibility does not dispel substantial questions regarding the government's ability to adequately regulate activities which it cannot absolutely preclude. In sum, we agree with the district court that the government violated NEPA by selling non-NSO leases without preparing an EIS.
>
> . . .
>
> Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.

Conner v. Burford, 848 F.2d 1441, 1450-1451, 1988 U.S. App. LEXIS 296, *27-30,

Lucky maintains that there are not currently "vested" rights to mine that are available to Lucky under the mining laws of the United States. Lucky has not, however, disavowed an intention to angle drill under the National Forest during its exploration activities nor then using information gained thereby to establish such a "vested' right.

The Court concludes first that DEQ was adequately put on notice of the issue of Lucky drilling into segregated, federal minerals. DEQ failed to evaluate the impacts of mining underneath National Forest lands, since if Lucky demonstrates valid existing rights to such minerals in conducting its exploration activities, DEQ would be unable to prohibit their development.

This is, "a secondary impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action", which the DEQ was required to evaluate under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human environment, the DEQ was required to consider "any precedent that would be set as a result of an impact of the proposed action that would commit the Department to future actions with significant impacts or a decision in principle about such further actions" ARM 17.4.608(1)(f) The granting of the exploration license does set a precedent that would commit the department to the future action of allowing mining and development of any valid existing rights to minerals underlying National Forest Lands that may be established by information gained in the exploration activities.

This significant potential impact alone mandated the preparation of an EIS.

Evaluation of Feasible Project Alternatives

The DEQ is required to consider alternatives to the proposed project in preparing an EA. Pursuant to ARM 17.4.607(2)(b), one of the purposes of an EA, is to "assist in the evaluation of

reasonable alternatives and the development of conditions, stipulations or modifications to be made part of a proposed action. Pursuant to § 75-1-201(1)(b)(v), MCA, agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources."

Plaintiffs maintain that DEQ adopted Lucky's stated objective, without discussion or visible consideration of at least two feasible project alternatives. DEQ first dismissed an alternative that would have limited Lucky's exploration license to one field season and the use of four drilling rigs rather than two. Second, DEQ dismissed an alternative to eliminate night drilling. Though eliminating night drilling would have eliminated some wildlife impacts, DEQ dismissed this alternative because it would extend the exploration.

Plaintiffs take issue with the fact that DEQ did not evaluate an alternative that would reduce the number of holes it would drill and that DEQ asserted it had no basis to second-guess Lucky's need to drill at all of the proposed locations. Plaintiffs cite to *Nat'l Parks Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F. 3d 1058, 1072, (9th Cir. 2010) which held that an agency may not "adopt private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." The DEQ is obligated to consult with Lucky regarding proposed alternatives and "give due weight and consideration to its comments", § 75-1-201(b)(iv)(C)(II), MCA. This does not, however, negate the DEQ's obligation to consider project alternatives that are economically feasible. Further, the EA must include "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonable available and prudent to consider." § 75-1-201(1)(b)(iv)(C)(I); ARM 17.4.609(3)(f).

The DEQ responds by pointing out that in the Final EA, DEQ evaluated a Proposed Action Alternative, a No Action Alternative and an Agency-Modified Alternative. DEQ evaluated an alternative requiring Lucky to complete its 46 drill hole exploration program in one season. This alternative was rejected because the impacts would have been substantially similar. It also evaluated an alternative that would have eliminated night drilling. This alternative was rejected because the impacts would have extended over three to four field seasons.

The DEQ asserts that applicable case law prevents the agency from determining for the applicant what the goals of an applicant's proposal should be. DEQ maintains that he purpose-and-need statement in the Lucky Final EA comports with applicable case law. DEQ maintains that it has no basis to second-guess Lucky's need to drill up to 46 bore holes at 23 drill sites. Final EA, p. 300.

In its Reply Brief, the DEQ emphasizes that the case law requires DEQ to take into account the needs and goals of the parties involved in the application. In *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190. (DC Cir. 1991), the Court concluded that the FAA had evaluated the only alternative that might reasonably accomplish the Airport's goal of expanding the Toledo Express Airport. Other authority cited by the DEQ stands for the proposition that the reviewing agency does not have to consider the alternative of a scaled back project, in lieu of the proposal submitted.

Lucky concurs in the DEQ's appropriate consideration of alternatives, particularly given what Lucky characterizes as the minor nature of its exploration program. Lucky also points to § 75-1-220(1), MCA which mandates evaluation of "different parameters, mitigation measures or control measures that would accomplish the same objectives as those included in the proposed action by the applicant."

Plaintiffs respond by noting that nothing in the cases relied upon by DEQ relieves an agency of its obligation to evaluate alternate ways of achieving the project's goals. Plaintiffs acknowledge that DEQ, in proposing and adopting an agency-modified alternative, complied with MEPA's requirement that the agency give due weight and consideration to the project sponsor's comments by seeking and responding to Lucky's input on the changes. AR 30-34; AR 656-663. However, by contrast, Plaintiffs maintain that DEQ dismissed the no night drilling and one season alternatives, without ever inquiring whether Lucky could meet its project goals under either of the alternatives.

The fundamental difference in the parties' positions on the issue of consideration of alternatives is DEQ's refusal to consider an alternative that would alter the basic parameters of the applicant's project and Plaintiff's insistence that MEPA requires the DEQ to evaluate different parameters that would accomplish the project's objectives while lessening its impacts. § 75-1-220(1), MCA.

The Court concludes that DEQ in this instance, gave unwarranted deference to Lucky's proposal, without conducting an independent analysis of alternatives, particularly the "no night drilling" and "one season" alternatives in order to determine whether the environmental impacts could be reduced, while still meeting the basic goals of the project.

CONCLUSION

MEPA was designed "to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans. § 75-1-102(2), MCA. To meet these purposes, MEPA requires the DEQ to "take a 'hard look' at the environmental impacts of a given project or proposal." *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation,* 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877. "The Court looks closely at

whether the agency has taken a hard look at the question presented. The Court does not take a hard look itself, but requires that the agency does so." *Clark Fork Coalition v. MT. DEQ,* 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482. For an EA to suffice, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. ARM 17.4.607(4). In identifying and evaluating these matters, the DEQ "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Mont. Wildlife Fed'n,* ¶ 43.

The Court concludes that the DEQ's analysis regarding the issues found herein was arbitrary, capricious and not supported by substantial evidence.

The DEQ's analysis did not include a "hard look" at grizzly bear and wolverine impacts from increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass'n,* 273 Mont. at 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the relevant data and articulating a satisfactory explanation for its action, its decision violated MEPA. *Montana Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation,* ¶ 43, quoting *Clark Fork Coal v. Mont. Dep't of Envtl. Quality,* ¶ 47.

The Court concludes that the DEQ did not take the requisite "hard look" at the relevant data regarding water quality issues. The Final EA provides only for a plan to make a plan to address water quality; the DEQ selectively relied upon the Duval bore hole data and ignored other pertinent water quality data; the record contradicts DEQ's prediction that artesian discharges will not have a significant environmental impact not cause harm to surface or ground water; and the DEQ did not adequately address or explain its dismissal of the acid rock drainage issue.

In doing so, DEQ failed to adequately consider pertinent data and failed to examine the relevant data. *Mont. Wildlife Fed'n.*, ¶ 43, *Clark Fork Coal, ¶47, National Audubon Soc'y v. Dept. of Navy,* 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole data was arbitrary and ignored other pertinent water-quality data to the detriment of the EA process. *Ravalli Cty. Fish & Game Ass'n,* 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues in the EA did not meet the requirements of MEPA.

DEQ was adequately put on notice of the issue of Lucky drilling into segregated, federal minerals. DEQ failed to evaluate the impacts of mining underneath National Forest lands, since if Lucky demonstrates valid existing rights to such minerals in conducting its exploration activities, DEQ would be unable to prohibit their development.

This is, "a secondary impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action", which the DEQ was required to evaluate under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human environment, the DEQ was required to consider "any precedent that would be set as a result of an impact of the proposed action that would commit the Department to future actions with significant impacts or a decision in principle about such further actions" ARM 17.4.608(1)(f) The granting of the exploration license does set a precedent that would commit the department to the future action of allowing mining and development of any valid existing rights to minerals underlying National Forest lands that may be established by information gained in the exploration activities. DEQ's EA is not in keeping with the mandates of MEPA with regard to this issue.

Finally, the Court concludes that the DEQ, in this instance, gave unwarranted deference to Lucky's proposal, without conducting an independent analysis of alternatives, particularly the "no night drilling" and "one season" alternatives in order to determine whether the environmental impacts could be reduced, while still meeting the basic goals of the project. The EA fails to comport with MEPA in this regard.

Based upon the foregoing decision, good cause exists for entry of the following order:

ORDER

I.

Plaintiffs' counsel shall prepare an Order that is consistent with the Court's Decision, as set forth above.

SO ORDERED this 23rd day of May, 2018.

Brenda R. Gilbert

BRENDA R. GILBERT, District Court Judge

CC: Jenny K. Harbine / Joshua R. Purtle
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MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION,

Plaintiffs,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

Case No. DV-17-126

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case challenges state approval for a plan by Canadian-based Lucky Minerals ("Lucky") to explore for gold and other minerals in Emigrant Gulch above Montana's iconic Paradise Valley, approximately 30 miles north of Yellowstone National Park. Lucky's project aims to pave the way for a large-scale gold mine in this sensitive and scenic area. More than 300 Park County, Montana businesses and thousands of individuals have objected to the project on grounds that it would industrialize a remote area that is home to grizzly bears, wolverines, and other wildlife, and would threaten to dismantle Park County's tourism economy that depends on clean water and pristine views. However, on July 26, 2017, the Montana Department of Environmental Quality ("DEQ") determined that the exploratory drilling—which would occur 24 hours each day between July 15 and October 15 for two consecutive years—would not cause any significant environmental impacts and approved the project.

2. DEQ's determination violated the Montana Environmental Policy Act ("MEPA"), which was enacted "to prevent or eliminate environmental damage" by fostering more informed decision-making by state agencies. Pompeys Pillar Historical Ass'n v. Mont. Dep't of Envtl. Quality, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148; see also Mont. Code Ann. § 75-1-102(3) (MEPA's purpose is "to inform the public and public officials of potential impacts resulting from decisions made by state agencies"). Although DEQ acknowledged in its Final Environmental Assessment ("Final EA") that the drilling project could harm sensitive wildlife and risk pollution of water resources, among other things, DEQ arbitrarily deemed these impacts insignificant without disclosing any legitimate rationale for its determination based on the evidence before the agency. And DEQ failed altogether to evaluate and disclose the potentially severe impacts of full-scale mining in Emigrant Gulch that could result from the exploration

project. Absent a rational finding that exploration in Emigrant Gulch will not cause significant environmental impacts, DEQ was required under MEPA to prepare an environmental impact statement ("EIS") thoroughly vetting the project's impacts.

3. In addition to its failure to rationally assess the project's environmental impacts, DEQ dismissed feasible project alternatives that could reduce the project's acknowledged impacts, improperly deferring to Lucky's proposed project scope without an independent assessment of the need for such a large exploration project, as MEPA requires.

4. In sum, DEQ failed to take a hard look at the environmental impacts of mineral exploration in Emigrant Gulch, dismissed evidence of significant impacts requiring preparation of an EIS, and failed to consider potentially reasonable alternatives to the project Lucky has proposed. DEQ's decision to issue an exploration permit based on this incomplete environmental analysis was therefore arbitrary, capricious, and contrary to MEPA.

JURISDICTION AND VENUE

5. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; and the Montana Environmental Policy Act, Mont. Code Ann. § 75-1-201.

6. Venue is proper in this district because plaintiff Park County Environmental Council is headquartered in this district, Mont. Code Ann. § 25-2-126(1), and the exploration project plaintiffs challenge will occur in Park County, Mont. Code Ann. § 75-1-108.

PARTIES

7. Plaintiff Park County Environmental Council ("PCEC") is a not-for-profit community organization based in Livingston, Montana, that aims to protect and enhance the quality of life in Park County by working with community members to preserve and restore our

rivers, wildlife, and landscapes. PCEC's vision is to create resilient ecosystems, communities, and economies in Park County by advocating for open lands and clean air and water.

8. Plaintiff Greater Yellowstone Coalition ("GYC") is a regional conservation organization based in Bozeman, Montana, with offices in Idaho and Wyoming and more than 90,000 members and supporters from across the country and within the Northern Rockies. GYC's mission is to protect the lands, waters, and wildlife of the Greater Yellowstone Ecosystem now and for future generations.

9. Plaintiffs' members include residents living in communities throughout Paradise Valley, including Old Chico and Emigrant Gulch, and visitors enjoying the Greater Yellowstone Ecosystem, the Custer Gallatin National Forest, the Yellowstone River, Old Chico and Chico Hot Springs. Plaintiffs' members live, work, and recreate in and around the area that will be affected by the proposed exploration project. Plaintiffs' members seek opportunities to view grizzly bears, wolverines, and other wildlife in Emigrant Gulch and nearby drainages in the Absaroka Mountains. Plaintiffs' members also fish in the Yellowstone River, and rely on the high quality of water in the Yellowstone and its tributaries to support a healthy fish population. Many of plaintiffs' members rely for their livelihoods on the tourism and recreation industries in Paradise Valley and Yellowstone National Park, which depend on the persistence of the unique environmental values the region has enjoyed for thousands of years.

10. Plaintiffs and their members are among the thousands of people who submitted comments to DEQ to urge the agency to thoroughly evaluate the many significant impacts of Lucky's exploration project in Emigrant Gulch through preparation of an EIS. Plaintiffs and their members' aesthetic, conservation, recreational, scientific, educational, economic, and wildlife preservation interests have been, are being, and will continue to be adversely affected by

DEQ's failure to adequately evaluate and disclose all the impacts of the proposed exploration project, and by the proposed exploration project itself.

11. Defendant Montana Department of Environmental Quality ("DEQ") is the agency charged with issuing permits for mineral exploration under the Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-332, and evaluating the environmental impacts of proposed exploration under MEPA, Mont. Code Ann. § 75-1-201. DEQ prepared and issued the Final EA approving the proposed exploration project in Emigrant Gulch.

12. Defendant Lucky Minerals, Inc. is a Canadian-based corporation that holds the mineral exploration license that is challenged in this proceeding, and is therefore a proper party to this action under Mont. Code Ann. § 27-8-301. According to its website, "Lucky Minerals is a venture stage exploration company that is targeting a large-scale porphyry copper-gold-molybdenum system in southern Montana that could potentially host a multi-million ounce gold deposit." See Lucky Minerals, Inc., www.luckyminerals.com (last visited Sept. 21, 2017).

BACKGROUND

I. THE PROPOSED EXPLORATION IN PARADISE VALLEY

13. Lucky Minerals proposes to explore for gold in one of the most spectacular areas of the Custer Gallatin National Forest, just 30 miles north of Yellowstone National Park. Emigrant Peak, near the site of the proposed exploration, is within the Absaroka Mountains and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. The nearly 11,000-foot high peak is one of the most prominent mountain tops visible from the aptly named Paradise Valley, to the west. Emigrant Peak is flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the north and Sixmile Creek on the south, both of which are tributaries of the Yellowstone River. The Absaroka Mountains, including Emigrant Peak and its adjacent valleys,

are home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, grizzly bears, and wolves. The Absarokas also provide important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears, as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. Further, as part of the Greater Yellowstone Ecosystem, these public lands constitute part of the largest intact natural areas in the lower-48 United States.

14. For these reasons, Emigrant Peak and its surrounding drainages are important places for people throughout the country. But they are also local treasures. Emigrant Peak is one of the most popular year-round recreation destinations in Montana, including for hiking in the summer and backcountry skiing in the winter. Since 1900, area residents and visitors have soaked in the natural mineral pools of Chico Hot Springs, which sits at the mouth of Emigrant Gulch. These features and the pristine beauty of the area are also important to the local economy, supporting tourism that directly and indirectly employs large numbers of Park County residents.

15. The proposed mineral exploration project would introduce industrial activity into the Emigrant Peak area, which has not seen significant mining or exploration activity for more than 20 years. Lucky proposes to drill 46 boreholes at 23 locations in the so-called St. Julian Claim Block in Emigrant Gulch, just up the road from Chico Hot Springs. Final EA at 19. Each hole would be drilled to depths between 1,000 and 2,000 feet. Id. at 20. To access this area, Lucky proposes to improve the Emigrant Creek Road and certain Forest Service roads, which are currently in poor condition and inaccessible to most vehicles. Road improvements will include "grading in localized areas, as necessary, in order to keep them serviceable for the type of vehicles that would be involved with the Proposed Action:" clearing of rock and other debris

from the road surface; and "slop[ing] to enhance draining and prevent channeling." Id. at 17. DEQ acknowledges that "[i]mprovements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage," impacting sensitive species such as wolverines. Id. at 66. Indeed, "[g]iven the low reproductive potential of wolverines, the impacts of improved access to more remote areas may be detrimental to regional populations." Id. at 66 (citation omitted).

16. Exploration will continue for nearly 24 hours a day over two three-month field seasons. Id. at 16, 20. Lights similar to those used by highway construction crews would light the operation every night, disturbing nearby wolverines, bats, and other wildlife. Id. at 20, 63–66. The project would require use of a D-7 bulldozer, a G-12-14 grader, a JD-50 excavator or backhoe, two LF-70 drilling machines, three diesel- or gas-powered water pumps, two service trucks, one four-by-four pickup truck, and two ATVs. Id. at 17. Ten workers would be present in the project area at all times. Id. at 20.

17. Although significant in its own right, the proposed project is only the first phase of "an aggressive exploration program," that Lucky proposes to conduct in Emigrant Gulch in the coming years. Lucky Minerals, Technical Report, The Emigrant Mining District Project, at 7 (Mar. 2015). In later phases, Lucky intends to construct new roads and drill at additional locations, on both private property and public land. Id. at 8, 73. Lucky's "[o]verall target" is a mine capable of producing millions of ounces of gold, copper, and silver. Id. at 73.

18. The affected community in Park County, Montana—including more than 300 businesses—and Montana's entire congressional delegation have opposed Lucky's plan for gold mining in Emigrant Gulch. Park County's newspaper, The Livingston Enterprise, editorialized that, "[a]s we have learned from a long, sordid history of mining in Montana, we must be

selective and critical in determining where companies are given the green light for resource extraction. … Emigrant Peak is the ideal location for many activities, but a mine exploration project isn't one of them." Justin Post, There's a place for mines, and it's not on Emigrant Peak, Livingston Enterprise (July 10, 2015). Community meetings in Park County have drawn in hundreds of local residents, revealing substantial opposition to any proposal for exploration drilling in Emigrant Gulch. The vast majority of the more than 3,000 comments DEQ received on its draft environmental assessment for Lucky's proposal highlighted the harm Park County's environment, economy, residents, and businesses will suffer if the exploration project goes forward.

19. Reflecting this opposition to gold exploration in Emigrant Gulch, on November 21, 2016, the U.S. Forest Service and Department of Interior announced a proposal to withdraw 30,000 acres of land in Paradise Valley—including National Forest System lands adjacent to Lucky's proposed project—from mineral exploration and development. See Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83,867, 83,867 (Nov. 22, 2016). The proposal had the immediate effect of preventing mining activity, subject to valid existing rights, for two years. Id. If finalized, the withdrawal will prevent mining activity on these lands for as many as 20 years. Id. U.S. Secretary of Interior Ryan Zinke recently announced that the Department of Interior will finalize the withdrawal "as quickly as possible" because "[s]ome places are too precious to mine." Matthew Brown, Assoc. Press, Zinke urges mining ban near Yellowstone, Billings Gazette (Aug. 28, 2017), http://billingsgazette.com/news/government-and-politics/zinke-urges-mining-ban-near-yellowstone/article_4327a00a-99f1-5b15-a481-523627192298.html. The withdrawal is intended "to protect and preserve the scenic integrity, important wildlife corridors, and high quality recreation values of the Emigrant Crevice

area located in the Custer Gallatin National Forest, Park County, Montana." 81 Fed. Reg. at 83,867.

20. Those same values the federal withdrawal seeks to preserve are threatened by the exploration project Lucky intends to conduct on its private claims, which is not precluded by the public lands withdrawal. Given the intensity of the proposed industrial activity within sensitive and remote lands in Emigrant Gulch and the likely significant local and regional impacts, it was critical that DEQ fully and rationally evaluate the project's environmental impacts as required by MEPA. In addition, there is significant uncertainty about Lucky's ability to use exploratory drilling on private lands to establish rights to develop a full-scale mine on adjacent National Forest system lands, notwithstanding the withdrawal. DEQ's MEPA analysis failed to adequately evaluate and disclose all of these direct and indirect impacts, and its decision to issue an exploration license on the basis of such deficient environmental analysis was arbitrary, capricious, and contrary to law.

II. MEPA

21. MEPA was designed "to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." Mont. Code Ann. § 75-1-102(2). To meet this purpose, MEPA requires DEQ to "take a 'hard look' at the environmental impacts of a given project or proposal." Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; see also Mont. Code Ann. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d). The agency must consider, among other things, reasonable alternatives to the proposed action, Mont. Code Ann. §§ 75-1-201(1)(b)(iv)(C), 75-1-201(1)(b)(v); the direct, indirect, and cumulative environmental impacts of the action, id. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d) (requiring an

evaluation of "impacts, including cumulative and secondary impacts, on the physical environment"); and "the economic advantages and disadvantages of the proposal," Mont. Code Ann. § 75-1-201(1)(b)(iv)(H); see also Admin. R. Mont. 17.4.609(3)(e). In evaluating environmental impacts pursuant to MEPA requirements, "[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Mont. Wildlife Fed'n, ¶ 43 (quoting Clark Fork Coal. v. Mont. Dep't of Env. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

22. DEQ must prepare an environmental impact statement ("EIS") before granting an exploration license if the proposed project will "significantly affect[] the quality of the human environment." Admin. R. Mont. 17.4.607(1). DEQ may issue an exploration license without preparing an EIS only if it rationally determines through preparation of an environmental assessment ("EA") that the project's impacts will not be significant, see id. 17.4.607(1)(b), or that otherwise significant impacts can be mitigated below the level of significance, id. 17.4.607(4) ("For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur."). (An EA or EIS is not required for certain limited categories of actions, none of which is relevant here. See Admin R. Mont. 17.4.607(5).)

23. In determining whether the impacts of a proposed action will be significant, the Department must consider:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected;

(f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

Admin. R. Mont. 17.4.608(1).

24. In addition, "[a]gencies must prepare environmental impact statements whenever a federal action is 'controversial,' that is, when 'substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.'" Nat'l Parks Conservation Ass'n v. Babbitt, 241 F.3d 736 (9th Cir. 2001) (quoting Nw. Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997)), abrogated in other part by Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010); accord Protecting Paradise v. Mont. Dep't of Envtl. Quality, No. DV-12-123, slip. op. at 10–11 (Mont. 6th Jud. Dist. July 16, 2013) (applying "substantial questions" standard in MEPA case). Where an uncertain impact of an agency action is potentially severe, DEQ may not deem it insignificant without "reasonable assurance ... that the impact will not occur." Admin. R. Mont. 17.4.608(1)(b).

25. As set forth below, DEQ did not meet these legal standards before granting Lucky's exploration license.

III. DEQ'S FLAWED MEPA ANALYSIS

26. DEQ began its environmental review after Lucky filed its first exploration license application in April 2015. Final EA at 9. The original application included proposed drilling on both private patented mining claims (the "St. Julian Claim Block") and adjacent National Forest land. Id. at 9. DEQ and the Custer Gallatin National Forest informed the public of this proposal on June 2, 2015, and requested comments concerning the scope of their environmental review by July 15, 2015. Id. at 10. The agencies later extended the scoping comment period to August 20, 2015. Id. DEQ received roughly 6,250 public comments during the scoping period. Id.

27. On November 30, 2015, Lucky withdrew its initial application and submitted a new proposal to drill on private land only. Final EA at 10. DEQ released a Draft Environmental Assessment ("Draft EA") for the proposal on October 13, 2016, and accepted public comments on the draft until December 12, 2016. Id. Members of the public submitted 3,384 comments on the Draft EA, primarily opposing the project. See id. at 168.

28. DEQ issued its Final Environmental Assessment ("Final EA") on July 26, 2017. The Final EA identifies an "agency-modified alternative," which adopts Lucky's proposal with slight modifications that, according to DEQ, will "address potential [environmental] impacts." See Final EA at 21.

29. The Final EA does not, however, rationally evaluate some of the project's most troubling impacts, or explain how measures included in the agency-modified alternative will ensure those impacts will not be significant. The Final EA also dismisses without any legitimate explanation project alternatives that could mitigate some of the potentially significant impacts DEQ identified.

A. Road Access Impacts

30. The EA acknowledges that Lucky would be required to improve the condition of roads—including Emigrant Creek Road and Forest Service roads—in order to access the planned exploration areas, but DEQ made no attempt to analyze the long-lasting impacts of Lucky's proposed road improvements to wildlife. DEQ's failure to disclose and evaluate these environmental impacts was arbitrary, capricious, and contrary to MEPA.

31. Numerous comments, including comments submitted by Montana Fish, Wildlife and Parks, raised concerns that road improvements could facilitate greater public access to remote areas in Emigrant Gulch, leading to greater disturbance of wildlife (particularly grizzly bears and wolverines) and potential conflicts between wildlife and humans even after the exploration project has concluded. DEQ dismissed these concerns:

> The public currently has access to the base of the St. Julian Claim Block via Emigrant Creek Road and recreationists presently access the area to pursue recreational activities. The improvements to Emigrant Creek Road discussed above would not lead to access to higher elevations and more remote habitat, or additional fragmentation of wildlife habitat. Currently, a four-wheel drive high clearance vehicle is required to get to the St. Julian Claim Block. It is anticipated that the same type of vehicle will be required after Lucky Minerals makes the road improvements and completes its exploration activities.

Final EA at 188–89.

32. DEQ's resolution of this issue was irrational first because the EA is internally inconsistent with respect to the effect of road improvements. In some sections, the EA claims that Lucky's proposed improvements to the Emigrant Creek Road and Forest Service roads will not permit greater human access to the drainage, and therefore "there are not expected to be any significant secondary impacts to wildlife" due to road improvements. Final EA at 70. The EA's discussion of impacts to wolverines, however, contradicts this conclusion, stating that "[i]mprovements to the existing roads would facilitate an increase in motorized access and

hunter access into higher, more remote areas in the drainage." Id. at 66. DEQ's conclusion that road improvement will not affect wildlife is therefore not supported by DEQ's own analysis.

33. Further, the EA's prediction that "[t]he clearing and localized improvements to Emigrant Creek Road ... will not materially change its character of an unimproved forest road," Final EA at 62, overlooks record evidence regarding the current and future condition of the road. Emigrant Creek Road is severely eroded in some areas and covered in rockfall in others. See Letter from GYC to Jen Lane, Re: Lucky Minerals, Inc. Proposed Exploration Project, at 13 (Dec. 12, 2016) (photographs documenting current road condition). The EA acknowledges that significant work will be required to make the road accessible to drilling equipment and other vehicles:

> The approximate four-mile length of Emigrant Creek Road from Old Chico to the St. Julian Claim Block would be cleared of rock and debris within its original configuration, some of which would include hand picking. The road would not be widened. Emigrant Creek Road may be graded in localized areas in order to keep it serviceable for the type of vehicles that would be involved in the project.

Id. at 62. In short, Lucky's proposed project would substantially improve the Emigrant Creek Road from its existing rugged condition. DEQ's conclusion that road improvements will not permit more people to access remote areas deeper in the Emigrant drainage is therefore not supported by the record, and DEQ was required to evaluate and disclose the impacts of improved access before issuing Lucky an exploration license.

B. Wolverine Impacts

34. The Final EA is additionally flawed with respect to its conclusion that potential impacts from the exploration project to wolverines will not be significant. In the lower-48 United States, the wolverine is a rare and elusive resident of high mountain landscapes, including the Absaroka Mountains and Emigrant Peak. The largest terrestrial member of the weasel

family, wolverines are adapted to live in high-altitude and high-latitude ecosystems characterized by deep snow and cold temperatures. Deep snow is particularly important for wolverine reproduction, but wolverines of both sexes rely on these same cold, snowy areas year-round—areas that have become less and less prevalent as Montana winters have warmed. Wolverine reproduction is very slow—one study found that wolverines on average produced less than one kit per female per year—and any disruption of denning wolverines could threaten the persistence of local populations.

35. The EA acknowledges that exploration in Emigrant Gulch will be harmful to local wolverines: "The use of lights during nighttime drilling may also disrupt wolverine use of the area"; "The Proposed Action would represent a disturbance to wolverines and likely would deter wolverines from using the area"; "Copeland (1996) documented three instances when a female and her kits abandoned an area after researchers disturbed wolverines at maternal den sites"; "Given the low reproductive potential of wolverines (Weaver et.al., 1996), the impacts of improved access to more remote areas may be detrimental to regional populations"; "Improvements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage." Final EA at 65–66.

36. The Final EA's proposed mitigation does not address these impacts. The EA provides for "pre-exploration surveys prior to each field season to identify potential areas of western toad habitat, bat habitat, and nesting birds in areas of new disturbance on drill pads and laydown area," but does not provide for a similar survey to detect wolverine presence or habitat use, despite evidence that wolverines may abandon den sites in response to human disturbance. Final EA at 69; see also id. at 56 ("The St. Julian Claim Block is within the home range distance for wolverines that have been documented in the area. However, specific knowledge of the

importance of the St. Julian Claim Block to the wolverines that use it is not known."). DEQ's failure to require Lucky to survey the area for wolverines is especially troubling, because Lucky has not disclosed the actual locations of its proposed drilling sites. See id. at 19 ("The locations of the proposed drill sites are conceptual and may change as new information is acquired."). It is therefore impossible to determine based on the information that DEQ and Lucky have disclosed so far whether drilling will occur near areas of documented wolverine activity. The EA does call for Lucky to "reduce any unnecessary lighting," id. at 69, but DEQ does not explain whether or how this vague measure will render the harm to wolverines due to "necessary" lighting insignificant. Further, the EA provides no mitigation to avoid or mitigate impacts caused by greater human access to high elevation areas in Emigrant Gulch used by wolverines, despite the EA's acknowledgement that such impacts will occur.

37. Absent mitigation measures eliminating or significantly reducing the acknowledged impacts to wolverines, DEQ cannot rely on mitigation to conclude that these impacts will not be significant and thereby avoid preparing an EIS. DEQ's alternative explanation—that the impacts of Lucky's exploration project overall will be limited in extent and duration, Final EA at 167—does not support a finding that impacts to wolverines are insignificant, where DEQ's own analysis indicates that even limited disturbance can cause wolverines to abandon maternal den sites, id. at 66. Further, wolverine impacts due to increased motorized access to upper Emigrant Gulch—including incidental trapping mortality due to increased access to wolverine habitat in the area for trappers of other species—could continue long after exploration has ended. In short, DEQ provided no rational explanation why wolverine impacts will not be significant.

C. Artesian Well Impacts

38. The EA further failed to rationally address potential discharges of poor-quality water from artesian boreholes in the project area to the surface waters in Emigrant Gulch. The EA acknowledges that "it is likely that Lucky Minerals would … encounter artesian conditions during drilling." Final EA at 118. DEQ states, however, that Lucky will "develop a mitigation plan to effectively contain flow from artesian boreholes during drilling" to address this potential impact. Id. at 119; see id. ("Containment of flow from an artesian borehole during the entire period of time it is producing water would prevent any potential discharge of water or sediment to surface waters or wetlands, prior to plugging and abandoning the drill hole in accordance with ARM 17.24.106.").

39. DEQ may not, however, rely on a "plan to make a plan" to support a finding that impacts from artesian borehole discharges will not be significant. See Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on "design, or enforceable controls or stipulations or both imposed by the agency or other government agencies" to deem impacts insignificant) (emphasis added). MEPA requires DEQ to explain why proposed mitigation will prevent significant impacts to surface waters and wetlands from harmful artesian discharges, and DEQ cannot rationally do so without identifying what such mitigation will entail.

D. Secondary Impacts of Full-Scale Mine Development

40. In addition to DEQ's deficient analysis of the exploration project's direct impacts, DEQ failed altogether to examine the significant environmental consequences of its approval from the full-scale mining it could facilitate on both private and National Forest lands. Numerous commenters implored DEQ to evaluate the significant impacts of such mining to water quality, wildlife, recreation, and the local economy. In dismissing these comments out of

hand, DEQ stated, "[t]he proposed state action is issuance of an exploration license. The Environmental Assessment properly limits its analysis to impacts from the proposed exploration activity." Final EA at 172.

41. To the contrary, MEPA requires DEQ to evaluate a project's direct and secondary environmental impacts. Admin. R. Mont. 17.4.609(3)(d). Such secondary impacts include any "further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action." Id. 17.4.603(18). Here, such secondary impacts include full-scale mine development, particularly where Lucky may seek to establish rights to minerals that underlay National Forest lands that are currently subject to the proposed federal mineral withdrawal by "angle drilling" into such federal minerals from Lucky's patented mining claims. See Final EA at 35 ("The drill holes would be either vertical or angled holes that could extend 1,000 to 2,000 feet from the ground surface, depending on the observed geologic trends and the most effective approach to investigate the subsurface at each site."). If Lucky were to establish existing rights to federal minerals through its exploration project, it would undermine the environmentally protective purposes of the proposed mineral withdrawal.

42. Although Lucky's ability to establish rights to federal minerals is uncertain, such uncertainty counsels in favor of preparing an EIS. Protecting Paradise, slip. op. at 10–11 (EIS required "when 'substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor'") (citation omitted). At a minimum, DEQ was required to consider "the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment" in describing the environmental impacts of its decision. Admin. R. Mont. 17.4.609(2)(c). Because the consequences of full-scale mining are potentially severe, DEQ could not dismiss these impacts without "reasonable

assurance" they will not occur. Id. 17.4.608(1)(b). DEQ's environmental review failed to meet these standards.

E. DEQ's Range of Alternatives

43. DEQ further violated MEPA by summarily rejecting two alternatives that would have reduced the extent of the exploration project's environmental impacts. MEPA's alternatives requirement ensures that agencies consider alternatives to a proposed project that will accomplish the project's goals while causing fewer environmental impacts. See Mont. Code Ann. § 75-1-201(1)(b)(v) (agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.").

44. The first dismissed alternative would have limited Lucky's exploration license to one field season. The second would have eliminated night drilling. DEQ dismissed these alternatives because, according to DEQ, they would both cause similar impacts to Lucky's proposal. If Lucky were obliged to complete its exploration in one field season, it would, according to DEQ, simply double the intensity of drilling, using "four, rather than two, drill rigs." Final EA at 26. If night drilling were prohibited, Lucky would, according to DEQ, extend exploration "for an additional three or four field seasons." Id. at 27.

45. DEQ's analysis, however, assumes that Lucky could not reduce the number of holes it will drill. DEQ conducted no independent evaluation of whether Lucky could f easibly reduce the scale of its exploration project, writing that "DEQ has no basis to second-guess Lucky Minerals [sic] need to conduct drilling at all of the proposed locations." Final EA at 300. However, MEPA does not permit DEQ to reject potentially reasonable project alternatives by blindly relying on a project applicant's claim about the necessary scope of its project. See Mont.

Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor"); id. § 75-1-201(b)(iv)(C)(II) ("the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative").

F. DEQ's No-Significant-Impact Finding

46. Despite the project's acknowledged impacts, and based on the irrational analysis and conclusions described above, DEQ concluded that the project will not have significant environmental impacts and, therefore, no EIS was required. Final EA at 168. However, as discussed, DEQ failed to evaluate the impacts of the project's proposed road improvements or explain why those impacts will not be significant. As to wolverines, DEQ acknowledged impacts to wolverines, but did not rationally explain why those impacts will not be significant, or how DEQ's wildlife mitigation measures will protect wolverines from significant impacts.

47. With respect to artesian discharges, DEQ stated only that Lucky will develop a mitigation plan at some point in the future; DEQ gave no clue as to what that mitigation plan will contain. DEQ cannot rely on a speculative mitigation plan to conclude that impacts from artesian discharges will not be significant.

48. Further, DEQ did not even evaluate the secondary environmental impacts of exploratory drilling, which may give rise to full-scale mine development on National Forest land currently subject to a federal withdrawal proposal, let alone justify why such impacts are not significant.

49. Because DEQ failed to justify its determination that the project will not cause significant impacts, DEQ's failure to prepare an EIS was arbitrary, capricious, and contrary to MEPA.

FIRST CAUSE OF ACTION
(Failure to Evaluate Impacts Due to Road Improvements, Mont. Code Ann. § 75-1-201)

50. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 49.

51. Under MEPA, DEQ is required to "take a 'hard look' at the environmental impacts of a given project or proposal." Mont. Wildlife Fed'n, ¶ 43. This "hard look" must include an evaluation of all of the project's direct, indirect, and cumulative environmental impacts. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d).

52. DEQ, however, failed to disclose and evaluate the impacts of improvements to the Emigrant Creek Road and connected Forest Service roads, which will facilitate human access to the drainage and increase harassment of wildlife and conflicts between humans and wildlife in this sensitive area.

53. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SECOND CAUSE OF ACTION
(Failure to Rationally Evaluate Impacts to Wolverines, Mont. Code Ann. § 75-1-201)

54. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 53.

55. MEPA and its implementing regulations require DEQ to evaluate all of the direct, secondary, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must "examine the relevant data and articulate a satisfactory explanation for its action, including a

rational connection between the facts found and the choice made." Mont. Wildlife Fed'n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

56. DEQ, however, failed to rationally explain its conclusions concerning the impacts the proposed exploration project will have on wolverines. Although DEQ acknowledges the risk of harm to wolverines from Lucky's exploration activities, including potential impacts to denning and reproduction, the Final EA does not rationally explain why these impacts are not significant or how DEQ's proposed mitigation will prevent or reduce these impacts.

57. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

THIRD CAUSE OF ACTION
(Failure to Rationally Evaluate Impacts from Artesian Wells, Mont. Code Ann. § 75-1-201)

58. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 57.

59. MEPA and its implementing regulations require DEQ to evaluate all of the direct, indirect, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Mont. Wildlife Fed'n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

60. DEQ, however, failed to rationally address impacts from artesian wells, which DEQ expects Lucky will encounter while drilling in the project area. Rather than explain how Lucky will address artesian discharges at the project site, the Final EA provides that Lucky will prepare a mitigation plan at a future time to address those impacts. DEQ cannot rely on a hypothetical mitigation plan to support its conclusion that artesian well impacts will not be significant. See Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on "design, or enforceable

controls or stipulations or both imposed by the agency or other government agencies" to deem impacts insignificant) (emphasis added).

61. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

FOURTH CAUSE OF ACTION
(Failure to Evaluate Secondary Impacts of Full-Scale Mining, Mont. Code Ann. § 75-1-201)

62. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 61.

63. MEPA requires DEQ to evaluate a project's secondary environmental impacts, Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d), which include "impact[s] to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action," Admin. R. Mont 17.4.603(18).

64. Here there are "substantial questions" regarding the potentially significant secondary impacts of full-scale mine development on private lands and National Forest lands that are subject to a federal withdrawal proposal. Protecting Paradise, slip. op. at 10–11. In particular, Lucky may seek to use its exploration project on private lands to establish mining rights on adjacent public lands that would exempt its future mining activities from the effect of the federal withdrawal. While Lucky's ability to do so is uncertain, the environmental consequences would be severe. Rather than evaluate these impacts or the likelihood they will occur, as MEPA requires, DEQ dismissed them out of hand.

65. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

FIFTH CAUSE OF ACTION
(Failure to Evaluate a Reasonable Range of Alternatives, Mont. Code Ann. § 75-1-201)

66. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 65.

67. Under MEPA, DEQ is required to consider reasonable alternatives to the proposed project. Mont. Code Ann. § 75-1-201(1)(b)(v). This requirement ensures that DEQ considers all of its options, including options that may cause less harm to the environment, before deciding whether to approve a proposed project. See id.

68. DEQ failed to evaluate reasonable alternatives that would have reduced the scope of the proposed project and, accordingly, its impacts.

69. DEQ dismissed these alternatives based solely on Lucky's unsubstantiated assertions that it must drill a specific number of boreholes. In doing so, DEQ failed to independently evaluate the feasibility of reducing the scale of the project, as required by MEPA. See Mont. Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor")

70. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SIXTH CAUSE OF ACTION
(Failure to Complete an EIS, Mont. Code Ann. § 75-1-201)

71. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 70.

72. Under MEPA, if DEQ determines that a project may have any significant impacts, it must prepare an EIS. Mont. Code Ann. § 75-1-201(1)(b)(iv).

73. As discussed above, DEQ has not rationally explained why acknowledged impacts to wildlife, including wolverines, impacts to water quality, or the consequences of full-scale mining are not significant, nor has DEQ explained how its proposed mitigation measures will eliminate otherwise significant impacts.

74. DEQ therefore acted arbitrarily and capriciously in approving the proposed exploration project without preparing an EIS or providing a rational explanation why an EIS is not required.

75. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SEVENTH CAUSE OF ACTION
(Unconstitutionality of Mont. Code Ann. § 75-1-201(6)(c), (d) – Clean and Healthful Environment)

76. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 75.

77. The State's constitutional obligation to prevent unreasonable environmental degradation under article II, section 3 and article IX, section 1 of Montana's Constitution is expressly implemented by MEPA, Mont. Code Ann. § 75-1-102, which promotes a healthy environment by requiring state agencies to thoroughly evaluate the environmental consequences of activities they permit before those activities occur.

78. Allowing Lucky's exploration project to commence before DEQ thoroughly and reasonably evaluates the project's environmental harm under MEPA would implicate Plaintiffs' fundamental right to a clean and healthful environment. Mont. Const. art. II, § 3.

79. The Montana Legislature amended MEPA in 2011 to provide that the sole remedy for MEPA noncompliance is a remand to the agency. Mont. Code Ann. § 75-1-201(6)(c); 2011 Mont. Laws ch. 396 (SB 233). As MEPA is currently written, "[a] permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court." Mont. Code Ann. § 75-1-201(6)(d).

80. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would permit unexamined environmental harm, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const., art. II, § 3, art. IX, § 1.

81. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const., art. II, § 3, art. IX, § 1.

EIGHTH CAUSE OF ACTION
(Unconstitutionality of Mont. Code Ann. § 75-1-201(6)(c), (d) – Public Participation)

82. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 81.

83. Montana Code Annotated sections 75-1-201(6)(c) and (d) also violate Plaintiffs' constitutional right to reasonable public participation prior to the agency's final decision. Mont. Const., art. II, § 8.

84. Under the Legislature's 2011 MEPA amendments, Lucky's exploration project may commence before DEQ has undertaken a lawful analysis of the project's significant environmental impacts and alternatives to lessen those impacts, and importantly, before the public has had a meaningful opportunity to evaluate and comment on DEQ's revised analysis. See Mont. Code Ann. § 75-1-201(6)(c) (providing that an authorization issued by an agency may not be revoked or suspended "pending the completion of an environmental review that may be remanded by a court").

85. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would foreclose meaningful public participation before DEQ's decision to authorize mineral exploration was made and implemented, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const., art. II, § 8.

86. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const., art. II, § 8.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare unlawful and set aside DEQ's July 26, 2017 EA evaluating mineral exploration in Emigrant Gulch;

2. Order DEQ to conduct a new environmental analysis that complies with MEPA;

3. Declare unlawful and vacate the exploration license permitting Lucky Minerals to conduct mineral exploration in Emigrant Gulch;

4. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 3 and article IX, section 1, as applied to this case.

5. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 8, as applied to this case.

6. Grant temporary and/or permanent injunctive relief prohibiting the proposed mineral exploration; and

7. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted this 1st day of June, 2018.

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MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and LUCKY MINERALS, INC., Defendants.	Cause No. DV-17-126 **SPECIAL APPEARANCE OF THE OFFICE OF THE ATTORNEY GENERAL AND STATE OF MONTANA**

On May 21, 2018, the Office of the Attorney General received a document titled "Plaintiff's Conditional Notice of Constitutional Question" ("Conditional Notice"), stating that the Plaintiffs "may challenge" the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). The ***original*** Complaint was served

with the Conditional Notice; however, the subsequent Amended Complaint asserting a constitutional question was not.

The purpose of this Special Appearance is to notify the Court and counsel that the Plaintiffs' Conditional Notice does not comport with Rule 5.1 of the Montana Rules of Civil Procedure. As such, it has no force or effect; it is a nullity not authorized by law. Rule 5.1(a) provides:

> A party that files a pleading, written motion, or other paper challenging the constitutionality of a state statute ***must promptly file a notice of constitutional question*** stating the question and identifying the paper that raises it, ***and serve the notice and paper on the state attorney general*** either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(Emphasis added.)

First, the Conditional Notice was filed prematurely, before the Plaintiffs had decided whether to challenge the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). See Conditional Notice at 1 (stating that the Plaintiffs "may" challenge the constitutionality of the statute). Second, the Plaintiffs failed to serve their Amended Complaint with the Conditional Notice, as expressly mandated by Rule 5.1. Moreover, the Rule also reflects that Plaintiffs' erroneous assumption that formal notice to the Attorney General is unnecessary because

the Department of Environmental Quality is a party (*see* Conditional Notice at 2, n.1) is demonstrably incorrect.[1]

As the Court has ordered the filing of the Amended Complaint, it is now incumbent upon the Plaintiffs to comply with the law and serve the Attorney General with a legally sufficient Rule 5.1 Notice and a copy of the Amended Complaint. The Attorney General will then have 60 days from service of such Notice within which to decide whether to intervene. *See* Mont. R. Civ. P. 5.1(b). ***Before the 60-day time to intervene expires, the Court may reject the constitutional challenge, but may not enter judgment holding the statute unconstitutional.*** *Id.*

In summary, the Attorney General does not, and indeed cannot, recognize the validity of Plaintiffs' Conditional Notice of Constitutional Question dated May 17, 2018.

Respectfully submitted June 21, 2018.

TIMOTHY C. FOX
Montana Attorney General

By: _____
ROB CAMERON
Deputy Attorney General

[1] Perhaps Plaintiffs' confusion arises from the fact that prior to 2011, under M.R.Civ.P. 24(d) the requirement to serve the Attorney General arose only when "neither the state nor any agency or any officer or employee thereof" was a party. In 2011, the Montana Supreme Court abolished Rule 24(d) and replaced it with Rule 5.1 which requires plaintiffs to serve the Attorney General in all cases involving a constitutional challenge to a statute regardless of whether another State agency is a party.

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2018, a true and correct copy of the foregoing document was served by deposit in the U.S. Mail, First Class and postage prepaid, and addressed as follows:

Jenny K. Harbine
Joshua R. Purtle
Earthjustice
313 East Main Street
Bozeman, MT 59715

C. Edward Hayes
Special Assistant Attorney General
Department of Environmental Quality
P.O. Box 200901
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KD Feeback
Toole & Feeback, PLLC
702 Main Street
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DATED: June 21, 2018

HON. BRENDA R. GILBERT
District Judge
Sixth Judicial District
414 East Callender Street
Livingston, Montana 5904
406-222-4130

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

* * * * * * * * * * * * * * *

PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION, Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and LUCKY MINERALS, INC., Defendants.	CAUSE NO. DV 17-126 **ORDER REGARDING PROCEDURE REQUIRED UPON CHALLENGE TO CONSTITUTIONALITY OF STATUTE**

The Court has reviewed Plaintiffs' Conditional Notice of Constitutional Question, the Special Appearance of the Office of the Attorney General and State of Montana, the Plaintiffs' Response to Special Appearance of the Office of the Attorney General and State of Montana, and the Requirements of Rule 5.1, M.R.Civ. P. Good causes exists for the following order, which clarifies the procedural requirements for a constitutional challenge to a statute, as applied to the documents filed in this case.

The Requirements of Rule 5.1, M.R.Civ. P.

The requirements of Rule 5.1. entitled, "Constitutional Challenge to a Statute — Notice and Intervention", are set forth as follows:

(a) Notice by a Party. A party that files a pleading, written motion, or other paper challenging the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, and serve the notice and paper on the state attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(c) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Procedural History

Plaintiffs' Complaint was filed on September 22, 2017. This original Complaint does not set forth a cause of action regarding a constitutional challenge to any statute. On May 17, 2018, the Plaintiffs filed Plaintiffs' Conditional Notice of Constitutional Question, (hereafter, "Conditional Notice"). Therein, the Attorney General was notified that

> "Plaintiffs Park County Environmental Council and Greater Yellowstone Coalition may challenge the constitutionality of Montana Code Annotated sections 75-1-201(6)(c) and (d), provisions of the Montana Environmental Policy Act ("MEPA") that restrict the Court's equitable power to prevent environmental harm pending the State's MEPA compliance. Mont. Code Ann. § 75-1-201(6)(c)(d), (providing that sole remedy for MEPA compliance is remand to the agency, and an "authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended.")

The Conditional Notice goes on to explain the pending challenge to DEQ's decision to grant an exploration license to Lucky Minerals. The Conditional Notice further represents that, "in the event this Court finds that DEQ failed to evaluate significant environmental harm caused by mineral

exploration, Plaintiffs intend to amend their complaint" to specifically allege that MEPA's remedial restrictions violate the Montana Constitution. In the Conditional Notice, Plaintiffs represent that the State was notified of their intent to challenge the constitutionality of MEPA's remedial restrictions during oral argument on the summary judgment motions herein. By footnote in the Notice, Plaintiffs contend that formal notice to the Attorney General under Rule 5.1(a) M.R.Civ.P is not required because the State is a party.

Plaintiffs made clear they were providing the Conditional Notice because Lucky Minerals intends to begin exploration activities as soon as July 15, 2018. The Conditional Notice was provided to the Attorney General with a copy of the original Complaint and was further provided to counsel of record herein.

This Court entered a Decision on May 23, 2018, finding that the DEQ violated the requirements of MEPA in the analysis that led to it granting Lucky Minerals its exploration license. The Court entered an Order setting aside the Final Environmental Assessment for the Lucky Minerals Exploration Project and remanded the matter to the Montana Department of Environmental Quality for further environmental review consistent with the Court's May 23, 2018 Decision.

Plaintiffs filed their Motion for Leave to Amend Complaint and Plaintiffs' Motion for Vacatur of Exploration License on June 1, 2018. On June 18, 2018, the Court entered an Order Granting Plaintiffs' Motion to Amend Complaint and directing the Clerk of Court to file the First Amended Complaint that was lodged in the Court file upon Plaintiffs' filing of their Motion to Amend. Thus, Plaintiffs' First Amended Complaint for Declaratsory and Injunctive Relief was filed on June 18, 2019.

Plaintiff's First Amended Complaint, as its Seventh Cause of Action, sets forth a claim alleging that Mont. Code Ann. § 75-1-201(6)(c), (d) is unconstitutional.

The Parties' Positions

The Attorney General filed a Special Appearance of the Office of the Attorney General and State of Montana on June 21, 2018. In its Special Appearance, the Attorney General represents that the Plaintiffs' original Complaint was served with the Conditional Notice, but that the subsequent Amended Complaint asserting a constitutional question was not. The Attorney General points out that the Conditional Notice was filed before Plaintiffs decided to challenge the constitutionality of the MEPA remedial restriction and was premature.

The Attorney General disagrees with Plaintiffs' representation that service on the Attorney General is not required where the State is already a party to the case. The Attorney General maintains that the Plaintiffs' Conditional Notice does not comport with Rule 5.1 and has no force and effect.

In Plaintiffs' Response to the Special Appearance of the Attorney General, Plaintiffs argue that they have complied with Rule 5.1, that the Attorney General has had actual notice, and that the Attorney General's position would create an unacceptable delay that would impair Plaintiffs' environmental rights. Plaintiffs maintain that their Conditional Notice was sufficient, and was provided to give sufficient notice to allow the Attorney General to respond by July 16, 2018.

Application of the Requirements of Rule 5.1

The plain language of Rule 5.1 (a) requires that, "[a] party that files a pleading, written motion, or other paper challenging the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, and

serve the notice and paper on the state attorney general." The notice and the paper raising the constitutionality of the statute must be served on the attorney general. The Court has no discretion to contravene the plain language of this Rule.

The Attorney General states, and Plaintiffs have not denied, that Plaintiffs did not serve their Amended Complaint on the Attorney General. This is, "the paper raising the constitutionality of the statute" and it must be served on the Attorney General. Such service starts the sixty day time frame that the Attorney General has to intervene as to the constitutional challenge.

The Conditional Notice that was provided to the Attorney General on or about May 17, 2018, was ineffective to put the Attorney General on notice that it had a constitutional challenge to address. The reason it was ineffective is because it was conditional and because it was not accompanied by "the paper raising the constitutionality of the statute", as required by Rule 5.1(a).

The Court recognizes that Plaintiffs' provision of the Conditional Notice was done in an effort to jump start the sixty day time frame to intervene to which the Attorney General is entitled. However, there is no discretion on the part of the Court that would allow for deviation from the plain language of the Rule.

The fact that a possible constitutional challenge to the statute was also mentioned by Plaintiffs' counsel during oral argument on the summary judgment motions does not suffice as notice either. The Attorney General correctly points out that when Rule 24(d), M.R. Civ. P. was abolished by the Montana Supreme Court in 2011, and replaced by Rule 5.1, the requirement was established for the Attorney General to be served in all cases involving a constitutional challenge to a statue regardless of whether another State agency is a party.

Because the requirements of Rule 5.1 M.R. Civ. P have not been met, the Court must vacate the hearing scheduled for July 10, 2018 for oral argument regarding Plaintiffs' Motion for Vacatur.

DATED this 29th day of July, 2018.

Brenda R. Gilbert

BRENDA R. GILBERT, District Court Judge

cc: Jenny K. Harbine sent via email and US Mail
Joshua R. Purtle sent via email and US Mail
C. Edward Hayes / John F. North sent via email and US Mail
KD Feeback sent via email and US Mail
Rob Cameron, Attorney General's Office sent via email and US Mail.

MLD 6-29-18 JC

DA 19-0492

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 303

PARK COUNTY ENVIRONMENTAL COUNCIL
and GREATER YELLOWSTONE COALITION,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL
QUALITY and LUCKY MINERALS, INC.,

Defendants and Appellants,

and

STATE OF MONTANA, by and through the
Office of the Attorney General,

Intervenor and Appellant.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV-17-126
Honorable Brenda Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant Department of Environmental Quality:

Edward Hayes (argued), Special Assistant Attorney General, Department of Environmental Quality, Helena, Montana

For Appellant Lucky Minerals, Inc.:

KD Feeback (argued), Toole & Feeback, PLLC, Lincoln, Montana

For Intervenor and Appellant State of Montana:

Timothy C. Fox, Montana Attorney General, Matthew T. Cochenour, Acting Solicitor General, Rob Cameron (argued), Deputy Attorney General, Jeremiah Langston, Assistant Attorney General, Helena, Montana

For Appellees:

Jenny K. Harbine (argued), Earthjustice, Bozeman, Montana

Argued and Submitted: September 30, 2020

Decided: December 8, 2020

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Montana Department of Environmental Quality, Lucky Minerals, Inc., and intervenor Montana Attorney General Tim Fox appeal from a May 23, 2018 ruling granting summary judgment to Park County Environmental Council and Greater Yellowstone Coalition and an April 12, 2019 order of vacatur of the contested exploration license. We affirm in part, reverse in part, and remand to the Montana Department of Environmental Quality to conduct additional analysis consistent with this Opinion.

¶2 We address the following issues on appeal:

> *Issue One: Whether Plaintiffs have standing to challenge the Department of Environmental Quality's issuance of an exploration permit to Lucky Minerals, Inc.*
>
> *Issue Two: Whether the District Court erred in determining that the Department of Environmental Quality was required to evaluate the environmental impacts of potential full-scale mining on federal lands.*
>
> *Issue Three: Whether the District Court erred in determining that the Department of Environmental Quality had not conducted an adequate analysis of the impacts of expected road improvements.*
>
> *Issue Four: Whether the District Court erred in concluding that the Department of Environmental Quality failed to take a "hard look" at water quality issues.*
>
> *Issue Five: Whether the District Court erred in determining that the Department of Environmental Quality failed to conduct a sufficient analysis of alternatives to exploration approval under the Montana Environmental Policy Act.*
>
> *Issue Six: Whether the District Court erred in determining that § 75-1-201(6)(c) and (d), MCA, which bars equitable remedies for a Montana Environmental Policy Act violation, is unconstitutional under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Emigrant Gulch lies within of the Greater Yellowstone Ecosystem and is located just outside the Absaroka-Beartooth Wilderness. It is a mere 15 miles north of Yellowstone National Park and its watershed flows into the Yellowstone River, a world-renowned trout fishery. The Absaroka Mountains surrounding Emigrant Gulch are home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, and wolves. Emigrant Gulch is within occupied grizzly bear and wolverine habitat as well as Canada lynx designated critical habitat. Emigrant Peak, the most prominent of the mountains flanking Emigrant Gulch, is a popular year-round recreation destination. At the mouth of Emigrant Gulch, residents and visitors have enjoyed the natural mineral pools of Chico Hot Springs for over 100 years. The region's natural beauty is also an important economic driver, supporting tourism that employs large numbers of Park County residents.

¶4 On February 17, 2015, Lucky Minerals, Inc. (Lucky) submitted an exploration license application seeking authorization under the Metal Mine Reclamation Act (MMRA), §§ 82-4-331-32, MCA, to conduct exploration activities within its privately-owned patented St. Julian mine claim block in Emigrant Gulch. Results from the proposed exploration would be used to model subsurface geology and associated mineralization. The St. Julian mine claim block is surrounded by the Custer Gallatin National Forest. Though the original proposal envisioned work on national forest lands, Lucky's revised proposal is for exploration only on its privately-owned patented claims on the St. Julian mine claim block. In its application, Lucky proposed to drill up to 46 holes—expected to average 1,000 feet in depth, with some potentially reaching as deep as 2,000 feet—from 23 drill

pads. The work would take place over the course of two field seasons, each anticipated to last from mid-July to mid-October. Lucky proposed using two drills running two ten-hour shifts per day, the night shift relying on light sources similar to those used by highway construction crews.

¶5 To reach Emigrant Gulch, one must traverse a forest service road that has suffered from rockslides and avalanches and is at times comparable to a Jeep trail not travelable by highway vehicles and best approached by ATV. Lucky's proposed exploration is expected to require the clearing of rocks and debris from the existing Forest Service road in order to access the drilling sight with vehicles and heavy equipment.

¶6 Pursuant to the Montana Environmental Policy Act (MEPA), found under Title 75, chapter one, MCA, the Montana Department of Environmental Quality (DEQ) released a draft Environmental Assessment (Draft EA) in response to Lucky's proposal on October 13, 2016. The Draft EA concluded that Lucky's proposed exploration would not result in significant environmental impacts.

¶7 However, the Draft EA did state that Lucky's proposed exploration would lead to an increase in wildlife disturbance, as road improvements intended to allow Lucky's mining equipment and vehicles to access Emigrant Gulch would also provide easier access for hunters, trappers, and others to enter habitat that has long been inaccessible to many. The Draft EA went on to describe the expected disturbance and displacement of grizzly bears and the potential for den abandonment by female wolverines. Scientific studies in the administrative record confirm that increased human presence in remote areas may have negative effects on wolverine and grizzly bear populations.

¶8 Among the more than 3,000 public comments made on the Draft EA, Montana Fish Wildlife & Parks (FWP) commented that the road improvements could "significantly increase[] [the] level of disturbance and fragmentation" of a presently "very remote and rarely disturbed" habitat. It warned of "a permanent change to the landscape, with long-term implications" for wildlife populations in the area, especially wolverine, lynx, grizzly bear, elk, deer, and moose. FWP recommended altering the project to avoid road improvements or reclaim/close the road after the project's completion.

¶9 On July 26, 2017, DEQ issued its Final Environmental Assessment (Final EA), maintaining that the project posed no significant environmental, and approved Lucky's proposal with slight modifications. In the Final EA, DEQ responded to FWP's comments regarding road improvements by noting that it had "re-evaluated the impact on wildlife resulting from the proposed road improvements and believes that the draft EA overstated the impacts." The Final EA concluded that the road work "may marginally make access to the area easier for hunters and may marginally increase higher mortality" for wildlife in addition to potentially increasing "the harassment or poaching of wildlife." However, DEQ did not expect the proposal to "materially change [the road's] character of an unimproved forest road."

¶10 The Final EA also outlined DEQ's detailed analysis of groundwater quality in the area. DEQ tested groundwater quality at a number of sites in the area, exhibiting a range of water chemistry values. DEQ determined that "[s]ome of the mineralized geologic materials in the Emigrant Mining District are potentially reactive and may produce acid rock drainage or mobilize metals under near-neutral pH conditions. Some water quality

samples within the district reflect the reactive nature of the geology . . . ." In particular, DEQ found elevated acidity and concentrations of Total Dissolved Solids (TDS) and sulfites in sights tested to the north of the East Fork of Emigrant Creek (East Fork), which drains the proposed exploration area. Though DEQ identified natural acid rock drainage occurring to the north of the East Fork, the agency concluded that the reactivity of that slope was due to a locally intense pyrite alteration that was not reflective of all subsurface materials in the East Fork drainage. The Final EA noted the presence of disseminated sulfides throughout the Emigrant Mining District deposits.

¶11 The Final EA also analyzed DEQ's groundwater testing on the south side of the East Fork, the same slope upon which the proposed exploration would occur. DEQ collected samples from a spring, two seeps, and three boreholes created during exploration conducted in 1971-73, known as the Duval Corporation Boreholes (Duval Boreholes). DEQ found minimal flow of less than five gallons per minute and no water quality standard exceedances at these sites, with relatively neutral pH values ranging from slightly acidic to slightly basic. DEQ concluded that the samples from the seeps and the Duval Boreholes "represent what is known about the groundwater flowing mid-slope on the south side of the East Fork." Although the "depths of the [Duval] [B]oreholes and the nature of the altered volcanics that were encountered are unknown," the Final EA found it "likely that [Lucky's] proposed boreholes could produce water with chemistry and flow similar to the Duval Corporation boreholes and the seeps below the St. Julian Mine."

¶12 The Final EA concluded that the expected artesian flow from Lucky's proposed drilling would, like the Duval Boreholes, result in "no discernible impact on water quantity

or quality in the East Fork of Emigrant Creek drainage, and even less so further downstream in Emigrant Gulch." Not only was the groundwater flowing out of the drill holes expected to be of acceptable quality and limited quantity, but DEQ determined that it could be contained. In addressing potential long term impacts of the proposed boreholes, the Final EA pointed to a regulatory provision (not in existence when the Duval Corporation created its boreholes in the 1970s) requiring Lucky to plug each hole prior to removing the drill rig. *See* Admin. R. M. 17.24.106 (1994). To address the impacts of the expected "artesian conditions" during drilling, the Final EA only noted that Lucky would be required to "develop a mitigation plan to effectively contain flow from artesian boreholes during drilling" and that "procedures for artesian flow containment would be developed prior to commencing drilling operations."

¶13 In the Final EA, DEQ briefly considered completing the exploration project within one year rather than two and eliminating night drilling as alternatives to Lucky's proposal. However, DEQ dismissed these alternatives without significant analysis based on the determination that the impacts would be substantially the same as those envisioned by Lucky's proposal. DEQ determined that, by compressing the exploration project into a single season, Lucky might need to use four drill rigs instead of two, with an attendant increase in traffic, noise, and lighting. Under the other alternative, abandoning night drilling, Lucky's operation could potentially minimize bat disturbances, but would result in the project requiring an additional three or four seasons to reach completion. In addition to a "No Action Alternative," DEQ also considered an "Agency-Modified Alternative" to Lucky's proposal containing minor mitigation measures. The Final EA did not address the

potential environmental impacts if Lucky were to use information gained from the proposed exploration to establish vested rights to conduct full scale mining in adjacent federal lands.

¶14 On September 22, 2017, Park County Environmental Council and Greater Yellowstone Coalition (collectively Council and Coalition) filed suit against DEQ and Lucky in the Sixth Judicial District Court, arguing that DEQ did not comply with the requirements of MEPA in producing its Final EA and finding of no significant environmental impact, thereby granting Lucky's exploration license without preparing a full environmental impact statement (EIS). The parties filed cross-motions for summary judgment and, after briefing and argument, the District Court issued a decision in favor of Council and Coalition on May 23, 2018.

¶15 The District Court determined that DEQ had failed to take a "hard look" at the effects of road improvements on grizzly bear and wolverine populations. The District Court also found that DEQ's water quality analysis fell short under MEPA. The District Court concluded that DEQ had "selectively relied upon" the Duval Borehole data while ignoring other, less optimistic, water quality data collected in the area. Furthermore, the District Court held that the Final EA provided only a "plan to make a plan" for Lucky to contain expected artesian flow during drilling. The District Court also concluded that DEQ failed to consider that Lucky's exploration could result in Lucky developing vested rights to mine on federal lands, constituting a "secondary impact" that required evaluation. Finally, the District Court determined that DEQ had given "unwarranted deference" to

Lucky's proposal and failed to conduct sufficient "independent analysis" of potential alternatives, such as the "no night drilling" and "one season" options.

¶16 On June 1, 2018, Council and Coalition filed a Motion for Vacatur of Exploration License in the Sixth Judicial District Court. The State of Montana, by and through the Attorney General, Timothy C. Fox (Attorney General) filed a Notice of Intervention on August 20, 2018. After briefing and oral argument, the District Court issued an order on April 12, 2019, granting the motion for vacatur and voiding Lucky's exploration license. The District Court concluded that the 2011 MEPA Amendments (2011 Amendments), § 75-1-201(c) and (d), MCA (2011 Mont. Laws ch. 396, § 2), which strip the judiciary of any remedy for a MEPA violation other than a remand to the agency, violated the guarantees of a clean and healthful environment, adequate remedies to prevent unreasonable degradation, and the right of public participation found in Article II, Section 3, Article IX, Section 1, and Article II, Section 8, of the Montana Constitution.

¶17 Lucky filed this appeal on August 27, 2019. Significantly, in March 2019, the United States Congress enacted a mineral withdrawal of the federal lands adjacent to Lucky's private claim block, rendering these lands permanently off limits to mining. John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, 133 Stat. 580 (2019).[1]

[1] On May 19, 2020, the Court requested supplemental briefing regarding the congressional withdrawal's effect on the District Court decision.

STANDARD OF REVIEW

¶18 A district court's grant or denial of summary judgment, and related conclusions of law, are reviewed de novo for correctness. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712. This Court reviews DEQ's MEPA analysis using the same standard as a district court, determining whether the agency decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *See Clark Fork Coal. v. Mont. Dep't. of Envtl. Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482 (quotation omitted); *see also* § 75-1-201(6)(a)(iii), MCA. We inquire "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Clark Fork Coal.,* ¶ 21 (quotation omitted). Accordingly, this Court "looks closely" at agency decisions to determine whether the agency has taken a "hard look" by fulfilling its obligation to "make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.*, ¶ 47. The Court's focus is on the administrative decision-making process rather than the decision itself. *Clark Fork Coal.*, ¶ 47. In general, agency decisions implicating "substantial agency expertise" are afforded "great deference." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493 (*MEIC III*) (citations omitted). Government actions that interfere with the exercise of a fundamental right are subject to strict scrutiny review. *See Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 1999 MT 248, ¶¶ 62-63, 296 Mont. 207, 988 P.2d 1236 (*MEIC I*).

DISCUSSION

¶19 *Issue One: Whether Plaintiffs have standing to challenge the Department of Environmental Quality's issuance of an exploration permit to Lucky Minerals, Inc.*

¶20 Lucky argues that Council and Coalition does not have the requisite standing to challenge DEQ's grant of an exploration permit to Lucky, alleging that its members have not demonstrated particularized injuries. To satisfy the constitutional requirements for standing, plaintiffs must "clearly allege a past, present, or threatened injury" that is "distinguishable from the injury to the public generally," and which can be "alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 33, 360 Mont. 207, 255 P.3d 80 (citations omitted). Under the standing analysis, a judiciable injury may be to aesthetic or recreational interests. *See Heffernan*, ¶ 38 (finding property owner had standing where proposed development could decrease wildlife presence and increase traffic, noise, and pets); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 41-42, 356 Mont. 41, 230 P.3d 808 (finding landowner had standing to challenge subdivision allegedly expected to disrupt his enjoyment of the property through adverse impacts to the water supply, wildlife habitat, and wetlands in addition to causing increased noise, traffic, and light pollution); *MEIC I*, ¶ 45 (finding plaintiffs had standing to challenge action with arguably adverse impact on waterway in which they "fish and otherwise recreate"); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484 (9th Cir. 2011).

¶21 Members of Council and Coalition filed affidavits demonstrating that, for years, they have variously hiked, climbed, skied, and biked in Emigrant Gulch, as well as owned

property in the area and maintained a business, Chico Hot Springs Resort, at the base of Emigrant Gulch. They allege that Lucky's activities will harm their recreational interests by disturbing wildlife habitat and scenic beauty, introducing industrial activity into a pristine wilderness, and threatening water quality, in addition to diminishing the value and enjoyment of their nearby properties and business. Members of Council and Coalition allege that harms would be caused not only by potential full-scale mining operations, but by Lucky's proposed exploration activities.

¶22 Members of Council and Coalition have clearly alleged a threatened injury to their property, recreational, and aesthetic interests. This injury is particularized to these and other individuals who live and recreate in and around the Emigrant Gulch and is not shared by the public at large. *See Aspen Trails Ranch*, ¶ 43 (concluding proximity to development demonstrated that impacts would have more particular effect on plaintiff than the general public). The alleged injury is the direct result of DEQ's approval of Lucky's exploration permit and could be alleviated by a successful action resulting in an order vacating the permit. These individuals meet the constitutional requirements for standing.

¶23 Associations have standing to assert the rights of their members:

> when (a) at least one of its members would have standing to sue in his or her own right, (b) the interests the association seeks to protect are germane to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual participation of each allegedly injured party in the lawsuit.

Mont. Immigrant Justice All. v. Bullock, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430 (citing *Heffernan*, ¶ 43).

¶24 Because Council and Coalition's members have standing to bring the suit in their own right and Lucky does not challenge the remaining elements of associational standing, we conclude that the District Court did not err in determining that Council and Coalition has standing to challenge DEQ's decision to issue Lucky an exploration permit without first producing an EIS.

¶25 *Issue Two: Whether the District Court erred in determining that the Department of Environmental Quality was required to evaluate the environmental impacts of potential full-scale mining on federal lands.*

¶26 DEQ and Lucky argue that the District Court erred in faulting DEQ for failing to consider the environmental impacts of full-scale mining in neighboring federal lands that could potentially occur as a result of the information gained during Lucky's proposed exploration activities. However, on March 12, 2019, after the District Court issued its decision, Congress placed these national forest lands permanently off-limits to future mining. *See* John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1204, 133 Stat. 580, 653 (2019). Section 1204 of this legislation, titled "Emigrant Crevice Withdrawal," provides:

> (b) Withdrawal.—Subject to valid existing rights in existence on the date of enactment of this Act, the National Forest System land and interests in the National Forest System land, as depicted on the map, is withdrawn from—
>
> (1) location, entry, and patent under the mining laws; and
>
> (2) disposition under all laws pertaining to mineral and geothermal leasing.

Section 1204, 133 Stat. at 653.

¶27 According to Council and Coalition, this enactment foreclosed any potential full-scale mining by Lucky on neighboring federal lands. If so, then the issue of whether

DEQ should have analyzed the potential impacts of such activities is rendered moot. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75 ¶ 17, 364 Mont. 390, 276 P.3d 867 ("[I]f the issue presented at the outset of the action has ceased to exist or is no longer 'live,'" the issue is moot.). A determination of mootness would preclude us from considering the issue further. *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 11, 355 Mont. 142, 226 P.3d 567 ("A court lacks jurisdiction to decide moot issues or to give advisory opinions insofar as an actual 'case or controversy' does not exist."). However, Lucky argues that it may still conduct full-scale mining on neighboring federal lands in the future, based on the contention that it has "valid existing rights in existence" on March 12, 2019, the date the congressional withdrawal was enacted. *See* § 1204, 133 Stat. at 653.

¶28 The U.S. Forest Service considered the issue of valid existing rights in a Draft Environmental Assessment that the Forest Service produced in preparation for a prior administrative withdrawal proposed for the same area:

> The process for determining valid existing rights must be conducted by a certified mineral examiner. The findings in the mineral examiners report would either (1) recognize that the claim(s) has valid existing rights and that the NOI or plan of operations should be processed, or (2) recommend initiating contest charges against the claim through the BLM, subject to their technical approval of the report. The process for determining valid existing rights is outside the scope of this environmental analysis.

U.S. Dep't of Agric. Forest Serv., *Emigrant Crevice Mineral Withdrawal Draft Environmental Assessment* 15 (2018).

¶29 This glimpse into federal mining law demonstrates that Lucky's aspirations for a full-scale mine depend in part on federal actors applying complex federal law. The

outcome of this process is both uncertain and beyond the authority of this Court. Because we cannot be certain that the Emigrant Crevice Withdrawal has completely precluded the possibility of an eventual full-scale mine, we cannot say that the issue of whether DEQ should have considered that possibility is moot.

¶30 In its May 23, 2018 decision made prior to the congressional withdrawal, the District Court found that DEQ was required to consider the potential for future full-scale mining as a "secondary impact" of the proposed exploration. The District Court voiced concern that the information gained from the proposed exploration could give rise to vested rights to mine national forest property under the Mining Act of 1872. *See* 30 U.S.C. § 26 (providing that "locators of all mining locations . . . [made] on any mineral vein, lode, or ledge . . . shall have the exclusive right of possession and enjoyment of . . . all veins, lodes, and ledges throughout their entire depth" though they may "depart from a perpendicular in their course downward as to extend outside the vertical side-lines"); *Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 375 (9th Cir. 1999) (noting that mining rights on federal lands may be established by a "geologic inference" of a "reasonable likelihood of the persistence of similar mineralization beyond the areas actually sampled").

¶31 At its core, MEPA requires DEQ to engage in a prescribed level of environmental forecasting before taking an action impacting the environment. As we explained in *Bitterrooters for Planning*:

> MEPA requires an agency to produce a formal environmental impact statement (EIS) if an agency action will significantly affect the quality of the human environment. However, MEPA does not require an EIS if a preliminary EA determines that the agency action *will not significantly affect* the quality of the human environment. An EA thus serves as both the initial

> tool for determining whether a more intensive EIS is necessary and as the mechanism for required environmental review of agency actions that will likely impact the environment but not sufficiently to require an EIS.

Bitterrooters for Planning, Inc., ¶ 20 (citations omitted) (emphasis added). The critical issue here is whether, by granting a permit allowing exploration that could produce information potentially leading, in turn, to a full-scale mine on federal lands, DEQ has taken an agency action significantly affecting the environmental attributes of those federal lands. If so, DEQ would be required to consider those effects and, should they be found to be significant, prepare a detailed EIS with which to fully understand them.

¶32 In considering the degree to which an agency action will affect the quality of the human environment, an environmental assessment must include an evaluation of "secondary impacts," defined as "a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action." Admin. R. M. 17.4.603(18), .609(3)(d) (1989). However, MEPA "requires a reasonably close causal relationship between the triggering state action and the subject environmental effect." *Bitterrooters for Planning, Inc.*, ¶ 33. The critical point by which the required environmental review must have occurred is the "go/no go" juncture, beyond which lies an "irretrievable commitment of resources" or "successive steps set into irreversible motion." *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 461-62, 778 P.2d 862, 868-69 (1989) (citing *Conner v. Burford*, 836 F.2d 1521, 1528 (9th Cir. 1988)).

¶33 Here, DEQ's decision to grant an exploration license to Lucky does not irreversibly set in motion a chain of events inevitably leading to a full-scale mine. Lucky is required to get another approval from DEQ prior to conducting any future mining operations.

Section 82-4-335(1), MCA. DEQ's response would once again be governed by MEPA. The "go/no go" point on any potential full-scale mining in the area has not yet been reached. *See North Fork Preservation*, 238 Mont. at 462, 778 P.2d at 869 (finding that an EIS was not required before drilling exploratory well where oil and gas lease prohibited further activity until receiving state approval, such that full-scale drilling was not "a matter of successive steps set into irreversible motion by the issuance of the lease.").

¶34 Moreover, the Mining Act of 1872 does not preempt state environmental regulations. *See Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584, 107 S. Ct. 1419, 1426 (1987) (California Coastal Commission's requirement that claimant obtain a state permit to mine in national forests not preempted by federal regulations under the Mining Act of 1872); *see also Cal. Coastal Comm'n,* 480 U.S. at 603, 107 S. Ct. at 1436 (Powell, J., dissenting) ("[I]f the Coastal Commission can require Granite Rock to secure a permit before allowing mining operations to proceed, it necessarily can forbid Granite Rock from conducting these operations."). Therefore, even if Lucky's exploration yields discoveries that grant Lucky rights under the Mining Act of 1872, DEQ will still have the final say before any future mining activities go forward. By granting Lucky an exploration permit now, DEQ has not yet crossed an event horizon from which there is no return. The point by which DEQ must consider the environmental impacts of a full scale mine will be if and when DEQ acts upon an application for a full scale mine.[2]

[2] Because we conclude that DEQ was not required to consider potential future mining on federal lands, we need not address DEQ's alternative argument that Council and Coalition was precluded from raising the issue by the doctrine of administrative issue exhaustion.

¶35 *Issue Three: Whether the District Court erred in determining that the Department of Environmental Quality had not conducted an adequate analysis of the impacts of expected road improvements*.

¶36 The District Court determined that DEQ had not taken a "hard look," as required under MEPA, at the impacts of Lucky's expected road work on wildlife in the area, particularly grizzly bears and wolverines. On appeal, DEQ does not defend its analysis on this matter and asks the Court to remand to DEQ to conduct supplemental environmental review on the issue. Though Lucky challenges the District Court decision and defends DEQ's initial analysis, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870 (1983). Because DEQ has expressly chosen not to defend its own analysis of the proposed road improvements' impact on wildlife or to appeal the District Court's decision on the matter, but instead requests the opportunity to conduct supplemental review of the matter, we affirm the District Court's ruling to that effect and remand to DEQ for additional analysis.

¶37 *Issue Four: Whether the District Court erred in concluding that the Department of Environmental Quality failed to take a "hard look" at water quality issues*.

¶38 The District Court found that DEQ failed to take a "hard look" at relevant water quality data by over-relying on data from the Duval Boreholes while disregarding other sample sites with somewhat less benign water chemistry and evidence of geological materials with the potential to cause acid rock drainage in the area. DEQ denies having "cherry-picked" favorable evidence in its Final EA and claims to have reached its decision

by examining all available evidence and determining that the Duval Boreholes provided the most representative samples for predicting the impact of Lucky's proposed drilling.

¶39 The detailed analysis of DEQ's groundwater sampling in its Final EA convinces us that DEQ did take the requisite "hard look" at the relevant data before concluding that there would be no significant environmental impact from groundwater quality issues associated with Lucky's proposed exploration. The Final EA discussed how the results of groundwater sampling were correlated with their location in relation to the East Fork of Emigrant Creek. While samples taken from the north of the East Fork demonstrated potentially more troubling water chemistry, those taken from the south slope, the same slope upon which Lucky's proposed exploration would occur, did not exceed water quality standards. DEQ concluded that this variation was due to the presence of "locally-intense pyrite alteration" to the north of the East Fork and determined that the "acidic chemical signature is certainly not reflective of all subsurface materials in the East Fork of Emigrant Creek drainage."

¶40 The Final EA determined that, among the sites sampled to the south of the East Fork, "[i]n addition to the St. Julian Mine area seeps, the flowing Duval Corporation boreholes represent what is known about the groundwater flowing mid-slope on the south side of the East Fork." Although the "depths of the boreholes and the nature of the altered volcanics that were encountered are unknown," the Final EA found it "likely that the proposed boreholes could produce water with chemistry and flow similar to the Duval Corporation boreholes and the seeps below the St. Julian Mine." Based on this analysis, DEQ concluded that the expected flow from Lucky's proposed boreholes would result in

"no discernible impact on water quantity or quality in the East Fork of Emigrant Creek drainage, and even less so further downstream in Emigrant Gulch."

¶41 After analyzing groundwater samples collected from a variety of sites in the area, DEQ determined in its Final EA that the data collected from sites to the south of the East Fork was more predictive of groundwater conditions in the proposed exploration area than those sites to the north of the East Fork, which were affected by a locally intense pyrite alteration. Thus, DEQ has "articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" and we cannot conclude that its decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454 (*MEIC II*); *Clark Fork Coal.*, ¶ 47. The depth of the analysis presented in the Final EA supports a conclusion that DEQ took the necessary "hard look" at the issue of ground water quality.

¶42 Council and Coalition points to a passage of a Montana Bureau of Mines and Geology report from 2000 describing the effect of the artesian flow from the Duval Boreholes at that time as "unknown and may be of some concern." Neither this expression of past uncertainty nor the existence of localized mineral formations in the area with the potential to create acidity undermines DEQ's current determination, after conducting a detailed groundwater analysis of the area, that Lucky's proposed boreholes are expected to share similarities with the Duval Boreholes and not significantly impact the environment.

¶43 The process of assigning relative weights to conflicting data for predictive purposes is essentially a technical exercise requiring agency expertise that should be afforded

substantial deference. *MEIC III*, ¶ 20 (agency decisions implicating "substantial agency expertise" are afforded "great deference"). The Court's role in these areas is limited. *Clark Fork Coal.*, ¶ 47. DEQ provided legitimate scientific reasons for its decision to rely on data from the Duval Boreholes. We conclude that the District Court erred in substituting its judgment for that of the agency regarding which samples were most predictive of the environmental impacts from Lucky's proposed boreholes.

¶44 However, DEQ concedes that the Final EA's requirement that Lucky develop a mitigation plan to contain artesian flow before commencing drilling—referred to by the District Court as a mere "plan to make a plan"—was insufficient and DEQ does not challenge the District Court finding on the matter. DEQ concedes that it should have, in its Final EA, identified and evaluated specific measures for Lucky to take before granting the exploration license and requests that the matter be remanded back to the agency to conduct supplemental environmental review on the issue. Therefore, we affirm the District Court decision to remand to DEQ to conduct supplemental review on the issue of containing artesian flow during drilling.

¶45 *Issue Five: Whether the District Court erred in determining that the Department of Environmental Quality failed to conduct a sufficient analysis of alternatives to exploration approval under the Montana Environmental Policy Act.*

¶46 DEQ challenges the District Court's conclusion that DEQ failed to conduct a sufficient independent analysis of reasonable alternatives by dismissing, without detailed analysis, modifications such as proceeding without night drilling or completing the exploration in one season rather than two. In its Final EA, DEQ concluded that these options would not substantially decrease the project's total environmental impacts but,

rather, would essentially simply spread out or concentrate them across a different length of time. DEQ concluded that preventing night drilling would extend the project on over the course of additional seasons while compressing the project into a single season would increase the intensity of environmental impacts during that time frame. As Council and Coalition points out, these conclusions contain a hidden premise: that a scaled down project with fewer drilling locations was not an option under consideration. The dispute here turns on whether DEQ is obligated to consider a scaled-down alternative to Lucky's proposal of creating 46 boreholes from 23 drill pads.

¶47 MEPA requires agencies to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources." Section 75-1-201, MCA. One of the purposes of an EA is to "assist in the evaluation of reasonable alternatives," Admin. R. M. 17.4.607(2)(b) (1989), and an EA must contain "analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider." Admin. R. M. 17.4.609(3)(f) (1989). Under MEPA, an alternative analysis is defined as an "evaluation of different parameters, mitigation measures, or control measures that would accomplish the same objectives as those included in the proposed action by the applicant. For a project that is not a state-sponsored project, it does not include an alternative facility or an alternative to the proposed project itself." Section 75-1-220(1), MCA.

¶48 Like the parties here, federal courts addressing the analogous National Environmental Policy Act (NEPA) are not in accord in determining the scope of the

relevant objectives, whether they are those held by the agency or by the applicant, and who they should be defined by. *See, e.g.*, *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1071-72 (9th Cir. 2010) (finding agency's purpose and need statement including three goals of the applicant and only one goal of the agency resulted in objectives being defined in unreasonably narrow terms); *Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (holding that the district court erred in adopting overly broad purpose and need—"commercial timber harvesting"—where applicant sought to build a specific timber transfer facility at a designated location (citation omitted)); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (determining that agency purpose "to act upon" applicant's proposal was not unreasonably narrow and permitted "a reasonable range of alternatives" in responding to the application, including by approving it, rejecting, or approving it with modifications); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) ("An agency cannot redefine the goals of the proposal" because "Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be."); *Alaska Survival v. Surface Transp. Bd*., 705 F.3d 1073, 1085 (9th Cir. 2013) (finding that agency must consider the statutory context in addition to private applicant's objectives and act "in light of the goals stated by the applicant").

¶49 Part of the confusion appears to stem from the added layer of analysis that arises when an agency "acts upon"—usually by approving, denying, or approving with modifications—an application by another party seeking to undertake its own action. *Compare Roosevelt,* 661 F.3d at 73 (discussing agency purpose as "to act upon" applicant's

proposal and characterizing the relevant alternatives as varying responses to the application) *with Burlington, Inc.*, 938 F.2d at 199 (characterizing the relevant objectives as defined by the applicant because an "agency cannot redefine the goals of the proposal"). The parties, likewise, disagree here over whether the proper subject of the alternatives analysis is the proposed actions of Lucky—to conduct exploration—or of DEQ—to respond to Lucky's proposal.

¶50 We conclude that MEPA does not require DEQ to attempt to define an applicant's objectives and raise alternatives to the applicant's proposed exploration project. The plain language of the statute requires alternatives analysis only for "major actions *of state government.*" Section 75-1-201(1)(iv), MCA (emphasis added). In the case of a project that is not state-sponsored, the statute makes clear that, while the applicant "may volunteer to implement" a proposed alternative, § 75-1-201(1)(v), MCA, the required alternatives analysis does "not include an alternative facility or *an alternative to the proposed project itself*." Section 75-1-220(1), MCA (emphasis added). The obvious impracticalities of requiring DEQ to put itself in the shoes of each applicant to not only determine whether a proposed project will actually be feasible but also raise alternative approaches that may fail to yield essential information counsel against a strained interpretation to the contrary.

¶51 DEQ properly considered alternative means of reaching its own objective of "act[ing] upon Lucky Minerals' proposal"—namely, by approving, approving with modifications, or denying the application. In doing so, DEQ met its obligation under MEPA to consider alternatives. DEQ was not required by MEPA in this case to unilaterally determine whether Lucky could meet its exploration goals by creating fewer drillholes.

Therefore, we reverse the District Court's holding that DEQ failed to undertake a sufficient analysis of alternatives under MEPA.

¶52 *Issue Six: Whether the District Court erred in determining that § 75-1-201(6)(c) and (d), MCA, which bars equitable remedies for a Montana Environmental Policy Act violation, is unconstitutional under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.*

¶53 Because DEQ concedes that its analysis of road improvement impacts on wildlife and mitigation plans for expected artesian flow during drilling fell short under MEPA, we must now address the issue of appropriate remedies. DEQ asks, and we have agreed, that the matter be remanded to the agency to cure these shortcomings. The issue here centers around the status of Lucky's exploration license while DEQ proceeds to complete its MEPA review. Lucky and the Attorney General contest the District Court order vacating Lucky's exploration license in the interim, pointing to legislative amendments made to MEPA in 2011 (2011 Amendments) prohibiting equitable relief for a MEPA violation. Section 75-1-201(6)(c), (d), MCA (2011 Mont. Laws ch. 396, § 2). The District Court concluded that the 2011 Amendments violated the Montana Constitution's guarantee of a "clean and healthful environment" and its corollary obligation upon the Legislature to provide "adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const., art. II, § 3, art. IX, § 1.

¶54 The Attorney General asks us to avoid the constitutional question and resolve the issue on statutory grounds instead by analyzing MEPA in light of other environmental statutes and noting its procedural nature. "[C]ourts should avoid constitutional issues whenever possible." *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338

Mont. 259, 165 P.3d 1079. However, the doctrine of constitutional avoidance does not allow us to abandon our responsibility to resolve the disputes brought before us.

¶55 Here, DEQ has conceded that its Final EA was insufficient under MEPA and requests the opportunity to correct it. The judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside. *See Citizens for Responsible Dev. v. Bd. of Cty. Comm'rs*, 2009 MT 182, ¶ 26, 351 Mont. 40, 208 P.3d 876; *Aspen Trails Ranch,* ¶ 59; *Kadillak v. Anaconda Co.*, 184 Mont. 127,144, 602 P.2d 147, 157 (1979); *see also Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1185-86 (9th Cir. 2004). Courts only decline to do so in "limited circumstances." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (internal quotation omitted). The District Court correctly determined that equitable relief should be afforded to Council and Coalition if within the court's authority to grant. The 2011 Amendments to MEPA strip that authority. The judiciary will, of course, respect statutory mandates that are within the Legislature's constitutional authority. Whether Council and Coalition is entitled to the remedy sought here depends entirely upon whether the 2011 Amendments are valid under the Montana Constitution. The constitutional question is therefore unavoidable in resolving this dispute.

¶56 The Attorney General's suggestion—that we consider MEPA in light of other environmental statutes or its procedural nature—does not allow us to avoid determining whether the 2011 Amendments are constitutional. While these considerations might be helpful in answering the constitutional question, they provide no alternative means of resolving this dispute without *asking* it. Likewise, the doctrine of constitutional avoidance

does not allow us to, as suggested by the Attorney General, avoid the constitutional question by holding that Council and Coalition should have sought relief under another environmental statute, such as the MMRA.[3] Here, Lucky sought a permit to conduct extensive exploratory actions for determining the feasibility of fully developing a mine, and Council and Coalition contests the lawfulness of DEQ's response under MEPA. We will not avoid our responsibility to resolve the dispute actually before us by hypothesizing about whether other disputes might arise at a future time.

¶57 The 2011 Amendments to MEPA provide that:

> (c) The remedy in any action brought for failure to comply with or for inadequate compliance with a requirement of parts 1 through 3 of this chapter is limited to remand to the agency to correct deficiencies in the environmental review conducted pursuant to subsection (1).
>
> (d) A permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.

Section 75-1-201(6), MCA. These provisions allow a project to go forward even when, as here, the agency has conceded that the project was approved without the proper environmental review required by MEPA. A court's only remedy under the 2011 Amendments is to remand to the agency to complete its review, with no ability to halt the project in the interim.

[3] Despite the Attorney General's repeated assertion that the MMRA provides Council and Coalition with an adequate alternative remedy, the Attorney General does not contend that Council and Coalition would have a valid claim under the MMRA, but, rather, suggested at oral argument that they would not.

¶58 Article II, Section 3, of the Montana Constitution guarantees Montanans inalienable rights that "include the right to a *clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." Mont. Const., art. II, § 3 (emphasis added).

¶59 Significantly, Article IX, Section 1, of the Montana Constitution further provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and *provide adequate remedies to prevent unreasonable depletion and degradation* of natural resources.

Mont. Const., art. IX, § 1 (emphasis added).

¶60 Laws implicating either constitutional provision are subject to strict scrutiny. *MEIC I*, ¶¶ 63-64. Here, neither Lucky nor the Attorney General argue that the 2011 Amendments would survive strict scrutiny review. Instead, they argue that the 2011 Amendments do not implicate the constitutional right or, alternatively, that the Court should apply a lower level of scrutiny by balancing these rights against the right to "possessing and protecting property." Mont. Const. art. II, § 3.

¶61 We turn first to the question of whether the 2011 Amendments implicate the Montana Constitution's environmental provisions. We considered these constitutional provisions at length in *MEIC I*, where the challenged statute created a blanket exemption for specified activities from water quality nondegradation review without regard to the

nature or volume of the substances being discharged. After a detailed review of the history of the 1972 Montana Constitutional Convention, we determined that the framers of the Montana Constitution intended it to contain "the strongest environmental protection provision found in any state constitution." *MEIC I*, ¶ 66. The delegates' adamant statements during the convention informed our conclusion that these provisions were meant to be "both anticipatory and preventative" and do "not require that dead fish float on the surface of our state's rivers and streams before [the Montana Constitution's] farsighted environmental protections can be invoked." *MEIC I*, ¶ 77. We determined that the exclusions violated fundamental rights and remanded to the District Court to determine whether the exclusions could survive strict scrutiny. *MEIC I*, ¶¶ 80-81.

¶62 Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a "clean and healthful environment" is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of "future generations," while requiring "protection" of the environmental life support system "from degradation" and "prevent[ion of] unreasonable depletion and degradation" of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.

¶63 Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX,

Section 1, Subsections 1 and 2, of the Montana Constitution command that the Legislature "shall provide for the administration and enforcement" of measures to meet the State's obligation to "maintain and improve" the environment. Critically, Subsection 3 explicitly directs the Legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. art. IX, § 3.

¶64 When considering which remedies are "adequate" in this context, we note that equitable relief, unlike monetary damages, can avert harms that would have otherwise arisen. It follows that equitable relief must play a role in the constitutional directive to ensure remedies that are adequate to prevent the potential degradation that could infringe upon the environmental rights of present and future generations. We are not alone in this conclusion. As Delegate Mae Nan Robinson pointed out during the 1972 Constitutional Convention:

> if you're really trying to protect the environment, you'd better have something whereby you can sue or seek injunctive relief before the environmental damage has been done; it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed.

MEIC I, ¶ 71 (citing Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. V 1230).

¶65 We turn now to MEPA's role in fulfilling this constitutional mandate. MEPA, which requires environmental review prior to government actions that may significantly affect the human environment, § 75-1-201, MCA, was enacted in 1971—just prior to the 1972 Constitutional Convention—with nearly unanimous support from across the political

spectrum. *See generally* Legislative Environmental Policy Office, *A Guide to the Montana Environmental Policy Act*, 3 (2006), available at perma.cc/JM9N-CEM7. MEPA's policy declaration provided that the State will pursue various ends consistent with a thoughtful relationship between the State and Montana's natural environment, including to:

> (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
> (b) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
> (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . . .

Section 75-1-103(2), MCA (1971). The provision went on: "The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." Section 75-1-103(3), MCA (1971). According to MEPA's 1971 statement of purpose, MEPA would "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of the ecological systems and natural resources important to the state." Section 75-1-102, MCA (1971).

¶66 These statements of purpose and intent were subsequently amended several times, including in 1995 when the Legislature added language expressing a concern for protecting private property rights from "undue government regulation." Section 75-1-102(2), 103(2)(d), MCA (1995 Mont. Laws ch. 352, §§ 1-2). A 2003 amendment inserted language stating that the Legislature had enacted MEPA "mindful of its constitutional obligations under Article II, section 3 and Article IX of the Montana constitution," that MEPA "is

procedural," and that the purpose of environmental review is to ensure that "environmental attributes are fully considered." Section 75-1-102(1), MCA (2003 Mont. Laws ch. 361, § 5). The 2003 amendments also recognized that, in addition to the right to a healthful environment, each person has a right to "pursue life's basic necessities" and that the "implementation of these rights requires the balancing of the competing interests" in order "to protect the public health, safety, and welfare." Section 75-1-103(3), MCA (2003 Mont. Laws ch. 361, § 6). In 2011, MEPA's policy statement was amended to clarify that the purpose of environmental review under MEPA is to better enable the Legislature "to fulfill [its] constitutional obligations" and to "assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies." Section 75-1-102(1)(a), (3)(a), MCA (2011 Mont. Laws ch. 396, § 1). The 2011 Amendments also contained the provisions at issue in this dispute, seeking to prevent the grant of equitable remedies for MEPA violations. Section 75-1-201(6)(c), (d), MCA (2011 Mont. Laws ch. 396, § 2).

¶67 We agree that MEPA serves a role in enabling the Legislature to fulfill its constitutional obligation to prevent environmental harms infringing upon Montanans' right to a clean and healthful environment. The Attorney General points to our language in the 1979 *Kadillak v. Anaconda Co.* decision as support for the opposite proposition. *Kadillak*, 184 Mont. 127, 602 P.2d 147 (1979). There, we held that an EIS was not necessary where the 60 days in which the agency was directed to act by the Hardrock Mining Act were too prohibitively few to allow for a comprehensive EIS to be prepared. *Kadillak*, 184 Mont.

at 138, 602 P.2d at 153. While seeking to interpret MEPA in a way reconcilable with the Hardrock Mining Act, we briefly addressed the Montana Constitution's environmental provisions and found:

> no indication that the MEPA was enacted to implement the new constitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the Legislature had intended to give an EIS constitutional status they could have done so after 1972.

Kadillak, 184 Mont. at 138, 602 P.2d at 154.

¶68 *Kadillak* is not persuasive here. Subsequent MEPA amendments made clear that the Legislature has shaped MEPA as a vehicle for pursuing its constitutional mandate. *See* § 75-1-102(2), 103(2)(d), MCA (1995 Mont. Laws ch. 352, §§ 1-2) (addressing constitutional property rights); § 75-1-102(1), MCA (2003 Mont. Laws ch. 361, § 5) (providing that Legislature had enacted MEPA "mindful of its constitutional obligations under Article II, section 3 and Article IX of the Montana constitution."); § 75-1-102(1)(a), (3)(a), MCA (2011 Mont. Laws ch. 396, § 1) (declaring the purpose of environmental review under MEPA to better enable the Legislature "to fulfill [its] constitutional obligations" and to "assist the legislature in determining whether laws are adequate to address impacts to Montana's environment"); *see also N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 14, 366 Mont. 399, 288 P.3d 169 ("One of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA.").

¶69 The Montana Constitution's framers likely saw MEPA as an essential element of Legislative efforts to meet the government's newly-enshrined constitutional obligations.

MEPA's freshly enacted references to an individual right to a healthful environment—vested in present and future generations—and the State's role in preventing degradation and "unintended consequences" to that environment could not have been far from the minds of the delegates who convened in January of the following year to constitutionalize many of these very same environmental principles. The undeniable proximity in time and substance between these two lawmaking efforts informs our conclusion that the constitutional obligations at issue encompass the forward-looking mechanisms found within MEPA.

¶70 We agree that MEPA's role in fulfilling the Legislature's constitutional mandate is essentially procedural. *See* § 75-1-102(1), MCA; *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877 ("MEPA is essentially procedural." (internal quotations omitted)). "Procedural," of course, does not mean "unimportant." The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought. MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment. Therefore, the Legislature cannot fulfill its constitutional obligation to prevent proscribed environmental harms without some legal framework in place that mirrors the uniquely "anticipatory and preventative" mechanisms found in the original MEPA.

¶71 From the 1972 ratification of the Montana Constitution until 2011, MEPA performed an essential part of the Legislature's efforts to meet its constitutional obligations

by ensuring that information was gathered and carefully considered *before* committing to an action with potential to cause an environmental harm forbidden by the Constitution. While MEPA's text prior to 2011 did not explicitly provide for equitable remedies, such relief is generally appropriate for violations of the sort, *see Pollinator Stewardship Council*, 806 F.3d at 532, and this Court has granted injunctions for MEPA violations prior to the 2011 Amendments. *See, e.g.*, *Friends of the Wild Swan v. Dep't of Nat'l Res. & Conservation*, 2000 MT 209, 301 Mont. 1, 6 P.3d 972; *Montana Envtl. Info. Ctr. v. Montana Dep't of Transp.*, 2000 MT 5, ¶¶ 9-10, 28-29, 298 Mont. 1, 994 P.2d 676; *Montana Wilderness Ass'n v. Board of Health & Envtl. Sciences*, 171 Mont. 477, 516, 559 P.2d 1157, 1177 (1976). Thus, the 2011 amendments constituted a significant departure from MEPA as it existed since its enactment less than a year prior to Montana's Constitutional Convention.

¶72 Without a mechanism to prevent a project from going forward until a MEPA violation has been addressed, MEPA's role in meeting the State's "anticipatory and preventative" constitutional obligations is negated. Whatever interest might be served by a statute that instructs an agency to forecast and consider the environmental implications of a project that is already underway—perhaps analogous to a mandatory aircraft inspection after takeoff—the constitutional obligation to prevent certain environmental harms from arising is certainly not one of them.

¶73 Here, DEQ has conceded that it failed to conduct the level of review required by MEPA in determining whether to approve Lucky's exploration permit. This information gap occurred within the Greater Yellowstone Ecosystem and the Yellowstone River

watershed, in an area that is a mere 15 miles from the national park, home to important habitat for wildlife including grizzly bears and wolverines, and host to one of the most popular year-round recreation destinations in Montana[4] and a tourism-dependent human economy. The need for fully informed and considered decision making could hardly be more pressing.

¶74 DEQ requests a remand to correct this shortfall, gaining the information that it was required under MEPA to collect *prior* to making a permitting decision. However, under the 2011 Amendments, DEQ's early error is essentially irreversible, and the cost of that error will accrue to Montanans' constitutionally-guaranteed environmental rights. Presumably, one of Lucky's first orders of business in proceeding with the proposed exploration will be making improvements to the access road. FWP warned that this undertaking could create a "permanent change to the landscape, with long-term implications" for important wildlife by "significantly increas[ing the] level of disturbance and fragmentation" of a presently "very remote and rarely disturbed" habitat. The 2011 Amendments seek to allow Lucky to commence this work before DEQ completes supplemental review, a review that can be expected to achieve very little beyond informing Montanans—perhaps tragically—of the consequences of actions that have already been taken. Article IX, Section 1, of the Montana Constitution guarantees that the government will provide Montanans with remedies adequate to prevent unreasonable degradation of

[4] The region is one of the most popular destinations in the United States. In 2019, Yellowstone National Park hosted more than four million visitors. *See* National Park Service, *Annual Visitation Highlights*, available at perma.cc/KR7L-85T2 (last visited, Dec. 3, 2020).

their natural resources. This guarantee includes the assurance that the government will not take actions jeopardizing such unique and treasured facets of Montana's natural environment without first thoroughly understanding the risks involved.

¶75 The Attorney General does not contest the assertion that the 2011 MEPA amendments render the statute incapable of protecting Council and Coalition's constitutional rights, but, rather, points to the MMRA and a host of other substantive environmental laws as evidence that the Legislature has met its burden of providing Council and Coalition with "adequate remedies," even absent meaningful MEPA remedies. The Attorney General points to various ways in which these provisions protect environmental interests by regulating Lucky's behavior and providing remedies—including injunctive relief—should Lucky violate these provisions.

¶76 These cumulative efforts to meet the Legislature's constitutional obligations, however, fail to show that MEPA is redundant within Montana's ecosystem of environmental protections. MEPA is unique in its ability to avert potential environmental harms through informed decision making. As Delegate Mae Nan Robinson pointed out during the 1972 Constitutional Convention, a remedy implemented only *after* a violation is a hollow vindication of constitutional rights if a potentially irreversible harm has already occurred. *MEIC I*, ¶ 71 (citing Montana Constitutional Convention, Verbatim Transcript, March 1, 1972, Vol. V 1230) (noting the ineffectiveness of remedies after "the air has been polluted or . . . the stream has been polluted if you can't change the condition of the environment once it has been destroyed"). Furthermore, MEPA's environmental review process is complementary to—rather than duplicative of—other environmental provisions,

functioning to, for example, enable DEQ to make an informed decision in responding to Lucky's operational permit application under the MMRA. Without some other equally proactive and preventative measure in place, injunctive relief available under MEPA *before* action commences remains essential to fulfilling the constitutional mandate.

¶77 The Attorney General's reliance on *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs,* where we upheld leases made to Arch Coal prior to environmental review, actually demonstrates this point. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, 366 Mont. 399, 288 P.3d 169. There, we upheld the leases at issue because the environmental review would still occur before the permitting stage and the leases themselves allowed for no environmental degradation. *Northern Plains*, ¶ 19 ("Those reviews are only deferred from the leasing stage to the permitting stage."). *Northern Plains* demonstrates that the relevant question is whether an environmental review occurs at some point *before* decisions are made and actions are taken which have the potential for causing environmental harm. Lucky and the Attorney General's opposite contention, that the environmental review may constitutionally occur *after* the project has begun, is unsupported.

¶78 We are not asked here to engage in a difficult exercise of determining what attributes constitute a "clean" or "healthful" environment, or an "unreasonable" amount of degradation, or what the judiciary's role should be in answering these questions. The question presented to us by this case is straightforward: has the Legislature met its obligation to provide "adequate remedies" with which to prevent potential future

environmental harms when it removes what appears to be the *only* available legal relief positioned to do so? We conclude that it has not.

¶79 Having determined that § 75-1-201(6)(c) and (d), MCA (2011 Amendments), fails to meet the State's constitutional obligations and burden constitutional rights, we now turn to selecting the appropriate level of scrutiny with which to analyze these provisions. We have determined that the rights found in Article II, Section 3, and Article IX, Section 1, of the Montana Constitution are fundamental rights and should be subject to strict scrutiny. *MEIC I*, ¶¶ 63-64. The Attorney General does not contest the District Court's finding that the 2011 Amendments fail under strict scrutiny but instead asks us to analyze the 2011 Amendments by balancing environmental rights against the private property rights also found in the Montana Constitution. *See* Mont. Const. art. II, § 3 (setting forth inalienable rights including the right of "possessing and protecting property"); Mont. Const. art. II, § 17 (providing the right to due process protection of property); Mont. Const. art. II, § 29 (protecting right to just compensation for taking of private property).

¶80 Balancing may be appropriate when a case presents an irreconcilable conflict between the co-equal rights of the parties. *See, e.g., Bozeman Daily Chronicle v. City of Bozeman Police Dep't.*, 260 Mont. 218, 224, 859 P.2d 435, 439 (1993) (addressing right to privacy's limitation on the public's right to know). Here, however, MEPA's enforcement does not implicate Lucky's private property rights to a constitutionally cognizable degree. When "regulations are designed to have a real and substantial bearing upon the public health, safety, morals and general welfare of a community, such regulations do not unduly interfere with the fundamental nature of private property ownership."

Williams v. Bd. of Cty. Comm'rs of Missoula Cty., 2013 MT 243, ¶ 56, 371 Mont. 356, 308 P.3d 88 (internal quotations omitted). MEPA poses even less of a burden on private property ownership than regulations designed to protect the general welfare. As the Attorney General points out, MEPA is procedural and contains no regulatory language. While it directs the government to engage in informed decision making, MEPA itself does not restrict Lucky's use of its private property.

¶81 Restrictions on Lucky's ability to conduct mining operations on its private property stem from the MMRA, rather than MEPA. Completely apart from MEPA or its 2011 Amendments, the MMRA forbids Lucky from commencing mining activities until permitted to do so by the State. Section 82-4-335(1), MCA. Government regulation of mining has never been held to pose an undue burden on private property rights. *See, e.g.*, *Northern Plains*, ¶ 17 (noting that mining companies "have no right to engage in mining operations until all necessary permits required by State law or regulation are obtained."); *Seven Up Pete Venture v. State*, 2005 MT 146, ¶¶ 27-28, 327 Mont. 306, 114 P.3d 1009 ("Clearly, the right to mine is conditioned upon the acquisition of an operating permit."). If the MMRA's requirement that Lucky await DEQ approval prior to commencing exploration activities does not cognizably burden a constitutional property right, then MEPA's requirement that DEQ's decision on the matter be well-informed certainly does not either.

¶82 Neither does an equitable remedy for a MEPA violation substantially interfere with constitutionally protected property rights. In essence, it simply requires an applicant to undergo the same wait now that it should have experienced before. There is no argument

that simply waiting for DEQ to properly review and act upon an application constitutes an infringement upon property rights. Had DEQ completed the analysis of wildlife impacts and artesian flow containment plans *before* issuing the exploration permit, as required by MEPA, Lucky could not have complained that its private property rights were burdened by being forced to wait for that process to be completed. Waiting while DEQ completes that review *now* does not signify a substantially greater constitutional burden than that which would have been felt while awaiting the completion of that same review process when it should have occurred—*before* the permit was issued. That DEQ's error may give rise to some administrative delay with which to cure the shortfall does not demonstrate an unconstitutional infringement of private property rights.

¶83 DEQ's erroneously premature approval of Lucky's application did not grant Lucky an irrevocable and constitutionally-protected private property right. Even after a permit has been granted, DEQ has broad enforcement powers to address subsequent violations, including through permanent injunctive relief. *See* § 82-4-361(5), MCA. We do not see why a court-ordered injunction to remedy a MEPA violation poses more of a threat to property rights than an agency-ordered injunction to remedy a substantive violation. Any private property rights implicated by an equitable remedy here are far too minor to be constitutionally cognizable and move us from a strict scrutiny to a balancing analysis.

¶84 As noted previously, the parties do not contest the District Court ruling that the 2011 Amendments fail under strict scrutiny. They do not attempt to demonstrate the 2011 Amendments are narrowly tailored to further a compelling government interest. Because § 75-1-201(6)(c) and (d), MCA, burdens Counsel and Coalition's fundamental

constitutional rights and does not withstand strict scrutiny, we hold that these amendments are unconstitutional under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.

¶85 The parties disagree on whether we should view this as an as-applied or facial constitutional challenge. *See Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("In order to prevail on their facial challenges, Plaintiffs must show that 'no set of circumstances exists under which the [challenged sections] would be valid, *i.e.*, that the law is unconstitutional in all of its applications.'" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008)) (alterations in original)). The distinction is perhaps overstated. *See Citizens United v. FEC*, 558 U.S. 310, 331, 130 S. Ct. 876, 893 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined[.]").

¶86 Courts seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns. *See New York v. Ferber*, 458 U.S. 747, 767-68, 102 S. Ct. 3348, 3360 (1982) (noting the Court's general reluctance to make a facial ruling by "consider[ing] every conceivable situation which might possibly arise" (quotations omitted)). Generally, a statute's facial invalidity does not depend upon the characterization of the challenge brought; rather, it results from our duty to fashion an appropriate remedy in resolving the case before us and to subsequently adhere to the resulting opinion's precedential reasoning. *See Citizens United*, 558 U.S. at 331, 130 S. Ct. at 893 (noting that the distinction between a challenged provision's facial and as-applied constitutionality has no "automatic effect" but, rather, "goes to the breadth of the remedy

employed by the Court"); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339-41 (2000) (describing facial unconstitutionality as an outgrowth of the precedential effects of as-applied determinations). Here, the 2011 Amendments are unconstitutional because they substantially burden a fundamental right and are not narrowly tailored to further a compelling government interest. Thus, our conclusion that § 75-1-201(6)(c) and (d), MCA, is unconstitutional flows from the content of the statute itself, not the particular circumstances of the litigants. *See* Fallon, *supra*, at 1338 (describing how application of strict scrutiny to a statute "can inevitably result in facial invalidations"). This is the hallmark of facial unconstitutionality.

¶87 In *MEIC I*, we held that the challenged statute was subject to strict scrutiny and that it violated environmental rights but limited our decision to the application of the facts of that case. *MEIC I*, ¶¶ 63, 80. In a special concurrence, Justice Leaphart wrote:

> I do not see how the Court can logically avoid declaring that the statute is unconstitutional on its face. The constitutional infirmity of § 75-5-317(2)(j), MCA (1995), is not limited to the facts in the present case but inheres in the statute's creation of a blanket exception. It creates a blanket exception to the requirements of nondegradation review for discharges from water well or monitoring well tests without regard to the harm caused by those tests or the degrading effect that the discharges have on the surrounding or recipient environment. The fact that there may be water discharges from well tests, say for agricultural purposes, that do not in fact create harm to the environment, does not alter the fact that such discharges are exempted from nondegradation review and that such review is the tool by which the State implements and enforces the constitutional right to a clean and healthy environment. The facial unconstitutionality of § 75-5-317(2)(j), MCA (1995), lies in its exemption of particular water discharges from nondegradation review without consideration of the nature and volume of substances in the water that is discharged. The possibility that some water discharges will not harm the environment does not justify their

> exemption from careful review by the State to protect Montana's fundamental rights to a clean and healthy environment and to be free from unreasonable degradation of that environment. The whole purpose of the nondegradation review is to determine, in advance, whether a water discharge will be harmful and, if so, is the harm justified and can it be minimized. *See* § 75-5-303, MCA. In excluding water discharges from well tests from review, the statute makes it impossible for the State to "prevent unreasonable depletion and degradation of natural resources" as required by Article IX, Section 1(3), of the Montana Constitution.

MEIC I, ¶ 85 (Leaphart, J., specially concurring).

¶88 As in *MEIC I*, the 2011 Amendments at issue here are unconstitutional because they undercut the State's ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to "prevent unreasonable depletion and degradation of natural resources" as required by Article IX, Section 1(3), of the Montana Constitution. Additionally, the 2011 Amendments categorically remove the Plaintiffs' only available remedy adequate to prevent potential constitutionally-proscribed environmental harms, in violation of Article IX, Section 1(3), of the Montana Constitution's guarantee of "adequate remedies." The constitutional infirmities here, as in *MEIC I*, are not limited to the present facts but stem from the statute itself. We find Justice Leaphart's reasoning persuasive and adopt it here.

¶89 MEPA is an essential aspect of the State's efforts to meet its constitutional obligations, as are the equitable remedies without which MEPA is rendered meaningless. Section 75-1-201(6)(c) and (d), MCA, by seeking to deny the people of Montana these remedies, falls short of the constitutional guarantee and is therefore facially

unconstitutional.[5] Vacatur of the previously issued exploration permit is an equitable remedy suitable to the present MEPA violations and we affirm the District Court decision to that effect.

CONCLUSION

¶90 We reverse the District Court ruling requiring DEQ to conduct supplemental review of water quality issues, additional analysis of alternatives, and possible impacts of potential future full-scale mining of federal lands. We affirm the District Court ruling requiring DEQ to conduct supplementary review of the impacts of road improvements on wildlife in the area. We also affirm the District Court ruling requiring DEQ to specify mitigation plans for capturing expected artesian flows during drilling. Finally, we affirm the District Court's order vacating Lucky's current exploration license and finding § 75-1-201(6)(c) and (d), MCA, in violation of the Legislature's constitutional mandate to provide remedies adequate to prevent proscribed environmental harms under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ LAURIE McKINNON

[5] Because we find § 75-1-201(6)(c) and (d), MCA, unconstitutional under the environmental provisions of Article IX, Section 1, and Article II, Section 3, of the Montana Constitution, we need not determine whether the District Court was correct in finding the 2011 Amendments to also be in violation of the right of public participation found in Article II, Section 8, of the Montana Constitution.

/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE