IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0524

PROTECT THE CLEARWATER,

Plaintiffs / Appellee,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant / Appellant,

and

LHC, INC.,

Defendant / Appellant.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY BRIEF

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, Cause No. DV-32-2023-0000776-IJ,
Honorable John W. Larson Presiding

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INTRODUCTION

This case concerns Defendant-Appellant Montana Department of Environmental Quality's ("DEQ") grant of Defendant-Appellant LHC, Inc's ("LHC") application for an opencut mining permit, issued pursuant to the Montana Opencut Mining Act, *see* §§ 82-4-401 to -446, MCA, north of Clearwater Junction on Highway 83 in Western Montana. Plaintiff-Appellee Protect the Clearwater ("PTC") requested the district court grant a preliminary injunction to block the permit on the basis DEQ failed to adhere to the Montana Opencut Mining Act, pending administrative review before the Montana Board of Environmental Review ("BER"), which the district court granted. Doc. 14. DEQ appeals the district court's decision, arguing the district court lacked jurisdiction to hear claims properly before the BER and PTC did not satisfy the likelihood of success on the merits requirement of the preliminary injunction standard. Section 27-19-201(1)(a), MCA.

During this appeal, the hearing examiner for the BER issued an order on the parties' cross-motions for summary judgment, finding DEQ had properly issued LHC's opencut permit. *In re LHC, Inc.*, Cause No. BER 2023-03 OC, Order on Cross-Mot. for Summ. J. (Mont. Board Envtl. Rev. March 8, 2024) (App. A). The parties will have the opportunity to file exceptions and the members of the BER will have to adopt the hearing examiner's order before the matter becomes final.

Section 2-4-621, MCA. Because of the expansive remedy granted by the district court, predicating dissolution of the preliminary injunction on both future Montana Administrative Procedure Act ("MAPA") and Montana Environmental Policy Act ("MEPA") judicial review, *see* Doc. 14 at 48, the BER's potential adoption of the hearing examiner's proposed order will not resolve this case, necessitating continuation of this appeal.

ARGUMENT

I. The district court lacked jurisdiction to issue the preliminary injunction.

A. The district court failed to identify a cause of action that would vest it with subject matter jurisdiction to hear PTC's claims.

PTC asserts Montana courts have broad jurisdiction to hear all civil and criminal matters arising in law and equity and subject matter jurisdiction was established here. PTC's Answer Br. to DEQ's Opening Br. 15–17 (Mar. 7, 2024) ("PTC Answer Br."). PTC's description of this issue lacks an important clarification that subject matter jurisdiction also depends on whether the claim is consistent with "conforming statutes." *North Star Dev., LLC v. Mont. PSC*, 2022 MT 103, ¶ 22, 408 Mont. 498, 510 P.3d 1232 ("*North Star*") (citation omitted).

This Court's analysis in *North Star* elucidates the importance of statutes creating a cause of action to establish a court's subject matter jurisdiction to conduct judicial review of agency action. For instance, this Court noted § 2-4-702,

MCA provided a cause of action giving the district court subject matter jurisdiction to hear the petitioner's claims:

> As an implementation of that legislative authority, MAPA provides, inter alia, for district court jurisdiction for review of contested case agency decisions not otherwise provided for and *creates a statutory cause of action for that purpose*, but precludes exercise of that jurisdiction, and thus availability of that *cause of action*, until after the agency issues a final contested case decision and the aggrieved party has "exhausted all administrative remedies available within the agency." Within that framework, the exhaustion of administrative remedies requirement of § 2-4-702(1)(a), MCA, is an express procedural prerequisite for *exercise of district court subject matter jurisdiction under § 2-4-702(1), MCA*, and thus a procedural justiciability requirement that generally must be satisfied before a final contested case agency decision is ripe for judicial review under § 2-4-702(1), MCA.

North Star, ¶ 23 (citation omitted, and emphasis added and removed).

This Court has similarly stated "[d]istrict courts are courts of general jurisdiction, but only the Legislature may provide them subject matter jurisdiction for direct review of administrative decisions." *K & J Invs., LLC v. Flathead Cty. Bd. of Cty. Comm'rs*, 2020 MT 277, ¶ 10, 402 Mont. 33, 476 P.3d 20 (citation omitted). Here, PTC has disavowed § 2-4-702, MCA as the basis for the district court's subject matter jurisdiction. PTC Answer Br. at 21. Without identifying a statute that authorizes a cause of action, PTC fails to explain how the district court had subject matter jurisdiction to issue a preliminary injunction.

Rather than identify a specific cause of action, PTC argues Montana's preliminary injunction statutes generally vest the district court with subject matter

jurisdiction. *Id.* at 16–17. But as discussed in DEQ's opening brief, a preliminary injunction is a potential remedy and not a cause of action. DEQ's Opening Br. at 17. Reflecting this principle, under Montana's former preliminary injunction standard, this Court stated applicants must establish "a legitimate cause of action[,]" and additionally show "an injunction is an appropriate remedy." *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123 (citation omitted). If it were the case that a request for a preliminary injunction automatically established a legitimate cause of action—as PTC proposes—then this standard would have been rendered a tautological exercise where every request for preliminary injunction would presume a legitimate cause of action. Instead of imposing such an unworkable and ineffective standard, this Court required parties to show that the lawsuit was independently authorized by some other statute or other cause of action to obtain a preliminary injunction. *See, e.g., Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 22, 334 Mont. 86, 146 P.3d 714 ("As a necessary threshold matter, Benefis must show that it has a legitimate cause of action under Title 50, Chapter 5, Montana Code Annotated[.]").

Federal courts have also found the remedy of a preliminary injunction is not the same as a cause of action. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004) ("There is no such thing as a suit for a traditional injunction in the abstract. For a traditional injunction to be even theoretically available, a

plaintiff must be able to articulate a basis for relief that would withstand scrutiny under Fed. R. Civ. P. 12(b)(6)") (citation omitted); *Litton Industries, Inc. v. Colon*, 587 F.2d 70, 74 (1st Cir. 1978) (an injunction "must be based on a valid cause of action alleged in the complaint"); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available.") (emphasis in original).

Other state courts have found the same. *Long v. Dell, Inc.*, 93 A.3d 988, 1004 (R.I. 2014) ("An injunction is a remedy, not a cause of action.") (citation omitted); *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. 2011) ("an injunction is a remedy and not a cause of action; therefore, it must be based on some recognized and pleaded legal theory") (citation omitted) *overruled on other grounds* 661 S.W.3d 778, 785 (Mo. 2023); *McDowell v. Watson*, 59 Cal. App. 4th 1155, 1159 (Cal. Ct. App. 1997) ("Injunctive relief is a remedy and not, in itself, a cause of action") (ellipses and citation omitted); *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014) ("Injunctions are a form of relief, not a cause of action."); *Cooper v. Litton Loan Servicing, LP*, 325 S.W.3d 766, 769 (Tex. App. 2010) ("A permanent injunction is not a cause of action but an equitable remedy. To obtain an injunction a party must first assert a cause of

action.") (citation omitted). For its part, PTC fails to cite to any case in which a court has stated a request for a preliminary injunction by itself is a cause of action that would confer a court subject matter jurisdiction.[1]

PTC's confusing and inconsistent argument on what the merits are in this case entails further exemplifies that the district court did not have subject matter jurisdiction to grant the preliminary injunction. Specifically, PTC states "[w]hile 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." PTC Answer Br. at 26. PTC's conception of the merits in this passage is in tension the district court's statement "[t]he 'merits' here are the merits of the BER appeal[,]" Doc. 14 at 29 (¶ 10), and its own statement the "functional[] … underlying complaint"— from which the likelihood of success on the merits emanates in this case— "is the BER proceeding[,]" PTC Answer Brief at 32.

[1] PTC cites two cases that found an applicant could obtain a preliminary injunction without filing a complaint. PTC Answer Br. at 18–19 (*citing Heart K Land & Cattle Co., LLC v. Mont. Rail Link*, 2013 U.S. Dist. LEXIS 115272, *6 n.1 (D. Mont. Aug. 14, 2013); *City of Great Falls v. Forbes*, 2011 MT 12, ¶ 13, 359 Mont. 140, 247 P.3d 1086). Both cases only addressed this simple procedural question, and neither case suggested an applicant could evade subject matter jurisdiction requirements by failing to establish an independent cause of action.

PTC's strained description of the merits, additionally, should be rejected because the US Supreme Court has explained the likelihood of success standard is functionally the same as the merits standard in obtaining permanent relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 33 (2008) ("our analysis of the propriety of preliminary relief is applicable to any permanent injunction as well"). To the extent the merits and likelihood of success on the merits standards differ, applicants for a preliminary injunction are subjected to a lower bar, but they are not somehow required to prove some different *kind* of claim. *Id.* at 32 ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.") (citation omitted). Thus, if it's the case that the district court would lack subject matter jurisdiction to hear the final merits of PTC's claims, then the same is true of PTC's request for a preliminary injunction. PTC cannot evade this fact by arguing the merits of the preliminary injunction somehow entails different inquiries and issues than the merits of the BER proceeding, such that the preliminary injunction proceeding would not intrude upon the BER's jurisdiction in administrative review.

Further, the relief granted by the district court is not limited to the merits of the BER proceeding. Instead, the district court ordered:

> [T]he preliminary injunction shall last during the pendency of both the administrative matter pending before the Board of Environmental Review (Case No. BER 2023-03 OC) and any subsequent petition for judicial review pursuant to § 2-4-701, MCA *et seq*. and/or until the MEPA case currently before this Court reaches a judgement in herein.

Doc. 14 at 48. Showing the expansive nature of the district court's relief, the BER's hearing examiner found DEQ properly granted the permit, *see* App. A, but the BER's potential adoption of the hearing examiner's order will not dissolve the preliminary injunction because further action is required in both MAPA and MEPA[2] judicial review to obtain such dissolution. If it were truly the case the district court limited its analysis to the merits of the BER proceeding, then the preliminary injunction would end after the conclusion of the BER proceeding—that is, however, not the case here.

B. PTC's claims are not procedurally justiciable.

In addressing the issue of procedural justiciability, PTC concedes that district court "was not 'judicially reviewing' the BER decision" pursuant to § 2-4-702, MCA and therefore argues it was not required to adhere to this statute's requirement to exhaust all administrative remedies available within the agency. PTC Opening Br. at 21. PTC disavowing the applicability of § 2-4-702, MCA to this case firmly establishes the district court never identified a cause of action—

[2] Inclusion of MEPA judicial review in the scope of the remedy is in stark contrast with the district courts statement "[t]his suit is independent of … MEPA suit." Doc 14 at 11 (¶ 26).

and resulting subject matter jurisdiction—to hear PTC's claims. *North Star*, ¶ 23 (finding § 2-4-702, MCA conferred the district court subject matter jurisdiction). In addition to the district court's lack of subject matter jurisdiction, PTC also fails to meet the requirements for procedural justiciability in this case.

In its answer brief, *see* PTC Answer Br. at 21–22, PTC cites *Qwest Corp. v. Mont. PSC*, 2007 MT 350, ¶ 20, 340 Mont. 309, 174 P.3d 496, to argue it has satisfied all three criteria of a ripe and justiciable case:

> [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."

(Citation omitted.) PTC's claims fail to satisfy these three factors.

On the first factor, delayed review does not automatically render a case ripe for judicial review. The US Supreme Court has stated some amount of delay in relief is inherent to administrative review of agency action and courts should not second-guess legislative decisions trading off the adequacy of the administrative record for the immediacy of judicial relief. *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 12–13, 24 (2000). Delayed review, furthermore, is not unique to opencut permits. *See, e.g., MEIC v. Westmoreland Rosebud Mining*, LLC, 2022 Mont. LEXIS 735, *10–11 (Mont. Sup. Ct. Aug. 9, 2022) (finding that even though the permit had been in place during administrative and judicial review, a

stay under Mont. R. App. P. 22 of the district court's vacatur of the permit was warranted because petitioners failed to establish that substantial injury would result from the stay). PTC cannot, therefore, create a procedurally justiciable case and disregard the legislature's instructions for reviewing opencut permits simply because the permit is valid during the pendency of administrative review.

Regarding the second factor, PTC attempted to frustrate the administrative proceeding through the district court's order. Specifically, PTC requested a procedural stay of the BER's contested case proceeding, arguing this appeal would resolve pending matters in that case. *In re LHC, Inc.*, Cause No. BER 2023-03 OC, Order on PTC's Mot. for Stay 2 (Mont. Board Envtl. Rev. Oct. 20, 2023) (App. B). The BER hearing examiner correctly rejected PTC's motion for stay, *see id.* at 4, but PTC's failed request for a procedural stay should show the precedent of allowing premature review of agency action provides litigants an opportunity to frustrate the BER appeals process.

Pertaining to the third factor, the BER's hearing examiner arrived at a different decision than the district court, finding DEQ properly granted the permit and petitioners failed to satisfy their burden of proof. App. A. This decision was based on several months of process culminating in a well-informed decision. *Id*. The district court's one day hearing is not an adequate substitute for this process. What's more, the need for the district court to receive and weigh evidence (beyond

its statutory powers) demonstrates the record needed additional development and was not ripe for judicial review. *MEIC v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 47, 414 Mont. 80 (the purpose of the BER proceeding is, in part, to receive evidence and argument on "information DEQ officials would have had and relied upon at the time of [issuing the permit]").

PTC also attempts to excuse its failure to exhaust administrative remedies by claiming that proceeding with the BER would be futile. But the BER has the authority to issue a decision that is consistent with PTC's request for relief. Section 82-4-427, MCA; *MEIC*, 2023 MT 224, ¶¶ 13–25 (describing how the BER may find DEQ's grant of a permit was unlawful). The fact relief is not immediately available before the BER does not make that relief futile, either. *Dano Resource Recovery v. District of Columbia*, 566 A.2d 483, 486 (D.C. Cir. 1989) ("It is well established ... that delay alone will not suffice to trigger the futility exception.") (citation omitted); *North Star*, ¶ 18 ("In contrast to the narrow circumstance where an available administrative remedy would in any event be futile as a matter of law, the mere possibility or likelihood that an administrative remedy may not succeed is insufficient to render it futile as a matter of law.") (citation omitted). PTC, therefore, cannot claim that being required to obtain a final agency decision from the BER is futile. To say otherwise would disrupt and undermine the legislature's creation of the administrative review process before the BER.

B. Interlocutory review under § 2-4-701, MCA is improper here.

This Court's decision in *Wilson v. Mont. PSC*, 260 Mont. 167, 172–73, 858 P.2d 368, 371–72 (1993) states (1) parties seeking interlocutory relief of agency action bear a heavy burden demonstrating they are entitled to such relief and (2) interlocutory review should not reach the final substantive merits of the case. Rather than grappling with either of these principles and their applicability to this case, PTC instead asserts *Wilson* supports its argument because that case gave effect to constitutional principles. PTC Answer Br. at 24–25.

PTC's argument ignores the fact that the constitutional principle at play in *Wilson* was due process. *Wilson*, 260 Mont. at 171, 858 P.2d at 371. The Wilsons were, therefore, entitled to interlocutory review because it allowed them to obtain fundamental fairness within the MAPA contested case proceeding. *Id.*, 260 Mont. at 172, 858 P.2d at 371 ("the agency has failed to afford the Wilsons fundamental fairness and due process"). PTC's constitutional claims are not aimed at ensuring fundamental fairness in the BER proceeding—indeed, they were filed prior to when the BER proceeding started in earnest—but instead are aimed at obtaining a certain type of remedy. PTC Answer Br. at 24–26. In particular, PTC asserts its claims are bolstered by its right to a clean and healthful environment. *Id*. On the basis of this constitutional claim, PTC is not entitled to relief under § 2-4-701, MCA for three reasons.

First, the right to a clean and healthful environment—unlike due process[3]—is not a self-executing right because the legislature has the responsibility of establishing adequate remedies in furtherance of this right. Mont. Const. Art. IX, § 1(3) ("The legislature shall provide adequate remedies for the protection of the environmental life support system[.]"); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257 ("provisions beginning 'the Legislature shall' are non-self-executing provisions") (citation omitted); *cf. Shammel v. Canyon Res. Corp.*, 2007 MT 206, ¶ 10, 338 Mont. 541, 167 P.3d 886 ("the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties."). In the event PTC thinks the legislature's implementation of this right is insufficient, it may raise a constitutional challenge under Mont. R. Civ. P. 5.1. *See, e.g., Park Cty. Envtl. Council v. Mont. DEQ*, 2020 MT 303, ¶ 84, 402 Mont. 168, 477 P.3d 288 (finding § 75-1-201(6)(c)–(d), MCA (2011) unconstitutional); *MEIC v. Mont. DEQ*, 1999 MT 248, ¶¶ 79–80, 296 Mont. 207, 988 P.2d 1236 (finding § 75-5-317(2)(j), MCA (1995) unconstitutional). But PTC may not haphazardly invoke its right to a clean and healthful environment as a basis for this Court to

[3] *Edwards v. Cascade County Sheriff's Dep't*, 2009 MT 451, ¶ 56, 354 Mont. 307, 223 P.3d 893 (finding due process of law under Mont. Const. Art. II, § 17 is a self-executing constitutional provision); *accord Dorwart v. Caraway*, 2002 MT 240, ¶ 44, 312 Mont. 1, 58 P.3d 128.

ignore clear statutory limitations on the availability of judicial review and find an implied or inherent basis to grant PTC's request for relief. *Water for Flathead's Future, Inc. v. Mont. DEQ*, 2023 MT 86, ¶ 36, 412 Mont. 258, 530 P.3d 790 (finding the district court could not ignore MEPA's remedial limitations in § 75-1-201(6)(c), MCA, in part, because '[t]his provision is not constitutionally challenged here.").

Second, PTC may raise a constitutional challenge in judicial review of final agency action under § 2-4-704(2)(a)(i), MCA. PTC's supposed constitutional claims do not further its interest in obtaining fundamental fairness within the BER proceeding and thus interlocutory review is not justified here. Instead, PTC's claims are aimed at the outcome of an administrative proceeding and the district court's premature intervention in this case is antithetical to the principles articulated in *Wilson*.

Third, PTC is legally able to obtain a decision from the BER that the permit was unlawfully granted. The district court's statement "[t]he 'merits' here are the merits of the BER appeal" exemplifies this point. Doc. 14 at 29 (¶ 10). This Court has found the availability of such relief precludes the application of § 2-4-701, MCA. *Kingsbury Ditch Co. v. Mont. DNRC*, 223 Mont. 379, 382, 725 P.2d 1209, 1211 (1986) (declining to grant interlocutory review because "[t]here has been no showing in this case that a review of the final agency action would provide an

inadequate remedy."). This Court should follow its precedent in *Kingsbury Ditch Co.* and find the availability of relief from the BER precludes judicial review under § 2-4-701, MCA here.

Even if this Court found the district court's jurisdiction was somehow provided by § 2-4-701, MCA, the district court did not adhere to or even consider the standards applicable to judicial review of MAPA contested case proceedings. PTC concedes at multiple times in its answer brief the district court weighed evidence, *see* PTC's Answer Br. at 12, 34, 37, which is impermissible for both final and interlocutory judicial review of agency action, *Wilson*, 260 Mont. at 173, 858 P.2d at 372 (stating that in interlocutory review a court may not "substitute its judgment for that of the agency in violation of § 2-4-704, MCA."). Thus, PTC cannot claim harmless error by the district court failing to identify § 2-4-701, MCA as the basis of its jurisdiction, *see* PTC Answer Br. at 23 n.3, because the district court failed to adhere to the relevant standards which would have guided its interlocutory decision.

C. This Court should revisit *City of Great Falls v. Forbes*, 2011 MT 12, 359 Mont. 140, 247 P.3d 1086.

Citing principles of statutory interpretation, PTC argues this Court should not find the legislature's amendment of the preliminary injunction standard requires the simultaneous filing of a complaint with an application for a preliminary injunction. PTC Answer Br. at 27–33. PTC's argument ignores "this

Court's long-held presumption that the Legislature intended to make some changes in existing law by enacting an amendment or new law." *Sammons v. Sims*, 2023 MT 83, ¶ 37, 412 Mont. 157, 529 P.3d 854 (citation omitted). The legislative history for Senate Bill 191 establishes the legislature intended to amend the preliminary injunction standard to ensure the applicant would only obtain a preliminary injunction if the court thought the applicant would eventually win. DEQ Opening Br. at 26. Hence, the legislature's inclusion of the requirement for the applicant to demonstrate they are "likely to succeed on the merits[.]" Section 27-19-201, MCA.

To state the obvious, a plaintiff cannot ultimately succeed on the merits if it has not filed a complaint. This Court should, accordingly, find a successful request for a preliminary injunction must be accompanied by a complaint for final adjudication of the merits. Indeed, the district court and PTC's inconsistent and confusing recitation of what the merits are in this case should demonstrate the potential mischief of allowing a party to obtain a preliminary injunction without filing a complaint. *Compare* Doc. 14 at 29 (¶ 10) (the district court finding "[t]he 'merits' here are the merits of the BER appeal"), *and* PTC Answer Br. at 32 (PTC arguing the "underlying complaint is the BER proceeding."), *with* Doc. 14 at 11 (¶ 26) (the district court asserting "[t]his suit is independent of ... the BER

appeal[.]"), *and* PTC Answer Br. at 26 (PTC asserting "the District Court uses the term 'merits' [but] it is not in fact deciding the merits of the BER hearing").

II. PTC failed to establish it is likely to succeed on the merits.

A. In its answer brief, PTC fails to articulate what standards governed the district court's interlocutory review of the permit.

PTC attempts to argue the district court's reweighing of evidence and fact finding was justified under the standard for preliminary injunctions. PTC's Answer Br. at 34. But "[t]here is no such thing as a suit for a traditional injunction in the abstract. For a traditional injunction to be even theoretically available, a plaintiff must be able to articulate a basis for relief that would withstand scrutiny under Fed. R. Civ. P. 12(b)(6)[.]" *Klay*, 376 F.3d at 1097 (citation omitted); *Sandrock*, ¶ 16 (to obtain a preliminary injunction, applicants must establish "a legitimate cause of action") (citation omitted). PTC cannot, therefore, exclusively cite the preliminary injunction standard as the basis of its claims. PTC must instead identify a cause of action and apply those standards to establish that it has demonstrated a likelihood of success on the merits.

In multiple forms of judicial review—whether it be judicial review of MAPA contested case proceedings and agency MEPA decisions, or standalone declaratory actions—this Court has consistently stated courts may not substitute their judgment for that of the agency on questions of fact or technical matters. *Mont. Trout Unlimited v. Mont. DEQ*, 2024 MT 36, ¶ 12, 2024 Mont. LEXIS 188

(Mont. Sup. Ct. Feb. 26, 2024) ("Courts should not substitute their own judgment for that of the agency by asking whether the agency's decision was the 'correct' one scientifically, morally, or politically."); *MEIC v. Mont. DEQ*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493 ("This Court acknowledges that it is not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water requires significant technical and scientific expertise beyond the grasp of the Court.... [T]o ensure that agency decision-making is scientifically-driven and well-reasoned, this Court affords 'great deference' to agency decisions implicating substantial agency expertise."); *MEIC*, 2023 MT 224, ¶ 10 ("we do not substitute our judgment for that of the agency as to the weight of the evidence on factual questions") (citing § 2-4-704(2), MCA).

PTC's concession that the district court engaged in reweighing of evidence, *see* PTC's Answer Br. at 12, 34, 37, shows that the district court failed to articulate the appropriate standards, and ultimately that its finding that PTC had shown a likelihood of success on the merits was in error. DEQ, accordingly, requests this Court reverse the district court because it failed to adhere to universal standards applicable to judicial review of agency action.

B. The district court's interpretation of "affect" in § 82-4-432(1)(b)(i), MCA reads dryland permits out of statute.

PTC asserts the plain language of § 82-4-432(1)(b)(i), MCA is clear, and this Court need not look to the legislative history to interpret the meaning of the

term "affect[.]" PTC's Answer Br. at 37–40. While PTC correctly states this Court should "not read into statutes something that is not there[,]" *id.* at 38 (citation omitted), the district court did precisely that in interpreting affect in § 82-4-432(1)(b)(i), MCA. Specifically, the district court added language to this subsection when it phrased the relevant issue as "whether the proposed pit will 'affect' ground or surface water *in any way*." Doc. 14 at 30 (¶ 12) (emphasis added). As stated in DEQ's opening brief, the language "in any way" appears nowhere in § 82-4-432(1)(b)(i), MCA. DEQ's Opening Br. at 38. Contrary to PTC's assertions, such an interpretation reads language into the requirement that is not there, broadening its meaning to the point where a speck of dust will prevent a dryland permit from being issued and effectually reading dryland permits out of statute. Doc. at 14 at 32 (¶ 17).

Since the district court issued its decision adopting an interpretation of "affect[,]" the hearing examiner for the BER arrived at a different meaning of the term, finding "[t]he common definition of 'affect' is 'to influence in some way.'" App. A at 5 (¶ 9). While similar, "affect in any way" and "influence in some way" are not the same,[4] these diverging definitions and the district court's insertion of language into the statute demonstrates that this Court would benefit from looking

[4] The district court used the Cambridge and Merriam-Webster dictionaries, Doc. 14 at 31 (¶ 14), whereas the BER hearing examiner used Black's Law Dictionary, App. A at 5 (¶ 9).

to the legislative history for clarification. *Swanson v. Consumer Direct*, 2017 MT 57, ¶ 16, 387 Mont. 37, 391 P.3d 79 ("When the legislative intent cannot be readily derived from the plain language, we review the legislative history and abide by the intentions reflected therein.") (citation omitted).

As discussed in DEQ's opening brief, legislative history shows the legislature intended for "affect" in § 82-4-432(1)(b)(i), MCA to mean intercept. DEQ's Opening Br. at 39–41. What's more, the district court's interpretation would nullify the legislature's intent to create a new category of opencut projects that are "high and dry" and therefore don't intercept groundwater or surface water. *Id.* at 39. Because the district court's interpretation of "affect" fails to give effect to a new category of opencut permits created by the legislature, it should be rejected. Section 1-2-101, MCA.

CONCLUSION

For the reasons stated above, DEQ requests this Court find (1) the district court exceeded its jurisdiction in granting the preliminary injunction and (2) PTC failed to establish a likelihood of success on the merits and the district court should not have granted PTC's motion for preliminary injunction.

Submitted March 21, 2024.

/s/ Jeremiah Langston
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is 4,989 words, excluding table of contents, signature, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston
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CERTIFICATE OF SERVICE

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Electronically signed by Catherine Ann Armstrong on behalf of Jeremiah Radford Langston
Dated: 03-21-2024