IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0492

PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants,

v.

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

Intervenor and Appellant.

APPELLANT STATE OF MONTANA'S OPENING BRIEF

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Brenda R. Gilbert, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF THE ISSUES

1. Whether the district court erred in applying strict scrutiny in its constitutionality analysis of Mont. Code Ann. § 75-1-201(6)(c) and (d).

2. Whether Mont. Code Ann. § 75-1-201(6)(c) and (d), clarifying an injunction is not available as a remedy within the Montana Environmental Policy Act ("MEPA"), is constitutional under Article II, Section 3 and Article IX, Section 1 of the Montana Constitution providing the right to a clean and healthful environment.

STATEMENT OF THE CASE

On July 2, 2018, Plaintiffs and Appellees Park County Environmental Council and Greater Yellowstone Coalition (collectively, "PCEC") served the Attorney General with a Renewed Notice of Constitutional Question. The Notice indicated PCEC's intent to challenge the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). These provisions, added by the 2011 Montana legislature through the passage of Senate Bill 233 ("SB 233"), limit remedies for MEPA non-compliance to remand to the agency to correct deficiencies in the environmental review and preclude district courts from enjoining agency authorizations—like permits or licenses—pending completion of court-ordered environmental review.

Intervenor-Defendant and Appellant State of Montana, by and through the Office of the Attorney General ("the State of Montana"), submitted a Notice of Intervention dated August 16, 2018, for the limited purpose of addressing PCEC's as-applied constitutional challenge to Mont. Code Ann. § 75-1-201(6)(c) and (d).

After the constitutional question was fully briefed and argued by the parties, on April 12, 2019, the district court issued its Order (Appendix A) ruling, among other things, that Mont. Code Ann. § 75-1-201(6)(c) and (d) violate the Clean and Healthful Environment provisions of the Montana Constitution, and are therefore unconstitutional as applied to this case.

This appeal followed.

STATEMENT OF THE FACTS

I. MEPA's Legislative History

In 1971, the Montana legislature enacted MEPA. *See* 1971 Mont. Laws 238, §§ 1–7. As it was passed in 1971, MEPA included the following sections:

- Purpose of the act, Rev. Codes Mont. 1947 § 69-6502 (1971);
- Declaration of state policy for the environment, *id.* § 69-6503;
- General directions to state agencies, *id.* § 69-6504;
- Review of statutory authority and administrative policies to determine deficiencies or inconsistencies, *id.* § 69-6505;
- Specific statutory obligations unimpaired, *id.* § 69-6506; and
- Policies and goals supplementary, *id.* § 69-6507.

This bill also established the Environmental Quality Council, *see* 1971 Mont. Laws 238, §§ 8–17, which is still tasked with informing the legislature, agencies, and public with how to achieve the policies set forth in MEPA, *see id.*, § 14 (codified at Mont. Code Ann. § 75-1-324). This bill provided the Environmental Quality Council with the authority to conduct hearings, issue subpoenas, and request contempt proceedings in district court. *Id.*, § 16 (codified at Mont. Code Ann. § 75-1-312). As it was passed in 1971, MEPA did not include a private cause of action or include an injunction as a remedy.

In 2001, the Montana legislature provided the first express cause of action for challenging agency MEPA decision-making. *See* 2001 Mont. Laws 299, § 3 (codified at Mont. Code Ann. § 75-1-201(5)(a)). This act clarified that only final agency action could be challenged, these actions could be brought in either state district court or federal court, and that the lawsuit must be brought within 60 days of the final agency action. *Id*. This addition still did not provide a specific remedy, including an injunction, for successful MEPA challenges.

In 2011, the Montana legislature passed SB 233 giving additional guidance on judicial review of state agency MEPA action. SB 233 clarified that injunctive relief is not available under MEPA and the sole remedy is to remand the issue to the agency. *See* 2011 Mont. Laws 396, § 2 (codified at Mont. Code Ann. § 75-1-201(6)(c) and (d)). The legislature also clarified MEPA's purpose is to

ensure that the legislature considers environmental attributes when enacting laws to fulfill its constitutional obligations and to inform the public of the anticipated impacts in Montana of potential state actions. *Id.*, § 1 (codified at Mont. Code Ann. § 75-1-102(1)).

Additionally, SB 233 established a separate statute effective upon the contingency of this Court declaring Mont. Code Ann. § 75-1-201(6)(c) or (d), the provisions in question, unconstitutional. *See* 2011 Mont. Laws 396, § 11. If declared unconstitutional, the party seeking an injunction would have to provide "a written undertaking to the court in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial decision in the case." Mont. Code Ann. § 75-1-201(6)(d) (effective on occurrence of contingency).

II. The Lucky Minerals, Inc. Project

On February 17, 2015, Lucky Minerals, Inc. ("Lucky Minerals") filed an exploration license application seeking to conduct mining exploration in the Emigrant Gulch Mining District on the west side of the Absaroka Mountains, Park County, Montana. AR 10. Since 1864, mining activity has intermittently occurred in the Emigrant Gulch Mining District. AR 11–13. The most recent mining exploration took place here in 1990s. *Id*.

The proposed project is located entirely on private property. AR 10. Lucky Minerals proposes to drill up to 46 holes over two seasons spanning mid-July to mid-October. *Id*. All of the proposed drilling would occur within the existing road prism to reduce to the total surface disturbance. AR 28, 166-67. No new road construction would be required to access the exploration area. AR 17, 167. The total disturbance area would be 4.8 acres. AR 10. All drill pads would be located a minimum of 100 feet away from perennial streams and 50 feet away from other riparian or wetland areas. AR 28.

The Montana Department of Environmental Quality ("DEQ") prepared a draft environmental assessment, which was submitted for public review and comment on October 12, 2016. AR 18–24. There was a 60-day comment period. AR 10. DEQ received approximately comments from 3,384 individuals, organizations, and agencies on Lucky Minerals' proposed exploration activities, which were responded to by DEQ. AR 19, 177-87. On July 26, 2017, DEQ approved Lucky Minerals' application for an exploration license, selecting the mitigation measures contained in the agency modified alternative as the preferred alternative. AR 1, 30–34. This agency modified alternative included relocation of the drill sites to only occur on private land and a 100 buffer from the East Fork of Emigrant Creek for one drill site. AR. 31. In granting this approval, DEQ noted "[s]ome of these mitigation measures are outside DEQ's regulatory authority, but

will be included as requirements of the exploration license with the consent of Lucky Minerals." AR 1; *see also* Mont. Code Ann. § 75-1-201(4)(a) ("The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.").

III. The Federal Moratorium of Mining Exploration

In October 2016, the Forest Service applied to the Secretary of the Interior for withdrawal actions on Forest Service lands in the Emigrant and Crevice areas. 81 Fed. Reg. 83,867 (Nov. 21, 2016). The Emigrant area includes federal lands adjacent to Lucky Minerals' proposed mining exploration area. D.C. Doc. 36 at 4. The Department of Interior finalized withdrawal of these federal lands for 20 years in October of 2018. 83 Fed. Reg. 51,701 (Oct. 12, 2018).

STANDARD OF REVIEW

The standard of review applicable here involves the balancing of the co-equal competing, fundamental constitutional rights; *i.e.*, the private property rights of the landowner, Lucky Minerals, and the right to a clean and healthful environment. Consequently, the proper analysis involves balancing these competing rights, ascribing no greater weight to either. Additionally,

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it

> conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Powell, 2000 MT 321, ¶ 13.

The exploration license at issue in the present case authorizes limited mineral exploration exclusively on Lucky Minerals' private property; *i.e.*, patented mining claims. AR 1. The rights of private property owners are unmistakably fundamental—and inalienable—under the 1972 Montana Constitution. *McCabe Petroleum Corp. v. Easement & Right-Of-Way Across Twp. 12 N.*, 2004 MT 73, ¶ 14, 320 Mont. 384, 87 P.3d 479.

As Justice Rice explained, "[f]ound within the Declaration of Rights, the right of property is a fundamental one, dictating that the standard of review applied to governmental action affecting this interest is the most stringent standard, strict scrutiny." *Kellogg v. Dearborn Info. Servs., L.L.C.*, 2005 MT 188, ¶ 22, 328 Mont. 83, 89, 119 P.3d 20, 24 (Rice, J., dissenting) (citations and quotations omitted). Indeed, the very same section of Article II recognizing the right to a clean and healthful environment also recognizes "acquiring, possessing and protecting property" as an Article II fundamental constitutional right. Mont. Const. art. II, § 3; *see also id.* art. II § 17 (fundamental right to due process protection of property); *id.* art. II § 29 (fundamental right to just compensation for taking of private property).

It is true that the right to a clean and healthful environment is likewise a fundamental right. However, the right to a clean and healthful environment is entitled to no greater protection than the rights of private landowners to possession and use of their private property. *Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987) ("The real property interests of private landowners are important as are the public's property interest in water.").

The notion of competing fundamental rights is not novel, and in Montana, perhaps most often arises in the context of the public's right to know vis-à-vis the individual right of privacy. *See, e.g., Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 224, 859 P.2d 435, 439 (1993) (balancing constitutional right of public to know with individual's constitutional right to privacy). As the Montana Supreme Court recognized in *Krakauer v. State*, competing constitutional interests should be addressed on a case-by-case basis and according to the facts of each case. 2016 MT 230, ¶ 36, 384 Mont. 527, 381 P.3d 524; *see also Galt* at 148, 859 P.2d at 439 (balancing the constitutional interests of private landowners under Article IX, Section 7 and Article II, Section 3 with the public's property interest in water under Article IX, Section 3).

As presented by PCEC and the district court, the putative task of the Court is to determine whether, as applied to this case, Mont. Code Ann. § 75-1-201(6)(c) and (d) adequately balances the competing fundamental rights of PCEC and

Lucky Minerals. In doing so, the Court is obligated to presume the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d), and to construe the statute in a manner which preserves the statute's constitutionality, if at all possible. *See Powell*, ¶ 13. A close examination of the district court's order reveals the district court examined MEPA in isolation. D.C. Doc 88 at 16–17. Because the district found Mont. Code Ann. § 75-1-201(6)(c) and (d) provided inadequate remedies based off of a historical interpretation of MEPA, *see id.*, these findings would apply equally to PCEC, Lucky Minerals, or any other interested party regardless of context, *see, e.g., State v. Ber Lee Yang*, 2019 MT 266, ¶ 13, 397 Mont. 486 (finding whether a fine is excessive as applied to an individual based on their financial circumstances is an as-applied challenge whereas a challenge to the underlying formula contained in a statute is a facial challenge).

Accordingly, this Court should find this case presents a facial challenge to Mont. Code Ann. § 75-1-201(6)(c) and (d). As the party challenging the statute, PCEC bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997). To meet their burden, the party challenging the statute must show either that "no set of circumstances exists under which the statute would be valid or that the statute lacks any 'plainly legitimate sweep.'" *In re S.M.*, 2017 MT 244, ¶ 10, 389 Mont. 28,

403 P.3d 324. Every possible presumption must be indulged in favor of the constitutionality of Mont. Code Ann. § 75-1-201(6)(c) and (d). *See Davis v. Union Pacific R. Co.*, 282 Mont. 233, 240, 937 P.2d 27, 31 (1997).

SUMMARY OF THE ARGUMENT

While the district court and PCEC have presented this case as asserting an as-applied constitutional challenge, the district court treated it as a facial challenge, and must be reviewed accordingly. Because this district court did not examine the underlying environmental protections offered by the Metal Mine Reclamation Act ("MMRA"), *see* Mont. Code Ann. §§ 82-4-301 to -390, and other applicable substantive laws, the district court's findings were not limited to Lucky Minerals' request for a mining exploration license authorizing minimal surface activity on private property. The district court's analysis looks solely at MEPA in isolation. For example, it assumed, incorrectly, that MEPA had offered an injunction remedy for the past 40 years. D.C. Doc 88 at 16. On this historical basis, the Court broadly reasoned that the legislature had not upheld its constitutional "obligation to provide adequate remedies" through the passage of SB 233. *Id.* at 17. Under the district court's reasoning, because MEPA does not offer an injunction as a remedy in any instance, Mont. Code Ann. § 75-1-201(6)(c) and (d) are necessarily declared

unconstitutional in every instance. Hence, in the final analysis, the district court erroneously ruled the statute to be facially invalid, not merely as applied to the facts of this case.

If this Court chooses to examine this case for what it is, a facial challenge, its precedent resolves the question of whether Mont. Code Ann. § 75-1-201(6)(c) and (d) are constitutional. Specifically, in *Kadillak v. Anaconda Co.*, this Court found that MEPA does not have constitutional status. 184 Mont. 127, 138, 602 P.2d 147, 154 (1979). Additionally, MEPA has never contained explicit language authorizing a specific remedy, which this Court has recognized by saying "[n]owhere in the MEPA is found any regulatory language." *Montana Wilderness Ass'n v. Board of Health & Envtl. Sciences*, 171 Mont. 477, 485, 559 P.2d 1157, 1161 (1976). Accordingly, this Court can view SB 233 as clarifying the existing structure of MEPA rather than "directly contravene[ing] the State's [constitutional] obligation to provide adequate remedies" or eliminating "the injunctive relief that was available under MEPA since its enactment over forty years ago." D.C. Doc. 88 at 16–17.

If this Court chooses to examine this case as an as-applied challenge, Mont. Code Ann. § 75-1-201(6)(c) and (d) still survive. This would require examining the underlying substantive laws to discern what environmental protections exist in the

context of Lucky Minerals' request for a license authorizing minimal exploration. This is something the district court did not do. D.C. Doc. 88 at 16–17. By failing to examine these underlying substantive laws, the district court ignored the template this Court established in *Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, for invalidating laws that fail to provide adequate remedies to ensure environmental nondegradation. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999) ("*MEIC*"). In *MEIC*, this Court invalidated a very specific statute. *Id.*, ¶ 80. Because the district court failed to consider the mining exploration provisions of the MMRA and similar laws, it impliedly ruled that these substantive laws are inadequate and therefore unconstitutional. Such a curt invalidation cannot stand. If the district court had examined the substantive laws governing mining exploration—like Mont. Code Ann. § 75-5-303, which was approved resoundingly in *MEIC*—then it would have found these laws to be comprehensive in both substance and remedies. At a minimum, this Court should remand the case and require the district court to take these steps to ensure this is actually an as-applied challenge and prevent MEPA from enveloping all other substantive environmental law in Montana.

ARGUMENT

I. Under Current Precedent, Mont. Code Ann. § 75-1-201(6)(c) and (d) Are Facially Constitutional.

In 1979, this Court answered a question which is fundamental to this litigation: whether MEPA has constitutional status. The answer to this question was a resounding no.

> Both the MEPA and the HRMA predate the new constitution. There is 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 [environmental impact statement ("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. It is not the function of this Court to insert into a statute "what has been omitted." The ordinary rules of statutory construction apply.

Kadillak, 184 Mont. at 138, 602 P.2d at 154 (internal citations omitted). *Kadillak* is especially applicable here because it also concerned Title 82, Chapter 4, Part 3 of the Montana Code Annotated.[1] The legislature has still not given Constitutional

[1] In *Kadillak*, this Court refers to "82-4-301 *et seq.*, MCA" as the Hard Rock Mining Act or HRMA. 184 Mont. at 138, 602 P.2d at 154. In 1979, this portion of the Montana Code Annotated was referred to as the Metal Mine Reclamation Act as it is today. *See* Mont. Code Ann. §§ 82-4-301 to -362 (1979). This Court has since not used the Hard Rock Mining Act title to refer to this section of law except in one other instance. *See Lincoln County v. Sanders County*, 261 Mont. 344, 346, 862 P.2d 1133, 1135 (1993). As apparent from the citations of this Court in *Kadillak*, the Metal Mine Reclamation Act and Hard Rock Mining Act are synonymous.

status to MEPA beyond informing the legislature and the public. *See* Mont. Code Ann. § 75-1-102(1). Mont. Code Ann. § 75-1-201(6)(c) and (d) make abundantly clear the legislature has not given constitutional status to MEPA as a remedy. Upholding the district court's invalidation of Mont. Code Ann. § 75-1-201(6)(c) and (d) would overturn this 40-year-old precedent by conferring MEPA constitutional status.

Additionally, MEPA's text has never included a remedy section allowing for an injunction. *See* Rev. Codes Mont. 1947 §§ 69-6502 to -6507 (1971). In this Court's first consideration of MEPA, it overturned a district court decision granting an injunction as a remedy for noncompliance with MEPA, finding "the express purpose of MEPA set out previously herein states to 'encourage', 'promote' and 'enrich' [understanding]. Nowhere in the MEPA is found any regulatory language." *Montana Wilderness Ass'n*, 171 Mont. at 485, 559 P.2d at 1161. This decision was primarily based on MEPA's inapplicability to county governments. Still and all, as demonstrated in Justice Haswell's dissenting opinion, in which he struggled mightily to cobble together various authorities to justify an injunction under MEPA, the plain text of MEPA did not offer an injunction as a remedy. *Id*, 171 Mont. at 516, 559 P.2d at 1177 (Haswell, J., dissenting). Thus, the district court's assertion that the passage of SB 233 "eliminated the injunctive

relief that was available under MEPA since its enactment over forty years," D.C. Doc 88 at 16, is belied by a historical investigation of MEPA and its lack of regulatory language.

This Court recently found "MEPA remains substantially unchanged and this Court has not overruled or limited *Montana Wilderness* in the 40 years since we issued it." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 30, 388 Mont. 453, 401 P.3d 712. Considering this recent declaration, it would be remarkable and surprising for this Court to overrule both *Kadillak* and *Montana Wilderness Ass'n*. Because this Court has already answered the overarching questions of whether MEPA has constitutional status and whether an injunction was initially available under MEPA, this Court can resolve this case on precedent alone and find that Mont. Code Ann. § 75-1-201(6)(c) and (d) are constitutional in any instance.

Moreover, aggrieved parties have no guaranteed right to an order enjoining a project which had been approved based on an insufficient environmental review. Specifically, as federal courts have recognized construing the National Environmental Policy Act, the federal counterpart to MEPA, it is often appropriate for courts to deny injunctive relief altogether in this context. For example, "courts are not mechanically obligated to vacate agency decisions that they find invalid."

Pac. Rivers Council v. U.S. Forest Serv., 942 F. Supp. 2d 1014, 1017 (E.D. Cal. 2013) (gathering cases); *see also* 5 U.S.C. § 702 ("[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground"). Rather, "when equity demands," the challenged agency action can be "'left in place while the agency follows the necessary procedures' to correct its action." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)). This is the proper outcome in the present case as well.

II. Mont. Code Ann. § 75-1-201(6)(c) and (d) Are Also Constitutional As-Applied to Lucky Minerals' Request for a Mining Exploration License.

A. The MMRA and other applicable substantive laws are constitutionally adequate.

When the Montana legislature passed SB 233, it clarified existing law. It did not remove any existing statutory remedies from MEPA. The legislature added these clarifying remarks to ensure that MEPA continued to act as a procedural law and is not confused with substantive laws—like the MMRA—which provide environmental protections. *Compare* Mont. Code Ann. § 75-1-102 (MEPA provides "for the adequate review of state actions in order to ensure that environmental attributes are fully considered by the legislature in enacting laws to

fulfill constitutional obligations . . . ."), *with id.* § 82-4-301(1) ("mindful of its constitutional obligations," "[i]t is the legislature's intent that . . . [the MMRA] 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.").

In committee hearings, a proponent of SB 233 explained that MEPA, as a procedural law, is on a separate and parallel track from substantive environmental protection laws like the Clean Air Act, MMRA, Major Facilities Siting Act, the Water Quality Act. Comm. Hr'g Video at 8:39:40–8:40:40 (Mar. 9, 2011).[2] MEPA is not intended to uphold the constitutional guarantee of clean and healthful environment the same way these substantive laws do. *Id*. at 8:38:30–8:39:15. Even prior to the passage of SB 233, MEPA analysis could not be used to condition or deny a license or permit. *See* 2001 Mont. Laws 268 (codified at Mont. Code Ann. § 75-1-201(4)(a)); *see also* AR 1 (acknowledging the conditions set forth in the agency's preferred alternative consented to by Lucky Minerals were "outside DEQ's regulatory authority"). Instead, MEPA is intended to inform the legislature and the public whether these substantive environmental protection laws are sufficient. 2011 Mont. Laws 396, § 1 (codified at Mont. Code Ann. § 75-1-102(1)).

[2] *Available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/20352?agendaId=93015>.

This same SB 233 proponent imagined a hypothetical of an applicant who had been granted an environmental permit subject to MEPA:

> You can challenge the EIS, and the court can find that the EIS may have not been adequately prepared. But this permit over here that met all of the standards the legislature set, it stays valid. And the EIS can be remanded back to the agency to correct any deficiencies, because that's what it's for. It's not to make a decision on a permit, it's to analyze and inform the public, the legislature, and public officials as to what the impacts are. And if there's something that isn't being adequately addressed, then the legislature can address that the next time. But you can't invalidate my permit because I've complied with all of your standards you've set so far.

Comm. Hr'g Video at 8:40:28–8:41:09 (Mar. 9, 2011).

This view is consistent with this Court's previous holding that specific environmental laws—like the Clean Air Act, MMRA, Major Facilities Siting Act, the Water Quality Act—govern when in conflict with general statutes like MEPA. *See Kadillak,* 184 Mont. at 137, 602 P.2d at 153 ("The MEPA is the general statute in these circumstances. HRMA is the specific statute and controls in this case."); *accord Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 29, 365 Mont. 232, 280 P.3d 877; *see also* Mont. Code Ann. § 1-2-102 ("When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."); *id.* § 75-1-102(3)(b) ("it is not the purpose of [MEPA] to

provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.").

As an example of the specific environmental protections that exist here, DEQ is only allowed to authorize mining exploration if the applicant meets the requirements set forth in Mont. Code Ann. §§ 82-4-331 and -332. The Board of Environmental Review holds specific rulemaking authority for the MMRA. Mont. Code Ann. § 82-4-321. Accordingly, DEQ administers rules governing mining exploration. *See* Mont. Admin. R. 17.24.103–108. Existing water quality statutes, like Mont. Code Ann. § 75-5-303(3), ensure that mining exploration activities cannot not contaminate the alluvial aquifers of rivers with pumped ground water. *MEIC*, ¶ 18.

Under these requirements, first Lucky Minerals must salvage all suitable practically salvaged soil and soil material prior to any other site disturbance and either stockpile the soil or use it for immediate reclamation. Mont. Admin. R. 17.24.105(1). Lucky Minerals must also ensure that drilling mud, water, other fluids, and waste cuttings from drilling is confined to the drill site by use of storage tanks or sumps. *Id*. at (2). Lucky Minerals cannot construct any drill sites in natural flowing streams. *Id*. at (3). Lucky Minerals must also keep any areas disturbed by removal of vegetation or grading to the minimum size necessary to accommodate the exploration operation. *Id*. at (4). Of course, no exploration will occur in natural

flowing streams. *Id*. at (5). Moreover, no spoil or other excavation will be located in drainage ways, and the lower edge of any spoil bank must be at least five vertical feet above high flow level. *Id*. at (6). If Lucky Minerals' drilling operation intercepts an artesian aquifer, Lucky Minerals must plug the drill hole at depth (top to bottom) prior to removal of the drill rig. *Id*. at (7). Furthermore, Lucky Minerals is prohibited from releasing any oil, grease, hydraulic fluid or other petroleum products on the exploration site. *Id*. at (8).

Once the exploration phase is complete, Lucky Minerals is subject to stringent regulations governing the reclamation phase. *Id.* 17.24.107; *see also id.* 17.24.106 (providing comprehensive drill hole plugging ensuring protection of water resources). First, upon completion of the drilling operation, Lucky Minerals must remove all drill cuttings or core from the site, and dispose of them of down the hole, or buried. *Id.* 17.24.107. Lucky Minerals must also remove all drilling mud and other nontoxic lubricants from the site or allow them to percolate into the ground prior to backfilling the sump. *Id.* at (1). Additionally, Lucky Minerals must return drill sites to a stable configuration that approximates the original contour to the extent possible. *Id*. at (4). Lucky Minerals is also required to remove and properly dispose of all refuse, buildings, and other facilities associated with the exploration project. *Id*. at (7). Lucky Minerals must also rip or otherwise loosen all compacted surfaces associated with exploration shafts and associated facilities

prior to soil replacement. *Id*. at (8). Furthermore, Lucky Minerals must reapply soil and soil materials salvaged during construction over all disturbance areas; and revegetated as soon as possible with a seed mixture that is approved by the department. *Id*. at (10) and (11).

The district court acknowledged this regulatory regime when it stated "[t]he 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." D.C. Doc. 36 at 6. Yet the district court then proceeded to ignore the provisions of the MMRA and failed to substantively consider the related administrative rules. For the remainder of the district court's orders, these authorities are only mentioned when describing the arguments of Lucky Minerals and the State of Montana. *See* D.C. Doc. 36 at 17, 21 (citing Mont Admin. R. 17.24.105(7) & Mont. Code Ann. § 82-4-332); D.C. Doc 88 at 9 (citing the MMRA and Mont. Admin. R. 17.24.105). The district court provided no substantive analysis on these specific environmental protections. This is due in no small part to PCEC only alleging MEPA violations. *See* D.C. Docs. 16 & 50. The district court conceded as much when it stated SB 233 "eliminated *any* ability on the part of a Court to prevent *any* environmental harm that would ensue from a MEPA violation, while the matter is further addressed by the agency upon remand." D.C. Doc. 88 at 17 (emphasis added).

Had the district court looked beyond MEPA, it would have discovered that other Montana laws provide comprehensive environmental protections. *See, e.g,* Mont. Code Ann. §§ 82-4-331 to -332, 75-5-303(3); Mont. Admin. R. 17.24.103–108. Supposing Lucky Minerals had violated these substantive requirements, the district court could have enjoined any mining exploration activities through writ of mandate. Mont. Code Ann. § 82-4-354; *see, e.g., Kadillak*, 184 Mont. at 143, 602 P.2d at 157 (issuing a writ of mandate preventing the operation of a mine that did not comply with the permitting requirements of providing a complete mining plan, reclamation plan, and statement of subsequent use); *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 17, 366 Mont. 399, 288 P.3d 169 (mining companies "have no right to engage in mining operations until all necessary permits required by State law or regulation are obtained."); *accord Seven Up Pete Venture v. Mont.*, 2005 MT 146, ¶¶ 27–28, 327 Mont. 306, 114 P.3d 1009. Additionally, DEQ has broad enforcement powers to address any operator violation including, but not limited to, permanent injunctive relief. Mont. Code Ann. § 82-4-361(5).

By overlooking these substantive provisions, the district court overlooks the Montana legislature's creation of remedies to ensure a clean and healthful environment without the necessity of an additional injunction remedy under

MEPA. If the district court believed the MMRA to be deficient, it should have said so and explained why. But without the necessary initial step of evaluating the State's comprehensive regulatory over mining exploration, the district court committed reversible error in taking the remarkable next step of declaring Mont. Code Ann. § 75-1-201(6)(c) and (d) unconstitutional and fashioning a remedy of its own making.

B. By overlooking the MMRA and other applicable substantive laws, the district court erroneously declared these laws unconstitutional in contravention of the template set forth by *MEIC*.

As described above, the MMRA and other substantive laws provide adequate protections and remedies in the context of mine exploration licenses. By erroneously assuming that only MEPA can provide adequate remedies to protect the environment, the district court impliedly ruled that these substantive laws are inadequate and therefore unconstitutional. This point is illustrated by this Court's analysis in its *MEIC* decision.

In *MEIC*, Seven-Up Pete Joint Venture ("SPJV") had an exploration license that was initially approved by DEQ. ¶ 8. Later, SPJV sought to expand that license, which was initially approved, but later determined by DEQ to require pumping of groundwater into the Blackfoot and Landers Fork alluvial aquifers. *Id.*, ¶ 9. The Court noted that Montana's substantive environmental protections concerning

water quality (*i.e.*, Mont. Code Ann. § 75-5-303) were "a reasonable legislative implementation of the mandate provided for in Article IX, Section 1 . . . ." *Id.*, ¶ 80. The Court went on to find that because SPJV's water pumping activities were "arbitrarily exclude[d]" from this substantive review, the waiver provisions contained in Mont. Code Ann. § 75-5-317(2)(j) were in violation of "those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution." *Id*. The district court's approach to evaluating nearly the same question differs in two significant respects.

First, *MEIC* demonstrates that the water quality laws contained in Mont. Code Ann. § 75-5-303—equally applicable to SPJV and Lucky Minerals—are "a reasonable legislative implementation of the mandate provided for in Article IX, Section 1 . . . ." *Id.* Because this Court has already declared these protections reasonable, the district court should not have overlooked this body of substantive law, and instead relied on MEPA, when it evaluated the water quality impacts of Lucky Minerals' exploration license application. *See* D.C. Doc. 36 at 15–19. Notably, neither the PCEC alleged nor the district court found that Lucky Minerals had violated substantive water quality laws. *Id.*; *see also* D.C. Doc. 50, ¶¶ 1–4, 21–25 (PCEC limiting their alleged violations to MEPA).

Second, in evaluating a mining exploration permit, the *MEIC* Court directed its attention to the substantive law concerning water quality and examined whether particular pieces of that law upheld the constitutional right to clean and healthful environment. In finding that a certain provision did not, the Court said, "[o]ur holding is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts in this case. We have not been asked to and do not hold that this section facially implicates constitutional rights." *MEIC*, ¶ 80. The district court's finding here is antithetical to this restrained and targeted approach. The district court did not limit its review to MMRA or any other substantive law that might apply to mining exploration. Instead, it went to an entirely separate—and procedural—area of law in MEPA, as if it provided the sole remedy.

If ignoring legislatively created criteria for environmental protection is to be tolerated, environmental regulation in Montana becomes a Rorschach test of what a particular judge believes to be reasonable environmental protections. *But see* Mont. Code Ann. § 1-2-101 ("the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). This subjective and amorphous form of judicial review is precisely what the legislature intended to avoid when it put sideboards on MEPA review in 2011. Comm. Hr'g Video at 8:32:45–8:35:16

(Mar. 9, 2011). Even worse, the substantive environmental protections concerning mining exploration are implicitly declared inadequate without the district acknowledging that it was doing as much or providing an explanation for doing so. Such an unceremonious invalidation of the legislature's clear direction—both in the MMRA and MEPA—cannot be permitted when this Court has previously relied on such targeted means to evaluate whether certain statutes provide adequate environmental protections.

C. The district court's finding on mining claims on federal land is a red herring and ignores the rational tiered decision-making for licensing mining exploration and mine operation.

The district court faulted DEQ for not considering the secondary impacts of actual mining—not preliminary exploration—that might occur on federal land in the future. *See* D.C. Doc. 36 at 19–29. [3] This creates an impossible task for DEQ. Under this district court's rationale, whenever presented with a mining exploration license adjacent to federal lands, DEQ must do the environmental analysis for not

[3] While the Attorney General's purpose for reappearing in this case is not to defend the DEQ's MEPA decision-making, the district court's finding on secondary impacts of Lucky Minerals' exploration license contravenes this Court's holdings that a property interest, like a state lease, does not trigger environmental review, but instead that review occurs in the permitting process because a mining company "has no right to engage in mining operations until an operating permit has been obtained." *Seven Up Pete Venture v. Mont.*, 2005 MT 146, ¶ 27; *accord Kadillak*, 184 Mont. at 138-40, 602 P.2d at 154-55; *Northern Plains Res. Council, Inc.*, 2012 MT 234, ¶ 17; *Jefferson County v. Dep't of Envtl. Quality*, 2011 MT 265, ¶ 33, 362 Mont. 311, 264 P.3d 715.

just the exploration license, but also the entire mining operation that may never even be proposed. This disregards the legislature's tiered decision-making under the MMRA in which a mining project first seeks an exploration license under less stringent standards, Mont. Code Ann. §§ 82-4-331 to -332, and if viable, the project then seeks a full-blown operating permit under much more stringent criteria, *id.* § 82-4-335. The district court's approach in effect requires the prospective mine to prove its entire case when much of the relevant information is not available. For example, until mining exploration is complete, the applicant will not know precisely where the mine will be located. *See, e.g.*, AR 10 ("Results from this preliminary phase of the project would be used to model the subsurface geology and associated mineralization, if any."). Until the applicant has this necessary piece of information, the agency cannot begin to conduct the MEPA process of identifying reasonable alternatives including "similar projects having similar conditions and *physical locations* . . . ." Mont. Code Ann. § 75-1-201(1)(b)(iv)(C)(I) (emphasis added). Rather than allowing MEPA to be supplementary to the policies and goals of existing authorities, *id.* § 75-1-105, the district court's findings allow MEPA to envelop these substantive provisions and render them nonsensical.

The district court's analysis on this point relies on an assumption that "[i]f Lucky were able to establish . . . valid existing rights [on adjacent federal lands], they would amount to a possessory interest, under federal mining law, that would entitle them to extract all minerals from the claim." D.C. Doc. 36 at 24 (citing *McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013)). In *McMaster*, the 9th Circuit held the opposite by finding a litany of federal policies precluded the claimant from holding a fee simple possessory right to a mining claim just because it was located on federal land. The federal lands adjacent to Lucky Minerals' proposed exploration area were already withdrawn in October of 2018. 83 Fed. Reg. 51,701. Just as the federal policies in *McMaster* prevented the claimant from holding those mineral rights in fee simple, the recent withdrawal of federal lands in the Emigrant and Crevice areas prevents Lucky Minerals from doing the same. This information was known when the district court issued its order on summary judgment on May 23, 2018. *See* D.C. Doc. 36 at 4–5. Fears about Lucky Minerals' unencumbered expansion into federal lands should not have served as a justification to ignore the substance of the MMRA. *Id.* at 19–26.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) is equally inapposite. It states federal permitting of mining on federal lands must comply with state environmental regulation because state regulation of mining is not preempted. *Id*. at 583-84. The district court's suggestion that this holding is

limited to instances "where it does not seek to prohibit mining of the unpatented claim on national forest land," D.C. Doc. 36 at 24, does not render future state regulation inapplicable in this instance. The U.S. Supreme Court further elaborated:

> Granite Rock suggests that the Coastal Commission's true purpose in enforcing a permit requirement is to *prohibit Granite Rock's mining entirely*. . . . If the Federal Government occupied the field of environmental regulation of unpatented mining claims in national forests—concededly not the case—then state environmental regulation of Granite Rock's mining activity would be pre-empted, whether or not the regulation was implemented through a permit requirement. Conversely, if *reasonable state environmental regulation* is not pre-empted, then the use of a permit requirement to impose the state regulation does not create a conflict with federal law where none previously existed.

California Coastal Comm'n, 480 U.S. at 588-89 (emphasis added). It is unclear if the district court intended to suggest that Montana's regulation of Lucky Minerals might be interpreted as prohibiting mining outright and thus preempted by federal law. Ironically, the implications of the district court's decision suggest that mining regulation under the MMRA is too lenient and doesn't prohibit mining outright. *See also* D.C. Doc. 16 at 17 (PCEC arguing "DEQ could place reasonable conditions on an operating permit to mitigate environmental impacts, but it would be unable to altogether prevent such development and its unavoidable impacts"). But because Montana, like the California Coastal Commission, uses a permit

system, future regulation of Lucky Minerals would plainly fit the reasonable state environmental regulation not preempted by federal law.

This analysis of *California Coastal Comm'n* is, however, purely academic for the next 19 years. Federal lands adjacent to Lucky Minerals' exploration activities have already been withdrawn. 83 Fed. Reg. 51,701. In this instance, it is the federal government that is altogether preventing mining activities. While district court's analysis of *California Coastal Comm'n* may not actually matter, the notion that mining claims on federal land somehow become a runaway train is itself nowhere to be found in the authorities cited by the district court. Accordingly, this false premise should not serve as an excuse to dismantle the tiered decision-making established by the legislature in the MMRA.

CONCLUSION

If this Court chooses to examine this case as a facial constitutional challenge to Mont. Code Ann. § 75-1-201(6)(c) and (d), then *Kadillak* and *Montana Wilderness Ass'n* resolve this case outright in favor of finding these subsections constitutional. This is especially true in light of the high burden placed on PCEC to prove a statute is unconstitutional. *Grooms*, 283 Mont. at 467, 942 P.2d at 703. If this Court chooses to view this case as an as-applied challenge, then it must examine the underlying protections offered by the MMRA and other substantive environmental laws. This examination is a necessary step the district court did not

take. In either instance of an as-applied or facial challenge, the regulatory scheme enacted by the legislature provides adequate remedies to protect Montana's environment and natural resources from degradation. Accordingly, this Court should declare Mont. Code Ann. § 75-1-201(6)(c) and (d) constitutional. At a minimum, this Court should remand the case to the district court so that the protections offered by the MMRA and other substantive environmental laws can truly be examined in the context of Lucky Minerals' request for an exploration license.

Respectfully submitted this 29th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 7,130 words, excluding certificate of service and certificate of compliance.

/s/ Jeremiah Langston
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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0492

PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER YELLOWSTONE COALITION,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants,

v.

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

Intervenor and Appellant.

APPENDIX

CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-29-2019:

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