

IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause: DA 23-0524

PROTECT THE CLEARWATER

Plaintiff/Appellee.

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,
and LHC, INC.

Defendants/Appellants.

APPELLEE'S ANSWER TO DEQ'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court

Missoula County

District Court Cause No. DV-23-776

Honorable John W. Larson, Presiding

APPEARANCES:

Robert Farris-Olsen
David K. W. Wilson, Jr.
MORRISON SHERWOOD WILSON
DEOLA, PLLP
401 N. Last Chance Gulch
P.O. Box 557
Helena MT 59624
Phone: (406) 442-3261
Fax: (406) 443-7294
Email: rfolsen@mswdlaw.com
kwilson@mswdlaw.com

Graham Coppes
FERGUSON & COPPES, PLLC
P.O. Box 8359
Missoula, MT 59802
graham@montanawaterlaw.com

Attorneys for Plaintiffs and Appellee

Mark L. Stermitz
Scott D. Hagel
CROWLEY FLECT, PLLP
305 South 4th St. East, Suite 100
P.O. Box 7099
Missoula, MT 59801
Phone: (406) 523-3600
Email: mstermitz@crowleyfleck.com
shagel@crowleyfleck.com

*Attorneys for Defendant and Appellant,
LHC, Inc.*

Jeremiah R. Langston
Sarah Christopherson
Dept. of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Phone: (406) 444-4201
Email: Jeremiah.Langston2@mt.gov
Sarah.Christopherson@mt.gov

*Attorneys for Defendant and Appellant
Dept. of Environmental Quality.*

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	iii
<u>TABLE OF ISSUES</u>	1
<u>STATEMENT OF THE CASE</u>	1
<u>STATEMENT OF FACTS</u>	3
<u>STANDARD OF REVIEW</u>	11
<u>SUMMARY OF THE ARGUMENT</u>	12
<u>ARGUMENT</u>	15
A. The District Court did not Lack Jurisdiction.....	15
1. The District Court had Subject Matter Jurisdiction	15
2. PTC’s Claims Were Justiciable.....	18
3. Administrative exhaustion also was not required under § 2-4-701, MCA	23
4. The general injunction statutes in Title 27, as amended in 2023, do not require filing an underlying complaint for injunctive relief.....	27
B. PTC established that they were likely to succeed on merits.....	33
1. Under § 27-19-201, MCA, the district court properly adjudicates the facts and law which control an agency action as a necessary part of determining whether an applicant is entitled to preliminary injunctive relief.....	33

2. PTC established at the District Court that it was likely to succeed on the merits.....35

CONCLUSION41

CERTIFICATE OF COMPLIANCE.....42

TABLE OF AUTHORITIES

CASES

<i>Amoco Prod. Co. v. Vill. Of Gambell</i> , 480 U.S. 531, 545 (1987).....	36
<i>Automation & Modular Components, Inc. v. Blackford</i> , 2023 U.S. Dist. LEXIS 198219 (E.D. Mich. Nov. 3, 2023)	30
<i>Baitis v. Dep’t. of Revenue</i> , 2004 MT 17, 319 Mont. 292, 83 P.3d 1278.....	41
<i>Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’t Quality</i> , 2017 MT 222, 388 Mont. 453, 401 P.3d 712.....	46
<i>Caldwell v. Sabo</i> , 2013 MT 240, 371 Mont. 328, 308 P.3d 81.....	22, 23
<i>City of Great Falls v. Forbes</i> , 2011 MT 12, 359 Mont. 140, 247 P.3d 1086.....	30, 37, 38, 40, 41, 44
<i>Clark Fork Coal. v. Dep’t of Env’tl. Quality</i> , 2012 MT 240, 366 Mont. 427, 288 P.3d 183	47
<i>De Beers Consol. Mines, Ltd. v. United States</i> , 325 U.S. 212, 220 (1945)	43
<i>Dep’t of Revenue v. Burlington N. Inc.</i> , 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976).....	41, 49
<i>Forbes v. City of Great Falls</i> , 2011 MT 12, 359 Mont. 140, 247 P.3d 108630.....	37, 38, 40, 41, 44
<i>Goble v. Montana State Fund</i> , 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.....	38
<i>Haney v. Mahoney</i> , 2001 MT 201, 306 Mont. 288, 32 P.3d 1254.....	38, 49

<i>Heart K Land & Cattle Co., LLC v. Mont. Rail Link</i> , 2013 U.S. Dist. LEXIS 115272, *6 at n. 1 (D. Mont. Aug. 14, 2013)	30, 41
<i>Idaho Watersheds Project v. Hahn</i> , 307 F.3d 815, 827 (9th Cir. 2002)	37
<i>In re Adoption of C.J.L.</i> , 2017 MT 19, 386 Mont. 218, 388 P.3d 951	26
<i>In re Marriage of Boharski</i> , 257 Mont. 71, 76, 847 P.2d 709, 712 (1993)	29
<i>In re Marriage of Rudolf</i> , 2007 MT 178, 338 Mont. 226, 164 P.3d 907	39, 49
<i>Larson v. State</i> , 2019 MT 28, ¶ 17, 394 Mont. 167, 434 P.3d 241	26
<i>McJunkin v. Kaufman & Broad Home Sys.</i> , 229 Mont. 432, 437, 748 P.2d 910, 913 (1987)	44
<i>MEIC v. Westmoreland</i> , 2023 MT 224, 414 Mont. 80, 2023 Mont. LEXIS 1177	51
<i>Montana Trout Unlimited v. Montana Dep't of Env't Quality</i> , 2024 MT 36, ¶ 12, 2024 Mont. LEXIS 188	47
<i>Nye v. Dept. of Livestock</i> , 196 Mont. 222, 639 P.2d 498 (1981)	28
<i>Oberlander v. Hennequin</i> , 2023 MT 45, 411 Mont. 320, 525 P.3d 1176	22
<i>Ohio Forestry Association v. Sierra Club</i> , 523 U.S. 726 (1998)	32
<i>Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality</i> ,	

2020 MT 303, 402 Mont. 168, 477 P.3d 288.....	38
<i>Planned Parenthood of Montana v. State by & through Knudsen,</i> 2022 MT 157, 409 Mont. 378, 515 P.3d 301.....	44
<i>Qwest Corp. v. Montana Dep't of Pub. Serv. Regul.,</i> 2007 MT 350, 340 Mont. 309, 174 P.3d 496.....	32, 33
<i>S. Oregon Barter Fair v. Jackson Cnty., Oregon,</i> 372 F.3d 1128, 1136 (9th Cir. 2004)	45
<i>Smith v. Burlington N. & Santa Fe Ry. Co.,</i> 2008 MT 225, 344 Mont. 278, 187 P.3d 639.....	38
<i>State v. Heath,</i> 2004 MT 126, 321 Mont. 280, 90 P.3d 426.....	42, 49
<i>University of Texas v. Camenisch,</i> 451 U.S. 390, 395 (1981)	45
<i>Water For Flathead's Future, Inc., v. Mont. DEQ,</i> 2023 MT 86, 412 Mont. 258, 530 P.3d 790	28, 29
<i>W. Montana Water Users Ass'n, LLC v. Mission Irr. Dist.,</i> 2013 MT 92, 369 Mont. 457, 299 P.3d 346.....	39
<i>Wilson v. Dep't of Pub. Serv. Regulation</i> 260 Mont. 167, 173, 858 P.2d 368, 372 (1993)	35, 36,
<i>Winter v. NRDC,</i> 555 U.S. 7, (2008).....	22, 30, 41, 42, 43

STATUTES

§ 1-2-101, MCA.....	39
§ 2-4-701, MCA.....	34, 35, 36, 38

§ 2-4-702, MCA	32
§ 3-5-302, MCA.....	27
§ 27-19-201, MCA	passim
§ 27-19-301, MCA	39, 40, 41
§ 27-19-303, MCA	40, 46
§ 27-19-315, MCA	40
§ 27-19-316(4), MCA	43
§ 75-1-201, MCA	passim
§ 82-2-427, MCA	17
§ 82-4-432, MCA	37, 38, 46
§ 82-4-402, MCA	50
§ 82-4-422, MCA	46
§ 82-4-432, MCA	51
§ 82-4-43, MCA	50
§ 87-2-427, MCA	13

RULES

Admin. R. Mont. 17.24.212	46
Admin. R. Mont. 17.24.227	50
Fed. R. Civ. P. 65(b)(2).....	43

M. R. Civ. P. 8(d)44

CONSTITUTIONAL PROVISIONS

Mont. Const. Art. II, § 3; Mont. Const. Art. IX, § 150

Montana Constitution, Article VII, Section 427

STATEMENT OF ISSUES

1. Whether the District Court erred by exercising its broad subject matter jurisdiction to determine PTC's entitlement to preliminary injunctive relief.
2. Whether the District Court abused its discretion when it determined that PTC was likely to succeed on the merits of its BER claim because DEQ and LHC ignored the projects potential impacts to water.

STATEMENT OF THE CASE

This case involves a challenge to a gravel mining permit issued by Montana Department of Environmental Quality (DEQ) on state trust lands administered by the Montana Department of Natural Resources and Conservation (DNRC), brought by Protect the Clearwater (PTC), a group of landowners, DNRC leaseholders and others concerned about the impacts of the proposed gravel mine on their properties, on the cherished Clearwater River and on the environment. In this case, the Court is getting a glimpse of the procedural morass that the Montana Legislature created for citizens who seek to protect their constitutional rights by challenging gravel mining operations near their property. In the case at hand, the already circuitous nature of administrative processes is made significantly worse because DEQ greenlit the mine, which immediately began operating under that authority, prior to the inception of a contested case hearing.

More specifically, DEQ issued the Opencut permit at issue on April 27, 2023. Pursuant to § 82-4-427, MCA, on May 27, 2023, PTC filed a formal administrative appeal with the Board of Environmental Review. *In the Matter of: Appeal and Hearing Request by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473, Mont. Board of Env. Review, Cause No. BER 2023-03 OC.* FOF, ¶ 21. PTC also filed a separate lawsuit challenging the adequacy of the Environmental Assessment (EA) under the Montana Environmental Policy Act (MEPA). *PTC v. Montana Dept. of Environmental Quality*, Mont. Fourth Jud. Dist. Ct., Missoula County, Case No. DV 32-2023-0000717-DK. Under MEPA, PTC was required to file a lawsuit separate from the BER proceeding. Section § 75-1-201, MCA.

Because the operator immediately began to mine, and because the BER process does not contain any provision for a stay or injunction, PTC was forced to file the separate – and third – action, for injunctive relief, now before this Court, seeking a temporary restraining order and preliminary injunction to enjoin the mining of gravel under Opencut Permit #3473.

On July 17, 2023, the District Court granted a restraining order and all parties appeared for a hearing on July 21, 2023. On August 8, 2023, the District Court issued a Preliminary Injunction. LHC's and DEQ's appeals followed.

STATEMENT OF THE FACTS

This appeal arises from DEQ and LHC failing to abide by the requirements of § 82-4-432, MCA, and to ensure that the waters in the Clearwater-Blackfoot watershed would not be affected by a significant industrial gravel pit adjacent to residential development, the Clearwater River, and in the middle of a wildlife corridor.

Central to this case, is DEQ's blanket approval of LHC's application to operate a gravel pit above the banks of Montana's most pristine waterways, the Clearwater River, and Elbow Lake. The mine site is situated approximately 1,000 feet away from the Clearwater River, a tributary of the Blackfoot river that is home to a number of trout species—including the endangered bull trout. The area is also a prime corridor for elk, deer, grizzly bear and other large animals traversing the Blackfoot-Clearwater Game Range across Highway 83, and west over the Clearwater. (Dkt. 1, Ex. A, pp. 10-16.)

Directly to the west of the mine site are numerous residences whose water is supplied by domestic wells and whose wastewater is treated via septic systems. These residences are both privately owned and leased sites – they include homes occupied year-round. (Dtk. 1, Nicholson and Langston Affidavits.)

Notwithstanding this coveted natural landscape and important water resources, DEQ approved LHC's dryland opencut permit to remove gravel and

process it into asphalt on March 23, 2023. (Dkt. 14, FOF ¶ 1.)¹ The purpose of the application, the pit, and processing facility was to provide aggregate and asphalt to a nearby project on Highway 83. LHC won a bid to provide these products to the highway project, being completed by Kiewit Construction. FOF, ¶¶ 14, 63. LHC's bid was based on providing gravel product and asphalt from a facility located 9 miles east of Ovando. It was not based on opening the pit on Highway 83. FOF, ¶¶ 65, 66.

DEQ requires an applicant to certify that the pit will not *affect* ground or surface water and that it is not within one half-mile of 10 or more occupied dwellings. FOF, ¶ 7. DEQ accepted LHC's certification, although, it was made without baseline information about the hydrogeology of the area. FOF, ¶¶ 52, 53, 59-60. The applicant did not conduct, or undertake, any serious analysis of the project area, including any hydrologic or hydrogeologic studies to determine the groundwater's directional flow. *Id.* Instead, it relied on the DEQ's identification of groundwater well information from wells dug in the surrounding area, but not on the project site. Some of those wells had shallow depth to groundwater. FOF, ¶¶ 54, 61. LHC's application provided no further information on static water levels, directional flow, or whether its operations would impact surface water.

¹ Hereafter findings or conclusions from the August 8th Order will be referred to as "FOF" or "COL", as appropriate. The District Court referenced documents before it, or testimony, for each of its FOF as applicable.

After receiving the application, DEQ did not perform any of its own independent hydrologic evaluation to confirm groundwater depth. Nor did it conduct or contract for any hydrological studies to evaluate groundwater and surface water connectivity. FOF ¶ 38. Instead, DEQ simply relied on GWIC well data and applicant's soil test pits. FOF ¶ 11. And DEQ conceded that these soil test pits were not deep enough to show an absence of groundwater. FOF, ¶¶ 37-39, 41.

Importantly, DEQ's "review" was conducted by staff with no professional or educational background in hydrology. FOF, ¶ 43. Despite this, DEQ relied on LHC's certification that no further evidentiary investigations were necessary. *Id.*, FOF, ¶ 47. There remain serious questions as to the veracity of data reviewed by DEQ. *Id.*, COL, ¶18.

Similarly, neither DEQ nor LHC know the number of occupied dwellings in the area. FOF, ¶¶ 31-33; COL, ¶55. At DEQ's request, LHC "certified" that there were not more than 10 occupied dwellings within one half-mile. FOF, ¶ 30. This certification however had no factual basis. FOF, ¶ 33. Despite the request, DEQ did not require any additional on-the-ground information or studies regarding water or information regarding the area residents. DEQ is still unaware of whether there are ten occupied dwellings within one half-mile of the project site. FOF, ¶¶ 31-33

Simultaneous with its evaluation, DEQ undertook an environmental analysis (EA) of the proposed gravel pit. The EA is pro forma and contains little meaningful analysis.

DEQ knew that the pit was up to 20' deep, but the on-site test pits were only dug to 14' feet. FOF, ¶ 57. DEQ knew there were no wells with groundwater data located on site but allowed LHC to rely on data from surrounding wells. FOF, ¶¶ 72-73. And DEQ knew it had no knowledge of the depth to groundwater or hydrology of the area, FOF, ¶ 38, but it allowed LHC to certify there would be no affect to water. DEQ could have asked for more information but chose not to.

Nevertheless, DEQ concluded in the EA that, in relation to water quality, “[d]uring the beginning stages of mining surface water may leave the site during a heavy storm event could carry sediment....” Dkt. 1, Ex. A, p. 8. Continuing, the EA then explained, “Impacts to water quality would be short term and would be negligible....” *Id.*, p. 9. It also noted, “Although Dryland Opencut applications do not specify site topography or drainage patterns during or after mining, the depression caused by mining activities would likely cause runoff to drain internally into the site. Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface.” *Id.*, p. 8. Put simply, the EA highlighted the affect of the mine on ground and surface water.

As with water, DEQ took no initiative to determine whether there were 10 occupied dwellings within one half-mile of the project site. In fact, DEQ does nothing to verify that an applicant, like LHC, is correct when it certifies that there are not sufficient occupied dwellings to trigger a standard opencut permit. FOF, ¶ 37. Ultimately, neither DEQ nor LHC have any idea how many occupied dwelling units are in the area. Yet both agree that a dryland permit is appropriate.

After DEQ's nominal review, it granted LHC its opencut permit on April 27, 2023. The permit is simply a one-page document, with the application attached and incorporated as part of the permit. LHC's permit is Opencut Permit #3473. FOF, ¶ 5.

Thereafter, LHC began moving equipment and clearing the site for mining. Upon operations beginning, PTC initiated this suit to enjoin and/or stay the approval of Opencut Permit #3473. On July 21, 2023, the District Court held a hearing with testimony presented by DEQ, LHC and PTC. PTC called three witnesses. Two of them, Gayla Nicholson and Jon Watson, reside in the area. Mr. Watson leases his land from DNRC and Ms. Nicholson owns hers in fee simple.

After the pit clearing began, but before actual rock crushing began, Jon Watson began experiencing the impacts of the pit. FOF, ¶¶ 83-84. He observed fine dust spreading everywhere across his property and settling on the Clearwater River at Elbow Lake. *Id.* The fine dust not only affected the environment, but it

began exacerbating his respiratory disease. Mr. Watson was particularly concerned that if the pit continued to operate, and started crushing rock into aggregate, that there will be significantly more dust. His concern was based on his former experience with gravel pits as a highway engineer for the Montana Department of Transportation. *Id.*, ¶ 84. Gayla Nicholson highlighted that the old growth trees had already been cleared. FOF, ¶ 87.

In contrast, LHC and DEQ further confirmed that neither entity knew whether the project would have an affect on water or who lived in the area. FOF, ¶¶ 33, 37-45, 59. Neither knew where the static groundwater level was, neither knew the hydrology of the area, neither had dug test pits to the depth of the pit, and neither had conducted any further hydrologic or hydrogeologic studies of the area. FOF, ¶¶ 33, 37-45, 52-53, 59. And neither could confirm that there were less than ten occupied dwelling units. FOF, ¶¶ 32-33,

This lack of information belies LHC certification there would be no affect on water. At the hearing, PTC called David Donahue, a professional hydrogeologist to opine about the lack of data. He ultimately concluded that neither DEQ nor LHC's actions, and their reliance on offsite unverified data, was sufficient to "certify" that there would be no impact to water. FOF, ¶ 73.

With respect to the wells, DEQ only looked at 25 surrounding wells. This well log information may be useful, but it cannot be relied on to determine aquifer

characteristics – such as the depth to shallow groundwater interception, the transmissivity (i.e., speed) of groundwater movement, or the direction of groundwater flow - they do provide general information which is relevant. FOF, ¶ 70.

More significantly, the well log data indicates that this area is typified by significant heterogeneity in aquifer characteristics, meaning there is significant variation in the depth and location of groundwater resources near the mine. FOF, ¶ 70. So, relying on unverified well logs outside the project site is inherently unreliable. FOF, ¶ 71. This unreliability was further highlighted by the diversity of information in the well logs. FOF, ¶ 72. There was significant variability between surface elevations, depth to groundwater, static water level within the wells located from GWIC database and it has not been field verified, and neither have the locations of the wells. FOF, ¶ 72. Accordingly, for an applicant to be able to “certify” that groundwater would not be affected by the mining operation, it would need to conduct on-site evaluations and not simply rely on well log data. FOF, ¶ 73.

Further, without knowing the depth to groundwater, LHC’s project created substantial environmental risks. Namely, the diesel, gasoline and heavy hydrocarbon fuels being used by different vehicles and as a part of the mining and production processes could contaminate the groundwater. Mr. Donohue testified

that the hydrocarbons used in asphalt production could similarly negatively impact groundwater. FOF, ¶ 74. DEQ did not look at the water quality impacts of these chemicals infiltrating the groundwater. FOF, ¶ 75. But if this water carries the toxic hydrocarbon fuels or materials into the groundwater, which generally could flow towards banks of the Clearwater River and Elbow Lake, the contaminants could also make it to these surface water bodies. FOF, ¶ 76.

Mr. Donahue's ultimate opinion was that a Dryland permit was inappropriate for this site because there is no reliable evidence in the record which supports the scientific conclusion that the Clearwater mine will not have some "[a]ffect" on ground or surface water – i.e. there would *not* be no affect. He testified that the only way to appropriately determine if an effect on ground or surface water may exist is for a detailed assessment of the hydrogeology to be conducted – an assessment that neither LHC nor DEQ conducted. FOF, ¶ 78. And no professional hydrologist or hydrogeologist would rely on data that was as uncertain as that relied on by LHC and DEQ. FOF, ¶ 79.

LHC claimed that it would suffer economically; however, that was belied by its testimony at the hearing. LHC testified that its bid for the project on Highway 83 was based on providing aggregate and asphalt from the *Ovando* pit site, *not* the site at issue here. FOF, ¶ 66. And relying on the *Ovando* pit would result in only 50 additional miles per trip. DNRC, in its EA for the project, highlighted the

insignificance of this distance. FOF, ¶ 67. In all, these impacts are outweighed by potential harm to the Clearwater River, Elbow Lake, and the residents nearby.

On August 8, 2023, the District Court issued its ruling in favor of PTC. The Court ruled that the appropriate standard for an injunction was that found in § 27-19-201, MCA, and not § 75-1-201, MCA, because the suit asked for an injunction of a permit issued under § 82-4-432, MCA, and not the environmental review under Title 75. Based on this finding, and the *Winter v. NRDC*, 555 U.S. 7 (2008) factors, Judge Larson concluded that PTC was likely to succeed on the merits, that PTC would suffer irreparable harm, that the equities tip in PTC's favor and that an injunction was in the public interest. In addition, Judge Larson issued a specific finding related to the state and local economies. He noted that the loss of the pit site would not have a significant impact on the local economy, but by granting the injunction local and state economies would be positively impacted. Indeed, the gravel pit's existence decreases the taxable values of adjacent properties, thereby decreasing state and local tax revenue – i.e., hurting local and state economies.

STANDARD OF REVIEW

“District courts are vested with a high degree of discretion to grant or deny preliminary injunctive relief.” *Caldwell v. Sabo*, 2013 MT 240, ¶ 18, 371 Mont. 328, 308 P.3d 81. This Court, therefore, reviews the grant of a preliminary injunction for manifest abuse of discretion. *Oberlander v. Hennequin*, 2023 MT

45, ¶ 13, 411 Mont. 320, 525 P.3d 1176. To that end, this Court will only disturb a district court's decision regarding a preliminary injunction upon a showing of a manifest abuse of discretion. *Id.* "A manifest abuse of discretion is one that is obvious, evident, or unmistakable." *Caldwell*, ¶ 18. When the grant of a preliminary injunction is based on a court's conclusions of law, the Supreme Court will review the court's conclusions for correctness. *Caldwell*, ¶ 19.

SUMMARY OF THE ARGUMENT

DEQ's arguments to this Court evidence a fundamental misunderstanding about what a preliminary injunction is and how and why it occurs. First and foremost, in all contexts, preliminary injunctions are indeed *preliminary*. Thus, by definition, they occur prior to final resolution of a case on the merits. Second, all preliminary injunctions require that evidence be taken by the presiding judge through an evidentiary hearing. This, by definition, makes that judge sit as the fact finder for that hearing and that question. Third, as a result of both the preliminary nature and requisite fact-finding inherent in all preliminary injunctions actions, doctrinal principles in administrative exhaustion are wholly inapplicable.

DEQ also fails to acknowledge how a preliminary injunction arises before the court. Harm, either actual or imminent, is a pre-requisite and condition precedent to any filing. This harm is connected to the principal purpose of the action - protecting the status quo. Both common law and statutory law have long

recognized the need for an equitable remedy which seeks to “hit pause” on actions already underway or about to occur so as to protect not just the rights of an applicant in their real property and physical health, but also the right to prevent environmental harm.

Mechanistically, once an application is filed in the appropriate venue, stating, alleging and attesting to appropriate facts and law, a district court judge, sitting in equity, is vested with authority and responsibility to weigh the facts against the law and render a determination of whom (based on their opinion) is likely to win the case on its merits, in which direction the balance of harm tips, and where the public’s interest is best served. Furthermore, when harm is already underway and/or an application presents exigency, the law recognizes a limited need for *ex parte* filings that, by definition, occur without notice to the opposing party. As a result, temporary restraining orders are by design temporary. If a judge finds that sworn facts support immediate or irreparable harm will occur in the absence of a restraining order, Montana law gives a judge authority to issue an order pausing the harm before an adverse party or their attorney are given an opportunity to be heard. In recognition of the need to balance due process and equity against the exigent circumstances presented, the Court must hold an evidentiary hearing within 10 days, for which service of process must be executed and all parties are commanded to appear and be heard.

Therefore, when viewed holistically, both state and federal law recognize that which is obvious: the need for a cause of action which prevents harm while the parties fight about the merits of a given dispute. In the case at hand, the harm Appellees sought to remedy was directly adjacent to their homes and right before their eyes. It included the cutting of old growth trees, heavy machinery on the ground ripping and tearing apart public lands, and the manifestation of physical health problems in their lungs. Simply put, had Appellees sat back and waited for the byzantine cog works of the Board of Environmental Review to determine their fate, there would be nothing left to save. And thus, the prototypical preliminary injunction action emerged.

When confronted with Appellees application, the District Court found that relevant criteria were met. Why DEQ is here before this Court arguing to protect the rights of a private company is unclear. However, what is absolutely certain from the record is that a temporary restraining order and preliminary injunction were necessary to protect the status quo and to shield applicants from harm. If this Court accepts DEQ's arguments, as presented here, Montana's citizens will be left without any recourse or remedy from the judiciary when staring into the face of grave assault. Simply put, DEQ apparently seeks to eliminate preliminary injunctive relief as a remedy when it has greenlit a mine into action. This Court

should deny this request and should uphold the legal tradition of providing extraordinary equitable relief when appropriate and necessary.

ARGUMENT

A. The District Court did not Lack Jurisdiction.

Protect the Clearwater incorporates by reference the arguments they made in response to LHC's appeal, under the heading B: "The District Court Properly Granted a TRO and Preliminary Injunction Pursuant to 27-19-201." Because DEQ's argument overlaps with LHC's, PTC's arguments apply equally here.

1. The District Court had Subject Matter Jurisdiction.

DEQ first attacks the District Court's decision for lack of subject matter jurisdiction, arguing, in part, the "order doesn't even include the word 'jurisdiction.'" (DEQ Br., p. 14). DEQ further argues that because the District Court found there was no mechanism to grant injunctive relief, that demonstrated there was no statutory basis for the Court's jurisdiction. DEQ's argument is without basis.

Montana Courts have broad subject matter jurisdiction to hear a myriad of cases. *In re Adoption of C.J.L.*, 2017 MT 19, ¶ 7, 386 Mont. 218, 388 P.3d 951. Subject matter jurisdiction, in turn, is the threshold power of a court to consider and adjudicate particular types of cases and controversies. *Larson v. State*, 2019 MT 28, ¶ 17, 394 Mont. 167, 434 P.3d 241. It is derived "exclusively from Article

VII, Section 4, of the Montana Constitution,” which gives district court’s subject matter jurisdiction over “all civil and criminal matters” arising “at law and in equity,” or statutorily created *Id.* (emphasis added.); § 3-5-302, MCA.

Because this is a case in equity and concerns a statutorily created cause of action (a preliminary injunction), the District Court has general subject matter jurisdiction. Even so, DEQ asserts that the District Court did not have subject matter jurisdiction because it failed to specify its authority. This argument is clearly contrary to the Montana Constitution, Art. VII, § 4, and § 27-19-201, MCA, both of which provide general subject matter jurisdiction over this matter.

Moreover, the District Court established its jurisdiction, DEQ simply disagrees. The first ten paragraphs of the Conclusions of Law discuss at length the requirements for an injunction under Title 27 as compared to Title 75, found that Title 75 was inapplicable; and applied the Title 27 requirements here. The District Court then concluded it had jurisdiction by stating that PTC “may proceed under § 27-19-201, and not § 75-1-201, MCA,” and that “The application, here, then is permissible.” (Dkt. 14, COL ¶¶ 8, 10.)

DEQ ignores these words, and instead argues that the District Court’s statement that the BER cannot grant an injunction means that the District Court has no subject matter jurisdiction. (DEQ Br., p. 10.) But the fact that COL ¶ 10 highlights the lack of any opportunity for injunctive relief under the BER

procedures does not somehow serve to strip the District Court of general subject matter jurisdiction to hear this case under § 27-19-201, MCA, or of its power to hear cases in equity. DEQ is silent on this point.

The cases relied on by DEQ are also not helpful, here. In *Nye v. Dept. of Livestock*, 196 Mont. 222, 639 P.2d 498 (1981), this Court evaluated a fired state employee’s discharge-related claims, including her claim that she was entitled to judicial review of the Department Director’s decision. This Court agreed with the district court that there was no statute that gave her an opportunity for a hearing prior to her termination. *Id.*, 196 Mont. at 226, 639 P.2d at 500. *Highlands Golf Club v. Ashmore*, 2002 MT 8, 308 Mont. 111, 39 P.3d 697, is similarly distinguishable. It addressed whether the issues of standing and mootness could be raised for the first time on appeal of an administrative contested case decision.

While both of these cases cite the general rule that review of administrative decisions is statutorily created, neither involve the situation here, where specific statutes – Title 27—provide jurisdiction. And, here, the issue is not a direct review of an agency decision, but rather a case in equity to prevent irreparable harm during an appeal to the BER.

Next, DEQ argues that the District Court’s “invocation of some implicit basis to review” DEQ’s actions aligns with this Court’s reversal in *Water For Flathead’s Future, Inc., v. Mont. DEQ*, 2023 MT 86, 412 Mont. 258, 530 P.3d 790.

This argument is similarly without basis. In *Water for Flathead's Future*, in dicta, after finding that DEQ had not violated MEPA, the Court discussed how the District Court erred in using its “inherent authority” to vacate the permit.² But this case is not about the Court’s “inherent authority”, nor is it about concepts in vacatur; rather the Constitutionally and Statutorily created subject matter jurisdiction. Flatly, DEQ’s arguments to the contrary are absurd.

DEQ, though, goes on and argues that the District Court “cannot invent its own cause of action.” (DEQ Br., p. 16.) But DEQ ignores more than a century of common law whereby Montana courts have heard matters seeking preliminary injunctive relief (Enacted Bannack Statutes, p. 58, § 83; reenacted by Laws 1867, p. 154, § 112) and the District Court’s clear jurisdictional statements invoking Title 27. Instead, it asserts a claim for a preliminary injunction is not “a substantive cause of action.” This argument is misleading at its best.

In making this statement, DEQ engages in misdirection and points this Court to cases from other jurisdictions, while ignoring binding case law. Indeed, as discussed more thoroughly below, this Court as well as the U.S. District Court for the District of Montana, have both held that an application for a preliminary

² Arguably, given that the Court had already found the Court erred in violating MEPA, the Court’s discussion at ¶¶ 35 and 36 is dicta. *In re Marriage of Boharski*, 257 Mont. 71, 76, 847 P.2d 709, 712 (1993) (“The Court is not bound or required to give precedential value to dicta.”)

injunction is sufficient to institute a lawsuit. *City of Great Falls v. Forbes*, 2011 MT 12, ¶ 13, 359 Mont. 140, 247 P.3d 1086; *Heart K Land & Cattle Co., LLC v. Mont. Rail Link*, 2013 U.S. Dist. LEXIS 115272, at *6 n.1 (D. Mont. Aug. 14, 2013). DEQ cannot escape binding Montana case law by relying on *Automation & Modular Components, Inc. v. Blackford*, 2023 U.S. Dist. LEXIS 198219 (E.D. Mich. Nov. 3, 2023), and *Winter*, which reach a different result. Those case also involved complaints for more than a preliminary injunction, which have different standards than this matter. *Heart K Land & Cattle Co., LLC v. Mont. Rail Link*, 2013 U.S. Dist. LEXIS 115272, at *6 n.1.

Simply put, District Courts of Montana have subject matter jurisdiction over claims for injunctive relief under both the Montana Constitution and Title 27. There is nothing unique or in error about the manner in which PTC sought, and the District Court granted, preliminary injunctive relief in the case at hand.

2. PTC's Claims Were Justiciable.

DEQ next argues that the District Court took on the role of the BER in determining the “merits” of the BER case prior to the BER making its own determination. In doing so, DEQ argues that PTC effectively did not exhaust administrative remedies, so the District Court lacked jurisdiction. This argument is similar to the argument made by LHC in its Opening Brief, pp. 24-25, and to which PTC, pp. 29-31 responded. Those arguments are incorporated herein by reference.

DEQ's arguments are not only wrong, but highlight a foundational misapprehension of preliminary injunctions, the requirements necessary to obtain injunctive relief, and the overall effect of the remedy. The first requirement is that there is a likelihood of success on the "merits". Section 27-19-201, MCA. In determining whether there is a likelihood of success, a Court must understand what facts and law apply – i.e., the merits of the case. Then, the Court must evaluate those facts and law to make a *preliminary* decision whether the applicant is likely to succeed based on the facts and law. The use of the term "merits" does not mean that a District Court is ruling on the ultimate merits of the case, but only deciding if it is *likely* that a party will succeed on the underlying merits.

DEQ misapprehends this process, and misconstrues the District Court's use of the term "merits." The underlying merits, here, are PTC's challenge of the propriety of a permitting decision made by DEQ. Because of the procedural manner in which the legislature has set up this process, DEQ had to make its final agency action granting the mining permit before PTC could file an administrative appeal with the BER. That contested case process is ongoing. Thus, the BER - not the District Court – will decide the ultimate merit of DEQ's grant of the permit at issue.

What is clear is that the District Court here was only evaluating whether PTC is *likely* to succeed at the BER. This ruling is a function of preliminary relief and thus, does not usurp the BER's administrative functions. Ultimately, whether arising

out of an administrative procedure or otherwise, adopting DEQ's opposite interpretation would render every preliminary injunction void because as part of the analysis a court must at least consider the "merits" as a component of its proper determination of the likelihood of success of the applicant.

In this same vein, DEQ wholly confuses judicial adjudication of entitlement to preliminary injunctive relief with judicial review of contested cases performed pursuant to a petition filed under MAPA. See § 2-4-702, MCA. DEQ asserts that the purpose of requiring parties to exhaust administrative remedies is to "ensure the record is complete on technical matters within the agency's expertise and avoid premature judicial review." (DEQ Br., pp. 18-19). But here, the District Court was not "judicially reviewing" the BER decision. Rather, it was exercising jurisdiction to issue an injunction because the BER itself lacks such jurisdiction. And in doing so, the District Court was simply exercising its role to determine "likelihood of success on the merits", which is explicitly required under § 27-19-201, MCA.

DEQ's next relies on *Qwest v. Mont. PSC*, 2007 MT 350, 340 Mont. 309, 174 P.3d 496, which does not support its argument. There, the PSC argued that the district court erred in finding certain issues arising from a rate case ripe for judicial review. In evaluating the case, this Court looked to *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998) for guidance on whether an agency decision is ripe for judicial review, and adopted the following standard:

Thus, a reviewing court must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

Qwest, ¶ 20 (citations omitted).

Application of these three factors favors PTC, here. First, “delayed review”, i.e., until the completion of the BER process certainly harms PTC and the environment. (COL ¶¶ 24-34). In contrast, in *Qwest*, the Court expressly found that *Qwest* would *not* suffer any hardship.

Second, the injunction here does not “interfere” with further administrative actions. The injunction does not “frustrate” the BER’s ability to review the matter on its own. Indeed, the District Court order applies during the matter “pending before the Board of Environmental Review.” (Dkt. 14, Order, p. 48.) Thus, the order itself indicates that the District Court was not attempting to, or in fact, interfering with the BER.

As to the third factor, DEQ ignores the fact that the District Court conducted an evidentiary hearing, and that the preliminary injunction is supported by substantial findings of fact. Since it is undisputed that the BER cannot issue an injunction, the BER would not be capable of “further factual development” to support an injunction.

Finally, while DEQ argues that the District Court “did not identify any of the exceptions” to the exhaustion requirement, the fourth exception cited by DEQ (DEQ Br., p. 20) – when recourse to the agency would be futile – clearly applies. (COL ¶ 10 (“Plaintiffs have brought this separate action because the BER provides no mechanism for them to protect their interests via injunctive relief. . . . The application, here, then is permissible.”))

3. Administrative exhaustion also was not required under § 2-4-701, MCA.

DEQ next argues that the District Court did not have jurisdiction under § 2-4-701, MCA. (DEQ Br., pp. 20-25). These arguments must fail.

Preliminarily, this Court does not need to reach the issue of whether § 2-4-701, MCA applies because the District Court had jurisdiction to hear the application for a preliminary injunction under § 27-19-201, MCA. This is articulated above, and in PTC’s response to LHC.

Regardless, § 2-4-701, MCA, provided the District Court with an alternative basis for hearing this matter.³ Section 2-4-701, MCA, provides that an agency decision is “immediately reviewable if the review of the final agency decision would not provide an adequate remedy.” This provision must be liberally interpreted in

³ This Court can affirm the District Court’s authority to hear the injunction under § 2-4-701, MCA, even if the District Court did not raise the issue. This Court “will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason.” *State v. Marcial*, 2013 MT 242, ¶ 10, 371 Mont. 348, 308 P.3d 69.

favor of judicial review, *Hilands Golf Club*, ¶ 18, in part, to ensure that “any ultimate judicial review of the final agency decision will, in fact, be an ‘adequate remedy’ instead of the meaningless exercise of review,” *Wilson v. Dep’t of Pub. Serv. Regulation*, 260 Mont. 167, 173, 858 P.2d 368, 372 (1993). That is the exact situation here – PTC has no adequate remedy through the BER, which is without authority to issue an injunction.

Nevertheless, DEQ argues that *Wilson* undermines the District Court’s reliance on § 2-4-701, MCA. (DEQ Br., pp 20-21). The holding in *Wilson*, however, is limited to the “facts and circumstances of [that] case.” *Id.*, 260 Mont. at 172, 858 P.2d at 371. And if anything, *Wilson* supports PTC’s position because it provides that a potential constitutional infringement vests a district court with jurisdiction absent administrative exhaustion. *Id.*

The constitutional provisions at issue, here, are no less important than those in *Wilson*. In *Wilson*, the court stayed an agency proceeding, and then required the agency to comply with constitutional procedural due process. *Id.* Here, the District Court, unlike *Wilson*, did not stay an entire proceeding, but rather enjoined a permit without affecting the agency proceeding. The injunction, here, was based, *inter alia*, on irreparable harm to PTC’s fundamental constitutional right to a Clean and Healthful Environment, and the constitutional principle that “waters of Montana belong to and must be protected on behalf of the public.” Dkt. 14, COL, ¶¶ 26, 46.

And because the BER provides no mechanism to prevent environmental degradation during the review process, PTC would be without a remedy in contravention of Article II, Section 16, of the Montana Constitution unless a district court could exercise its equitable powers. So much like *Wilson*, the risk to these constitutional rights satisfies the provisions of § 2-4-701, MCA.

Further in line with *Wilson* is the fact that PTC has no adequate remedy. Beyond the constitutional harms, the District Court found that PTC's harms were irreparable – i.e. there is no adequate remedy. Those harms include the destruction of trees and wildlife habitat, health-based harms, sedimentation of the Clearwater River and harm to the ecosystem. As the District Court noted, “the loss of trees alone constitutes an irreparable injury.” Dkt. 14, COL ¶ 27. It further observed that PTC has “established an irreparable injury to the aquatic environment surrounding their property.” *Id.*, COL, ¶ 28.

By finding that there is an irreparable injury, the District Court found that no “adequate remedy” exists. It did so explicitly, “Environmental injury, by its nature, can seldom be adequately remedied by money damages” it is often permanent or at least of long duration, i.e., irreparable. *Id.*, COL ¶ 25; *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). And once the mining began, the harm “will not easily be undone.” Dkt. 14, COL ¶ 34.

In summary, the PTC established, and the District Court found, that the BER proceeding did not provide an adequate remedy. Dk. 14, COL, ¶ 10 (“the BER provides no mechanism for them to protect their interest while the appeal is pending.”) The BER has no mechanism to stay or enjoin a permit, so PTC had no administrative mechanism to stop the harm. The only remedy was thus to seek district court intervention. *Cf Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 827 (9th Cir. 2002).

Despite these clear findings, and clear law, DEQ argues that Judge Larson improperly ruled on the merits of the BER hearing and took testimony. This argument is unpersuasive. While the District Court uses the term “merits” it is not in fact deciding the merits of the BER hearing, rather it is evaluating the likelihood of “success on the merits” of the BER hearing in order to show that an injunction was justified. *See, supra*, pp. 30-32. In doing so, the Court may consider testimony. *Forbes*, ¶ 12. And that is all that Judge Larson did.

Finally, DEQ argues that Plaintiffs have an adequate remedy because they could have sought an injunction under MEPA. This argument is again, inapposite. PTC’s argument is that it has no adequate remedy for wrongful approval of the permit itself, not for the flawed EA. The approval of the permit and the EA are based on separate statutory criteria, *Compare* § 75-1-201 et seq., MCA, *with* § 82-4-432, MCA; meaning, the permit could be improperly granted while the MEPA analysis

was acceptable. This would leave PTC without a remedy for DEQ's failure to evaluate the impacts to water as part of the permitting process. This is particularly problematic because MEPA is procedural, *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288, but the permitting process is not - an opencut mine cannot obtain a dryland permit if it affects water or is near occupied dwelling, § 82-4-432, MCA.

Ultimately, but for the Court granting the injunctive relief, PTC would be left without a remedy if DEQ's permit evaluating were defective. Thus, the District Court had jurisdiction under § 2-4-701, MCA, to immediately enjoin DEQ's permitting decision.

4. The general injunction statutes in Title 27, as amended in 2023, do not require filing an underlying complaint for injunctive relief.

DEQ's final argument regarding jurisdiction is that SB 191 impliedly superseded *Forbes*. This argument is contrary to the basic canons of statutory construction. "The starting point for statutory interpretation is the plain language of the statute itself," *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 22, 344 Mont. 278, 187 P.3d 639, and only if its ambiguous may the court look to legislative history, *Goble v. Montana State Fund*, 2014 MT 99, ¶ 21, 374 Mont. 453, 325 P.3d 1211. *Haney v. Mahoney*, 2001 MT 201, ¶ 7, 306 Mont. 288, 32 P.3d 1254 ("while legislative history may be helpful to interpret ambiguous terms of statutory

law, **we will not rely on legislative history to contradict the plain language** of statutory law when it is clear on its face.” (emphasis added)).

A statute must also be read and interpreted as a whole. *W. Montana Water Users Ass’n, LLC v. Mission Irr. Dist.*, 2013 MT 92, ¶ 28, 369 Mont. 457, 299 P.3d 346. It is longstanding precedent that the Court should “not read into statutes something that is not there” by inserting what has been omitted or omitting what has been inserted. *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907; § 1–2–101, MCA.

DEQ ignores these mandates and impute into the statute a requirement of a complaint in order to obtain an injunction. Yet, nothing in Title 27, Chapter 19, requires that an applicant file a complaint to obtain injunctive relief. Indeed, to obtain an injunction, § 27-19-301, MCA only requires that the adverse party be given notice “of the time and place that *application for the injunction order was made.*” (Emphasis added); *See also*, § 27-19-318, MCA (after a granting a temporary restraining order, “the application must be set for a hearing . . .”). Similarly, in evaluating whether to grant an injunction, § 27-19-201, MCA, simply refers to an “applicant,” not a “complainant” or a “complaint.”

In contrast, when the Legislature wants to impose specific requirements, it puts them into the code. Section 27-19-301, MCA, for example, requires “reasonable notice to the adverse party of the time and place that application for the injunction

order was made”; § 27-19-303, MCA requires that a hearing be held prior to granting an injunction; and, § 27-19-315, MCA, requires an applicant to certify to the court in writing efforts made to provide notice or why notice should not be required. Importantly, some of these sections were recently amended by legislature. So had the Legislature wanted to require a complaint, it would have said so, and this court should not insert what was omitted by requiring a complaint.

This is also consistent with this Court’s precedent. In *Forbes*, this Court observed previous iterations of the injunction statutes expressly included the following language:

Section 27–19–301, MCA (1978), had provided that an injunction could be issued at the discretion of the court with or without notice “**unless the defendant has answered.**” Section 27–19–303, MCA (1978), had provided that the preliminary injunction could be granted “at the time of **issuing the summons upon the complaint or at any time afterward.**” Further, a preliminary injunction could “**not be granted on the complaint alone**” **unless it was “duly verified”**—and the material allegations of the complaint were made “positively and not upon information and belief.” Section 27–19–303, MCA(1978).

Forbes, ¶ 13 (emphasis added).

Continuing, this Court observed that the “1979 amendments repealed these express references that had connected preliminary injunctions to civil actions **commenced by complaint**, summons, and answer. The legislative history of the 1979 amendments additionally indicates that an injunction could be issued upon application and notice **without filing a complaint.**” *Id.* ¶ 14 (emphasis added.) The

Court went on “[S]pecifically, the amendments proposed to allow a party to obtain an injunction ‘without filing a lawsuit’”. *Id.* In *Forbes* the Court found that the city “followed the proper procedure. . . , by filing an application for an injunction, requesting that the District Court set a hearing date, and providing reasonable notice to Forbes.” *Id.*, ¶ 15; *See also Heart K Land & Cattle Co., LLC v. Mont. Rail Link*, 2013 U.S. Dist. LEXIS 115272, *6 at n. 1 (D. Mont. Aug. 14, 2013).

Notably, § 27-19-301, MCA was revised during the 2023 legislature; however, no effort was made to re-insert similar express language from 1978 statute. When interpreting statutes, this Court must assume the “legislature knew what it was doing,” *Dep’t of Revenue v. Burlington N. Inc.*, 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976); *Baitis v. Dep’t. of Revenue*, 2004 MT 17, ¶¶ 22–24, 319 Mont. 292, 83 P.3d 1278. If the procedural requirement of a complaint was of concern, the Legislature would have explicitly amended the statute to reflect such a requirement, as it did when incorporating the federal *Winter* factors in 2023. In choosing not to, the plain language in Title 27 does not tie the issuance of a preliminary injunction order to civil actions commenced by complaint and therefore, the district court properly relied on § 27-19-201, MCA in issuing its injunction order.

DEQ nevertheless expands on this plain language and unreasonably interprets the term “federal preliminary injunction standard” as used in § 27-19-201, MCA. That provision reads: “It is the intent of the legislature that the language in subsection

(1) mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law.” Section 27-19-201(4), MCA. Subsection (1) states “[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest. Section 27-19-201(1), MCA. These are the “standards” derived from the federal law in *Winter*, 555 U.S. 7.

As plainly read the *Winter* standards do not expressly address the filing of an underlying complaint in the same cause of action. Subsection (1)(a) includes the term “likely to succeed on the merits[,]” but is silent as to which merits or where they may originate. DEQ attempts to define “merits” by extrapolating the legislature’s intent under § 27-19-201(4), MCA. In doing so, DEQ unreasonably interprets “federal preliminary injunction standard” to include any and all potentially related federal procedural rules and case law.

DEQ’s interpretation is unreasonable because it renders other sections of Title 27, Chapter 19 superfluous, leading to an absurd result. *State v. Heath*, 2004 MT 126, ¶ 31, 321 Mont. 280, 90 P.3d 426 (this Court must give effect to all words and avoid superfluity.)

Under DEQ's broad interpretation, federal rules and jurisprudence would contradict existing Montana rules. For example, F.R.C. P. Rule 65(b)(2) allows a temporary restraining order to remain effective for 14 days, while Montana law provides that a restraining order is not enforceable after 10 days. *Compare* Fed. R. Civ. P. 65(b)(2) with § 27-19-316(4), MCA. That would render Montana's statutes superfluous.

Finally, wholly adopting federal jurisprudence could undermine the constitutional rights unique to Montana. Therefore, this Court should narrowly read subsection (4) as strictly applying to the federal case law that relates only to the four *Winter* standard.

DEQ nonetheless tries to tie injunctive relief to a complaint based on various federal cases. Notably, though, those cases did not involve an administrative proceeding without a mechanism for an injunction for wrongly granting a permit. So, while those cases were based on the complaint, PTC has always made clear that functionally, the underlying complaint is the BER proceeding. And the relief sought in the injunction proceeding is "of the same character as that which may be granted finally". *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945). Put simply, if the BER sides with PTC, then the opencut permit is void and no mining would be allowed. The preliminary injunction proceeding sought that same relief –

no mining. This is sufficient to satisfy the federal standards as well as the state standards.

Finally, even if *Forbes* no longer controlled, the Court may still find the lack of a document titled a “complaint” as harmless. Rule 8, M. R. Civ. P., only requires that a claim for relief included a short and plain statement of the relief sought, and a demand for the relief. This language is liberally construed in order to achieve justice. *McJunkin v. Kaufman & Broad Home Sys.*, 229 Mont. 432, 437, 748 P.2d 910, 913 (1987). As previously discussed, the “application” contained all the elements of a “complaint.”

B. PTC established that they were likely to succeed on merits.

- 1. Under § 27-19-201, MCA, the district court properly adjudicates the facts and law which control an agency action as a necessary part of determining whether an applicant is entitled to preliminary injunctive relief .**

DEQ misstates the applicable legal standards for injunctions and misconstrues the district court’s role in issuing preliminary injunctions.

DEQ ironically characterizes the underlying proceedings as a “rushed and truncated review of the Permit[,]” (DEQ Br. p. 28) arguing the District Court violated § 2-4-704(2), MCA. (DEQ Br., p. 28.) What DEQ fails to grasp is the principal understanding that a preliminary injunction is *not* a final determination of the merits. *See Planned Parenthood of Montana v. State by & through Knudsen*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (“[I]n considering whether to

issue a preliminary injunction, neither the district court nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction.”) And thus, “decisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record.” *S. Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

This distinction is important because the interplay of the underlying statute at issue (here the Opencut law) and § 27-19-201, MCA therefore requires a district court to become a fact finder. Said another way, in every preliminary injunction hearing, the presiding district court judge is the finder of fact for *that* evidentiary hearing. The only thing at issue in that hearing is whether an applicant is entitled to the applied-for preliminary injunctive relief. Thus, the question surrounds a “likelihood” of success, not an adjudication of ultimate success. This is quite clearly where DEQ is confused.

As this Court is aware, under the Opencut law, final permits are issued *prior* to the administrative review process, and that administrative review contains no provision for injunctive relief. Consequently, the District Court was authorized determining whether PTC is likely to succeed on the merits before the BER. In doing so, it must hold its own evidentiary hearing and create its own record

pursuant § 27-19-303, MCA. Section 2-4-704(2), MCA, then, only comes into play after the BER makes a decision on the merits before it.

2. PTC established at the District Court that it was likely to succeed on the merits.

The law is clear, “[a]n agency decision is unlawful if it does not comply with governing laws and administrative rules.” *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’t Quality*, 2017 MT 222, ¶15, 388 Mont. 453, 401 P.3d 712. The permit at issue is allowed only if it does not “affect” ground or surface water and does not have 10 or more occupied dwelling units within one-half mile. § 82-4-432(1)(b), MCA. If a proposed mine does not meet these requirements, it must go through a more rigorous permitting process. *Id.* A permit application is only “acceptable if the materials and information provided to [DEQ] demonstrate that the proposed opencut operation complies with the requirements of [the Opencut Act].” Admin. R. Mont. 17.24.212 (3) (emphasis added). DEQ has an independent obligation to “ensure compliance” with the permit requirements. § 82-4-422(1)(b), MCA.

The District Court made clear and provided ample explanation as to what legal standards applied and did not apply in issuing its preliminary injunction. COL, ¶¶ 1-10, 15. The District Court properly found that the question on the merits before it “and the BER, is whether the proposed pit will ‘affect’ ground or surface water in any way.” COL, ¶ 12. It then proceeded to analyze the term “affect”

through the appropriate canons of statutory interpretation employed by this Court. COL, ¶¶ 12-15. Concluding, the District Court held “[i]f neither the applicant for a mining permit, nor the DEQ tasked with reviewing that application conduct the due diligence necessary to determine the legal threshold for applicability of the permit, then the permitting decision must fail as an arbitrary and capricious decision.” COL, ¶ 15 (citing *Clark Fork Coal. v. Dep't of Env'tl. Quality*, 2012 MT 240, ¶¶ 19-20, 366 Mont. 427, 288 P.3d 183).

i. Affect on Groundwater

An arbitrary and capricious decision is one that is “apparently random, unreasonable[,] or seemingly unmotivated based on the existing record.” *Montana Trout Unlimited v. Montana Dep't of Env't Quality*, 2024 MT 36, ¶ 12, 2024 Mont. LEXIS 188. Here, the record is replete with testimony that neither DEQ nor LHC conducted a requisite evaluation to prove no affect. FOF, ¶ 29 (“DEQ granted the Dryland permit based on LHC’s certification that mine would not affect ground or surface water...[and] did not require test wells.” “DEQ’s only visit to the subject property was in April 2023, while there was melting snow...[and] could not confirm whether the ground was still frozen, or the depth to surface water.”); FOF, ¶ 38 (DEQ personnel “stated that that the DEQ did not perform any independent hydrologic evaluation to confirm the depth to groundwater or whether there would be an intersection with ground or surface water by conducting a hydrological study

or contract for one.”); FOF, ¶ 41 (“DEQ concedes ...the 14-foot test holes were not deep enough to show that groundwater was not present at...the expected depth of mining[.]”); FOF, ¶ 47 (DEQ must “ ‘rely on the certifications of applicants’ and no further evidentiary investigations are necessary.”)

As the fact-finder, the district court appropriately ascribed more credibility to PTC’s expert witness over DEQ’s given that she testified that she is not a trained hydrologist and does not have an education or background in hydrology. FOF ¶ 43. In fact, her only experience in the hydrology field is her current 13-month stint with the DEQ. *See* Dkt. 6, Hr’g. Tr. pp. 21-23. Nevertheless, based on her review of GWIC logs, she was “sure” there would be no affect to groundwater. FOF, ¶ 44. In comparison, PTC’s expert is a hydrogeologist with over 30 years of experience in the hydrogeologic sciences, who testified no professional in his field would solely rely on this data for determining no affect. FOF, ¶¶ 68, 79. Given the District Court’s unique position and the extensive evidentiary testimony, the District Court properly weighed in favor of the PTC as it relates to petitioners’ success on the merits at the BER.

The DEQ’s reliance on recent legislative history to defend how it defines “affect” is an attenuated argument that inserts more ambiguity to the statute’s intent and therefore is unpersuasive. Specifically, DEQ points to differing draft iterations of HB 599 that previously included the term “intercept” in § 4(1)(b)(i),

arguing that “affect” was only inserted to address impacts to water conveyance facilities, mistakenly broadening the legislature’s intent.

DEQ’s interpretation undermines the long-standing principle that when interpreting statutes, this Court must assume the “legislature knew what it was doing,” *Dep’t of Revenue v. Burlington N. Inc.*, 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976). Importantly, this Court should “not read into statutes something that is not there.” *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907. “Furthermore, while legislative history may be helpful to interpret ambiguous terms of statutory law, **we will not rely on legislative history to contradict the plain language** of statutory law when it is clear on its face.” *Haney*, ¶ 7, (emphasis added).

Here, the legislature explicitly removed the term “intercept” and replaced it with “affect.” Had the legislature intended that “affect” was only to be applied to a water conveyance facility, it could have amended the statute to require operations “that [intercept] ground water or surface water, including intermittent or perennial streams, or [affect] water conveyance facilities[.]”

Furthermore, a statute must be read and interpreted as a whole. *W. Montana Water Users Ass’n, LLC*, ¶ 28. DEQ’s interpretation belies the underlying intent of Opencut Mining Act and specifically contradicts other portions of the statute. *Heath*, ¶ 31. (this Court is “required to avoid any statutory interpretation that

renders any sections of the statute superfluous and does not give effect to all of the words used;”)

The Montana legislature adopted the Opencut Mining Act with the intent to “provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources” consistent with the state’s obligations under the Montana Constitution’s environmental provisions – Article II, section 3, and Article IX. Mont. Code Ann. § 82-4-402(1). The legislature identified that it is Montana’s policy to provide for reclamation and conservation of land with the underlying purposes to “preserve natural resources[,] aid in the protection of wildlife **and aquatic resources** [,] . . . and [otherwise] promote the health, safety and general welfare of the people of this state.” Section 82-4-402(2), MCA (emphasis added).

Narrowly reading affect to mean “intercept” denies the broadly stated policies underlying the Act. Additionally, other portions of the statute elucidate the legislative’s intent to protect the water quality of nearby sources to permitted operations. Section 82-4-434(2)(d), MCA (requiring a reclamation plan to dispose of waste “in a manner that protects water quality.”); Admin. R. Mont. 17.24.227 (requiring specific setbacks from surface waters).

DEQ, in FN 13, tries to excuse its inadequate review because of the short period of time the Legislature has given it to review dryland applications.

However, if the applicant and DEQ have inadequate time to properly quantify that no waters will be affected, the proper response is to simply deny the permit.

This Court should affirm the District Court's findings because a review of the record makes clear a definite and firm conviction that a mistake has been made. *Westmoreland*, ¶ 10.

ii. Occupied Dwelling Units

Additionally, the District Court properly found that applicant did not demonstrate that there were not 10 occupied dwelling units within one-half mile of the project as required under § 82-4-432(1)(b)(ii), MCA. Importantly, DEQ testified that it issued a deficiency letter requesting, in part, LHC verify how applicant met this permit requirement. In turn, the applicant "confirmed" that the proposed permit area met the requirements but provided zero evidentiary support. FOF, ¶¶ 31-34, 37. In fact, DEQ conceded they "did not confirm whether there were 10 occupied dwelling units." FOF, ¶¶ 37, 45 The record makes clear, the agency relied solely on the applicant's certification, despite the applicant failing to conduct its own independent verification. COL, ¶ 56 ("No underlying data was presented during the hearing to support any conclusions as to the number of seasonal dwellings or status of the occupied dwellings.")

CONCLUSION

For the foregoing reasons, PTC requests that this Court deny DEQ's appeal and uphold the District Court's decision.

DATED this 7th day of March, 2024.

By: /s/ Graham J. Coppes
Graham J. Coppes
FERGUSON & COPPES, PLLC
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Mac is 9,713, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 7th day of March, 2024.

By: /s/ Graham J. Coppes
Graham J. Coppes
FERGUSON & COPPES, PLLC
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

I, Graham J. Coppes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-07-2024:

Scott Hagel (Attorney)
Crowley Fleck PLLP, P.O. Box 759
1667 Whitefish Stage Road
Kalispell MT 59903-0759
Representing: L.H.C., Inc.
Service Method: eService

Mark L. Stermitz (Attorney)
304 South 4th St. East
Suite 100
Missoula MT 59801
Representing: L.H.C., Inc.
Service Method: eService

Jeremiah Radford Langston (Govt Attorney)
1520 E 6th Ave.
Helena MT 59601
Representing: Montana Department of Environmental Quality
Service Method: eService

Sarah Elizabeth Christopherson (Attorney)
Department of Environmental Quality
Legal Unit
1520 East Sixth
Helena MT 59601
Representing: Montana Department of Environmental Quality
Service Method: eService

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601
Representing: Protect the Clearwater
Service Method: eService

David Kim Wilson (Attorney)
401 North Last Chance Gulch

Helena MT 59601
Representing: Protect the Clearwater
Service Method: eService

Electronically Signed By: Graham J. Coppes
Dated: 03-07-2024