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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT
MEAGHER COUNTY

MONTANA TROUT UNLIMITED, MONTANA ENVIRONMENTAL INFORMATION CENTER, TROUT UNLIMITED, EARTHWORKS, and AMERICAN RIVERS; Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, and TINTINA MONTANA INC.; Defendants.	Case No. **COMPLAINT FOR DECLARATORY RELIEF**

INTRODUCTION

1. Plaintiffs Montana Trout Unlimited, Montana Environmental Information Center, Trout Unlimited, Earthworks, and American Rivers (collectively, "Plaintiffs") challenge the Montana Department of Environmental Quality's ("DEQ") approval of Tintina Montana Inc.'s ("Tintina") permit application for the Black Butte Copper Mine, a major copper mining project proposed in the Smith River watershed of west-central Montana. The Smith River is one of Montana's premier recreational rivers due to its spectacular natural beauty and abundant wild trout populations.

2. Tintina's proposed mine would excavate about 440 tons of concentrated copper ore every day in the Smith River watershed. Over the life of the project, these mining activities would generate an estimated 12.9 million tons of tailings and nearly one million tons of waste rock and pollute waters within the Smith River watershed with metals and acid-generating minerals that are harmful or lethal to aquatic life.

3. DEQ is the agency charged with permitting mining activity under the Metal Mine Reclamation Act ("MMRA"), MCA § 82-4-301 et seq., and evaluating the environmental impacts of proposed mining activities under the Montana Environmental Policy Act ("MEPA"), MCA § 75-1-101 et seq. DEQ prepared and issued the permit, associated environmental impact statement ("EIS"), and record of decision ("ROD") approving Tintina's proposed Black Butte Copper Mine in the Smith River watershed.

4. However, in reaching its decision to issue the challenged permit, DEQ violates numerous requirements of the MMRA, MEPA, and their implementing regulations. These violations include DEQ's failure to follow the MMRA's procedural and substantive requirements for ensuring that Tintina's proposed tailings impoundment—the above-ground facility that would

hold millions of tons of toxic and acid-generating tailings and rock waste—remains safe and stable in the near and long term. DEQ also fails to rationally evaluate, as MEPA requires, significant environmental consequences of the mine. Such consequences include the potential that Tintina's proposed tailings facility will fail to contain toxic mine waste—an event made likelier by DEQ's failure to ensure the facility meets MMRA safety standards. In addition, DEQ does not rationally evaluate the proposed mine's potential to pollute and deplete streamflows in major Smith River tributaries, in turn harming the fish populations that depend on clean, cold water. DEQ also does not meaningfully and rationally evaluate feasible alternatives to the proposed action, including alternatives that could reduce some of the project's most significant environmental impacts.

5. To safeguard their interests in the waters and native and wild fish threatened by DEQ's unlawful permit approval, Plaintiffs seek relief from this Court.

JURISDICTION AND VENUE

6. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, MCA §§ 27-8-201, 202; the Montana Environmental Policy Act, MCA § 75-1-101 et seq.; and the Metal Mine Reclamation Act, MCA § 82-4-301 et seq.

7. Venue is proper in this District because the mining project Plaintiffs challenge would occur in Meagher County. MCA §§ 25-2-126(1), 75-1-108, 82-4-349(2).

PARTIES

8. Plaintiff Montana Trout Unlimited is a statewide grassroots non-profit organization located in Missoula, Montana, and is dedicated to conserving and restoring cold water fisheries throughout the state. Montana Trout Unlimited members live and recreate in the Smith River watershed where Tintina's copper mine is proposed. Montana Trout Unlimited has

helped fund fishery research and restorations in the Smith River, participated as a stakeholder in Smith River management decisions by state agencies, and served as lead plaintiff in a case that established the Smith River watershed as a closed basin under the Montana Water Use Act.

9. Plaintiff Montana Environmental Information Center ("MEIC") is a member-supported Montana non-profit organization based in Helena, Montana. Founded in 1973, MEIC represents approximately 5,000 members from across Montana and the United States. MEIC is dedicated to, among other things, protecting Montana's water quality and ensuring compliance with the laws and Constitution of Montana. MEIC has litigated numerous water protection cases related to metal mining in Montana. MEIC members live near, recreate in, and otherwise derive benefit from the public lands and waters in the Smith River watershed.

10. Plaintiff Trout Unlimited is a Michigan non-profit corporation headquartered in Arlington, Virginia with 387 affiliated chapters across the United States, including 12 chapters in Montana. Trout Unlimited's mission is to conserve, protect, and restore North America's cold water fisheries and their watersheds. Trout Unlimited grassroots chapter volunteers and national staff have engaged in extensive public education and advocacy to protect the Smith River watershed and associated aquatic life from the adverse effects of Tintina's proposed Black Butte Mine.

11. Plaintiff Earthworks is a non-profit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks is headquartered in Washington, D.C., and has offices around the country, including in Missoula, Montana. Earthworks has employed its extensive research and advocacy experience to protect the Smith River watershed and educate the public about the environmental impacts of hardrock mining in Montana.

12. Plaintiff American Rivers, Inc. is a non-profit conservation organization committed to protecting clean water in rivers across the nation to ensure ample supplies for fish, wildlife, agriculture, and communities. Headquartered in Washington, D.C., American Rivers has field offices across the country, including in Bozeman, Montana. American Rivers and its members value and derive benefit from the Smith River and its tributaries for their wild, free-flowing character, clean water, abundant fish and wildlife, and world class recreational opportunities.

13. All plaintiffs have longstanding interests in protecting water quality within the Smith River watershed because they and their members place a high value on the continued healthy functioning of the ecosystems that support thriving trout populations and depend on the clean, cold water of the Smith River and its tributaries. Plaintiffs have been actively seeking to protect the Smith River watershed through a wide array of actions, including public outreach and education, scientific analysis, and advocacy intended to promote healthy ecosystem functioning in the region. Plaintiffs submitted comments during the MEPA process detailing significant concerns with DEQ's analyses of the environmental impacts threated by the proposed mine.

14. Members of the plaintiff organizations also depend on the Smith River and its tributaries for traditional activities, recreational pursuits, and employment, including outfitting, guiding, angling, floating, swimming, wildlife viewing, and aesthetic enjoyment. In doing so, Plaintiffs rely upon the water quality of the Smith River watershed to sustain the ecosystems that enable these pursuits. Plaintiffs derive economic, aesthetic, recreational, scientific, inspirational, and other benefits from these activities.

15. Tintina's proposed Black Butte Copper Mine threatens to damage water quality and reduce surface water quantities within the Smith River watershed, thereby harming

Plaintiffs' members' opportunities to fish the Smith River's world-class trout fishery, enjoy the popular and spectacular 59-mile float of the river, study the wildlife supported by the Smith River watershed, and carry out businesses dependent upon the health of the watershed and associated recreation and tourism. The legal violations alleged in this complaint therefore cause direct injury to the economic, aesthetic, conservation, recreational, scientific, educational, spiritual, and wildlife preservation interests of Plaintiffs and their members.

16. Defendant Montana Department of Environmental Quality is the agency charged with issuing exploration and mining permits under the Metal Mine Reclamation Act, MCA § 82-4-332, and evaluating the environmental impacts of proposed exploration and mining activities under MEPA, MCA § 75-1-201.

17. Defendant Tintina Montana Inc. applied for—and upon payment of the requisite bond, will hold—the mine operating permit that is challenged in this proceeding. Plaintiffs do not seek any relief against Tintina Montana, Inc., but name the company as a necessary party to this action under MCA § 27-8-301. On information and belief, Tintina Montana Inc. also does business as Tintina Resources Inc. and is a subsidiary of the Canadian corporation Sandfire Resources America Inc.

LEGAL BACKGROUND

18. DEQ's consideration of the Black Butte Copper Mine is subject to statutory requirements under the MMRA and MEPA that are intended to ensure that such projects do not cause unreasonable environmental harm and that implement the environmental mandates of the Montana Constitution, Mont. Const. art. II, § 3 and art. IX, § 1.

I. MONTANA'S METAL MINING RECLAMATION ACT

19. The MMRA was enacted to allow for mining activity in Montana while "provid[ing] adequate remedies for the protection of the environmental life support system from degradation and provid[ing] adequate remedies to prevent unreasonable depletion and degradation of natural resources." MCA § 82-4-301(2)(a). Among other requirements, the MMRA mandates that tailings storage facilities meet rigorous design standards, use appropriate technologies and techniques, and provide for "protection of human health and the environment." Id. § 82-4-301(2)(b). The Legislature also mandated "proper reclamation of mined land … to prevent undesirable land and surface water conditions detrimental to the general welfare, health, safety, ecology, and property rights of the citizens of the state." Id. § 82-4-301(3).

20. Before engaging in mining activities, the MMRA requires a person to obtain a mine operating permit from DEQ. Id. § 82-4-335(1). Among other things, an application for a mine operating permit must include a plan detailing the design, operation, and monitoring of structures that will impound mine waste and water, and such plan must be "sufficient to ensure that the structures are safe and stable." Id. § 82-4-335(5)(l) (emphasis added). For large impounding structures that meet the MMRA's definition of "tailings storage facilit[ies]," id. § 82-4-303(34), permit applicants must meet additional, more stringent procedural and substantive requirements under MCA §§ 82-4-376 and 82-4-377.[1] These requirements include the submission of a design document, certified by an engineer, which evaluates the potential for proposed tailings facilities to release pollutants into the environment. Id. § 82-4-376(2). "The

[1] The MMRA defines "tailings storage facility" as a "facility that temporarily or permanently stores tailings …" excluding facilities that "store[] 50 acre-feet or less of free water or process solution." MCA § 82-4-303(34).

design document must be submitted prior to the issuance of the draft permit" by DEQ, id. § 82-4-376(3), and reviewed and approved by an "independent review panel," id. § 82-4-377.

21. Additionally, mine permit applicants must submit a reclamation plan for DEQ approval "provid[ing] sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands." Id. § 82-4-336(10). The plan must provide for post-mining restoration of disturbed areas and "include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377." Id. § 82-4-336(1), (13).

22. DEQ may not issue an operating permit to an applicant that fails to meet these standards. See id. § 82-4-351 (providing reasons for permit denial).

II. MONTANA ENVIRONMENTAL POLICY ACT

23. DEQ's authorization of the proposed mine is also subject to the environmental review requirements of MEPA, MCA § 75-1-101 et seq. MEPA is designed "to promote efforts that will prevent, mitigate, or eliminate damage to the environment" and promote human health and welfare. Id. § 75-1-102(2). To meet this purpose, MEPA requires DEQ to "take a 'hard look' at the environmental impacts of a given project or proposal." Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877. DEQ must prepare an environmental impact statement ("EIS") before authorizing a proposed project if the project would "significantly affect[] the quality of the human environment." ARM 17.4.607(1); see also MCA § 75-1-201(1)(b)(iv) (requirements for preparation of environmental impact statement); ARM. 17.4.609(3)(d) (same).

24. In an EIS, the agency must disclose and consider, among other things, the direct, indirect, and cumulative environmental impacts of the action. MCA § 75-1-201(1)(b)(iv), ARM

17.4.609(3)(d) (requiring an evaluation of "impacts, including cumulative and secondary impacts, on the physical environment" and "the economic advantages and disadvantages of the proposal"). As part of this consideration, DEQ's rules require it to determine the significance of an action's individual and cumulative impacts, based on its evaluation of the probability and severity of impacts, growth-inducing aspects of the proposal, and "the importance to the state and to society of each environmental resource or value that would be affected." ARM 17.4.608(1). Further, DEQ may not dismiss potentially severe impacts as insignificant without "reasonable assurance … that the impact will not occur." ARM 17.4.608(1)(b).

25. Additionally, DEQ must evaluate reasonable alternatives to the proposed action. MCA § 75-1-201(1)(b)(iv)(C), (v). An "[a]lternative" is "an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action," and includes alternate "design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS." ARM 17.4.603(2)(a). Alternatives must be "achievable under current technology" and "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor." MCA § 75-1-201(1)(b)(iv)(C).

26. DEQ must make a draft EIS available to the public and responsible state and federal agencies for public comment, ARM 17.4.620, and must respond to substantive comments in a final EIS, id. 17.4.619.

27. Following its issuance of a final EIS, DEQ must issue a "record of decision" that provides "public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation." ARM 17.4.629.

28. In evaluating environmental impacts pursuant to MEPA, "[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Mont. Wildlife Fed'n, ¶ 43 (quoting Clark Fork Coal. v. Mont. Dep't of Env. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

III. THE MONTANA CONSTITUTION'S ENVIRONMENTAL PROTECTIONS

29. Montana's Constitution compels the state to prevent unreasonable environmental degradation to protect the public's right to a clean and healthful environment. The Montana Constitution protects Montanans' inalienable "right to a clean and healthful environment," and requires that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3; art. IX, § 1(1). In addition, the Constitution requires that the Montana Legislature "shall … provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Id., art. IX, § 1(3).

30. In enacting these provisions, the drafters of Montana's Constitution aimed to establish "the strongest environmental protection provision found in any state constitution." Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality ("MEIC"), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.2d 1236 (citing Mont. Const. Convention, vol. IV at 1200 (Mar. 1, 1972)). To that end, these provisions do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." MEIC, ¶ 77. Rather, they provide environmental "protections which are both anticipatory and preventative." Id.

31. The Montana Legislature enacted the MMRA and MEPA to meet its constitutional obligation to prevent unreasonable environmental degradation. See 2003 Mont.

Laws ch. 361, § 5 (HB 437); see also MCA §§ 75-1-102(1) (MEPA's purpose), 82-4-302 (MMRA's purpose). Accordingly, those statutes must be interpreted to serve their constitutional purpose. To the extent any provision of the MMRA or MEPA allows for unreasonable environmental degradation, it would violate Plaintiffs' environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. See MEIC, ¶ 80.

FACTUAL BACKGROUND

I. THE SMITH RIVER

32. Montana's Smith River is renowned for its spectacular scenery, towering limestone canyons, and prized trout fishery. The Smith River originates high in the Castle Mountains of central Montana and flows through remote canyons before emptying into the Missouri River about 10 miles upstream of Great Falls. The Smith River has long proved an exceptional fishing and recreational resource to Montanans, and state agencies as well as the Montana Legislature have recognized the Smith River's importance by granting it special protections under the law.

33. In 1969, in response to increasing threats to the Smith River's exceptional water quality and abundant trout populations, the Montana Fish and Game Commission designated nearly 60 miles of the River as a State Recreational Waterway. In 1989, the Montana Legislature enacted the Smith River Management Act, MCA § 23-2-401 et seq., which specifically requires the State to manage the Smith River to: "(1) allow the continuation of compatible existing recreational public land uses; (2) maintain the opportunity to enjoy the natural scenic beauty and solitude; and (3) conserve fish and wildlife and scientific and recreational values." Id. § 23-2-407.

34. As a result of these protections, as well as the high public demand to experience the Smith River's exceptional fishing and recreational opportunities, the Smith River is Montana's only river subject to a recreational permitting program. In recent years, Montana Fish, Wildlife and Parks ("FWP") has awarded roughly 1,000 permits annually from the more than 10,000 applications received every year to float the Smith. A 2013 survey found that the Smith River hosted more than 23,000 angler days. Tributaries of the Smith are important trout fisheries in their own right: for example, Sheep Creek, which is adjacent to the proposed Black Butte Mine site, supported 1,139 angler days in 2013.

35. For these reasons, the Smith River watershed is an important economic engine, and recreation in the watershed generates more than $11 million annually. Recreation on the Smith supports a robust outfitting and guiding industry, generating over $3.2 million in salaries, wages, and proprietary income, and producing more than $800,000 in state and local tax revenue annually. Such recreational activities also provide a dependable revenue stream for FWP, which collected over $360,000 in fees from Smith River floaters in 2018 and more than $380,000 in fees in 2019.

36. In addition to providing significant economic benefits from recreational activities, the Smith River watershed also serves as an essential water resource for local ranchers and farmers. According to the U.S. Geological Survey, "most of the water used to irrigate 36,000 acres [of agricultural lands] of the upper Smith River watershed is withdrawn from the Smith River or its tributaries."[2] Such withdrawals accounted for about 845,000 cubic meters of water per day, irrigating lands used to grow hay (grass and alfalfa), wheat, barley, and other crops.

[2] Smith River Watershed Investigations, USGS, https://www.usgs.gov/centers/wy-mt-water/science/smith-river-watershed-investigations?qt-science_center_objects=0#qt-science_center_objects (last visited June 3, 2020).

37. The Smith River and its tributaries also provide crucial habitat and spawning grounds for regional trout fisheries. The Sheep Creek watershed accounts for more than half of tributary spawning of rainbow trout in the Smith River drainage, and rainbow trout are known to travel nearly 200 miles round-trip from the Missouri River to spawn in the Sheep Creek watershed. Westslope cutthroat trout, a sensitive species designated as vulnerable to extirpation in Montana are also reported to occur in Sheep Creek near Tintina's proposed mine.

38. The Smith River ecosystem depends on clean, cold water from the river's tributaries to sustain the aquatic life within its banks and the agricultural operations along it. Indeed, Sheep Creek provides nearly half of the flow of the Smith River at their confluence during late summer baseflows. Demands on the river's waters already exceed available flows in many years, creating challenges for fish populations and water users.

II. THE BLACK BUTTE MINE

39. The Black Butte Mine would be located in the Sheep Creek basin within the Smith River watershed, about 19 river miles upstream from the mainstem Smith River.

40. Tintina proposes to extract 14.5 million tons of copper ore from the Johnny Lee Deposit—about 440 tons of copper per day over the 13-year active lifetime of the mine. On average, eighteen trucks carrying the concentrate would leave the mine every day for nearby rail terminals in Livingston and/or Townsend. The mine would also generate approximately 12.9 million tons of tailings—acid-generating processed minerals separated from the copper ore—and 0.8 million tons of waste rock.

41. The Johnny Lee Deposit is a sulfide ore body, which contains minerals that produce high levels of acids and toxic metals when exposed to air and water. Mining sulfide ore bodies, particularly in close proximity to ground or surface water, presents inherent pollution

risks and requires careful water treatment and tailings waste management to avoid discharging noxious chemicals to adjacent groundwater or surface water. Even with such steps, mines in sulfide ore bodies frequently contaminate groundwater and nearby surface water. Sulfide-ore mines in Montana and across the country have caused severe pollution of drinking water aquifers, farmland, and surface waters, and resulted in losses of fish and wildlife and their habitat. At numerous mine sites, water quality impacts are so severe that acid mine drainage will generate water pollution in perpetuity. In addition to environmental consequences, Montana has suffered serious economic consequences from such pollution, for which reclamation bonds intended to fund clean-up efforts often prove inadequate. For example, the Zortman-Landusky and Beal Mountain mines, which both were developed in sulfide ore bodies, have saddled Montana taxpayers with ongoing liability for unfunded clean-up costs of $78.9–$103.8 million. For the Zortman-Landusky mine, alone, DEQ has estimated annual water treatment costs of $2-2.5 million, in perpetuity.

42. Excavating the Black Butte Mine would cause a substantial drawdown in the local water table, as groundwater is continuously pumped to the surface to prevent it from filling the mine void. Tintina estimates that it would withdraw approximately 800 acre-feet of groundwater annually. During mine operations, drawdown adjacent to the mine would lower the water table by 100 to 200 feet; drawdown on the order of ten feet would occur as far as 1.5 miles away from the mine site. FEIS at 3.4-40. The EIS acknowledges that the mine would cause drawdown and a loss of surface water flow in Sheep Creek, Coon Creek, and Black Butte Creek—including a loss of 70 percent of base flow in Coon Creek. And groundwater drawdown would deplete flows to nearby springs and seeps, potentially causing some to dry up.

43. DEQ's approval of the mine relies in part on Tintina's ability to mitigate these losses of surface water flows. Tintina has conceived a complex plan to attempt to mitigate the impacts of groundwater drawdown on the Smith River's important tributaries. The plan includes acquiring water rights from existing agricultural water users to retain such water instream, treating and discharging water pumped from the mine workings into the Sheep Creek alluvial aquifer through an underground injection gallery, seepage from a water storage pond, and pumping water from Sheep Creek under high flow conditions, and discharging it into Sheep Creek and Coon Creek in summer months when flows are diminished. Id. at 2-8, 2-11. Tintina has applied for, but has not yet obtained, approval from the Montana Department of Natural Resources and Conservation ("DNRC") for this mitigation scheme.

44. As part of mine operations, Tintina would continuously pump groundwater drawn into mine shafts and voids. Because this groundwater would carry high levels of metals and nutrients inside the mine, Tintina proposes to treat groundwater that it does not consumptively use in mine operations in a reverse osmosis plant before discharging it to an underground infiltration gallery, which would consist of a network of tunnels in the alluvial aquifer under Sheep Creek. Tintina would discharge water to the underground infiltration gallery at an average rate of 398 gallons per minute. Id. at 2-12. After passing through the alluvial aquifer, the effluent would eventually discharge to Sheep Creek. Id. at 3.4-53.

45. The reverse osmosis treatment may not sufficiently reduce nitrogen levels in the pumped groundwater to meet stricter summer standards intended to reduce nuisance algae in Sheep Creek and the Smith River. See id. at 2-8, 8-164. To circumvent this problem, Tintina plans to store treated wastewater in a pond during the summer months and recommence

discharge in October each year when the stricter nitrogen standards are no longer in force. Id. at 8-58, 8-261.

46. The 12.9 million tons of tailings and 0.8 million tons of rock waste generated by Tintina's excavation activities would contain high levels of acid-generating minerals and toxic metals, including nickel, thallium, strontium, copper, lead, arsenic, and uranium. See id. at 3.6-11. Tintina would dispose of about half of the tailings by backfilling underground areas of the mine with a mixture of cement and tailings. Tintina would deposit the remainder of the tailings and all of the waste rock aboveground in a tailings facility. Id. at 2-11.

47. The 72-acre tailings facility—which would cover more area than 54 football fields—would sit on the side of a hill overlooking Sheep Creek. Id. at 2-3, 2-5. According to Tintina's specifications, an earthen dam would prevent the tailings facility from collapsing and discharging mine waste directly into Sheep Creek. Tintina proposes a novel and untested methodology for stabilizing and containing these wastes that involves mixing the tailings with cement to provide structural stability. Should that method fail, Sheep Creek and its fishery would be devastated, and long-term or permanent harm to the mainstem Smith River likely would occur as well.

III. DEQ'S REVIEW AND APPROVAL OF THE BLACK BUTTE MINE

48. Tintina submitted an application to DEQ for a mine operating permit under the MMRA on December 15, 2015. DEQ, as well as Plaintiffs and independent technical experts, identified deficiencies in Tintina's application. As a result, on September 16, 2016, Tintina submitted "new and voluminous material that was lacking in the initial application, in particular sections on hydrology and geochemistry." DEQ, Second Deficiency Review, Pending Operating Permit 00188 at 1 (Dec. 15, 2016). Nevertheless, DEQ identified ongoing "major concerns"

with Tintina's application related to geochemical testing and modeling, hydrological modeling, and Tintina's estimates for the duration of water treatment following mine closure. Id. Tintina submitted revisions to its application on May 8 and July 14, 2017. DEQ issued a draft mine operating permit for Tintina in September 2017, and commenced its review of Tintina's draft permit under MEPA.

49. DEQ issued a Draft EIS for public comment in March 2019. In response, DEQ received more than 12,000 comments from the public—including numerous reports from independent technical experts—the vast majority of which were critical of the mine proposal. Despite these criticisms, DEQ issued a Final EIS on March 13, 2020 without addressing substantial issues raised in public comments. On April 9, 2020, DEQ issued a Record of Decision approving the issuance of final operating permit for the Black Butte Copper Mine based on the Final EIS's analysis.

A. DEQ's Analysis of the Safety and Stability of the Tailings Facility

50. With DEQ's authorization, Tintina proposes to bind tailings with cement and store them in an above-ground facility—an untested method for disposing of mine tailings. Over mine's active life, Tintina would pour millions of tons of toxic cement paste tailings, layer by layer, into the facility. According to DEQ, the structural integrity of Tintina's proposed tailings facility relies, in part, upon the cement-paste tailings solidifying into a "stable, non-flowable material." DEQ, Final EIS, Black Butte Copper Project, at 8-26 (Feb. 2020) ("FEIS"). Based on its expectation that Tintina's design would achieve such stability, DEQ concludes that the tailings facility would contain these tailings in perpetuity.

51. No other mine has attempted to use Tintina's proposed method to dispose of tailings in an above-ground facility, and even Tintina's consultant acknowledged that

"[w]idespread implementation of cemented-paste tailings placement in surface facilities is limited by insufficient long-term evidence of predicted benefits as well as a lack of defined testing framework for generating reliable predictions of performance." Enviromin, Inc., Surface-Placed Cemented-Paste Tailings at 17.

52. Independent reviewers of Tintina's proposed tailings facility raised several concerns that DEQ does not consider fully in the Final EIS. Among other issues, experts feared that the solidified cement-paste tailings would be vulnerable to breakdown from acid-generating minerals within the tailings reacting with water and oxygen. Indeed, Tintina and DEQ acknowledge that frequent exposure to oxygen and water would cause the tailings to oxidate—a process that would cause the cement tailings to deteriorate and turn acid, thereby compromising the structural integrity of the facility. This instability of the tailings facility would in turn threaten the discharge of a significant volume of toxic pollutants directly into Sheep Creek. However, despite the serious consequences associated with widespread oxidation of tailings within the facility, DEQ presumes that oxidation would not occur.

53. Expert analysis provided during the public comment period indicates that the cement-paste tailings within the proposed facility may not fully solidify into a non-flowable mass as DEQ and Tintina claim. During public comment on the Draft EIS, one expert commenter noted that DEQ does not consider the effects on the facility's structural integrity when layer upon layer of cement-paste tailings are added before previous layers have solidified and set. Tintina plans to add new tailings layers every 7 to 30 days during the 13 years of active mining. However, Tintina expects each new layer of cement-paste tailings to take 28 days to set, suggesting that, in many instances, a new layer would be added before the previous layer has set. The Final EIS, including DEQ's response to comments, does not address the degree to which

layering fresh cement-paste tailings on top of tailings that have not yet set may contribute to oxidation and undermine the structural integrity of the facility.

54. In the Final EIS, DEQ notifies the public for the first time that DEQ believes Tintina's 72-acre tailings storage facility—which would hold millions of tons of acid-generating tailings—is excluded from the definition of "tailings storage facility" under MCA § 82-4-303(34), because it would allegedly store less than the minimum 50 acre-feet of free water necessary to quality as a "tailings storage facility" under the MMRA. The consequence of that determination is to exempt Tintina's facility from the MMRA's procedural and substantive requirements for large tailings storage facilities. MCA § 82-4-335(5)(l); see also id. §§ 82-4-376, 82-4-377. DEQ does not address the fact that Tintina intends for the facility to provide "additional capacity for temporary storage of storm water up to and including the [Probable Maximum Flood] event of [243 acre-feet]," nearly 500 percent more water than the MMRA's exclusion threshold of 50-acre feet.[3] Therefore, at any given point in time throughout the lifespan of the tailings facility—which is built to stand in perpetuity—the facility could hold more than 50 acre-feet of free water.

55. While concluding that Tintina's proposed tailings facility is exempt from the requirements of MCA §§ 82-4-376, 82-4-377, the Final EIS asserts that Tintina nonetheless satisfied those requirements by preparing a design document and obtaining independent panel review of its facility design. However, DEQ provides no documentation showing that the independent panel reviewed the complete design document, as the MMRA requires, or addressed concerns regarding oxidation or the practicability of iterative layering of wet paste.

[3] Knight Piésold Consulting, Tailings Storage Facility Design, Black Butte Copper Project, Prepared for Tintina Resources Inc., at 17 (Sept. 12, 2017) (cited in FEIS as "Piesold 2017b").

56. DEQ further states in the Final EIS that failure of the tailings facility would result only in "[m]oderate" harm to the environment because the facility is designed to hold "non-flowable cemented tailings" and "is not a water retaining [facility]." FEIS at 8-21. But DEQ does not explain the environmental consequences associated with tailings facility failure due to, or in conjunction with, widespread tailings oxidation and anticipated large volumes of stormwater. In that case, harmful material in the tailings facility would not consist of a solid non-flowable mass, and instead would discharge liquid waste directly into Sheep Creek, thereby also threatening the Smith River.

B. DEQ's Analysis of Water Quality Impacts

57. Among other significant impacts on water quality in the Smith River watershed, Tintina's discharges to Sheep Creek through the underground infiltration gallery may elevate nitrogen concentrations in the creek and harm aquatic life. In the Final EIS, DEQ concedes that Tintina's water treatment process may not reduce nitrogen below non-degradation effluent limitations prior to being discharged to the underground infiltration gallery adjacent to Sheep Creek. Final EIS at 8-164. DEQ also acknowledges that "[a]ny elevation in nitrate in surface waters in the Project area may increase blooms of nuisance algae, which can reduce water quality for other aquatic organisms and may adversely affect fish or other aquatic life." Id. at 8-6. However, DEQ concludes that no mitigation of nitrogen concentrations is needed to protect Sheep Creek water quality because nitrogen levels would be reduced through attenuation—a process by which nitrogen is naturally removed from water by microbes in soil—prior to reaching Sheep Creek through the underground infiltration gallery. Id. at 8-164.

58. The Final EIS contains no analysis supporting DEQ's conclusion that attenuation would reduce nitrogen concentrations in Tintina's proposed discharges below a level that would

significantly contribute to nuisance algae and harm aquatic life. Indeed, DEQ's claims in this regard rely primarily on Tintina's assurances, which are based on observations of denitrification in agricultural soils and mine workings, not alluvial sediments through which Tintina's discharges would flow. Further, DEQ acknowledged that Tintina abandoned its original proposal to primarily discharge treated water into two upland infiltration galleries at a distance from Sheep Creek and instead now proposes to discharge only to one infiltration gallery immediately adjacent to Sheep Creek, providing little opportunity for attenuation.

59. Increased nitrogen pollution in Sheep Creek threatens to cause larger and more frequent algal blooms, which have already become a reoccurring problem in Sheep Creek and the Smith River. Such algal blooms can deoxygenate surface waters and would thus kill or harm fish and degrade the health of the region's most beloved trout fisheries

60. In addition to nitrogen discharged to Sheep Creek through the alluvium, the project would also discharge stormwater to Sheep Creek, which would contain sediment, metals, and acid-generating materials that are harmful to fish. DEQ requires Tintina to develop a stormwater pollution prevention plan to mitigate harm from stormwater discharges to Sheep Creek. However, Tintina has not yet formulated its plan and DEQ does not evaluate the effectiveness of any stormwater controls in the Final EIS.

61. Tintina's proposed mine would also threaten surface and groundwater quality after mine closure. As discussed, mine tailings stored in the surface tailings facility would contain nickel, thallium, strontium, copper, lead, arsenic, and uranium, in addition to acid-forming materials. DEQ relies on the integrity of the tailings facility liners and drainage collection system to contain these harmful materials in perpetuity. However, Tintina and DEQ do not dispute that liners leak. Tintina's evaluation of liner leakage claims to use industry-

standard assumptions regarding leakage rates from pinhole defects in the liner, but fails to account for liner abrasions and tears reasonably expected to result from the installation process and/or liner deterioration over time. Such tears may be below the surface of the tailings and thus not observed by quality assurance personnel. Compounding this problem, expert analysis of the tailings facility design in the draft EIS documents an increased risk of pollution caused by imperfections in the liner due to Tintina's plan to construct the tailings facility below the water table, which increases the likelihood that any imperfections in the tailings liner would result in direct contact between the tailings and groundwater.

C. DEQ's Analysis of Water Quantity Impacts

62. DEQ concludes that the mine's projected depletion of flows in Sheep Creek, Coon Creek, and Black Butte Creek—as well as depletion or destruction of seeps and springs—would not be significant because Tintina intends to mitigate such depletion.

63. However, DEQ defers scrutiny of Tintina's proposed mitigation to the future analyses and judgment of DNRC, which presumably will occur when DNRC processes Tintina's pending water rights applications and groundwater mitigation plan.

64. DEQ does not conduct an independent analysis, or review DNRC's analysis, to inform its conclusion that Tintina's mitigation plan would fully offset the predicted streamflow depletion cause by mine dewatering. Indeed, on January 30, 2020, before DEQ issued the Final EIS, DNRC released its first technical report on Tintina's groundwater permit application and mitigation plan. Plaintiffs formally requested that DEQ supplement its Draft EIS to evaluate the new information from DNRC, but DEQ did not respond to Plaintiffs' request nor evaluate or incorporate the information from DNRC in the Final EIS. DEQ acknowledges that Tintina does

not yet have approval from DNRC for the mitigation plan that provides the basis for DEQ's assurances that streamflow impacts from the mine would not be significant.

65. Further, the Final EIS does not acknowledge that the scope of the mitigation DNRC requires of Tintina will not address the full impacts of Tintina's planned groundwater withdrawals. Tintina estimates that its dewatering of underground mine workings would require pumping 800 acre-feet of water annually, but Tintina's mitigation plan addresses only the surface water depletion associated with 350 acre-feet of groundwater withdrawals that Tintina says it would put to "beneficial use" within the meaning of Montana's Water Use Act. See MCA § 85-2-102(5) (defining "beneficial use"). Thus, Tintina proposes no mitigation for its withdrawal of an additional 450 acre-feet of groundwater annually that Tintina asserts it would not put to "beneficial use." Additionally, DNRC states in a preliminary determination on Tintina's groundwater mitigation plan application that it will not require Tintina to mitigate depletion of flows in Black Butte Creek because there are no current water rights holders on that water body. Thus, it appears that DNRC's analysis will, at best, address less than half of Tintina's overall groundwater withdrawal and will not require mitigation for reduced flows in Black Butte Creek.

66. In addition to predicted impacts on surface waters, groundwater depletion from Tintina's pumping also threatens springs and wetlands. DEQ concedes that without adequate mitigation, groundwater depletion from the mine "could result in a reduction of the primary water source for [groundwater-dependent] wetlands." FEIS at 3.14-18. Although DEQ states that groundwater recharge from underground injection and seepage from the water storage pond would mitigate some of these impacts, the agency acknowledges that wetlands outside of the area affected by the underground injection of groundwater could dry up. DEQ does not evaluate the number or extent of such impacted wetlands. Nonetheless, DEQ concludes that the project's

impacts to wetlands "would be negligible" because the wetlands supposedly would return after mining is concluded. FEIS at 3.14-18.

67. The prospect of stream dewatering in Smith River tributaries is particularly troubling because diminished flows would harm important fisheries habitat. Flows in Sheep Creek are already inadequate at certain times of year to support the creek's fishery. Indeed, during the MEPA process FWP informed DEQ that FWP holds an instream flow water right of 30 cubic feet per second for Sheep Creek to ensure minimum flows necessary to sustain fish and wildlife habitat. Because FWP's instream flow right is already often not met, FWP recently called on junior water right holders to cease diversions from Sheep Creek. FWP also advised DEQ that hydrology impacts from the Black Butte Mine would further diminish flows and harm fisheries.

D. DEQ's Range of Alternatives Analysis

68. In the Final EIS, DEQ dismisses with minimal analysis potential changes to Tintina's favored methods of disposing and containing the mine's tailings that were identified in public comments on the draft EIS and could ameliorate some of the project's most troubling environmental impacts. Analyzing such alternatives is critical, because, as discussed, the tailings would contain high levels of toxic metals and acid-generating sulfide minerals. Whether Tintina successfully contains these materials—or whether the Black Butte project joins the ranks of other Montana mines that perpetually pollute streams and groundwater—depends on the success of Tintina's selected tailings disposal and containment methods.

69. The first alternative the Final EIS fails meaningfully to analyze would require Tintina to remove acid-generating pyrite from the mine tailings prior to surface disposal. Storing acidic pyrite waste in the above-ground tailings facility creates a risk, discussed further below,

that acidic mine waste could dissolve cement in the tailings, thus compromising the stability of the facility over the long term, and further heightens the risk of permanent environmental damage from acid mine drainage in the event the tailings dam breaks or the liners underlying the facility leak. Expert comments on the Draft EIS explain that methods to "de-pyritize" tailings are effective and available. Indeed, DEQ's own technical consultant identifies clear environmental benefits of depyritization. However, DEQ asserts that depyritization would provide "no net environmental benefit" as a basis for rejecting in-depth consideration of such an alternative. Final EIS 8-4. Further, DEQ claims that such an alternative may not be technically feasible but does not establish that to be the case in light of contrary record evidence. Indeed, DEQ seemingly ignores the advice of its own consultant, which recommended that DEQ conduct more analysis into the technical feasibility of depyritization.

70. The Final EIS also dismisses from in-depth consideration an alternative that would increase the stability of the tailings facility. Tintina proposes to add cement to the tailings to change the physical properties of the material to a stable, non-flowable material with low hydraulic conductivities. Expert comments on the draft EIS recommended that DEQ consider the alternative of increasing the cement content of the cement paste tailings to 4 percent rather than 2 percent cement. Increasing the cement content of the tailings would neutralize acid-generating minerals to a greater extent, thereby providing greater protection against oxidation on the surface of the tailings facility and decreasing the rate at which cement tailings would deteriorate. DEQ responds that the purpose of adding cement to the tailings is not to reduce acid formation; but regardless of the purpose, DEQ does not address expert comments that increasing the cement content would have such a beneficial effect. Moreover, 2 percent cemented tailings would take 28 days to solidify and set, while new layers of tailings are added to the facility about

every 7 to 30 days. By contrast, 4 percent cemented tailings set up in just four days, and would increase the stability and physical strength of the tailings facility by eliminating the placement of successive layers of wet tailings.

71. The Final EIS further dismisses without in-depth consideration the alternative of building the tailings facility above the water table, which would reduce the risk of groundwater contamination. As currently designed, the tailings facility would sit within the water table, such that groundwater would flow against the liner on the bottom of the facility. DEQ dismisses these concerns, stating that, as currently proposed, "the [tailings facility] underdrain would lower the water table such that there would be no groundwater pressure against the [tailings facility] liner." Final EIS 8-3. This response assumes that the underdrain system would effectively operate in perpetuity. In addition to overlooking the risk that the underdrain would fail, DEQ's response misses the point, as described in expert comments on the Draft EIS, that when the impoundment liner sits below the water table, groundwater may enter the seepage collection system or the impoundment itself, interfering with the efficacy of the containment system. DEQ further responds that elevating the tailings facility would necessarily increase the footprint, and corresponding impacts to wetlands and visual resources, of the facility. But DEQ apparently does not consider whether simply moving the tailings facility upslope could avoid these claimed impacts.

FIRST CAUSE OF ACTION
(Violation of MMRA—Failure to Ensure Safety and Stability of Cemented Tailings Facility, MCA §§ 82-4-335(5)(l), 82-4-376, 82-4-377)

72. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 71.

73. The MMRA prohibits DEQ from approving a mine operating permit application unless the applicant has first "ensure[d]" that all proposed "impounding structures" are "safe and stable." MCA § 82-4-335(5)(l).

74. DEQ fails to ensure that Tintina's proposed tailings facility is safe and stable because it does not rationally evaluate or respond to record evidence of deficiencies in the tailings facility's design that would impair its effectiveness to contain toxic mine waste during and after mine operations.

75. Furthermore, the MMRA imposes additional procedural and substantive requirements for "ensur[ing]" the safety and stability of impoundments that qualify as "tailings storage facilit[ies]." MCA §§ 82-4-376 and 82-4-377. DEQ erroneously determines that Tintina's tailings facility is exempt from these requirements based on a flawed interpretation of MCA § 82-4-303(34). The cemented tailings facility meets the definition of a "tailings storage facility" contained in that provision because it is designed to impound more than 50 acre-feet of free water. Id. Based on DEQ's erroneous legal conclusion, DEQ does not require compliance with the MMRA's heightened requirements for large "tailings storage facilit[ies]." Id.

76. Further, Tintina's apparent efforts to meet those requirements fall short because, among other things, they do not include independent panel review of Tintina's complete design document, or account for concerns regarding the practicability of containing toxic materials in Tintina's tailings facility due to oxidation and iterative layering of wet paste.

77. Based on DEQ's failure to adhere to MCA §§ 82-4-335(5)(l), 82-4-376, and 82-4-377, DEQ's decision to issue the mine operating permit to Tintina is arbitrary, capricious, and not in accordance with law and should be set aside.

SECOND CAUSE OF ACTION
(Unconstitutionality of MCA § 82-4-303(34),
Mont. Const. art. II, § 3, art. IX, §§ 1, 3)

78. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 77.

79. In addition to DEQ's improper application of the plain text of the MMRA, DEQ's interpretation of "tailings storage facility" under the statute would render the MMRA unconstitutional.

80. Montana Constitution Article II, Section 3 provides Montana citizens with certain "inalienable rights," including "the right to a clean and healthful environment." Mont. Const. art. II, § 3. It is the responsibility of "[t]he state and each person [to] maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. IX, § 1.

81. The Legislature has a constitutional obligation 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." Id. To that end, in enacting the MMRA, the legislature expressly intended to "fulfill the responsibilities and exercise the powers delegated by Article IX … of the Montana constitution." MCA § 82-4-302(1)(a).

82. As described above, DEQ's conclusion that the Tintina's tailings facility is exempted from the protective measures found in MCA §§ 82-4-376 and 82-4-377 is erroneous, because it misapplies the definition of "tailings storage facility" found in MCA § 82-4-303(34). However, in the alternative, if DEQ's interpretation of MCA § 82-4-303(34) is correct, such interpretation renders the provisions of the MMRA applicable to tailings storage facilities unconstitutional.

83. Specifically, if the statutory scheme excludes Tintina's tailings facility from the MMRA protective requirements for "tailings storage facilit[ies]," it would create an arbitrary loophole—irreconcilable with considerations of environmental harm—whereby a tailings facility designed to hold millions of tons of acid-generating tailings in perpetuity is not required to undergo the rigorous design standards and approval processes required by the MMRA, even while it is designed to contain more than 50 acre feet of stormwater. Such a result would undercut the MMRA's intended purpose of fulfilling the State's constitutional obligation to protect a clean and healthful environment and render the MMRA's definition of "tailings storage facility" unconstitutional. Mont. Const. art. IX, § 1.

84. Accordingly, to the extent that DEQ correctly determined that Tintina's tailings facility is not subject to the MMRA's heightened requirements under the language of MCA § 82-4-303(34)—which Plaintiffs dispute—the MMRA violates the Montana Constitution's environmental protections because it is not an adequate remedy to prevent unreasonable environmental degradation. Mont. Const. art. II, § 3; art. IX, § 1.

THIRD CAUSE OF ACTION
(Violation of MEPA—Failure to Provide Reasonable Assurance of Safety and Stability of Tailings Facility, MCA § 75-1-201, ARM 17.4.608(1)(b))

85. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 84.

86. In addition to violating the MMRA and Montana Constitution's environmental guarantees, DEQ's failure to adequately analyze the safety and stability of Tintina's proposed tailings facility and the environmental consequences associated with potential failure of the facility to contain toxic mine waste violates MEPA's requirement to "take a 'hard look'" at the project's potential impacts, Mont. Wildlife Fed'n, ¶ 43, and, for "potential[ly] sever[e]" impacts, to provide "reasonable assurance … that the impact will not occur," ARM 17.4.608(1)(b).

87. As discussed, DEQ's analysis of Tintina's proposed disposal and containment methods for mine tailings overlooks significant risks that acid-generating materials and toxic metals may escape the tailings facility, causing perpetual pollution in the Smith River watershed.

88. MEPA requires DEQ to evaluate "the probability that the impact will occur if the proposed action occurs," and where the environmental consequences of an impact are "potential[ly] sever[e]," DEQ may not deem an impact insignificant unless it provides "reasonable assurance … that the impact will not occur," ARM 17.4.608(1)(b). This analysis is similar to what is required under the National Environmental Policy Act ("NEPA"), the federal MEPA analogue: under NEPA, agencies must consider and disclose "potentially catastrophic consequences 'even if their probability of occurrence is low.'" See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1033 (9th Cir. 2006) (quoting 40 C.F.R. § 1502.22(b)(4)). Thus, an EIS cannot ignore potential environmental impacts merely because DEQ deems the probability of those impacts occurring to be low. See id.

89. The Final EIS, however, does not provide "reasonable assurance" that failure of the tailings facility to contain mine waste "will not occur," ARM 17.4.608(1)(b), and does not evaluate the resulting environmental harm in the event of such failure. Accordingly, the Final EIS is arbitrary, capricious, and not in accordance with law and should be set aside.

FOURTH CAUSE OF ACTION
(Violation of MEPA—Arbitrary and Unsupported Evaluation of Water Quality Impacts, MCA § 75-1-201)

90. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 89.

91. DEQ fails to "take a 'hard look'" at the potential water quality impacts of construction and operation of the Black Butte project, as required by MEPA. Mont. Wildlife Fed'n, ¶ 43.

92. The Final EIS concludes that mine discharges would not adversely impact water quality in Sheep Creek or groundwater. However, DEQ fails to account for or limit potentially significant discharges to Sheep Creek of nitrogen through the Sheep Creek alluvium, or of stormwater, for which DEQ relies on mitigation that has not yet been formulated or adopted. These water quality impacts may impair fisheries dependent on clean water in Smith River tributaries.

93. DEQ's analysis of water quality impacts is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

FIFTH CAUSE OF ACTION
(Violation of MEPA—Failure to Rationally Evaluate Dewatering Impacts)

94. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 93.

95. DEQ also fails to "take a hard look" at the depletion of surface waters in Sheep Creek, Coon Creek, and Black Butte Creek. Mont. Wildlife Fed'n, ¶ 43. DEQ acknowledged that the mine would cause groundwater drawdown and loss of surface water flow in all three creeks, but the EIS defers consideration of mitigation for these effects to future action of a separate state agency, DNRC, rather than rationally evaluating such mitigation in the EIS. In addition, DEQ's reliance on such future mitigation is arbitrary where it appears the scope of that mitigation will be limited to less than half of Tintina's estimated withdrawals and does not address impacts to Black Butte Creek.

96. DEQ further fails to rationally evaluate the impacts of groundwater depletion on springs and wetlands.

97. DEQ's analysis in the Final EIS of dewatering impacts is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SIXTH CAUSE OF ACTION
(Violation of MEPA—Failure to Rationally Evaluate Reasonable Alternatives, MCA § 75-1-201)

98. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 97.

99. MEPA requires DEQ to consider reasonable alternatives to the proposed project. MCA § 75-1-201(1)(b)(v). This requirement ensures that DEQ considers all feasible options for lessening environmental harm before deciding whether to approve a proposed project. See id.

100. DEQ fails to evaluate reasonable alternatives that would reduce the environmental impacts associated with Tintina's proposed mine. DEQ dismisses these alternatives because, according to DEQ, they provide "no net environmental benefit" compared to the proposed action and, in the case of one alternative, is allegedly infeasible. However, these conclusions are contradicted by the record.

101. The Final EIS is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

SEVENTH CAUSE OF ACTION
(Unconstitutionality of MCA § 75-1-201(6)(c), (d) –
Mont. Const. art. II, § 3, art. IX, § 1)

102. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 101.

103. The State's constitutional obligation to prevent unreasonable environmental degradation under article II, section 3 and article IX, section 1 of Montana's Constitution is expressly implemented by MEPA, MCA § 75-1-102, which promotes a healthy environment by requiring state agencies to thoroughly evaluate the environmental consequences of activities they permit before those activities occur.

104. The Montana Legislature amended MEPA in 2011 to provide that the sole remedy for MEPA noncompliance is a remand to the agency. MCA § 75-1-201(6)(c); 2011 Mont. Laws

ch. 396 (SB 233). As MEPA is currently written, "[a] permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court." MCA § 75-1-201(6)(d). As a result of this provision, even if this Court determines that DEQ's decision to authorize Tintina's proposed mine violates MEPA's provisions that are an essential component of the Legislature's scheme to provide adequate environmental remedies, Tintina could still move forward with its proposed mine and the resulting environmental harm.

105. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would permit unexamined environmental harm, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const. art. II, § 3, art. IX, § 1.

106. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const. art. II, § 3, art. IX, § 1.

EIGHTH CAUSE OF ACTION
(Unconstitutionality of MCA § 75-1-201(6)(c), (d) –
Mont. Const. art. II, § 8)

107. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 106.

108. Montana Code Annotated sections 75-1-201(6)(c) and (d) also violate Plaintiffs' constitutional right to reasonable public participation prior to the agency's final decision. Mont. Const. art. II, § 8.

109. Under the Legislature's 2011 MEPA amendments, Tintina may develop its proposed mine before DEQ has undertaken a lawful analysis of the project's significant

environmental impacts and alternatives to lessen those impacts, and importantly, before the public has had a meaningful opportunity to evaluate and comment on DEQ's revised analysis. See MCA § 75-1-201(6)(d) (providing that an authorization issued by an agency may not be revoked or suspended "pending the completion of an environmental review that may be remanded by a court").

110. Because Montana Code Annotated sections 75-1-201(6)(c) and (d) would foreclose meaningful public participation before DEQ's decision to authorize mineral exploration was made and implemented, they impair Plaintiffs' fundamental constitutional rights and are subject to strict judicial scrutiny. Mont. Const. art. II, § 8.

111. Because the record before the 2011 Legislature did not demonstrate any compelling state interest for stripping Montana courts of their authority under MEPA to prevent environmental harm, Montana Code Annotated sections 75-1-201(6)(c) and (d) are unconstitutional as applied to this case. Mont. Const. art. II, § 8.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that DEQ violated the MMRA by failing to ensure the safety and stability of Tintina's proposed tailings facility;

2. If the Court concludes that DEQ lawfully exempted Tintina's proposed tailings facility from the requirements of Montana Code Annotated sections 82-4-303(34), 82-4-376, and 82-4-377, declare that those provisions violate Montana Constitution article II, section 3 and article IX, sections 1 and 3, as applied to this case;

3. Declare that DEQ violated MEPA and DEQ's MEPA rules by failing to rationally evaluate the effects of, and alternatives to, the Black Butte Copper Mine;

4. Declare unlawful and set aside DEQ's Final EIS and Record of Decision for the Black Butte Copper Mine;

5. Declare unlawful and set aside the mine operating permit for the Black Butte Copper Mine;

6. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 3 and article IX, section 1, as applied to this case;

7. Declare that Montana Code Annotated sections 75-1-201(6)(c) and (d) violate Montana Constitution article II, section 8, as applied to this case; and

8. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted this 4th day of June, 2020.

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