

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 22-0406

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MONTANA TROUT UNLIMITED, MONTANA ENVIRONMENTAL  
INFORMATION CENTER, TROUT UNLIMITED, EARTHWORKS, AND  
AMERICAN RIVERS,

*Plaintiffs and Appellees,*

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,  
*Defendant,*

AND

TINTINA MONTANA INC.,  
*Defendant and Appellant,*

AND

STATE OF MONTANA, BY AND THROUGH THE OFFICE OF THE ATTORNEY  
GENERAL,  
*Defendant-Intervenor,*

AND

MEAGHER COUNTY AND BROADWATER COUNTY,  
*Defendants-Intervenors.*

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Defendant-Intervenors (Meagher and Broadwater Counties)  
Opening Brief

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ON APPEAL FROM THE MONTANA FOURTEENTH JUDICIAL DISTRICT  
COURT, MEAGHER COUNTY, CAUSE NO. DV-20-10,  
HON. KATHERINE M. BIDEGARAY PRESIDING

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## **ISSUES PRESENTED**

1. Did Defendant/Appellant Montana Department of Environmental Quality (“DEQ”) satisfy the requirements of the Montana Metal Mine Reclamation Act (“MMRA”) and Montana Environmental Policy Act (“MEPA”) when it found that Defendant/Appellant Tintina Montana, Inc.’s. (“Tintina”) cemented tailings facility was safe and stable?
2. Did Tintina’s Independent Review Panel (“IRP”) process satisfy the requirements of the MMRA?
3. Did DEQ satisfy MEPA by rationally evaluating the environmental impact of the mine’s total nitrogen discharges into Sheep Creek?
4. Did DEQ satisfy MEPA when it considered and dismissed alternatives to the proposed action?

## **STATEMENT OF THE CASE**

Defendant-Intervenor Appellants Meagher and Broadwater County, (“Counties”) adopt and incorporate the statements of fact and arguments in the Department of Environmental Quality (“DEQ”) and Tintina Montana, Inc.’s (“Tintina”) briefing.

The Black Butte Copper Project (“Project”) was permitted by the State of Montana on August 14, 2020. The potential underground copper mine is

located approximately fifteen (15) miles North of White Sulphur Springs in Meagher County Montana. AR046017. Plaintiffs filed their Complaint on June 4, 2020, asking the Court to invalidate the State’s Final Environmental Impact Statement (“EIS”) and to invalidate the Operating Permit. Following cross-motions for Summary Judgment and oral argument on July 16, 2021, the District Court adopted the Plaintiff’s Proposed Findings of Fact and Conclusions of Law on April 8, 2022, 266 days later, holding that the DEQ’s decision to issue a permit was arbitrary, capricious, and unlawful. Doc 74 at 1.

### **STATEMENT OF FACTS**

The EIS states, dryly: “Meagher County’s current economic indicators are generally on the lower end of the larger analysis area, indicating a less healthy economy.” AR046021. For residents of Meagher and Broadwater, a “less healthy economy” means:

- 18.3 percent of Meagher Counties residents live below the poverty line, compared to 13.4 percent statewide. AR046021.
- The median household income per year in Meagher County is \$10,981 lower than Montana as a whole. AR046021.
- The average earnings per job per year in Meagher County is \$12,998 lower than the statewide average. AR046021.

- The average earnings per job per year in Broadwater County is \$13,276 lower than the statewide average. AR046021.
- The per capita personal income per year in Meagher County is \$7,320 lower than Montana as a whole. AR046021.
- The median age in Meagher County is 48.6 years, compared to 39.8 years statewide. AR046019.
- The median age in Broadwater County is 46.7 years compared to 39.8 years statewide. AR046019.
- Meagher County ranks 41 out of 47 for Health Outcomes. AR046026, AR046028.
- K-12 enrollment in Meagher County in 2017 was 190 students, down 49 from 2011. AR046024.

These numbers tell the story of why both Meagher County and Broadwater County Commissioners intervened in favor of development of the Project. As local decision-makers, they start with the numbers above. Then the Project estimates 386 new jobs. AR046029. Then they factor in the median wage for a mining sector job in Montana at \$60,190 in 2016 while Montana's average per-job earnings are \$43,654. AR046020. In Meagher County and Broadwater Counties, the average per-job earnings are only

\$30,656, and \$30,378, the lowest in Central Montana, or about half of the average mining sector job in 2016. AR046021.

While compelling, these numbers can't express the *feeling* of a "less healthy economy." In Meagher County our largest employer is the critical access hospital (AR046021) that is mostly caring for the aging population. When the undersigned graduated from White Sulphur Springs High School in 2000 there were thirty-six students (36) in his class, this year, hopefully, all eighteen (18) seniors will graduate. The smallest class currently is six (6) students in the second grade. They are great kids, but it *feels* depressing and scary to walk into a classroom that only has six kids.

Additionally, it *feels* like major employers such as the hospital, school, County, or Showdown Ski Area have jobs, but they have trouble hiring because the housing stock is old, expensive, and dilapidated. AR046022. With the lower value of homes here (AR046022) it is difficult to get investment in housing when Meagher County is competing with Bozeman, Helena and Great Falls, all within a hundred miles of White Sulphur Springs, where developers can achieve much greater profit. Without the massive influx to the job and tax-base, lasting, sustainable, growth that arrests the slow economic decline of rural central Montana *feels* impossible.



In Meagher County, the formal process for preparing for the economic influx of this Project began with Hard Rock Mining Impact Plan. It has continued with the formation of the non-profit Meagher County Stewardship Council that is heading up the efforts to formalize a Good Neighbor Agreement with Tintina. Money from the Hard Rock Mining Impact plan, which vested when the permit was issued, has been utilized to create a new City-County Planning Board that has authored a new County-wide Growth Policy, new County Subdivision Regulations, with new Wildland Urban Interface plans, Disaster Plans, and Floodplain mapping in the pipeline. The Counties that intervened here are not simply focused on the jobs and the tax revenue. They are preparing, clear-eyed for the good and bad of development. The Counties know what it feels like to be in a “less healthy economy.” They are prepared for the opportunity to make the long-term investments made possible by this Project.

### **STANDARD OF REVIEW**

A district court's grant or denial of summary judgment, and related conclusions of law, are reviewed de novo for correctness.

*Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712. This Court reviews DEQ's MEPA analysis using the same standard as a district court, determining whether the agency decision was “arbitrary, capricious, unlawful, or not supported by substantial evidence.” *See Clark Fork Coal. v. Mont. Dep't. of Env'tl. Quality*,

2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482 (quotation omitted); *see also* Mont. Code Ann. § 75-1-201(6)(a)(iii). We inquire “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Clark Fork Coal*, ¶ 21 (quotation omitted). Accordingly, this Court “looks closely” at agency decisions to determine whether the agency has taken a “hard look” by fulfilling its obligation to “make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data.” *Clark Fork Coal*, ¶ 47. The Court’s focus is on the administrative decision-making process rather than the decision itself. *Clark Fork Coal*, ¶ 47. In general, agency decisions implicating “substantial agency expertise” are afforded “great deference.” *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493 (*MEIC III*) (citations omitted). Government actions that interfere with the exercise of a fundamental right are subject to strict scrutiny review. *See Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 1999 MT 248, ¶¶ 62-63, 296 Mont. 207, 988 P.2d 1236 (*MEIC I*).

*Park Cnty. Env’t Council v. Montana Dep’t of Env’t Quality*, 2020 MT 303, ¶ 18, 402 Mont. 168, 180–81, 477 P.3d 288, 295–96

### **SUMMARY OF ARGUMENT**

The District Court failed to in its obligation, outlined above, to focus on the administrative decision-making process, or to grant deference to the DEQ’s expertise. To label a four-year, seven-month process that results in a 90,000 page administrative record and results in an EIS that exceeds a thousand pages arbitrary or capricious beggars’ belief.

## **ARGUMENT**

At the bottom of this mountain of paper and process is an individual landowner and their decision to contract with Tintina to develop the long-ago discovered Johnny Lee deposit. The Project is on private property, adjacent to Sheep Creek, nineteen (19) river miles upstream from the Smith River. AR045780, AR045750. This Court must not ignore those private property rights.

**Montana's Constitution protects the environment *and* private property rights.**

Mining is legal in Montana. The drafters of Montana's Constitution did not prohibit mining when they enumerated the right to a clean and healthful environment. Rather, they sought to correct the imbalance mining interests had exerted over Montana's natural resources during its first century. The same section of "Inalienable Rights" included: the right to pursue life's basic necessities, to acquire property, to possess property, and to protect property. Mont. Const. Art. II, § 3. The MMRA and MEPA legislation requires the DEQ to balance these competing interests.

The purpose...of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment

and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state...

Mont. Code Ann. § 75-1-103(2)

The legislature finds that land reclamation and tailings storage as provided in this part will allow exploration for and mining of valuable minerals while adequately providing for the subsequent beneficial use of the lands to be reclaimed.

Mont. Code Ann. § 82-4-301(3).

As stated by the Meagher County Commissioners in their letter of support to the DEQ, “We are pleased that the environmental impacts of this positive economic proposal are successfully dealt with in the proposed plan. Tintina Montana, Inc., seems more than ready to prove they can conduct copper mining in an environmental and socially responsible way. Of particular importance to us is the handling of surface and ground water as well as the avoidance of impacts to the Smith River.” AR018225.

Through the judiciary, the Plaintiffs seek to strip the private property owners where this Project is to be located and Tintina Montana, Inc., of their constitutionally protected private property rights. In answering each of the issues presented above, the private property rights must be considered, and this Court should answer “Yes” to each issue presented.

Private property rights are inalienable and protected by the Montana Constitution. Mont. Const. Art. II, § 3. The right to a clean and healthful environment is entitled to the same protection as the rights of private landowner's right to possession and use of their private property. *Galt v. State*, (1987), 225 Mont. 142, 148, 731 P.2d 912, 916 (“The real property interests of private landowners are important as are the public's property interest in water.”).

In the recent case, *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, 402 Mont. 168, the Montana Supreme Court held that the *premature* approval by DEQ of an exploratory permit “did not grant Lucky an irrevocable and constitutionally-protected private property right.” *Id.* at ¶ 83. At issue was a delay allowing for DEQ to conduct additional analysis of wildlife impact and artesian flow containment plans. The Court stated, “There is no argument that simply waiting for DEQ to properly review and act upon an application constitutes an infringement upon property rights.” *Id.* at ¶ 82. The Court ultimately held: “Any private property rights implicated by an equitable remedy here are far too minor to be constitutionally cognizable and move us from a strict scrutiny to a balancing analysis.” *Id.* at ¶ 83.

The Counties respectfully argue the interest here is not minor.

Defendant Tintina Montana, Inc., first applied for its permit under the MMRA on December 15, 2015. AR045766. On August 14, 2020, following the posting of first reclamation bond increment of \$4,653,348, the final permit was issued. This permit issued under the MMRA and after the posting of the bond, as well as the funding of the Hardrock Mining Impact plan, are not the kind of *de minimis* delay relied upon in the Supreme Court to dismiss Lucky Mineral's private property rights.

As the Montana Supreme Court recognized in *Krakauer v. State*, 2016 MT 230, 384 Mont. 527, 381 P.3d 524, competing constitutional interests should be addressed on a case-by-case basis and according to the facts of each case. *Id.* at ¶ 36. In this case, millions of dollars have been spent and committed to develop this resource, the DEQ has issued a permit under the MMRA, and work has commenced. The Counties respectfully argue that if private property rights are to be balanced as intended by the drafters of our constitution, it is in this case. And when balanced, the overwhelming weight of scientific study, analysis, and local support of the Black Butte Copper Project outweigh the Plaintiffs' objections.

The Black Butte Copper Project is a much-needed reinvigoration of central Montana's economy. The Project will create a ripple effect of economic activity throughout the region, in addition to the green energy benefits of the ultimate resource, copper. This Court should overturn the District Court's Order and uphold the careful, thorough, and thoughtful DEQ process.

### **CONCLUSION**

The undersigned hoped to evoke what it *feels* like to live in a small town in a long economic decline. However, the undersigned is confident that this Court will disregard those feelings and is further confident this Court will instead rely on the experts, the DEQ, the 90,000-page administrative record, the years of agency work, the decades of work by geologists like Jerry Zieg, and overturn the District Court's ruling in this matter.

DATED this 2nd day of November, 2022.



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BURT N. HURWITZ

### **CERTIFICATION**

The foregoing document consists of 2,605 words, in roman-type, 14-point, font. It was served to the parties listed above via the Montana Court E-file service.

## **CERTIFICATE OF SERVICE**

I, Burt Norman Hurwitz, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 11-02-2022:

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