IN THE SUPREME COURT OF THE STATE OF MONTANA
Case Number DA 19-0492

PARK COUNTY ENVIRONMENTAL COUNCIL
and
GREATER YELLOWSTONE COALITION,

Plaintiffs and Appellees

-vs-

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY
and
LUCKY MINERALS, INC.

Defendants and Appellants

Opening Brief of Appellant Lucky Minerals, Inc.

ON APPEAL FROM THE MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

Hon. Brenda Gilbert, Presiding Judge

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II. Statement of the Case

Lucky Minerals, Inc. submitted an application for a mineral exploration license to DEQ in November 2015, seeking authorization to conduct minor exploration work on its property in the Emigrant Mining District, some 12 miles southeast of Emigrant, Montana. AR 001.[1] Lucky proposed a modest drilling program restricted entirely to existing roads on the St. Julian Claim Block, a group of nine patented claims located within the Emigrant Mining District on the Custer Gallatin National Forest. AR 385. Lucky chose early on to restrict its exploration activity to the private property, as such the proposal was evaluated under the Montana Metal Mines Reclamation Act ("MMRA") and MEPA . *Id.*

[1] The Parties stipulated early on to record review based upon the Administrative Record ("AR") compiled by DEQ pursuant to the judicial review provisions of MEPA. Mont. Code Ann. § 75-1-201(6)(a)(I); *see also* dkt. at Nov. 20, 2017, Sch. Order. Accordingly, citation to the record here is denominated by AR followed by the Bates No. found in the upper right corner of the cited document.

MEPA requires preparation of an Environmental Impact Statement ("EIS") for "actions of state government significantly affecting the quality of the human environment." Mont. Admin. R. § 17.4.607. The DEQ prepares an Environmental Analysis ("EA") to make the determination whether or not a State action is likely to "significantly" affect the environment thus requiring preparation of an EIS. Mont. Admin. R. § 17.4.607(1)(a). The Department did so in this matter, preparing an EA of remarkable scope and detail that rivals a traditional EIS in effort and content. AR 3. Due to the absence of significance, DEQ determined that an EIS was not required (AR 177) and released its EA granting Lucky's application in July 2017. The Plaintiff environmental groups challenged DEQ's EA thereafter, filing a prolix and largely speculative complaint in September 2017 followed by an amended complaint in June 2018, alleging eight causes of action against the Department:

1) Failure to evaluated impacts from road improvements;
2) Failure to rationally analyze impacts to wolverines;
3) Failure to rationally analyze impacts from artesian wells;
4) Failure to evaluate secondary impacts from full-scale mining;
5) Failure to evaluate a full range of reasonable alternatives;
6) Failure to complete an EIS;

See dkt. at Complaint.

Plaintiffs moved for summary judgment thereafter, seeking an order

that DEQ's MEPA analysis was arbitrary and unlawful. The Defendants filed cross-motions for summary judgment. Lucky challenged the Plaintiffs on all fronts including Plaintiffs' lack of standing to even challenge Lucky's permit in court; DEQ challenged Plaintiffs' flawed characterization of its obligations under Montana laws and administrative rules and rebutted the unsupported allegations in Plaintiffs' brief.

The district court issued its order on cross-motions for summary judgment in May 2018, denying Lucky's argument that Plaintiffs lacked standing to litigate and further denying both DEQ and Lucky's arguments on the merits. The district court granted summary judgment to Plaintiffs on all counts adopting in full all of Plaintiffs' arguments. *See* dkt. at May 23, 2018, Orders.

Plaintiffs subsequently moved the district court for leave to file an amended complaint alleging two additional causes of action based upon the district court's May 2018 order, *i.e.*:

7) Unconstitutionality of Montana Code Annotated § 75-1-201(6)(c-d) with respect to a clean and healthful environment; and
8) Unconstitutionality of Montana Code Annotated § 75-1-201(6)(c-d) with respect to the right of public participation.

See dkt. at Am. Compl. Plaintiffs additionally, and improperly filed a

motion to vacate Lucky's exploration license on constitutional grounds, as alleged in the not yet authorized or filed amended complaint, as well as a proposed order setting forth a proposed briefing schedule on the motion. Both DEQ and Lucky objected to Plaintiffs' improper filings based upon procedural defects, lack of jurisdiction, and failure to notice the Montana Attorney General ("AG"). *See* dkt. at DEQ's Jun. 5, 2019, objection and Lucky's joinder. The district court nonetheless granted Plaintiffs' motion to amend and set a briefing schedule irrespective of Plaintiffs' improper motion for vacatur. The AG subsequently appeared, contested the posture of the case, and intervened as its right on the constitutional question. Dkt. at Jun. 21, 2019, App. of AG.

The parties, inclusive of the AG ultimately resolved the procedural aspects, answered and argued in opposition to Plaintiffs' motion to vacate Lucky's exploration license on constitutional grounds. The district court nonetheless held in favor of Plaintiffs on all aspects holding Montana Code Annotated § 75-1-201(6)(c-d) are unconstitutional based upon both Plaintiffs' arguments under the clean and healthful and public participation provisions of the Montana Constitution. Mont. Const. art II, §§3, 8; and art. IX, § 1. Dkt. at Apr. 12, 2019, Order.

The instant appeal follows, challenging all three of the district court's orders: May 23, 2018, Orders on Plaintiffs' Standing and Cross-motions on summary judgment, and the April 12, 2019, Order vacating Lucky's exploration in license.

III. Statement of Facts

As noted above, Lucky Minerals' proposal is to conduct a very modest exploration drilling program entirely on its private property. Lucky Mineral's property and the location of the proposed exploration drilling project is in the Emigrant Gulch Mining District on the west side of the Absaroka Mountains, Park County, Montana. AR 10. The entire project is located on private property that was patented to the individuals that located and mined the property beginning in 1864, with the discovery of placer gold in Emigrant Creek. AR 1489-90. The District has been the site of placer and lode mining and exploration work periodically since that time. *Id.* The Administrative Record at page 1489-91 lists a chronology of activity in the District, including the St. Julian area. The last drilling project was completed in 1993. AR 1491. Lucky proposes to continue the geologic exploration of the area.

Lucky will access the St. Julian mining district via an existing road

which historically accessed the St. Julian Mine area. AR 151. The road is currently used by recreationists, cabin owners, and other area visitors. *Id.* No off-site road construction will be undertaken to accommodate Lucky's casual use beyond the occasional clearing of debris as necessary for passage. Lucky's use is projected to be up to 5 round trips per day during operations. The preferred alternative provides for mitigation of Lucky's casual use to avoid the tourist facility at Chico Hot Springs to the extent possible. *Id.*

Lucky's exploration project will only affect about 4.8 acres of its private property (AR 16):

- approximately 3.48 acres of existing unimproved roads on the St. Julian claim block will be maintained to render the roads passable - the roads will not be widened but merely graded to remove debris and ensure proper drainage (AR 17);
- a laydown area of approximately 0.8 acres will be cleared on previously disturbed ground near the old mill site at the St. Julian Mine (AR 16);
- and approximately 0.52 acres of drill locations, all of which will all be located on existing roads (AR 10) and reclaimed after drilling.

Due to adverse weather conditions, Lucky's proposed exploration project was scheduled for two field seasons of approximately three months each, July through October in 2018 and 2019. *Id.* Depending on results and weather, Lucky will implement 2 to 4 small track-mounted core drills operating for two, ten-hour shifts per day. *Id.* The purpose of Lucky's

exploration program is to gather subsurface geologic information and to gather mineralogical information designed to evaluate the property.

Lucky accordingly submitted a exploration permit application to DEQ in November 2015. The permit application is supported by a plan of operations and reclamation plan as is required by MMRA. Mont. Code Ann. § 82-4-331; Mont. Admin. R. § 17.24.103. The Department published a Draft EA in October 2016 and after consideration and response to public comments, published a final EA in July 2017. Therein, the Department authorized Lucky's proposed exploration program with certain agency modifications set forth in the preferred alternative. AR 18. The Department meticulously detailed its examination of Lucky's permit application under the applicable statutory and regulatory significance guidelines and clearly articulated its findings. AR 175-177. Lucky's exploration license only authorizes it to operate within the footprint of historic roads on its property and to completely reclaim each drill hole and drill location upon completion. AR 30.

IV. Standards of Review

A. Standing

"A district court's determination regarding standing presents a

question of law which we review for correctness." *In re Charles M. Bair Family Trust*, 2008 MT 144, ¶ 86, 343 Mont. 138, 183 P.3d 61; *accord Aspen Trails Ranch, LLC v. Simmons*, 356 Mont. 41, 51 (2010). "

B. Montana Environmental Policy Act

The Court's standard of review for MEPA decisions is "whether the record establishes that the agency acted arbitrarily, capriciously or unlawfully." *Ravalli County Fish & Game Assn. v. Mont. Dept. of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995). A review under the arbitrary and capricious standard "does not permit a reversal merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable or seemingly unmotivated based on the existing record." *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 24, 363 Mont. 310, 268 P.3d 31.

When courts review an executive agency's interpretation of governing law or regulation, substantial deference is paid to the agency decisions rendered pursuant to its expertise "unless such interpretation is plainly inconsistent with the spirit of the regulation." *Clark Fork Coalition v. Montana Dept. of Environmental Quality*, 2008 MT 407, ¶ 27, 347 Mont.

197, 197 P.3d 482. "The courts do not substitute their judgment for that of the agency by determining whether its decision was correct. Rather, the courts examine the agency process to determine if its decision was made on sufficient information, or whether the decision was so at odds with the information gathered that it could be characterized as arbitrary or the product of caprice." *Id., citing North Fork Preservation Association*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989).

It is settled law that courts interpret the substance and terms of statutes as well as the Constitution in accord with the plain meaning of the language employed. Mont. Code Ann. § 1-2-101; *Bud-Kal v. City of Kalispell*, 2009 MT 93, ¶ 18, 350 Mont. 25, 204 P.3d 738; *see also Shelby Distributors, LLC v. Montana Dept. of Revenue*, 2009 MT 80, ¶ 18, 349 Mont. 489, 206 P.3d 899 ("We read all parts of a statute as a whole and strive to give effect to all of its provisions. Our task 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.").

Finally, judicial review of an agency action must be based on the administrative record developed before the agency. *Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. Of Adjustment*, 2008 MT 1, ¶

47, 341 Mont. 1, 175 P.3d 282, ("[I]t is a general principle of administrative law . . . [that] the record developed by the agency serves to flesh out the pertinent facts upon which a decision is based in order to facilitate judicial review. *See also Ravalli County Fish & Game Ass'n Inc. v. Montana Dep't. of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995) ("We review [Montana Environmental Policy Act] decisions to determine whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully.").

C. Constitutional Review

The Court's standard of review for challenges to all legislative enactments is that "the constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt." *State v. Lorash*, 238 Mont. 345, 347, 777 P.2d 884, 886 (1989). The acts of the legislature are presumed to be constitutional:

> 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.

Stratemeyer v. Lincoln County, 259 Mont. 147, 150, 855 P.2d 506, 508-09 (1993), *cert. denied*, 510 U.S. 1011 (1993) (*citing Fallon County v. State*, 231 Mont. 443, 445-46, 753 P.2d 338, 339-40 (1988)); *see also State v. Lilburn*, 265 Mont. 258, 262, 875 P.2d 1036, 1039 (1994), *cert. denied*, 513 U.S. 1078 (1995).

A district court's constitutional conclusions are reviewed the same as other issues of law to simply determine whether or not they are correct. *See Wadsworth v. State*, 275 Mont. 287, 298, 911 P.2d 1165, 1171 (1996).

V. Summary of Argument

Since review of agency actions under MEPA are to determine whether the agency acted unlawfully, arbitrarily, or capriciously in its final decision, the Court must by definition look to the record to make that determination - did the agency indeed take the requisite "hard look" at the environmental effects of the proposed action.

An agency must take a "hard look" at the environmental impacts of a given project or proposal. Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data. *Clark Fork Coalition v.*

Mont. Dept. of Env. Qual., 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (internal citations omitted).

The agency's environmental review in this matter was plainly searching and comprehensive. AR 3-348. The Department conducted a *de facto* EIS to ensure that it had examined every facet of Lucky's proposal, modest though it be. A more comprehensive EA will be difficult to find. The Department determined that Lucky's plans to confine its drilling to existing roads and to completely reclaim each drill site upon completion did not adversely affect the environment. The Department examined all of the Plaintiffs' complaints and adjusted its findings according as was warranted or provided a detailed explanation of why the complaint was misdirected. *See e.g.* AR at 177-348 (responses to comments).

In summary, the Court cannot fault the substance of the Department's work, it may only substitute its own judgment, which is discouraged. *North Fork Preservation Association*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989).

Moreover, the provision in MEPA that addresses remedies is a valid legislative enactment. Mont. Code Ann. § 75-1-201(6)(c, d). MEPA is a procedural statute and it ought to have a procedural remedy. The

legislature clarified the matter in the 2011 session and this Court should be cognizant of the legislature's authority to do so.

VI. Argument

A. The district court erred in its determination that Plaintiff Environmental Groups have standing to litigate this matter.

The district court erred in reviewing Plaintiffs challenge to Lucky's exploration license. In response to Lucky's challenge below, Plaintiffs asserted they collectively have standing to challenge the agency based upon the declarations of four individual board member employees: Seabring Davis, Joseph W. Josephson, Lucinda Reinold, and Michelle Uberuaga. The declarants are universally opposed to Lucky's exploration license. The declarants base their collective opposition to Lucky's exploration program largely on allegations of interference with hiking, biking, camping, fishing, hunting, and a generalized enjoyment of the local environment they assert will be damaged or destroyed by Lucky's "large scale mine" (Seabring Dec. at ¶ 6); or "large-scale industrial mining operation" (Reinold Dec. at ¶ 7); or "potentially large-scale mining" (Uberuaga Dec. at ¶ 15); and finally, the line by line generalized critique of the mining industry in general set forth in the Josephson Declaration. In summary, none of the declarants's stated fears

are relevant to this case. *Lucky does not seek a permit to open a mining operation*. Lucky only seeks a license to do limited exploration work on its property, nothing more or less.

Plaintiffs asserted standing to challenge Lucky's exploration license based entirely on conjecture and speculation that legal injury could potentially be visited upon the declarants at some unspecified point in the future as a result of industrial mining activity. *Id.* Plaintiffs reach excessively and their complaint must be rejected for lack of jurisdiction. Plaintiffs do not and cannot present a justiciable case, controversy, or personal injury.

Whether a Plaintiff does or does not have standing to seek redress in the courts is a question of law and is a "threshold jurisdictional requirement in every case." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. It is axiomatic that courts must dismiss an action brought by a party that cannot demonstrate the requisite standing to do so for lack of jurisdiction. The *Heffernan* Court stated succinctly the variety of jurisdictional and prudential aspects of standing in Montana courts. *Id.* at ¶¶ 28-34. In its essence, the question of standing is the determination of whether or not an individual litigant is vested with a personal stake in a

legal action such that he or she is entitled to a decision on the merits. The Courts will not issue advisory opinions, an actual case or controversy is a requirement. *Id*.

Standing doctrine has evolved into two separate though related considerations. First, jurisdictional standing to complain in the courts is a initially a determination made on the basis of constitutional or statutory provisions as the case may be; secondly, standing may be conferred pursuant to prudential standards arising from the common law. *Heffernan*, 2011 MT 91 at ¶ 31; *accord Mitchell v. Glacier County*., 2017 MT 258, ¶ 9. Standing in Montana courts in MEPA actions is based upon prudential standards as the statute is strictly procedural and is barren of provisions conferring an express right of judicial review to private litigants. Consequently, Plaintiffs' standing to bring this action is by definition restricted to a prudential determination; *i.e*, is there a clear threat to a past, present, or threatened injury to a property or civil right; is the alleged injury distinguishable from an injury to the public generally; and is the alleged injury an actual "case or controversy" within the authority of the Court to decide. Additionally, the alleged injury must be "concrete" rather than "abstract." *Schoof v. Nesbit*, 2014 MT 6, ¶ 20, 373 Mont. 226, 316 P.3d 831

(citing *Heffernan*, 2011 MT 91 at ¶ 31). To qualify as "concrete," an injury must be "actual or imminent, not conjectural or hypothetical." *Heffernan*, ¶ 32 (emphasis added). "[T]he plaintiff must show that he has sustained, or is in immediate danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Schoof*, 2014 MT 6 at ¶ 20 (citation and internal quotations omitted).

Plaintiffs cannot satisfy the rudimentary requirements necessary to complain of a permit that was properly issued to Lucky for *de minimus* activities taking place entirely on its private property. Plaintiffs offer four declarations of individuals claiming personal damage arising from DEQ's authorization of Lucky's application for an exploration permit.

Lucinda Reinold declares that she has enjoyed hiking up the Emigrant Gulch road at some unspecified times in the past and intends to do so in the future. Dkt at Reinold Dec. at ¶ 5. Ms. Reingold asserts that mineral exploration will harm her enjoyment of doing so but does not offer an example or reason. *Id*. at 8.

William Josephson declares that he hiked down Emigrant Gulch in 1998 and states he has climbed "extensively on the steep cliffs of Emigrant Gulch." DKT. at Josephson Dec. at ¶ 15. Mr. Josephson does not

identify the location of the "steep cliffs" other than the same are in Emigrant Gulch somewhere. Like Ms. Reingold, Mr. Josephson offers nothing in way of concrete injury or specifics.

Michelle Uberuaga declares she has hiked and skied in Emigrant Gulch with friends and family. Dkt. at Uberuaga Dec. at ¶ 10.

Seabring Davis declares that she lives adjacent to the Emigrant Gulch road and maintains a business there. Dkt. at Davis Dec. at ¶ 1. Ms. Davis further avers she has hiked and biked in Emigrant Gulch at unspecified times. *Id*. at ¶ 5.

The respective declarations are considerably longer than paraphrased above and contain a laundry list of personal detail, miscellaneous irrelevant allegations, conjecture, and speculation; however, since the notion of personal injury is the touchstone of judicial standing, only the allegations that are claimed to bear on even an abstract notion of personal injury are set forth for the purpose of this motion. *See* dkt at Pl.s' Declarations. Plaintiffs' declarations are not adequate proof of personal injury such that enabled the district court to permissibly assume jurisdiction. The declarants only make generalized or ambiguous statements of potential harms arising unfounded perceptions of industrial scale activities that irrevocably lead to mining or

allege third party injuries; however, the one thing all the declarants have in common is a failure to show a particularized and personal injury. In short, the declarants do not make a persuasive case for standing to complain. *Id.*

The legal issue before the Court is entirely based upon whether the procedure DEQ employed in evaluating Lucky's planned drilling project was satisfactory. Mont. Code Ann. § 75-1-102 (MEPA is procedural). Plaintiffs contend that DEQ failed in its procedural duties in issuing the exploration permit to Lucky and as a direct result, make vague allegations of non-specific injuries to biking, hiking, and skiing up Emigrant Gulch. However, there is nothing in the declarations that goes to a specified personal stake in the litigation.

The Court must bear in mind that Lucky's project and the very minimal surface disturbances that will occur are entirely on private property. AR 10. The activities proposed by Lucky on the St. Julian property is nothing more or less that exploration activities that have occurred regularly on the property for over a century past and up to 1993. AR 11-13. The only off site activity is Lucky's use of the existing access road up Emigrant Gulch that is the historic access to its property and which is also regularly used by the public, and apparently by Plaintiffs as well

according to the declarations. AR 131, 139 (traffic on Emigrant Creek Road may be disrupted when Lucky mobilizes its drills), AR 150 (roads are generally kept open by off-road vehicle traffic), AR 155 ("Emigrant Creek Road would continue to provide access for recreationists in accordance with the GNF Travel Plan to private lands and CGNF lands in the Emigrant Creek drainage.").

Clearly the area byways are currently open to and are used by recreationalists. The Department found that with the exception of mobilizing and demobilizing equipment, the roads in Emigrant Gulch are open to hiking and biking, and will generally remain so. And any of Lucky's limited road maintenance activity will cease at the end of the field season in any event. AR 258.

The fact of the matter is that Plaintiffs cannot show a particularized injury that is "distinguishable from the injury to the public generally." *Schoof v. Nesbit*, 2014 MT 6 at ¶ 20 , 316 P.3d 831, 836. Moreover, any perceived injury complained of by the declarants does not differ in any way from that experienced by the other non-complaining members of the general public. *Id.* The Plaintiffs struggle to divert attention from the minimalist drilling program approved by DEQ by repeated references to

large-scale activities or large-scale industrial mining. Dkt. at Pl.s' Resp. Br. at 5, 6, 7, 8, 13, 15, 17, and 18; see also Davis Dec. at ¶¶ 2, 6; Reinold Dec. at ¶¶ 4, 5, 7, 8; Uberuaga Dec. at ¶¶ 6, 7, 15; Josephson Dec. at ¶¶ 3, 4, 5, 6, 7, 9, 10, 11, 14, 15. However, mining in Emigrant Gulch is very clearly not something that is contemplated by Lucky's exploration permit which is the sole issue at bar. Even if Lucky decided to seek an operating permit for a mine in Emigrant Gulch, an entirely new application process complete with an EIS would have to be completed under the MMRA. Plaintiffs' repeated references to mining is a red herring and of no consequence here.

The district court should have dismissed Plaintiffs' complaint upon Lucky's request that it do so.

B. The district court erred in finding that DEQ's Environmental Analysis was inadequate under MEPA and that an EIS should have been prepared.

1. The district court erred in its holding that the Department of Environmental Quality's finding that adverse effects to wildlife would be minimal was incorrect.

Plaintiffs impermissibly propose arguments in their supporting brief leveled at alleged impacts to grizzly bears, lynx, bats, birds. *See e.g.*, Dkt at Pl.s' SJ Br. at 9, 10, 11, and 19. Those allegations are not raised in Plaintiffs' complaint and were not permissibly before the district court. Plaintiffs'

arguments regarding wolverines is based entirely on its misunderstanding of the actual scope of DEQ's authorization with respect of the use made of historic mine access roads by Lucky's exploration vehicles. Dkt. Pl.s' SJ Br. at 9-13. Plaintiffs bootstrap Lucky's authorization to remove debris from the roads such that its four-wheel drive and tracked vehicles can access its private property into an influx of hunters and others driving "ordinary passenger vehicles" that will likely decimate the wolverine. *Id*. at 10. There is no support in the record for Plaintiffs' argument in this area and the same is factually and legal meritless.

At this time, four-wheel drive vehicles are generally able to access the St. Julian Mine and adjacent private property. AR 70. However, the "same type of vehicle will be required after Lucky Minerals makes the road improvements and completes its exploration activities." *Id*. Lucky's permit does not include new road construction or improvement beyond localized grading that clears loose rock and debris such that the existing roads, which have been present for over a century, are rendered passable to Lucky's field vehicles. AR 44. Nor does Lucky's permit require or authorize continued maintenance after the project is completed; as such, the roads will return to their present condition naturally. Based upon its analysis and available

evidence, the Department found "the improvements to Emigrant Creek Road discussed above would not lead to access to higher elevations and more remote habitat" than existed before. AR 198. The Department does acknowledge that marginal hunter access to the subject area may result, and that it "may marginally increase higher mortality." AR 63. But, it is also true that "hunting opportunities could be reduced in the area during the two field seasons if Lucky Minerals operations extended into the fall ungulate hunting season." *Id*. In other words, there is no evidence to support Plaintiffs' argument.

Plaintiffs carefully select passages from the record that do not accurately reflect the Department's findings. *See e.g.,*Dkt at Pl.s' SJ Br. at 10. DEQ's actual finding regarding wolverines is that:

> The local abundance of wolverines is likely to be reduced for the duration of the project. The activity and noise associated with road construction, maintenance, and drilling rigs is likely to cause displacement and disturbance. The use of lights during nighttime drilling may also disrupt wolverine use of the area. Sensory disturbance is expected to be temporary and should not result in permanent avoidance of the area.

AR 61. As DEQ notes, "wolverines have large home ranges," the limited impact from Lucky's activities is offset by the "large amount of undisturbed habitat surrounding the Proposed Action area." AR 325.

Plaintiffs select an out of context comment from Montana Fish, Wildlife, and Parks on page 10 of their brief that purports concern over "permanent changes to wildlife habitat." *See* AR 2983. However, that comment precipitated the following response from the Department: "DEQ has re-evaluated the impact on wildlife resulting from the proposed road improvements and believes that the draft EA overstated the impacts. DEQ has revised Section 3.4.4 accordingly." AR 197. The cited section does not support Plaintiffs' dire predictions; rather, as DEQ notes, "Any disturbances would be short-term due to the limited duration of the proposed project." AR 71. Plaintiffs' assertion that Lucky's limited maintenance of the access road would enable "members of the public to drive ordinary passenger vehicles to remote parts of the drainage" misstates the record and is not supportable in fact.

2. The district court erred in its holding that the Department of Environmental Quality's decision that adverse impacts to water quality were insignificant was incorrect.

Plaintiffs' characterization and the district court's concurrent that the Department's review and analysis of potential artesian flow is not accurate and does not acknowledge record facts. Aside from the fact that whether or not artesian flow is even encountered is entirely speculative, Lucky is

required to ensure that any artesian flow from an exploration borehole is terminated by plugging the hole. Mont. Admin. R. § 17.24.105(7). Moreover, DEQ requires a containment plan that includes necessary containment equipment be formulated and approved by DEQ prior to drilling. AR 31. Based on existing data in the area, even if artesian flow is encountered it is not expected to be excessive (≤ 5 gpm). AR 32. Additionally, none of the existing artesian flows, seeps, or springs exceed applicable water quality standards. AR 110-111. Using the actual groundwater data for the area, DEQ was unable to discern any reason to require groundwater from artesian flows be restrictively mitigated. AR 126. It is true as well that whether artesian flow even occurs is plainly speculative.

Plaintiffs ignore the relevant information and only select out-of-context passages in the EA from which they draw unsupported conclusions. For instance, Plaintiffs select an isolated quote from the AR: "The EA acknowledged that 'it is likely that Lucky Minerals would . . . encounter artesian conditions during drilling.'" Dkt. at Pl.s' SJ Br. at 13. The actual passage in the EA reads as follows:

> Based on the artesian hydraulic heads observed at lower elevations on the slope adjacent to the west, it is likely that

> Lucky Minerals would also encounter artesian conditions during drilling, though this may not be the case at every drill pad that is proposed. Following that comparison, it is also 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 (≤ 5 gpm and no aquatic life standard exceedances), and that water would likely infiltrate back into the rocky ground. This would have 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. Any local impacts from a flowing borehole would be eliminated as each hole is completed, as the holes are required to be plugged at depth (bottom to top) prior to removal of the drill rig (ARM 17.24.105). It is important that the appropriate combination of bentonite and cement be used to seal all holes, especially as dictated for flowing wells (ARM 17.24.106 and 36.21.671). The reclamation bonding must also be adequate to ensure artesian hole plugging at each site (ARM 17.24.106).

AR 127. The Court should also take note that as is stated above, there are several seeps, springs, and old boreholes that seep groundwater in the area which are not significant issues with respect to water quality. However, Plaintiffs morph their carefully selected passage into the rather grim statement that "Water contaminated by such acids and metals is extremely toxic to fish and other aquatic life." Pl.s' Br. at 13. The fact of the matter, is that there is no reason or data whatever, that support Plaintiffs' argument and the Court should disregard it in its entirety.

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3. The district court erred in its finding that DEQ should have been aware that granting Lucky's exploration license allowed Lucky to gain a vested development right on adjacent National Forest lands.

The district court's incorporation of Plaintiffs' argument that DEQ was, as a matter of law, required to evaluate the potential of mining taking place on national forest lands, or for that matter, Lucky's private property, has no basis in law or logic and ought to be summarily dismissed by this Court. Initially, as the Department points out (dkt. at DEQ Resp. Br. at 13), Plaintiffs' failed to broach this issue during scoping and should have been foreclosed from raising it before the district court as a matter of law. Mont. Code Ann. 75-1-201(6)(a)(ii) (matters that were not raised with the agency prior to decision and not in the administrative record are prohibited). Secondly, Plaintiffs' argument here that under MEPA's implementing rules DEQ was bound by law to delve deeply into the remote hinterland of potential mining on the national forest is not correct. Dkt at Pl.s' SJ Br. at 15. Plaintiffs significantly misapprehend the facts and law.

First, Plaintiffs' argument here is not supported by the law cited in support. *Id.* Plaintiffs point to Mont. Admin. R. § 17.4.609 in support of a far-ranging analysis into remote possibilities. The rule does not apply here. The plain language in the rule states that in instances where the Department

finds that "whenever an action is one that might normally require an EIS, but effects that otherwise might be deemed significant are mitigated in project design or by controls imposed by the agency, the analysis, format, and content must all be more substantial." In this case, the Department specifically found the minor nature of Lucky's proposed activities do not rise to the level of an EIS. AR 175-177 (addressing significance criteria). Only in the event the proposed action approaches disturbance normally consonant with preparation of an EIS are the provisions of the rule cited by Plaintiffs triggered. Mont. Admin. R. §§ 17.4.609(2, 3).

Second, Lucky did not submit an application for a mine operating permit, it simply requested an exploration permit for a very minor project that barely includes provisions for surface disturbance. And importantly, Lucky has not sought authorization to operate on public lands administered by the federal government. Absent an adverse environmental decision, DEQ is required by Montana law to issue an exploration license to Lucky upon payment of the statutory fees and posting of the reclamation bond. Mont. Code Ann. § 82-4-332. Plaintiffs' conjecture otherwise is not warranted, reasonable, or required by Montana's laws. In *Life of the Land v. Brinegar*, the Ninth Circuit addressed the proper consideration of

alternatives analysis mandated by NEPA, which is applicable here as well: NEPA's "alternatives discussion is subject to a construction of reasonableness. Certainly, the statute should not be employed as a crutch for chronic faultfinding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative. Rather, the EIS need only set forth those alternatives 'sufficient to permit a reasoned choice.'" 485 F.2d 460, 472 (9th Cir. 1973) (*citing N.R.D.C., Inc. v. Morton*, 458 F.2d 827, 834, 836 (DC Cir 1972). It is plainly unreasonable under the circumstances of this matter, that DEQ engage itself in the remote potential of Lucky's exploration program leading to "full-scale mining and its severe environmental consequences." Dkt. at Pl.s' SJ Br. at 15.

Plaintiffs' statement that "Lucky could attempt to use information it gains from such exploration to establish a vested right to mine a much larger body of minerals that underlies National Forest lands," is simply wrong as a matter of law and pervasively misleading. Dkt. at Pl.s' SJ Br. at 15. First, there is no evidence whatever that a mineable reserve of minerals exists under the National Forest, and even if there were, there are no "vested" rights to mine that are available to Lucky under the mining laws of

the United States, either by virtue of its exploration efforts on the St. Julian property or otherwise. The sole right Lucky has with respect to the National Forest lands is the right to seek authorization to enter the federal lands and to apply for a separate exploration permit from DEQ and USFS to investigate the mineral potential of its unpatented mineral claims located thereon. See generally 36 C.F.R. § 228, Subpt. A.

Plaintiffs' remark that Lucky's potentially vested right to the federal minerals "could give rise to a full-scale mine that DEQ is powerless to prevent," is similarly wrong as a matter of law. Dkt. at Pl.s' SJ Br. at 16. As noted above, there are no "vested" mining rights that are available to Lucky under the laws of Montana and the U.S. and in any event, DEQ does not possess the authority to “prevent” mining. The Department is an executive agency, tasked with regulation of natural resource activities as set forth in the statutes and implementing regulations; in other words, it does not "prevent," it regulates.

Plaintiffs' following argument that DEQ granting Lucky's exploration permit represents the "‘go/no go' point in development of federal minerals" is flat wrong. Dkt. at Pl.s' SJ Br. at 17. Plaintiffs' reliance on *North Fork Preservation Ass'n v. Dept. of State Lands* is not helpful to their argument.

238 Mont 451, 778 P.2d 862,869 (1989); *see* dkt. at Pl.'s SJ Br. at 17-18. The North Fork Court actually held that in a more or less similar instance, there is no "irretrievable commitment of resources" and accordingly not a "go/no go" posture assumed by a proposal that by law must be subjected to additional review. The Court analogized the Ninth Circuit's reasoning in *Conner v. Burford*:

> The test derived to pinpoint when the "go/no go" point is reached looks for the proposed action that will entail an "irretrievable commitment of resources." Some of the leases at issue in Conner had "no surface occupancy" (NSO) clauses. Under these clauses, no activity which would disturb the ground in any way could be undertaken without prior approval from the agency involved. The Ninth Circuit Court held that leases with NSO clauses were not an irretrievable commitment of resources. Nothing could happen under the leases without government approval. The point had not been reached where preparation of an EIS was "automatic." The court also noted, "We cannot assume that government agencies will not comply with their NEPA obligations in later stages of development."

836 F.2d 1521 at 1528 (9th Cir. 1988). Although Lucky's mineral claims on the National Forest do not have actual NSO clauses, it is nonetheless true that in light of federal law "no activity which would disturb the ground in any way could be undertaken without prior approval from the agency involved." *Id*; see also 36 C.F.R. § 228, Subpt. A.

Lucky's exploration license on the St. Julian private property has

absolutely no bearing whatever on the potential development of federal minerals. In the event Lucky seeks development of federal minerals hosted by its unpatented mineral claims, it would have to submit a Notice of Intent and in the event it intended to use mechanized equipment (drill rigs), a proposed Plan of Operations, which is reviewed pursuant to NEPA prior to authorization. 36 C.F.R. § 228.4. Hardly an irretrievable commitment of agency resources. Dkt. at Pl.s' SJ Br. at 17. Plaintiffs' argument in this regard is unreasonable, unsupported, and legally and factually without merit and the district court's adoption of the same is erroneous and must be reversed.

4. The district court's finding that an EIS was required and that DEQ failed to consider feasible project alternatives is incorrect.

Plaintiffs complain and the district court held that DEQ ought to have prepared an EIS instead of its finding otherwise. However, the touchstone of any environmental review is whether or not the Department took the requisite "hard look" at the facts and data and made a scientifically and logically defensible determination thereafter. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 54, 356 Mont. 41, 230 P.3d 808 (Mont. 2010). The Department's alternatives analysis was undertaken in accord with the law, was searching and thorough, and yielded the best and least intrusive

program that would accomplish the permittee's necessary goals. AR 10 (purpose of Lucky's request is to drill 46 holes over two, approximately three month-long field seasons); AR 175-77 (alternative analysis).

Plaintiffs' fault the Department for not examining and presumably forcing an alternative that reduces the number of bore holes Lucky would be authorized to drill. Dkt. at Pl.s' SJ Br. at 19. However, the scope of DEQ's alternatives analysis is restricted by statute:

> "Alternatives analysis" means 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.

Mont. Code Ann. § 75-1-220(1). The Department is simply not authorized to change the basic parameters of an applicant's project, such as the total number of bore holes proposed by Lucky.

The Department performed its alternative analysis based upon the applicant's work plan as is its duty under the statute and implementing regulations (*id.*) - it is not DEQ's purview to restrict the scope of operations but to regulate operations so as to be in concert with MEPA's requirements. Mont. Code Ann. § 75-1-201. The law requires that DEQ use a systematic,

interdisciplinary approach that will ensure environmental compliance by a thorough examination of the facts including a range of reasonable alternatives developed during consultation with the project sponsor and includes a no-action alternative for comparison. Mont. Code Ann. § 75-1-201(1)(b) - 75-1-201(iv)(C)(III). Importantly, there is no statutory or rule-based directive or authorization allowing for the Department to re-write the applicant's proposal as Plaintiffs argue. Mont. Code Ann. § 75-1-220(1).

Although the Montana Supreme Court does not appear to have directly addressed the matter, the Ninth Circuit addressed the legal standard for agency review in *Westlands Water Dist. v. US Dept. of Interior*:

> Courts have afforded agencies considerable discretion to define the purpose and need of a project. Preparing an EIS necessarily calls for judgment, and that judgment is the agency's. However, this discretion is not unlimited. Courts evaluate a Statement of Purpose and Need under a reasonableness standard. Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS.

376 F. 3d 853, 866 (9th Cir. 2004). Federal law interpreting the National Environmental Policy Act is considered persuasive in Montana courts.

Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877. It is correspondingly important to note that MEPA directives are procedural and do not require the Department to reach any particular goal. Mont. Code Ann. § 75-1-102(1).

In accord with the law, DEQ reviewed Lucky's Plan of Operations pursuant to MMRA as the implementing statute. *Westlands Water*, 376 F.3d at 866. In its review, DEQ considered a range of alternatives including a No Action Alternative, the Proposed Action Alternative, and the Agency Modified Alternative in addition to alternatives limiting exploration to one field season and an alternative eliminating night drilling. AR 1, 35. Plaintiffs argue that DEQ violated its duties under MEPA by not considering the discarded alternatives in detail. Dkt. at Pl.s' SJ Br. at 19. However, DEQ is not required to consider alternatives that are not reasonably calculated to improve the scope of proposed disturbance. Rather, DEQ is required to present "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented." Mont. Admin. R. § 17.4.609(3)(f).

The Department identified and rejected the two alternatives

complained of by Plaintiffs because neither one was reasonably calculated to make a positive difference. AR 35, 36. The Department analyzed compressing Lucky's Plan of Operations into one field season and rationally concluded there was no appreciable difference between it and the preferred alternative. AR 35. Similarly, the Department also concluded elimination of night drilling did not make a demonstrable difference with respect to environmental impact. AR 36. Moreover, in both instances, the Department found both alternatives had the potential to exacerbate adverse effects of the exploration project. AR 408. In summary, the Department completed its alternatives analysis pursuant to Montana law. Plaintiffs' argument otherwise is not persuasive and the district court's holding in this area in accord with Plaintiffs' argument is not correct.

C. The district court's holding that Montana Code Annotated § 75-1-201(6)(c-d) is unconstitutional as applied is incorrect.

The district court's constitutional decision in not in line with the facts of this matter and should be reversed. Plaintiffs' argued below that the district court should vacate Lucky's exploration license because the Montana Legislature's MEPA amendments allegedly violate Plaintiffs' fundamental rights found in Article II, §§ 3, 8, and Article IX, § 1 of

Montana's Constitution. Dkt. at Pl.s' Vacatur Br. at 3-4; Mont. Code Ann. § 75-1-201(6)(c, d). Plaintiffs' arguments circle the notions that they are entitled to an order vacating Lucky's exploration license based on MEPA itself and Article II, §§ 3, 8, and Article IX, § 1 of Montana's Constitution. Plaintiffs pervasively mis-read the applicable law and mis-construe this Court's previously holdings on Montana's Constitution.

1. MEPA

With respect to MEPA, Plaintiffs refuse to recognize the fact that MEPA is a procedural device. Mont. Code Ann. § 75-1-102(1) ("The Montana Environmental Policy Act is procedural" and is intended to guide agency review of state actions). MEPA was enacted in 1971 (§ 2, Chap. 238, L. 1971) and was originally intended to be procedural. Rev. Code Mont. 1947, 69-6504(b)(2). Plaintiffs' complaint alleges procedural defects in DEQ's Environmental Analysis of Lucky's application. The Court issued its decision and found in Plaintiffs' favor, that DEQ's EA was out of compliance with MEPA procedure and ordered the subject EA be remanded to DEQ "for further environmental review consistent with the Court's May 23, 2018, Decision." June 11, 2018, Order. Although, as stated above, Lucky disagrees with the district court's decision on the merits, its remand to DEQ

ends the matter, MEPA is a procedural statute with a procedural remedy which was originally ordered by the district court.

Plaintiffs misapprehend the Legislature's stated purpose in the MEPA amendments. The Legislature passed the subject 2011 amendment specifically for the purpose of foreclosing lawsuits like this case in favor of Montana's economic vitality. Democratic Senator Jim Keane of Butte, sponsored Senate Bill 233, which was the legislative vehicle by which the 2011 MEPA amendments moved to codification during the Schweitzer administration. During the floor debates the recurring theme was moving environmental review away from the endless obstructive litigation brought in response to the procedural decisions of DEQ and other agencies authorizing natural resource projects. During the second reading of SB 233 on April 8, 2011, the sponsor and supporters of SB 233 reiterated that MEPA is was always intended to be a procedural statute by definition and was originally intended by the Legislature to be a vehicle for permitting considerations, not regulatory enforcement. SB 233 - Jim Keane - Generally revise environmental laws, Apr. 8, 2011, Floor Session Audio 2:12 – 3:19; see also Mont. Code Ann. 75-1-102 ("The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the

Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions . . .") (emphasis added).

The fact is the 2011 Legislature preserved and reiterated that MEPA's original intent that state agencies work with proponents and opponents of a project in crafting environmental documents that fully consider all aspects of a proposal and ensure that "the public is informed of the anticipated impacts in Montana of potential state actions." Mont. Code Ann. § 75-1-102(1)(a, b); *see also* Mont. Const., art. II, § 8 (providing for public participation). Regulatory actions are appropriate only under other Montana statutes unless agreed to otherwise by the agency and project proponent. Mont. Code Ann. § 75-1-102(3)(b).

And indeed Montana does have comprehensive regulatory enforcement procedures for application where and when appropriate. For instance water quality permits may be suspended or revoked by law for violations. Mont. Code Ann. § 75-5-404. As such, Montana's water quality is protected from degradation. Similarly, Montana's air quality is protected by statutory requirements including fines and the ability of the state agency

to vacate an operating license. Mont. Code Ann. § 75-2-401. Pollution from mining activities are regulated and relevant laws incorporate penalties including revoking a permit or license. Mont. Code Ann. § 82-4-1001. Lucky's exploration proposal is so insubstantial and non-disturbing that DEQ did not find any reason to require any additional permits. Consequently, regulatory enforcement is neither necessary nor is it appropriate so far as Lucky's exploration license is concerned.

Neither MEPA nor any other Montana laws provide for revoking an exploration license so long as the reclamation requirements are provided for and the appropriate bond is in place. Mont. Code Ann. § 82-4-332; Mont. Admin. R. § 17.24.103. In the event an exploration project is successful and a mineral resource is located that is suitable for mining, a entirely new statutory scheme for obtaining an operating permit is triggered which as noted above is heavily regulated. However, the Legislature intended that MEPA's purpose, as stated in 1971 when it was originally passed, and which was emphasized and restated in 2011, is only to ensure the proper procedures are followed during environmental review.

Moreover, acts of the Legislature are presumed to be constitutional. *Stratemeyer*, 259 Mont. 147 at 150. It is perfectly appropriate for the

Legislature to balance Montana's economic interest with other fundamental rights and simply declare that MEPA is indeed purely procedural as the statute itself has proclaimed for nearly 50 years. *See Wadsworth v. State*, 275 Mont. 287, 911 P. 2d 1165, 1176 (1996) (A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among interests of employers, employees and the public). The Plaintiffs here complain that DEQ's comprehensive procedural efforts in evaluating Lucky's minor exploration proposal are defective, the Department and Lucky both agree that Plaintiffs is incorrect and DEQ's analysis was searching and in compliance with the law. The Court determined that Plaintiffs had the better argument and that the issue must be remanded to DEQ for additional work in compliance with the Court's Order. At that point, MEPA is satisfied and the matter is over pending DEQ's remedial efforts. MEPA is not now and has never been intended to be substantive or regulatory despite Plaintiffs' spirited aspirations otherwise.

2. Montana's Constitution

Plaintiffs' accompanying argument that Montana's Article II and Article IX provisions are offended by the 2011 amendments to MEPA are

similarly incorrect. Looking to Montana's Bill of Rights in Article II, § 3 is a list of inalienable rights accorded to Montana citizens:

> All persons are born free and have certain inalienable rights. They 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. In enjoying these rights, all persons recognize corresponding responsibilities.

The plain constitutional language guarantees both a clean and healthful environment as well as the right to pursue life's basic necessities, which includes employment (*Wadsworth*, 911 P.2d at 1176), in addition to enjoying private property and seeking health and happiness in all lawful ways. The fact that inalienable rights are several must by definition require the same be balanced. In its efforts to achieve that balance, the Legislature determined that regulated parties in Montana must be free to proceed with properly executed and issued permits irrespective of procedural defects in the license or permit unless the laws of Montana were otherwise violated. The plain language of both the statute, as detailed above, and the Constitution both support the Legislature's action in 2011.

The fatal defect in Plaintiffs' constitutional argument is the unstated assumption that Article II and Article IX are self-executing and provide for

some perceived remedy arising directly from the Constitution. See generally Dkt. at Pl.s' Vacatur Br. Plaintiffs are not correct. The Constitution plainly instructs the legislature to "provide for the administration and enforcement" of the duty to "maintain and improve a clean and healthful environment in Montana . . ." Mont. Const., art. IX, § 1. Article IX, § 1 and Article II, § 3 are to be construed together. *MEIC v. DEQ*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. The legislature has done so in several areas, notably in passing and amending MEPA. Since Plaintiffs' cause of action arises solely from MEPA, Plaintiffs are confined to MEPA's remedy which is remand. The plain and simple fact of the matter is that the legislature purposely foreclosed any other remedy based upon MEPA and MEPA is the sole cause of action in Plaintiffs' complaint. Plaintiffs' *post hoc* constitutional complaints are not persuasive or correct and the district court should have dismissed the same.

Plaintiffs' Article II, § 8 argument is curious at best. The reason this issue is before the Court arises directly from Plaintiffs' enthusiastic participation in DEQ's review of Lucky's application for an exploration permit. Plaintiffs and Plaintiffs' members commented at length on DEQ's environmental analysis - presumably the commenters read the document

and investigated the decisions made therein. *See e.g.*, AR at 269, 299. The right to comment and to be involved in the decision making process is integral to MEPA. Mont. Code Ann. § 75-1-102.

The same statutory right to be involved in the MEPA process will also be afforded Plaintiffs on remand. *Id.* Plaintiffs complain that: "By allowing Lucky Minerals' exploration project to proceed before DEQ has studied the impacts of that project as required under MEPA—and before the public has been afforded the opportunity that MEPA provides to participate in that process—the 2011 amendment violates the public participation provision of the Montana Constitution." Dkt. at Pl.s' Vacatur Br. at 15. However, Plaintiffs again misconstrue MEPA's procedural intent and in doing so compound their legal error. Plaintiffs' have already participated at length and are certainly able to in the future during DEQ's remedial environmental analysis which is assured by the plain language of the statute. Mont. Code Ann. § 75-1-102. As Plaintiffs observe in their brief, "One of MEPA's basic purposes is to ensure that 'the public is informed of the anticipated impacts in Montana of potential state actions.'" Dkt. at Pl.s' Vacatur Br. at 15 citing Mont. Code Ann. § 75-1-102(1)(b). It is ludicrous for Plaintiffs to argue they are not informed or have been, or will be barred from participation. That

opportunity was certainly afforded to Plaintiffs before and will be available during DEQ's next review - after all MEPA is procedural.

VII. Conclusion

In the interest of justice and equity, for the reasons set forth above, the district court's orders ought to be reversed and remanded. Moreover, the Court should instruct the district court to enter judgment in favor of the Department and Lucky, reinstating Lucky's exploration license.

Dated this 29th day of November 2019.

TOOLE & FEEBACK, PLLC

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* * * * * * *

Certificate of Compliance

The undersigned certifies that in accord with Montana Rule of Appellate Procedure 11, this brief is drafted with proportionately spaced 14 point font, double spaced, roman, non-script text, and excluding table of contents, table of citations, certificate of service, certificate of compliance, or

any appendix containing statutes, rules, regulations, and other pertinent matters, and contains 9,265 words as calculated by Word Perfect software.

/s/ *KD Feeback*

Certificate of Service

The undersigned certifies that a copy of this Opening Brief on Appeal was served on the following on the 29th day of November 2019 by electronic service via the Court's E-File system.

/s/ *KD Feeback*

CERTIFICATE OF SERVICE

I, KD Feeback, 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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