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

Reply 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana Cases

Montana Constitution

Statutes & Rules

Lucky Minerals respectfully submits the following Reply Brief in support of DEQ's Exploration License issued to it in July 2017. The Department of Environmental Quality ("DEQ"), the Montana Attorney General, and Lucky Minerals, Inc., accurately presented the arguments in opposition to Appellees in the opening briefs filed in this matter. Appellees' Response Brief largely paraphrases its position in the district and only raises limited new issues.

I. Reply to Statement of Facts

Appellees take considerable latitude with the actual facts of this matter throughout the Response Brief in an unabashed attempt to inaccurately inflate Lucky Mineral's modest exploration proposal into an "industrial scale" mining operation. Resp. Br. at 5 (Lucky proposes to introduce mining vehicles and heavy equipment into a sensitive area), 6 (the Livingston Enterprise cautions against Lucky's proposal in light of the "long, sordid history of mining in Montana), *etc.* Appellees' entire brief is drafted in the same overly prolix and dramatic style that portends environmental doom and despair for its members and the community. *See generally* Resp. Br.

It is important the Court look past Appellees' exaggerated prose and

recognize at the outset that Lucky actually proposes a relatively small and environmentally insignificant drilling program restricted entirely to private property in the historic Emigrant mining district within the St. Julian Claim Block. Lucky's exploration license application seeks authorization for a maximum of 23 very small drill locations - all located on existing roads and all on private property. AR 10, 25.[1] Lucky's application requests authorization to use two track-mounted core drills that will operate entirely on the existing private roads. *See* AR 27 at Fig. 2.1. Surface disturbance beyond existing conditions is essentially nil. AR 149-150.

Appellees similarly imply that Lucky's minor exploration activity is likely to ruin the area's "natural beauty" and "local economy." Resp. Br. at 5. In support, Appellees claim Emigrant Peak is "one of the most popular year-round recreations in Montana." *Id.* Those claims are not and cannot be supported beyond Appellees' speculation; the Court must bear in mind that the subject area has limited access and lack of developed campgrounds. AR 136. In any event, Appellees citation to the record at AR136 does not support the notion that Lucky's exploration will particularly impact anything, nor did DEQ find otherwise. AR 176.

[1] The Administrative Record page number is denominated DV-17-126000010Adm Record. In the interest of space, the page numbers herein are shortened to AR 10, *etc.*

Appellees are similarly incorrect regarding the rather convoluted argument advanced in support of their theory that somehow Lucky's exploration license vests it with "'valid existing rights' to mine adjacent federal lands." AR 17, 32-36. First, the mineral entry withdrawal enacted by the U.S. Congress in March 2019 (Pub. L. No. 116-9, 133 Stat. 580, § 1204(b)) has no effect on Lucky's property position on adjacent federal land. Lucky's unpatented mineral claims predate the withdrawal and are intact. However, irrespective of the fact that Lucky has not sought a permit from the U.S. Forest Service to explore on the federal reserve, Appellees' argument with respect to the same is meritless as is discussed below.

In summary, and although time consuming, Lucky urges the Court to check Appellees' statements of fact against the record. Appellees carefully select passages from the record and present a rather creative rendition of the actual facts and law of this matter.

II. Reply to Standard of Review

Appellees' stated Standard of Review presumes environmental impact that is not present. DEQ's MEPA analysis is searching and comprehensive, especially given the minor scope of the exploration program. DEQ's finding of No Significant Impact is true and is warranted by the facts identified

during the Department's investigation and set forth in detail in the EA. Consequently the Court's analysis ought to defer to the agency and be restricted to the settled notion that absent arbitrary and capricious findings, the EA must be affirmed. Additionally Appellees' baseless speculation does not implicate Article II, § 3 of the Montana Constitution. Consequently, strict scrutiny review is not the correct standard; rather, the intermediate balancing standard of constitutional rights is appropriate.

Moreover, Appellees incorrectly rely on what they refer to as MEPA's remedial restrictions. Resp. Br. at 10. MEPA is a procedural device and does not contain remedial provisions. Mont. Code Ann. § 75-1-102 ("The Montana Envionmental Policy Act is procedural . . .").

III. Reply to Argument

A. Appellees' argument fails to establish standing to litigate the Department's EA.

Appellees do not have standing to sue and the district court accordingly did not have subject matter jurisdiction. The Court should remand with orders to dismiss Plaintiffs' complaint. In order to show standing to litigate, to cross the threshold into the district court, Appellees must show a personal injury. Plaintiffs' standing to bring this action is by definition restricted to a prudential determination; *i.e*, is there a clear threat

of 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 v. Missoula City Council*, 2011 MT 91, ¶ 31, 360 Mont. 207, 255 P.3d 80). 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).

Appellees argue vaguely that the established criteria set forth above are satisfied. Appellees base standing on the declarations submitted by four members of their respective organizations. Resp. Br. at 14-15. However, the fact of the matter is that unless the four named individuals trespass on Lucky's property, its activities will be largely unnoticeable. AR 532. It appears the nearest affiant relied on by Appellees for standing is located approximately six miles away at Chico Hot Springs resort. AR 132 (Fig.

3.15), 499. It unavoidably follows that absent trespassing on private property, Appellees cannot see Lucky's activities. *See also* AR 165 (discussion of minimal visual impact).

Appellees are unlikely to be able to hear Lucky's activities for the same reason. AR 167 (no significant noise increase from Lucky's activities), AR 532 ("The additional traffic and drilling noise from the Proposed Action added to the current land use in the area would have a minimal short-term impact to recreational experience."). It follows that direct impacts to the Appellee are realistically non-existent.

Appellees impermissibly rely on speculative injury to create standing. One hundred percent of Appellees "injuries" are based upon the unsupported allegations in the subject affidavits. Resp. Br. at 14. Ms. Lucinda Reinold finds it "abhorrent that any mining exploration be allowed in Paradise Valley, [and] mineral exploration is just the first step toward developing a large-scale industrial mining operation." Reinold Dec. ¶¶ 7, 8. Mr. William Josephson identifies himself as an employee of one of the Plaintiff environmental organizations, and notes that upon his review of Lucky's application, he "immediately recognized the vast scope" of Lucky's plans. He testified that four full-time positions are currently funded to

oppose Lucky's exploration plan. Josephson Dec. ¶ 4. Josephson also includes a section citing to the environmentalist perspective on mining in general and lamenting the same. *Id.* ¶ 11 (*citing* Earthworks publications). Josephson does not, however, allege any personal injury inuring from Lucky's proposed exploration program.

Declarant Michelle Uberuaga is similarly employed by Appellees and also does not live near the subject location. Uberuaga Dec. ¶¶ 1, 2. Ms. Uberuaga alleges impacts from traffic that after a thorough investigation, DEQ stated unequivocally were *de minimus*. AR 532. Ms. Uberuaga complains her enjoyment of area recreational opportunities will be damaged by Lucky's work. *Id.* ¶ 15. Finally, Ms. Seabring Davis asserts familiarity with Lucky's "industrial-scale mining exploration" proposal. Davis Dec. ¶ 2. However, Ms. Davis does not assert any personal injury arising from Lucky's exploration license either. Ms. Davis merely makes non-specific statements that she "definitely oppose[s] any exploratory drilling, mineral exploration and proposed industrial scale development of Emigrant Gulch." *Id.* ¶ 6. In summary, none of the declarants alleges a "concrete," injury that is "actual or imminent, not conjectural or hypothetical." *See Schoof v. Nesbit*, 2014 MT 6, ¶ 20, 373 Mont. 226, 316 P.3d 831.

Appellees suggest that it makes no difference to standing in this matter that Lucky is operating on private property. Appellees point to the Court's opinions in *Aspen Trail Ranch* and *Heffernan* for support. 2010 MT 79, 356 Mont. 41, 230 P.3d 808; and 2011 MT 91, 360 Mont. 207, 255 P.3d 80 respectively. However, both cases are readily distinguishable and neither support Appellees' standing argument. In both *Aspen Trails* and *Heffernan*, the issue at bar concerned property owners situated adjacent to challenged subdivision proposals. *Aspen Trails* 2010 MT 79 at ¶ 8; *Heffernan* 2011 MT 91 at 38. Conversely, none of the Plaintiff Declarants in this issue live at all close to the St. Julian Claim block, the closest appears to be Ms. Davis and she is roughly 6 miles away. AR 132, 499. And as further noted above, none of the Declarants are able to hear or see Lucky's activities unless they make a special trip up Emigrant Gulch to do so. Appellees plainly do not have a personal stake in Lucky's small program other than a misplaced fear of "industrial scale mining operations," which are not even proposed, and philosophical differences, which are irrelevant.

Standing is an important jurisprudential check on separation of powers doctrine and was of primary importance to the framers of the U.S. Constitution. Indeed, the seminal case of *Marbury v. Madison* stands for

the proposition that the courts are merely "to say what the law is" and not to meddle in the affairs of the executive or presumably the legislative. 5 U.S. 137, 170 (1803). The entire notion of standing is a safeguard on the courts intruding into the provinces of the legislative or executive. *Best v. Police Dept. of City of Billings*, 2000 MT 97, ¶ 16, 299 Mont. 247, 999 P. 2d 334. As such, there must be a concrete injury shown such that jurisdiction is invoked and a court may fashion an appropriate remedy on the merits. *Heffernan,* ¶¶ 28-34. Appellees have failed to shoulder that burden and the complaint must be dismissed.

B. Appellees' MEPA arguments fail to incorporate DEQ's research, analysis, and findings in the EA and are legally incorrect.

The Montana Rules of Appellate Procedure caution that "The reply brief must be confined to new matter raised in the brief of the appellee." The Appellee has not successfully made its case nor, with one exception, has it broached new subject matter that warrants a response beyond the Appellants' previous briefing. Lucky will address Appellees' incorrect observations and argument regarding "vested rights" on the public domain below. Otherwise, Lucky joins in the opening arguments advanced by the Department of Environmental Quality and the Attorney General as well as the respective reply briefs.

The Appellees' MEPA argument is nothing more or less than a expression of their collectively philosophical opposition to mining and mineral exploration. *See e.g.* Josephson Dec. ¶ 4. There exists an obvious underlying assumption that mineral exploration is ruinous and must be opposed, irrespective of circumstance. "The prospect of a large-scale mine in Paradise Valley would change the quality of life in Park County and diminish the experience for my family and thousands of people who visit Chico Hot Springs." Davis Dec. ¶ 6. These observations are not a persuasive legal argument and the Court's review of this matter must recognize that Lucky *has not applied for a mine operating permit*. Rather, Lucky only seeks a license to do limited work to investigate its property. In the event that Lucky discovers a mineable reserve the permitting process is much more detailed and higher level. However, all of that is premature at this time - the Court does not speculate nor does it issue advisory opinions. *See Serena Vista, LLC v. Dept. of Nat. Resources and Conserv.*, 2008 MT 65, ¶ 14, 342 Mont. 73, 179 P.3d 510 ("We consistently have held that this Court does not render advisory opinions.").

Consequently, the Court's MEPA analysis begins with a determination of "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).

In this case, Appellees strive to select passages in the EA that may be construed as "inconsistent evidence or evidence which might support a different result." *Id.* The Court must set those arguments aside in light of DEQ's searching and comprehensive review of what is plainly an environmental non-issue. Lucky is not proposing any cognizable surface disturbance at all and the minimal disturbance that is proposed is limited to existing roads and previously cleared areas on its property. AR 10, 25, 149-50. In short, the Department has carefully reviewed the actual fact of Lucky's proposal and generated an extremely thorough EA. Appellees merely disagree with DEQ's findings because Appellees irrationally fear the very notion of mining. *See generally* Dec.s of Davis, Reinold, Josephson, and Uberuaga. Appellees did not make a case below and have failed to do so here.

The result is that the Constitution is not implicated nor are the laws of Montana. The Appellees have failed to prove otherwise and the Court should remand with instructions to dismiss the matter.

C. Reply to argument regarding Lucky's potential acquisition of vested exploration or mining rights on adjacent National Forest is not correct.

Importantly, Appellees are foreclosed from raising this argument, both at the district court and in this Court. As the Department points out in

its brief, Montana Code Annotated § 75-1-201(6)(a)(ii) prohibits its consideration at the district court. Matters that were not raised with the agency prior to decision and not in the administrative record are prohibited. *See* dkt. at DEQ Resp. Br. at 13. Plaintiffs' failed to broach this matter during scoping and should have been foreclosed from raising it before the district court as a matter of law.

Additionally, Appellees' statement that the March 2019 twenty-year mineral withdrawal has some effect on Lucky's property position is not true. Lucky's unpatented mineral claims on the public lands adjacent to its property in the Emigrant Mining District predate the withdrawal and are valid claims. Pub. L. 116-9, 133 Stat. 653, § 1204(b) Those claims may be explored pursuant to the federal mining laws and regulation by filing a Notice of Intent with the U.S. Forest Service and proceeding under federal regulations thereafter. *See e.g.*, 36 C.F.R. § 228, Subpt. A.

Notwithstanding Lucky's mineral claims, Appellees' following arguments are wrong. It should be axiomatic that DEQ's regulatory jurisdiction does not include mineral permitting on federal lands. In the event a party seeks an exploration permit on federal land, if the same is granted, DEQ has oversight authority on certain aspects of the operations. *Id.* However, Appellees' assertion that somehow DEQ granting an

application for an exploration license creates a "'valid existing right' to exploit federal minerals" is not a correct statement of federal law or procedure. Appellees do not supply any support for their rather novel argument because none exists.

Rather, locatable minerals on the public domain may be claimed and perhaps developed pursuant to the General Mining Law of 1872 and the regulations enacted thereunder. 30 U.S.C. § 22-42; 36 C.F.R. § 228, Subpt. A; *see also* Mont. Code Ann. § 82-2-101 (procedure for staking a claim on federal property located in Montana); § 82-2-101(3) ("Within 60 days after posting notice, the locator shall comply with the United States mining laws."). There is no legal support for the notion that an exploration license on State ground has any bearing whatsoever on a mineral interest on the public lands.

Appellees cite Montana Administrative Rule § 17.4.609(3)(d) for the proposition that DEQ ought to have considered the non-existent secondary impact from mineral development on the National Forest. Resp. Br. at 33. The Rule is not helpful to Appellees' argument for the plain reason that any mineral activity on the National Forest is entirely speculative and as is noted comprehensively throughout the law, speculation is not a legal basis for litigation nor are advisory opinions. The district court's concurrence with

Appellees' argument on this matter is not supportable and must be reversed.

IV. Conclusion

For the foregoing reasons, and reasons set forth in the Appellants' opening briefs and reply briefs, the district court's decisions on standing, MEPA compliance, and the unconstitutionality of MEPA's remedial restrictions should be reversed and Lucky's Exploration License approved.

Dated this 10th day of February 2020.

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 3,015 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 10th of February 2020 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 Reply to the following on 02-10-2020:

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