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OF DISTRICT COURT
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FILED
BY Pamela Dendill
DEPUTY

1 HON. BRENDA R. GILBERT
District Judge
2 Sixth Judicial District
3 414 East Callender Street
Livingston, Montana 59047
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9 **MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

11 PARK COUNTY ENVIRONMENTAL)
12 COUNCIL and GREATER)
13 YELLOWSTONE COALITION,)
14 Plaintiffs,)
vs.)
15 MONTANA DEPARTMENT OF)
16 ENVIRONMENTAL QUALITY and)
17 LUCKY MINERALS, INC.,)
18 Defendants.)
19)
20)

CAUSE NO. DV 17-126

**DECISION REGARDING CROSS-MOTIONS
FOR SUMMARY JUDGMENT
FILED BY PLAINTIFFS AND DEQ**

21 Plaintiffs, Park County Environmental Council and Greater Yellowstone Coalition, filed
22 their Motion for Summary Judgment and Brief in Support of Plaintiff's Motion for Summary
23 Judgment. Defendant Montana Department of Environmental Quality filed its Cross-Motion for
24 Summary Judgment and DEQ's Brief Opposing Plaintiff's Motion for Summary Judgment and
25 Supporting DEQ's Cross-Motion for Summary Judgment. Defendant Lucky Minerals, Inc., filed
26 its Response Brief in Opposition to Plaintiff's Motion for Summary Judgment. Plaintiffs filed
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1 their Consolidated Brief in Response to Cross-Motions for Summary Judgment and Reply in
2 Support of Plaintiffs' Motion for Summary Judgment. DEQ filed its Reply Brief in Support of
3 DEQ's Cross-Motion for Summary Judgment.
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5 Plaintiffs filed Declarations of four of Plaintiffs' members and the parties have further
6 submitted excerpts from the Administrative Record, the entirety of which has been made part of
7 the record herein.

8 The Court heard oral argument regarding the Motions for Summary Judgment on April 16,
9 2018, at which time the Motions were deemed submitted.
10

11 The Court has considered the Motions for Summary Judgment, the Briefs filed in support
12 and in opposition to said motions, the Administrative Record and the other records and files herein,
13 the argument of counsel, and applicable legal authority. Good cause exists for the following
14 Decision.
15

16 **DECISION**

17 **Factual and Procedural Background**

18 This case involves the Plaintiffs' challenge of the decision made by Defendant Department of
19 Environmental Quality (hereinafter "DEQ") to grant Defendant Lucky Minerals, Inc., (hereinafter
20 "Lucky") an exploration license in the Emigrant Gulch area of the Absaroka Mountains. Plaintiffs
21 are the Park County Environmental Council and the Greater Yellowstone Coalition.
22

23 Lucky's proposal is to drill 46 exploratory holes, each up to 2,000 feet deep, at 23 locations in
24 Emigrant Gulch. AR 10, 29. Drilling would take place for nearly 24 hours a day over the course of
25 two three-month field seasons. AR 25, 29. Lights similar to those used by highway construction
26 crews would light the operation each night. AR 29. The project would require the use of a D-7
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1 bulldozer, a G-12-14 grader, a JD 50 excavator or backhoe, two LF-70 drilling machines, three diesel
2 or gas-powered water pumps, two service trucks, a four-by-four pick-up truck and two ATV's. AR
3 26.

4
5 DEQ chose to prepare an Environmental Assessment ("EA") with regard to Lucky's
6 application for an exploration license. The Draft EA was released on October 13, 2016 for public
7 comment and the DEQ issued its Final Environmental Assessment ("Final EA") on July 26, 2017,
8 concluding that the project will not have significant environmental impacts and that an
9 Environmental Impact Statement (EIS) is not required. AR 177. DEQ issued Lucky the exploration
10 license on July 26, 2017 and the Plaintiffs filed this case challenging the agency decision on
11 September 22, 2017. The cross-motions for summary judgment followed.
12

13 **The Emigrant Gulch**

14 Emigrant Gulch, the site of Lucky's proposed exploration, is within the Absaroka Mountains
15 and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. AR 10, 14 (project
16 location map), 130-131. The nearly 11,000-foot high Emigrant Peak is one of the most prominent
17 mountain tops visible from the aptly named Paradise Valley, to the west. AR 1489. Emigrant Peak is
18 flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the northeast and Six Mile Creek
19 on the southwest, both of which are tributaries of the Yellowstone River. AR 14. The Absaroka
20 Mountains, including Emigrant Peak and its adjacent valleys, are home to bighorn sheep, elk, deer,
21 moose, marmots, coyotes, black bears, and wolves. AR 51, 2327. The Absarokas also provide
22 important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears,
23 as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. AR
24 51-53, 62. As part of the Greater Yellowstone Ecosystem, these public lands constitute part of the
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1 largest intact natural area in the lower-48 United States. See AR 2057 (describing Greater
2 Yellowstone Ecosystem).

3 Emigrant Peak is one of the most popular year-round recreation destinations in Montana,
4 including for hiking in the summer and backcountry skiing in the winter. AR 136. For over a
5 hundred years, area residents and visitors have soaked in the natural mineral pools of Chico Hot
6 Springs, which sits at the mouth of Emigrant Gulch. AR 2934-35. The creeks in Emigrant Gulch
7 drain into the Yellowstone River, which hosts a world-renowned trout fishery. AR 2884. These
8 features and the natural beauty of the area are also important to the local economy, supporting tourism
9 that directly and indirectly employs large numbers of Park County residents. AR 176; 2883-84; 2937.
10 According to a recent economic evaluation of Park County, “[t]he chief threat to area quality of life
11 and economic well-being would be any large-scale activities that negatively impact area amenities
12 and environmental attributes that are the foundation of the area’s economic vitality.” AR 2885; AR
13 3099. The economist concluded that “[l]argescale, highly visible, and environmentally disruptive
14 activities-such as large-scale mining and heavy manufacturing – may pose the greatest threats, and
15 could lead to long-term economic impairment and future economic stagnation.” AR 2885; AR 3099.
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19 On November 21, 2016, the U.S. Forest Service and Department of Interior announced a
20 proposal to withdraw 30,000 acres of federal land in Paradise Valley – including National Forest
21 System lands adjacent to Lucky’s proposed project – from mineral exploration and development. See
22 Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83, 867 (Nov.
23 22, 2016). The proposal had the immediate effect of preventing mining activity on the National
24 Forest lands, subject to valid existing rights, for two years. Id. at 83, 867-68. If finalized, the
25 withdrawal will prevent mining activity on these lands for as many as 20 years. Id. The withdrawal
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1 is intended “to protect and preserve the scenic integrity, important wildlife corridors, and high-quality
2 recreation values of the Emigrant Crevice area located in the Custer Gallatin National Forest, Park
3 County, Montana.” Id.

4
5 The federal mineral withdrawal does not include the patented mining claims on which Lucky
6 now proposes mineral exploration. Id.

7 **Standard of Review**

8 This Court reviews the DEQ’s analysis and decision under MEPA to determine whether or
9 not it is “arbitrary, capricious, unlawful, or not supported by substantial evidence.” *Mont. Env’tl. Info.*
10 *Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454. Under this
11 standard, the Court determines, based on a careful review of the record, “whether the decision was
12 based on a consideration of the relevant factors and whether there has been a clear error of judgment.”
13 *Id.* An agency is required to take a “hard look” at the environmental impacts of a project or proposal.
14 *Clark Fork Coalition v. Montana DEQ*, 2008 MT 407, 197 P.3d 482, ¶47, 347 Mont. 197, ¶ 47.

15
16 Summary judgment is the appropriate mechanism for resolving a case where, as here, there
17 are “no genuine issues of material fact” and the moving party is entitled to judgment as a matter of
18 law. Rule 56 (c)(3), Mont. R. Civ. P. “Summary judgment is particularly appropriate where, as here,
19 the review is on the administrative record”. *Montana v. EPA*, 941 F. Supp. 945, 955 (D. Mont.
20 1996), *aff’d*, 137 F.3d 1135 (9th Cir 1998).

21
22 The Metal Mine Reclamation Act applies to applications for mineral exploration,
23 pursuant to § 82-4-331(1) MCA. The Legislature adopted the Metal Mine Reclamation Act
24 (MMRA) to “provide adequate remedies to prevent unreasonable depletion and degradation of
25 natural resources” consistent with the state’s obligations under the Montana Constitution’s
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1 environmental protections, Article II, Section 3 and Article IX. §82-4-301(2)(a). The
2 Legislature intended the provisions of the MMRA to “mitigate or prevent undesirable offsite
3 environmental impacts” of mineral exploration and development.” § 82-4-302(1)(g), MCA.
4

5 To secure an exploration license, pursuant to § 82-4-331(1)
6 MCA, an applicant shall:

7 ...
8 (c) submit an exploration plan of operations and a map or
9 sketch in sufficient detail to locate the area to be explored as
10 well as the actual proposed disturbances, and to allow the
11 department to adequately determine whether significant
12 environmental problems would be encountered. The plan of
13 operations must state the type of exploration techniques that
14 would be employed in disturbing the land and include a
15 reclamation plan in sufficient detail to allow the department
16 to determine whether the specific reclamation and
17 performance requirements of ARM 17.24.104 through
18 17.24.107 would be satisfied.

19 Pursuant to § 82-4-332(1), MCA, the DEQ must issue an exploration license to a person
20 that “agrees to reclaim any surface area damaged by applicant during exploration operations, as
21 may be reasonably required by the department.” The reclamation and performance standards are
22 specified in ARM 17.24.104 through 107.

23 In addition, the general purpose provision of the MMRA, stated at § 82-4-301(2)(a)
24 MCA is to “mitigate or prevent undesirable offsite environmental impacts.” Though specific
25 reclamation and performance standards are set forth in the pertinent ARMs, the general purpose
26 provisions do require consideration of mitigation or prevention of undesirable offsite
27 environmental impacts. The general purposes of the MMRA cannot be ignored, while the
28 specific provisions of the ARMS must be considered in connection with each of the standards
they address.

1 The Montana Environmental Policy Act was designed to “promote efforts that will
2 prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health
3 and welfare of humans.” § 75-1-102(2), MCA. MEPA was enacted to prevent or eliminate
4 environmental damage. *Pompeys Pillar Historical Ass’n v. Mont. Dep’t of Env’tl. Quality*, 2002
5 MT 352, ¶ 17, 313 Mont 401, 61 P.3d 148. Another express purpose of MEPA is to protect the
6 right to use and enjoyment of private property free from undue regulation. *Id.* Pursuant to § 75-
7 1-102(2) MCA, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a
8 given project or proposal.” *Mont. Wildlife Fed’n v. Mont Bd. Of Oil & Gas Conservation*, 2012
9 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; *see also* § 75-1-201(1)(b)(iv); ARM
10 17.4.609(3)(d). The DEQ must consider, among other things, reasonable alternatives to the
11 proposed action, the direct, indirect, and cumulative environmental impacts of the action, and
12 “the economic advantages and disadvantages of the proposal.” § 75-1-201(1)(b)(iv) and (v),
13 MCA; ARM 17.4.609(3). The DEQ must evaluate measures that will mitigate the project’s
14 impacts. ARM 17.04.609(3)(g). It must also “[e]xamine the relevant data and articulate a
15 satisfactory explanation for its action, including a rational connection between the facts found
16 and the choice made.” *Mont. Wildlife Fed’n*, ¶ 47, (quoting *Clark Fork Coal v. Mont. Dep’t of*
17 *Env’tl. Quality*, 2008 MT 407, ¶47, 347 Mont. 197, 197 P.3d 482).

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22 The DEQ must set forth its analysis in an Environmental Impact Statement (EIS) if the
23 project it is considering will “significantly affect the quality of the human environment.” ARM
24 17.4.607(1). The DEQ may approve the project without preparing an EIS only if it rationally
25 determines, through preparation of an Environmental Assessment (EA), that the project’s
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1 impacts will not be significant, or that otherwise significant impacts can be mitigated below the
2 level of significance. A.R.M.s 17.4.607(1)(b) and 17.4.607(4).

3 In determining whether the impacts of a proposed action will be significant, DEQ must
4 consider the following criteria:

5 (a) the severity, duration, geographic extent, and frequency of occurrence of the
6 impact;

7 (b) the probability that the impact will occur if the proposed action occurs; or
8 conversely, reasonable assurance in keeping with the potential severity of an impact
9 that the impact will not occur;

10 (c) growth-inducing or growth-inhibiting aspects of the impact, including the
11 relationship or contribution of the impact to cumulative impacts;

12 (d) the quantity and quality of each environmental resource or value that would be
13 affected, including the uniqueness and fragility of those resources or values;

14 (e) the importance to the state and to society of each environmental resource or value
15 that would be affected;

16 (f) any precedent that would be set as a result of an impact of the proposed action that
17 would commit the department to future actions with significant impacts or a decision
18 in principle about such future actions; and

19 (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

20 A.R.M. 17.4.608(1)

21 In order to demonstrate that an EIS is required, a plaintiff challenging an agency
22 decision, “need not show that significant effects will in fact occur, but if the plaintiff raises
23 substantial questions whether a project may have a significant effect, an EIS must be prepared.”

24 *Ravalli Cty. Fish & Game Ass’n*, 273 Mont. At 379, 903 P.2d at 1368. Where an uncertain
25 impact of an agency action is potentially severe, DEQ may not deem it insignificant without
26 “reasonable assurance...that the impact will not occur.” ARM 17.4.608(1)(b)

27

1 **Evaluation of Potential Impact to Wildlife**

2 In the Draft EA, DEQ concluded that the road improvements attendant to the mineral
3 exploration project would provide easier motor vehicle access into the Emigrant Creek drainage,
4 causing harm to wildlife residing there:
5

6 Improvements to the roads would lead to easier vehicle and
7 human access to higher elevations and more remote habitat.
8 Wildlife populations that are subjected to hunting and
9 trapping may sustain higher mortalities as a result of better
10 access (Jalkotzy et. al., 1997) . . . Further, because of the
11 increased human presence under the Proposed Action, the
12 harassment or poaching of wildlife may also increase.

13 AR 442.

14 The Draft EA predicted that improved access could be “detrimental” because “an increase
15 in human disturbance may cause” female wolverines to abandon their dens.” AR 445. The
16 Record reflects the following regarding the Emigrant Gulch access road:
17

- 18 1. It is impassable to most passenger vehicles due to rockfall and other hazards.
19 (AR 6632)
- 20 2. The existing road is comparable to a Jeep trail. (AR 3009-10)
- 21 3. “The lower portion of the road is not passible with hwy vehicles.” (AR 6634)

22 The significance of the current state of the Emigrant Gulch access road is that Lucky
23 proposes to make the road accessible to its equipment by grading, clearing rock and other debris
24 from the road surface, and sloping the road to enhance draining and present channeling. AR 26.
25 These improvements will “facilitate access for motorized use.” (AR 2983).

26 Fish Wildlife & Parks (FWP) commented on the Draft EA, as follows:

27 There is cause for concern over permanent changes to
28 wildlife habitat that would result from the proposed road

1 improvements, included in both the proposed Action and
2 Agency Modified Alternative. . .The road improvements will
3 facilitate access for motorized use in an area that presently is
4 very remote and rarely disturbed. This will result in a
5 potentially significantly increased level of disturbance and
6 fragmentation of the habitat with higher traffic volume,
7 higher traffic speeds, and increased human presence. The
8 road improvements would represent a permanent change to
9 the landscape, with long-term implications for habitat
10 suitability and productivity of the area for wildlife. This is of
11 greatest concern for those species that are most sensitive to
12 human activity, such as wolverine, lynx, grizzly bears, and
13 ungulates including elk, mule deer and moose that use this
14 habitat for calving/fawning or migration.

15 AR 2983.

16 Numerous scientific studies that are part of the Administrative Record conclude that
17 increased human development and activity in once remote areas would have a negative impact on
18 wolverines. AR 2601; AR 1211-1912; AR 2535. Wolverines are already scarce in the Yellowstone
19 region and wolverine populations are highly sensitive to habitat alteration. AR 2619; AR 2305; AR
20 2575.

21 Grizzly bear populations are also affected by the creation of human access into prime bear
22 habitat. Increased bear mortality rates caused by improved access is a major concern for grizzly
23 bear conservation. AR 2141-2142; AR 1908-1910 AR 2116. The proposed action, “increases the
24 potential for human/bear conflicts to occur, possible leading to injury, direct harm, or secondary
25 mortality of grizzly bears- as well as risks to human safety, particularly during the critical fall
26 season.” AR 73.

27 Plaintiffs argue that that the DEQ illogically abandoned its conclusion in the Draft EA that
28 the proposed project would be detrimental to wildlife when it issued the Final EA. The Final EA
states that, “DEQ has re-evaluated the impact on wildlife resulting from the proposed road

1 improvements and believes that the draft EA overstated the impacts.” Plaintiffs argue that the DEQ
2 offered “no reasoned analysis whatsoever in support of its conclusion –which is in direct conflict
3 with the conclusion. . . of its sister agency, FWP.” citing *W. Watersheds Project v. Kraayenbrink*,
4 632 F.3d 472, 492-493 (9th Cir. 2011).

5
6 Lucky argues that Plaintiffs’ assertion that modifications to the road will make it accessible
7 by ordinary passenger vehicles is not supported by the record. Accordingly, Lucky takes issue with
8 any of the Plaintiffs’ concerns that stem from increased access to the area.

9
10 DEQ responds to Plaintiffs claims by admitting that it revised its analysis in the Final EA to
11 acknowledge a marginal increase in access to the area and a marginal increase in impacts to
12 wildlife. The Final EA states that:

13 The public has no access to the base of the St. Julian Claim
14 Block via Emigrant Creek Road. Therefore, the
15 improvements to Emigrant Creek Road discussed above
16 would not lead to access to higher elevations and more
17 remote habitat than existed before. The removal of rocks and
18 debris and localized grading of the approximately four-mile
19 long Emigrant Creek Road may marginally make access to
20 the area easier for hunters and may marginally increase
21 higher mortality. . .Furthermore, because of the increase in
22 human presence under the Proposed Action, the harassment
23 or poaching of wildlife may also increase.

24 Final EA p. 63.

25
26 In response to the FWP comment expressing concern over the impacts resulting
27 from the road improvements, DEQ revised its analysis as follows:

28 DEQ has re-evaluated the impact on wildlife resulting from
proposed road improvements and believes the draft EA
overstated the impacts. DEQ has revised Section 3.4.4
accordingly.

1 Vehicles would access the St. Julian Claim Block using the
2 existing roads between East River Road and the St. Julian
3 Mine Claim Block. The Proposed Action does not include
4 any new road construction. The approximate four-mile
5 length of Emigrant Creek Road from Old Chico to the St.
6 Julian Claim Block would be cleared of rock and debris
7 within its original configuration, some of which would
8 include hand picking. The road may be graded in localized
9 areas in order to keep it serviceable for the type of vehicles
10 that would be involved in the project. The clearing and
11 localized improvements to Emigrant Creek Road, however,
12 will not materially change its character of an unimproved
13 forest road. The clearing and localized grading should not
14 facilitate traffic on Emigrant Creek Road at appreciably
15 higher speeds than the current traffic. (Final EA, p. 188)

16 In responding to a comment submitted on behalf of Park County Environmental Council,
17 DEQ stated that the maintenance of the access roads would not continue after the two three-month
18 exploration seasons and that road conditions would naturally return to pre-project conditions. The
19 DEQ further opined that there would not be a genetic threat to wolverines as a result of the short-term
20 improved access included in the Proposed Action as the temporal duration is far too short. (Final EA
21 p. 308.)

22 The DEQ maintains that it did take a hard look at impacts to wolverines and grizzly bears.
23 DEQ acknowledges that the activity and noise associated with localized road improvements and
24 maintenance, drilling rigs and night lighting is likely to disturb any wolverines in the area and may
25 cause den abandonment. DEQ goes on to conclude, in the Final EA, that the activity associated with
26 the Proposed Action is limited spatially and temporally, allowing for avoidance of the area by
27 wolverines.
28

1 The Final EA states that impacts of improved access to more remote areas may be detrimental
2 to regional populations, but DEQ maintains that this was inadvertently not edited out of the document
3 when DEQ changed its position from the Draft EA to the Final EA.
4

5 The DEQ maintains that it took a hard look at impacts to grizzly bears. It acknowledges that
6 the local abundance of grizzly bears is likely to be reduced for the duration of the exploration project
7 and that the use of lights during nighttime drilling may disrupt grizzly bear use of the area. The DEQ
8 determined that because the impacts are temporary, this should not result in the bears permanently
9 avoiding the area. The Final EA also acknowledges that the Proposed Action increases the potential
10 for human/bear conflicts leading to risk of harm or mortality of grizzly bears as well as risks to
11 human safety.
12

13 In the Final EA, DEQ again responded by stating that the bears would have a large amount of
14 undisturbed habitat because the Proposed Action is limited spatially and temporally. DEQ also points
15 to the stability of the grizzly bear population and the fact that the patented mining claims at issue here
16 do not lie within the Primary Conservation Area identified in the Grizzly Bear Conservation Strategy.
17

18 In its Reply Brief, the DEQ argues that the impact from Lucky's project are transitory because
19 the project is of a short duration. DEQ maintains that the Emigrant Gulch Road will return to its
20 present state by the forces of nature and gravity.
21

22 The Court concludes that DEQ failed to take a hard look at the harm to sensitive wildlife that
23 would follow from the improvements to the Emigrant Gulch Road. Though the Draft EA concluded
24 that the road improvements would increase wildlife mortality, DEQ downgraded this risk in the Final
25 EA, stating that, "the draft EA overstated the impacts." AR 197. This is so despite the comments of
26 FWP, raising significant concerns about the impacts to wildlife. DEQ's downgrading of the risk, in
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1 this manner, was not supported by the record. DEQ failed to “articulate . . . a rational connection
2 between the facts found and the choice made.” *Mont. Wildlife Fed’n v. Mont. Bd. Of Oil & Gas*
3 *Conservation*, 2012 MT 128, ¶43, 365 Mont. 232, 280 P.3d 877.

4
5 There is no basis for DEQ’s claim that Lucky’s plan to clear obstructions from the Emigrant
6 Road will not improve public access to the area. The Final EA appears to acknowledge this by
7 stating that the “[r]emoval of rocks and debris . . . may marginally make access to the area easier for
8 hunters and may marginally increase higher [wildlife] morality.” AR 72. DEQ offers no rational
9 basis for downgrading the risk to sensitive wildlife where FWP’s comments expressed concern that
10 such increased human presence would have “long-term implications for habitat suitability and
11 productivity of the area for wildlife” especially for “those species that are most sensitive to human
12 activity,” including wolverines and grizzly bears. AR 2983.

13
14 The DEQ violated MEPA in its treatment of this issue in the Final EA, by providing, “no
15 reasoned analysis whatsoever in support of its conclusion, which conclusion directly conflicts with
16 that of DEQ’s sister agency, FWP. *W. Watershed Project v. Kraayenbrink*, 632 F.3d 472 492-93 (9th
17 Cir. 2011). This is particularly so where wolverines are highly sensitive to human encroachment, and
18 have been a confirmed presence near the project area. AR 2575 AR 2352-2353.

19
20 The DEQ stated in the Final EA that “the impacts of improved access to more remote areas
21 may be detrimental to regional [wolverine] populations.” AR 75. The DEQ explains in its briefing
22 that this statement was an oversight that was meant to be edited out. That being the case, DEQ has
23 not explained any logical basis for the change of its position in the Final EA. The statements of
24 counsel interpreting what the DEQ may have meant must be disregarded by the Court. For example,
25 it its Brief, the DEQ attempts to dismiss the impact to wolverine den sites by asserting that Lucky’s
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1 drilling session does not overlap with the wolverine denning season. This is not a basis relied upon in
2 the EA. Moreover, the increased access to the upper reaches of the Emigrant Gulch Road, due to
3 road improvements, will remain after the drilling project is concluded.
4

5 In the Final EA, DEQ has failed to consider and take a “hard look” at wolverine and grizzly
6 bear impacts from increased human access to sensitive wildlife habitat that have the potential to
7 persist beyond the two-year period of Lucky’s exploration. The road will remain improved, for
8 some unknown period of time, and the gradual lessening of accessibility of the road will be
9 interrupted.
10

11 The DEQ’s analysis did not include a “hard look” at grizzly bear and wolverine impacts from
12 increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass’n*, 273 Mont. at
13 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the relevant
14 data and articulating a satisfactory explanation for its action, its decision violated MEPA. *Montana*
15 *Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation*, ¶ 43, quoting *Clark Fork Coal v. Mont.*
16 *Dep’t of Env’tl. Quality*, ¶ 47. In revising its conclusion concerning the impacts of improved access
17 to the Emigrant drainage, DEQ failed to examine the relevant data, including data submitted by
18 FWP, that contradicts the conclusion reached by DEQ. The DEQ did not articulate a satisfactory
19 explanation for its action that disregarded record evidence that road improvements would facilitate
20 greater motorized access, an increased human presence, and a detriment to wildlife.
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23 **Evaluation of Water Quality Impacts**

24 Plaintiffs maintain that DEQ failed to adequately consider water quality impacts due to
25 contaminated flow from the drill holes contemplated by the project. The DEQ acknowledged that
26 it is likely that Lucky would encounter artesian conditions during drilling. This means that
27
28

1 groundwater may flow freely from the drill holes before the holes are plugged following
2 exploration. AR 127. Drilling fluid and groundwater that escape the drill pad under these
3 conditions and enter ground or surface waters, “could contain contamination that is independent of
4 the drill additives that are used,” including dissolved metals and sulfuric acid which are extremely
5 toxic to fish and other aquatic life. AR 1866-1867.
6

7 Plaintiffs rely upon studies in the agency record documenting that mining project proposals
8 and analyses almost always predict that the potential for water contamination will be avoided or
9 mitigated, while post-mining water quality exceeds acceptable water quality standards. See AR
10 1874-1875.
11

12 Plaintiffs further point to the Final EA setting forth nothing more than a “plan to make a
13 plan” to address water contamination issues, as opposed to including concrete measures that could
14 be evaluated in the EA process. The Final EA states that Lucky “would develop a mitigation plan
15 to effectively contain flow from artesian boreholes during drilling... The procedures for artesian
16 flow containment would be developed prior to commencing drilling operations, and any necessary
17 equipment would be readily available onsite, if those conditions were encountered during drilling.”
18 AR 128.
19

20 Plaintiffs maintain that the water quality information relied upon by DEQ in the Final EA to
21 dismiss potential impacts due to uncontrolled discharges from Lucky’s artesian boreholes is
22 unrepresentative and incomplete. Plaintiffs maintain that DEQ cherry picked water quality data
23 from the Duval boreholes, which DEQ acknowledged “stand out” from data for other boreholes and
24 seeps in the vicinity of Lucky’s planned drilling. AR 100; DEQ Br. P. 11, (asserting that the Duval
25 boreholes are “[t]he best predictor of artesian flow at the Lucky Project.”) Plaintiffs maintain that
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1 in the Final EA, DEQ described, but then arbitrarily disregarded, other pertinent water-quality data,
2 including data gathered on the St. Julian Claim Block. These additional groundwater sources
3 exhibit higher acidity and concentrations of metals and other pollutants than the Duval boreholes.
4

5 AR 104, 110-111)

6 Though Lucky states in its Brief that “none of the existing artesian flows, seeps or springs,
7 exceed applicable water quality standards. (Lucky Brief. P. 9), three-cold-spring seeps immediately
8 adjacent to the Duval boreholes exhibit low to very low Ph and water quality exceedences for
9 several metals, including zinc, cadmium, copper, aluminum, lead, and significantly elevated
10 concentrations of sulfate,
11

12 Thus, Plaintiffs allege that DEQ selectively relied upon the Duval borehole data, while
13 ignoring other data that undermines its conclusions that artesian discharges will not have a
14 significant impact.
15

16 The Plaintiffs further allege that DEQ’s analysis was misleading because the record
17 demonstrates that the geology of the minerals Lucky proposes to probe is likely to produce harmful
18 acid rock drainage. They are sulfides which according to the LaFave report, primarily relied upon
19 by DEQ for its conclusions, produce acid rock drainage.
20

21 Lucky points out that it is required to ensure that any artesian flow from an exploration
22 borehole is terminated by plugging the hole. ARM 17.24.105(7). Further, DEQ requires a
23 containment plan be formulated and approved by DEQ prior to drilling. AR 31. Lucky maintains
24 that the artesian flow is not expected to be excessive, and that DEQ was unable to discern any
25 reason to require ground water from artesian flows be restrictively mitigated. AR 126.
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1 The DEQ dismisses Plaintiffs' claims stating that the presence of sulfide minerals in the
2 project area is "not supported by any analysis of available scientific information." DEQ Brief P. 10.
3 However, the Final EA and Lucky's technical report both acknowledge that the ore body Lucky
4 seeks to explore contains sulfide mineral deposits. AR 40.

5
6 DEQ suggests that the EPA report on acid mine drainage is an industry-wide report not
7 relevant to Lucky's specific project. However, LaFave 2016, on which DEQ extensively relied,
8 concluded that acid rock drainage near the project site occurs due to the presence of sulfide
9 minerals.

10
11 Finally, the Final EA states that the "water quality in the East fork [of Emigrant Creek]
12 degrades along the gulch, primarily due to inputs from ground water and surface discharge from
13 springs and seeps. AR 99. According to the Montana Bureau of Mines and Geology, "[t]he effects
14 [of the discharges] on ground water are unknown and may be of some concern. AR 8063.

15
16 In its Reply Brief, the DEQ points out that Plaintiffs do not take into consideration that
17 Lucky is required to plug its drill holes prior to removing the drill rigs. The DEQ takes issue with
18 Plaintiffs' concern about acid rock drainage. The DEQ maintains that the quality of the
19 groundwater on the slope north of the East Fork that has been impacted by locally intense pyrite
20 alteration is not representative of the quality of the groundwater to the south of the East Fork where
21 Lucky's mineral exploration activity has been approved. DEQ emphasizes that the Duvall
22 boreholes are in close proximity and elevation to the project area.

23
24 The Court concludes that the DEQ did not take the requisite "hard look" at the relevant data
25 regarding water quality issues for the following reasons:
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- 1 1. The Final EA provides only for a plan to make a plan to address water quality
2 issues, which is insufficient analysis for a Final EA.
- 3 2. The DEQ selectively relied upon the Duval bore hole data and ignored other
4 pertinent water quality data that undermines its conclusion that artesian
5 discharges will not have a significant environmental impact.
- 6 3. The record contradicts DEQ's prediction that Lucky's artesian discharges will not
7 harm surface or groundwater.
- 8 4. The DEQ ignored or dismissed the acid rock draining near the project site which
9 occurs due to the presence of sulfide minerals, where the minerals Lucky seeks to
10 explore for are sulfide minerals.

11 In doing so, DEQ failed to adequately consider pertinent data and failed to examine the relevant
12 data. *Mont. Wildlife Fed'n.*, ¶ 43, *Clark Fork Coal*, ¶47, *National Audubon Soc'y v. Dept. of Navy*,
13 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole data was
14 arbitrary and ignored other pertinent water-quality data to the detriment of the EA process. *Ravalli*
15 *Cty. Fish & Game Ass'n*, 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert
16 analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues
17 in the EA did not meet the requirements of MEPA.

21 **Consideration of Impacts from Mine Development on Federal Lands**

22 Plaintiffs maintain that DEQ's MEPA analysis is flawed because it failed to consider the
23 potential that Lucky's exploration project could facilitate full-scale mining, particularly if Lucky
24 were to use the exploration to obtain a vested right to develop minerals underlying adjacent
25 National Forest lands. Plaintiffs point to ARM 17.4.609(3)(d) which requires DEQ to evaluate a
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1 project's direct and secondary environmental impacts, including "further impact to the human
2 environment that may be stimulated or induced by or otherwise result from a direct impact of the
3 action." *Id.*

4
5 Plaintiffs rely on *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, 2017 MT
6 222, ¶ 25, 388 Mont. 453, 401 P.3d 712 for the proposition that an agency's review must include all
7 impacts for which there is "reasonably close causal relationship' between the subject government
8 action and the particular environmental effect." Plaintiffs argue that such a causal relationship
9 exists in this case because Lucky could attempt to use information it gains from its exploration
10 activities to establish a vested right to mine a much larger body of minerals underlying National
11 Forest lands.

12
13 Under the 1872 Mining Law, which governs mining on federal lands, an individual may
14 establish a 'valid existing right' to exploit federal minerals if he can demonstrate a reasonable
15 prospect of success in developing a valuable mine, given market conditions and relevant operating
16 costs. Mining companies have established such a right based upon "geologic inference" where
17 "[g]eologic information is used to determine the reasonable likelihood of the persistence of similar
18 mineralization beyond the areas actually sampled or exposed." *Wilderness Soc'y v. Dombeck*, 168
19 F.3d 367,375 (9TH Cir. 1999).

20
21 Plaintiffs maintain that Lucky's exploration raises the prospect that it may attempt to infer a
22 valid existing right to minerals not only on its own lands, by also on its unpatented mining claims
23 on federal lands, using information gained under this exploration permit. Plaintiffs believe Lucky
24 may seek to meet the "valid existing rights standard" by angle-drilling into such federal minerals
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1 from Lucky's patented mining claims on adjacent lands. The drill holes would be either vertical or
2 angled holes that could extend 1,000 to 2,000 feet from the ground surface. AR 44.

3 If such valid existing rights were established, the unpatented mining claim is a property
4 right in the full sense. *McKown v. United States*, 908 F. Supp. 2d 1122, 1124 (E.D. Cal. 2012).

5 Plaintiffs maintain that granting of an exploration license reflects the "go/nogo" point in the
6 development of federal minerals, or an "irretrievable commitment of resources" under MEPA.

7 Plaintiffs maintain that if Lucky were able to establish a valid existing right to federal minerals by
8 its exploration, DEQ would be unable to prevent the development of those minerals, but could only
9 place reasonable conditions on an operating permit to mitigate environmental impacts.
10

11 Thus, Plaintiffs argue, that contrary to MEPA, DEQ failed to provide "reasonable
12 assurance" that the severe environmental effects of mine development on National Forest lands will
13 not occur. ARM 17.4.608(1)(b). Because there are "substantial questions" about whether Lucky's
14 exploration project will cause such impacts, Plaintiffs argue, an EIS was required.
15

16 Lucky denies that the DEQ was obligated to evaluate the potential of mining taking place on
17 National Forest lands. Lucky maintains that Plaintiffs failed to raise this issue during scoping and
18 are precluded from arguing it now. Lucky emphasizes that it did not submit an application for a
19 mine operating permit, it simply requested an exploration permit for a very minor project. Lucky
20 maintains that DEQ was obligated to issue the license to Lucky upon payment of the statutory fees
21 and posting of the reclamation bond. §82-4-332, MCA. Lucky dismisses Plaintiffs' claims to the
22 contrary as speculative and contrary to legal precedent.
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24

25 DEQ responds by maintaining that it properly confined its environmental review to the
26 proposed exploration program. DEQ also contends that Plaintiffs are raising this issue without
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1 having first raised the issue by way of comment from the Plaintiffs on the Draft EA. Though there
2 were a significant number of comments on the Draft EA that presumed the action under review was
3 the permitting of a mine, no comment was submitted regarding the issue of whether Lucky's
4 establishment of a vested right to mine under federal law would preclude DEQ's environmental
5 review of the mine. Thus, DEQ contends, this Court is precluded from considering the issue. under
6 § 75-1-201(6)(a)(ii), MCA.
7

8 DEQ denies that the environmental impacts from potential mining are secondary impacts to
9 Lucky's mineral exploration activity. DEQ argues that Plaintiffs inconsistently state that Lucky's
10 ability to develop a full-scale mine based upon its exploration license is uncertain, and, at the same
11 time, argue there is a causal link between the exploration program and the environmental impacts
12 that may result from mining under adjacent Forest Service land. DEQ emphasizes that any
13 potential future mining would be the subject of another environmental review under MEPA.
14

15 DEQ asserts that there is no causal relationship between the information Lucky would gain
16 from exploration and a vested right to mine under adjacent Forest Service Land. DEQ disagrees
17 with Plaintiffs' reliance on *Bitterrooters for Planning and White Tanks Concerned Citizens, Inc. v.*
18 *Stock*, to support its position that environmental impacts resulting from any future mining must be
19 evaluated in this review regarding Lucky's exploration project. In those cases, the issue was
20 whether an agency's action should be considered a cause of an environmental effect even when the
21 agency has no authority to prevent the effect. DEQ maintains those cases are not analogous to the
22 instant case because DEQ has regulatory authority over any future mining that may be conducted by
23 Lucky.
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1 DEQ argues that the instant case is analogous to *North Fork Preservation Ass'n v. Dept. of*
2 *State Lands*, 238 Mont. 451, 778 P.2d 862(1989). In that case, State Lands issued an approval
3 allowing Cenex to drill one exploratory well under an oil and gas lease, and determined that an EIS
4 was not required. The district court determined that full-field development required preparation of
5 an EIS. The Supreme Court disagreed and determined the district court was incorrect in concluding
6 that full development of oil and gas “was a matter of successive steps set into irreversible motion by
7 the issuance of the lease”. The Court was not to assume that State Lands would not comply with
8 its MEPA obligations at a later stage of development and full-field development was not the
9 proposed action before the Department of State Lands. *Id.* 463-64.
10

11 DEQ maintains that Plaintiffs’ reliance on *Cal. Coastal Com. v. Granite Rock Co.*, 480 U.S.
12 572 (1987) is misplaced. In that case, DEQ emphasizes, the Supreme Court held that Forest
13 Service regulations were devoid of an expression of intent to pre-empt state laws regulating
14 unpatented mining claims in national forests, but rather appear to assume that those submitting
15 plans of operation will comply with state laws. The Court found that the state’s laws were not pre-
16 emptied.
17

18 In their Reply, Plaintiffs initially maintain that they adequately alerted the DEQ to this issue.
19 Numerous commenters requested that DEQ evaluate the impacts of full scale mining that might
20 occur as a result of the exploration. Plaintiffs’ comments gave notice that Lucky’s plan for angle
21 drilling “raises the question of the Proposed Action intersecting minerals that lie underneath public
22 lands that are subject to the segregative effects of a withdrawal notice, “and that drilling of federal
23 minerals requires a determination of “valid existing rights’ to such minerals, “including those that
24 may be accessed via angled drilling from private land.” AR 3023; See also AR 3022.
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1 Plaintiffs go on to reiterate that DEQ was required to evaluate the impacts of mining
2 underneath National Forest lands because if Lucky demonstrates valid existing rights to such
3 minerals based on its exploration project, DEQ would be unable to prohibit their development.
4 DEQ contests this position and argues that DEQ has all of its regulatory authority over future
5 mining, notwithstanding any demonstration of valid existing rights. However, Lucky disagrees
6 with DEQ's position and states that "DEQ does not possess the authority to prevent mining."
7 Lucky's Brief, p. 12.

8
9 The crux of the issue in this case is that Lucky may establish valid existing rights with
10 respect to minerals on adjacent federal lands by conducting its exploration under the exploration
11 license at issue here. If Lucky were able to establish such valid existing rights, they would amount
12 to a possessory interest, under federal mining law, that would entitle them to extract all minerals
13 from the claim. *McMaster v. United States*, 731 F.3d 881, 885 (9th Cir. 2013). Though DEQ could
14 regulate such mining, it could not prohibit it altogether without violating the claimant's rights under
15 federal law. The holding in *Cal Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 586-589
16 (1987) is in accord by finding that state regulation of mining was not preempted, "where it does not
17 seek to prohibit mining of the unpatented claim on national forest land."

18
19 The application of federal law to DEQ's right to regulate a valid existing right as to
20 minerals underlying federal lands, takes the inquiry out of the realm of *North Fork Preservation*
21 *Association, supra*. This is so because DEQ would lack the ability to deny the mining of minerals
22 underlying federal lands and would be relegated to regulating, rather than being able to preclude the
23 mining operation. In *North Fork Preservation Association*, the Court affirmed that the key question
24 in determining whether further resource development must be anticipated and evaluated in the
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1 initial stage of agency approvals is whether the agency's actions entail an 'irretrievable commitment
2 of resources.' *N. Fork Pres. Ass'n v. Dept of State Lands*, 238 Mont. 451, 461-462, 778 P.2d 862,
3 868-869 (1989).

4
5 The Court in *North Fork Preservation Association* relied upon *Connor v. Burford*, 848 F.2d
6 1441, 1449 (9th Cir. 1988) for the proposition that "an irretrievable commitment of resources is
7 reached when the agency no longer has "the absolute right to prevent all surface-disturbing activity."
8 The *Conner* Court explained that, "[t]he 'heart' of the EIS—the consideration of reasonable
9 alternatives to the proposed action—requires federal agencies to consider seriously the "no action"
10 alternative before approving a project with significant environmental effects." *Id.* at 1451. "The
11 government's right to regulate, rather than preclude, surface disturbing activities" is an insufficient
12 basis for the agency to avoid examining such activities in an EIS before the initial authorization. *Id.*
13 at 1449. The Court in *Conner* explained,
14

15
16 . . . an EIS must be prepared as long as "substantial
17 questions" remain as to whether the measures will
18 completely preclude significant environmental effects.
19 *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir.
20 1986); *Foundation for North Am. Wild Sheep v. United*
21 *States*, 681 F.2d 1172, 1180-81 (9th Cir. 1982). Thus, even
22 if there is a chance that regulation of surface-disturbing
23 activities will render insignificant the impacts of those
24 activities, that possibility does not dispel substantial
25 questions regarding the government's ability to adequately
26 regulate activities which it cannot absolutely preclude. In
27 sum, we agree with the district court that the government
28 violated NEPA by selling non-NSO leases without
preparing an EIS.

...

Appellants' suggestion that we approve now and ask
questions later is precisely the type of environmentally
blind decision-making NEPA was designed to avoid.

1 *Conner v. Burford*, 848 F.2d 1441, 1450-1451, 1988 U.S. App. LEXIS 296, *27-30,

2 Lucky maintains that there are not currently “vested” rights to mine that are available to
3 Lucky under the mining laws of the United States. Lucky has not, however, disavowed an intention
4 to angle drill under the National Forest during its exploration activities nor then using information
5 gained thereby to establish such a “vested” right.
6

7 The Court concludes first that DEQ was adequately put on notice of the issue of Lucky
8 drilling into segregated, federal minerals. DEQ failed to evaluate the impacts of mining underneath
9 National Forest lands, since if Lucky demonstrates valid existing rights to such minerals in
10 conducting its exploration activities, DEQ would be unable to prohibit their development.
11

12 This is, “a secondary impact to the human environment that may be stimulated or induced
13 by or otherwise result from a direct impact of the action”, which the DEQ was required to evaluate
14 under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human
15 environment, the DEQ was required to consider “any precedent that would be set as a result of an
16 impact of the proposed action that would commit the Department to future actions with significant
17 impacts or a decision in principle about such further actions” ARM 17.4.608(1)(f) The granting of
18 the exploration license does set a precedent that would commit the department to the future action
19 of allowing mining and development of any valid existing rights to minerals underlying National
20 Forest Lands that may be established by information gained in the exploration activities.
21

22 This significant potential impact alone mandated the preparation of an EIS.
23

24 **Evaluation of Feasible Project Alternatives**

25 The DEQ is required to consider alternatives to the proposed project in preparing an EA.
26 Pursuant to ARM 17.4.607(2)(b), one of the purposes of an EA, is to “assist in the evaluation of
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1 reasonable alternatives and the development of conditions, stipulations or modifications to be made
2 part of a proposed action. Pursuant to § 75-1-201(1)(b)(v), MCA, agencies must “study, develop,
3 and describe appropriate alternatives to recommended courses of action in any proposal that
4 involves unresolved conflicts concerning alternative uses of available resources.”
5

6 Plaintiffs maintain that DEQ adopted Lucky’s stated objective, without discussion or visible
7 consideration of at least two feasible project alternatives. DEQ first dismissed an alternative that
8 would have limited Lucky’s exploration license to one field season and the use of four drilling rigs
9 rather than two. Second, DEQ dismissed an alternative to eliminate night drilling. Though
10 eliminating night drilling would have eliminated some wildlife impacts, DEQ dismissed this
11 alternative because it would extend the exploration.
12

13 Plaintiffs take issue with the fact that DEQ did not evaluate an alternative that would reduce
14 the number of holes it would drill and that DEQ asserted it had no basis to second-guess Lucky’s
15 need to drill at all of the proposed locations. Plaintiffs cite to *Nat’l Parks Conservation Ass’n v.*
16 *Bureau of Land Mgmt.*, 606 F. 3d 1058, 1072, (9th Cir. 2010) which held that an agency may not
17 “adopt private interests to draft a narrow purpose and need statement that excludes alternatives that
18 fail to meet specific private objectives.” The DEQ is obligated to consult with Lucky regarding
19 proposed alternatives and “give due weight and consideration to its comments”, § 75-1-
20 201(b)(iv)(C)(II), MCA. This does not, however, negate the DEQ’s obligation to consider project
21 alternatives that are economically feasible. Further, the EA must include “a description and
22 analysis of reasonable alternatives to a proposed action whenever alternatives are reasonable
23 available and prudent to consider.” § 75-1-201(1)(b)(iv)(C)(I); ARM 17.4.609(3)(f).
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1 The DEQ responds by pointing out that in the Final EA, DEQ evaluated a Proposed Action
2 Alternative, a No Action Alternative and an Agency-Modified Alternative. DEQ evaluated an
3 alternative requiring Lucky to complete its 46 drill hole exploration program in one season. This
4 alternative was rejected because the impacts would have been substantially similar. It also
5 evaluated an alternative that would have eliminated night drilling. This alternative was rejected
6 because the impacts would have extended over three to four field seasons.
7

8 The DEQ asserts that applicable case law prevents the agency from determining for the
9 applicant what the goals of an applicant's proposal should be. DEQ maintains that the purpose-and-
10 need statement in the Lucky Final EA comports with applicable case law. DEQ maintains that it
11 has no basis to second-guess Lucky's need to drill up to 46 bore holes at 23 drill sites. Final EA, p.
12 300.
13

14 In its Reply Brief, the DEQ emphasizes that the case law requires DEQ to take into account
15 the needs and goals of the parties involved in the application. In *Citizens Against Burlington, Inc.*
16 *v. Busey*, 938 F.2d 190. (DC Cir. 1991), the Court concluded that the FAA had evaluated the only
17 alternative that might reasonably accomplish the Airport's goal of expanding the Toledo Express
18 Airport. Other authority cited by the DEQ stands for the proposition that the reviewing agency does
19 not have to consider the alternative of a scaled back project, in lieu of the proposal submitted.
20

21 Lucky concurs in the DEQ's appropriate consideration of alternatives, particularly given
22 what Lucky characterizes as the minor nature of its exploration program. Lucky also points to § 75-
23 1-220(1), MCA which mandates evaluation of "different parameters, mitigation measures or control
24 measures that would accomplish the same objectives as those included in the proposed action by
25 the applicant."
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1 Plaintiffs respond by noting that nothing in the cases relied upon by DEQ relieves an agency
2 of its obligation to evaluate alternate ways of achieving the project's goals. Plaintiffs acknowledge
3 that DEQ, in proposing and adopting an agency-modified alternative, complied with MEPA's
4 requirement that the agency give due weight and consideration to the project sponsor's comments
5 by seeking and responding to Lucky's input on the changes. AR 30-34; AR 656-663. However, by
6 contrast, Plaintiffs maintain that DEQ dismissed the no night drilling and one season alternatives,
7 without ever inquiring whether Lucky could meet its project goals under either of the alternatives.
8

9 The fundamental difference in the parties' positions on the issue of consideration of
10 alternatives is DEQ's refusal to consider an alternative that would alter the basic parameters of the
11 applicant's project and Plaintiff's insistence that MEPA requires the DEQ to evaluate different
12 parameters that would accomplish the project's objectives while lessening its impacts. § 75-1-
13 220(1), MCA.
14

15 The Court concludes that DEQ in this instance, gave unwarranted deference to Lucky's
16 proposal, without conducting an independent analysis of alternatives, particularly the "no night
17 drilling" and "one season" alternatives in order to determine whether the environmental impacts
18 could be reduced, while still meeting the basic goals of the project.
19

20 CONCLUSION

21 MEPA was designed "to promote efforts that will prevent, mitigate, or eliminate damage to
22 the environment and biosphere and stimulate the health and welfare of humans. § 75-1-102(2),
23 MCA. To meet these purposes, MEPA requires the DEQ to "take a 'hard look' at the
24 environmental impacts of a given project or proposal." *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil &*
25 *Gas Conservation*, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877. "The Court looks closely at
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1 whether the agency has taken a hard look at the question presented. The Court does not take a hard
2 look itself, but requires that the agency does so.” *Clark Fork Coalition v. MT. DEQ*, 2008 MT 407,
3 ¶ 47, 347 Mont. 197, 197 P.3d 482. For an EA to suffice, the agency must determine that all of the
4 impacts of the proposed action have been accurately identified, that they will be mitigated below
5 the level of significance, and that no significant impact is likely to occur. ARM 17.4.607(4). In
6 identifying and evaluating these matters, the DEQ “must examine the relevant data and articulate a
7 satisfactory explanation for its action, including a rational connection between the facts found and
8 the choice made. *Mont. Wildlife Fed’n*, ¶ 43.

11 The Court concludes that the DEQ’s analysis regarding the issues found herein was
12 arbitrary, capricious and not supported by substantial evidence.

13 The DEQ’s analysis did not include a “hard look” at grizzly bear and wolverine impacts
14 from increased human access to sensitive wildlife habitat. *Ravalli Cty. Fish & Game Ass’n*, 273
15 Mont. at 381, 903 P.2d at 1369. Because the DEQ dismissed those impacts without examining the
16 relevant data and articulating a satisfactory explanation for its action, its decision violated MEPA.
17 *Montana Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation*, ¶ 43, quoting *Clark Fork Coal v.*
18 *Mont. Dep’t of Env’tl. Quality*, ¶ 47.

20 The Court concludes that the DEQ did not take the requisite “hard look” at the relevant data
21 regarding water quality issues. The Final EA provides only for a plan to make a plan to address
22 water quality; the DEQ selectively relied upon the Duval bore hole data and ignored other pertinent
23 water quality data; the record contradicts DEQ’s prediction that artesian discharges will not have a
24 significant environmental impact not cause harm to surface or ground water; and the DEQ did not
25 adequately address or explain its dismissal of the acid rock drainage issue.

1 In doing so, DEQ failed to adequately consider pertinent data and failed to examine the
2 relevant data. *Mont. Wildlife Fed'n.*, ¶ 43, *Clark Fork Coal*, ¶47, *National Audubon Soc'y v. Dept.*
3 *of Navy*, 422 F. 3d 174, 194, (4th Cir. 2005). The DEQ's selective reliance on the Duval borehole
4 data was arbitrary and ignored other pertinent water-quality data to the detriment of the EA process.
5 *Ravalli Cty. Fish & Game Ass'n*, 273 Mont. At 381, 903 P.2d at 1369. The DEQ ignored the expert
6 analysis of acid rock drainage. The DEQ's analysis and conclusions regarding water quality issues
7 in the EA did not meet the requirements of MEPA.
8

9 DEQ was adequately put on notice of the issue of Lucky drilling into segregated, federal
10 minerals. DEQ failed to evaluate the impacts of mining underneath National Forest lands, since if
11 Lucky demonstrates valid existing rights to such minerals in conducting its exploration activities,
12 DEQ would be unable to prohibit their development.
13

14 This is, "a secondary impact to the human environment that may be stimulated or induced
15 by or otherwise result from a direct impact of the action", which the DEQ was required to evaluate
16 under ARM 17.4.603(18). Further, in determining the impacts on the quality of the human
17 environment, the DEQ was required to consider "any precedent that would be set as a result of an
18 impact of the proposed action that would commit the Department to future actions with significant
19 impacts or a decision in principle about such further actions" ARM 17.4.608(1)(f) The granting of
20 the exploration license does set a precedent that would commit the department to the future action
21 of allowing mining and development of any valid existing rights to minerals underlying National
22 Forest lands that may be established by information gained in the exploration activities. DEQ's EA
23 is not in keeping with the mandates of MEPA with regard to this issue.
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1 Finally, the Court concludes that the DEQ, in this instance, gave unwarranted deference to
2 Lucky's proposal, without conducting an independent analysis of alternatives, particularly the "no
3 night drilling" and "one season" alternatives in order to determine whether the environmental
4 impacts could be reduced, while still meeting the basic goals of the project. The EA fails to
5 comport with MEPA in this regard.
6

7 Based upon the foregoing decision, good cause exists for entry of the following order:

8 **ORDER**

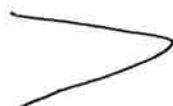
9 **I.**

10 Plaintiffs' counsel shall prepare an Order that is consistent with the Court's Decision, as set
11 forth above.
12

13 SO ORDERED this 23rd day of May, 2018.

14
15 
16 BRENDA R. GILBERT, District Court Judge

17
18 CC: Jenny K. Harbine / Joshua R. Purtle
19 C. Edward Hayes / John F. North
20 KD Feedback

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28  mid 5/23/18 p.p.