

HON. BRENDA R. GILBERT
District Judge
Sixth Judicial District Court
414 East Callender Street
Livingston, Montana 59047
406-222-4130

PARK COUNTY CLERK
OF DISTRICT COURT
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DEPUTY

MONTANA SIXTH JUDICIAL DISTRICT COURT
PARK COUNTY

PARK COUNTY ENVIRONMENTAL
COUNCIL and GREATER YELLOWSTONE
COALITION,

Plaintiffs,

vs.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY and
LUCKY MINERALS, INC.,

Defendants,

and

STATE OF MONTANA, by and through
The OFFICE OF THE ATTORNEY
GENERAL,

Intervenor.

Case No. DV-17-126

**ORDER RULING ON PLAINTIFFS'
MOTION FOR VACATUR OF
EXPLORATION LICENSE**

The Plaintiffs, Park County Environmental Council and Greater Yellowstone Coalition, (hereinafter, "Plaintiffs") filed their Motion for Vacatur of Exploration License and Brief in support on June 1, 2018. The Defendant Montana Department of Environmental Quality (hereinafter, "DEQ") initially responded to the Plaintiffs' Motion with DEQ's Opposition to Plaintiffs' Filing of First Amended Complaint for Declaratory and Injunctive Relief, Motion for Vacatur of Exploration

License, Plaintiffs' Brief in Support of Motion for Vacatur of Exploration License and to Proposed Order, filed June 6, 2018. Plaintiffs filed their Response to DEQ's Opposition to Plaintiffs' Filing of Fist (sic) Amended Complaint, Motion for Vacatur, Brief in Support of Motion for Vacatur, and Proposed Order on June 7, 2018. The State Attorney General filed its Special Appearance on June 21, 2018. Plaintiffs filed their Response to Special Appearance of the Office of the Attorney General and State of Montana on June 27, 2018. The Court entered an Order Regarding Procedure Required Upon Challenge to Constitutionality of Statute on June 29, 2018. The Court entered an Order Granting Defendant Lucky Minerals, Inc.'s Motion to Amend the June 18, 2018 Scheduling Order to allow more time for Briefing of Responses to the Motion for Vacatur. The Plaintiffs filed a Reply Brief in Support of Motion for Vacatur on July 17, 2018.

Plaintiffs filed their Renewed Notice of Constitutional Question on June 29, 2018, and served the State Attorney General by certified mail. Defendant Lucky Minerals, Inc. (hereinafter, "Lucky Minerals" or "Lucky") filed its Response in Opposition to Plaintiffs' Motion for Vacatur on July 11, 2018. The State of Montana, by and through the Attorney General, Timothy C. Fox, (hereinafter referred to as "the State") filed its Notice of Intervention herein on August 20, 2018. The State Attorney General filed its Brief in Response to Plaintiffs' Motion for Vacatur of Exploration License on October 19, 2018. The Plaintiffs filed their Reply Brief in Response to the State of Montana's Brief and in Support of Motion for Vacatur on November 7, 2018.

The Court heard oral argument with respect to the Motion for Vacatur at a hearing on January 3, 2018. The Court took the matter under advisement. Having considered the Motion and Briefs, the oral argument of counsel, and applicable legal authority, the Court now finds good cause for entry of the following Decision and Order.

DECISION

I. The Plaintiffs' Position

Plaintiffs seek an Order vacating the exploration license issued to Lucky Minerals by the DEQ. The Plaintiffs maintain that the 2011 Legislature's amendment to MEPA, §75-1-201(6)(c) and (d) (hereinafter "the Amendments") were unconstitutional, as applied to this case, and that the Court should vacate Lucky Mineral's exploration license.

Plaintiffs maintain that the Amendments unconstitutionally infringe on the Plaintiffs' fundamental right to a clean and healthful environment and further violate the State's corresponding obligation to provide adequate remedies to protect that right. Mont. Const., Article II, Section 3; Article IX, Section 1. The Plaintiffs point to *Ravalli Cty. Fish & Game Ass'n, Inc., v. Mont. Dep't of State Lands*, 273 Mont. 371, 384, 903 P.2d 1362, 1371 (1995), where the Court noted that MEPA promotes informed decision-making by requiring agencies to analyze impacts before reaching a decision. The Amendments provide that the only remedy for adjudicated MEPA violations is a remand to the agency, directing it to perform further analysis. The permit, license or other authorization issued by an agency is valid and cannot be enjoined, nullified, revoked, modified or suspended, pending the completion of an environmental review that may be remanded by a court. § 75-1-201(6)(d) MCA.

Plaintiffs argue that the Amendments upend the MEPA mandate from what was a "look before you leap" structure to a "leap before you look" structure under the Amendments. Plaintiffs maintain that the Montana Constitution prohibits this result.

The Supreme Court has held that the right to a clean and healthful environment and to reasonable public participation, found in Article II of Montana's Constitution, are fundamental rights because they are guaranteed by the Declaration of Rights. *Mont. Env'tl. Info. Ctr. v. Dept. of*

Env't. Quality, ("MEIC"), 1999 MT 248 ¶ 63, 296 Mont. 207, 988 P.2d 1236. Any statute or rule that impacts those rights must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective. *Id.*

To demonstrate a compelling interest, the State must show, "at a minimum, some interest 'of the highest order and. . .not otherwise served' or 'the gravest abuse[] endangering [a] paramount [government] interest.'" *Armstrong v. State*, 1999 MT 261, ¶ 41, n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) and *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

The environmental protection provided by Montana's Constitution was thought by the drafters, "to be the strongest environmental protection provision found in any state constitution". *MEIC*, ¶ 66 (citing Mont. Const. Convention, Vol. IV at 1200 (Mar. 1, 1972)). The Montana Constitution, Article II. Section 3 and Article IX, Section 1 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.*

Plaintiffs argue that the Amendments at issue do not serve any compelling State interest. Once the Plaintiffs demonstrate that a statute infringes upon a fundamental right then the burden shifts to the State to prove that the statute can survive strict scrutiny. *MEIC* ¶ 63, *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311, (1986). Plaintiffs maintain that the Legislators' speculation that the Amendments would stimulate or expedite industrial development in the State is not a governmental interest "of the highest order" that justifies eliminating public remedies protecting a fundamental constitutional right. *Armstrong, supra*, ¶ 41 n. 6.

Plaintiffs point to the requirement in the Montana Constitution that the Legislature “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources”, Mont. Const. Art. IX, § 1- not to eliminate such remedies for the purpose of expediting private projects before the State has adequately evaluated their significant environmental impacts. Plaintiffs argue that, even if the DEQ could demonstrate a compelling interest for eliminating any effective remedy for MEPA violations, the Amendments are not “the least onerous path that can be taken to achieve the State’s objective.” *MEIC* ¶ 63. Plaintiffs argue that the Amendments are not narrowly tailored to serve a compelling state interest and, therefore, fail the strict scrutiny test.

The Plaintiffs further argue that the Amendments violate the Plaintiffs’ constitutional right to participate meaningfully in DEQ’s decision-making process before the agency makes a final decision. The Montana Constitution provides at Article II, Section 8, that “[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Legislation that impairs the right to public participation is subject to strict scrutiny. *Reesor v. Mont. State Fund*, 2004 MT 370 ¶ 13, 325 Mont. 1, 103 P.3d 1019.

Plaintiffs argue that, although one of MEPA’s purposes is to ensure that “the public is informed of the anticipated impacts in Montana of potential state actions”, (§ 75-1-102(1)(b) MCA), the Amendments thwart this purpose. That is, under the Amendments, where DEQ is required to re-do an unlawful MEPA analysis, the public has no meaningful opportunity to participate in the DEQ’s new decision because, as a practical matter, DEQ’s unlawful decision will already have been fully implemented before a new decision-making process can occur. Thus, DEQ’s initial decision, would, for all practical purposes, constitute its final decision and public participation in a MEPA remand process would be reduced to a meaningless exercise.

Based upon Plaintiff's analysis of the unconstitutionality of the Amendments, they seek an Order vacating Lucky Minerals' exploration license. Plaintiffs reason that vacatur has been the normal remedy for an agency action that fails to comply with MEPA and that, given the invalidity of the Amendments, the same result should apply here. Plaintiffs argue that vacatur is necessary in order that the DEQ can meaningfully consider the environmental impacts of Lucky Minerals' exploration project before the decision to authorize exploration has been made and before that exploration and its environmental impacts have already occurred. Plaintiffs maintain that such vacatur is the only means of preventing the environmental harm that formed the basis for the Court's findings that DEQ violated MEPA.

II. The Defendant DEQ's Position

The DEQ filed its Response to Plaintiffs' Motion for Vacatur, explaining that, "while the DEQ respectfully disagrees with the District Court's determination that the environmental assessment prepared by DEQ regarding Lucky Minerals' exploration project was inadequate under the Montana Environmental Policy Act, the Court's summary judgment ruling remains the law of the case. Without waiving any grounds for appeal of the Court's summary judgment ruling, DEQ respectfully submits that it does not oppose, in substance, Plaintiffs' motion to vacate the exploration license issued to Lucky Minerals based upon a determination that Sections 75-1-201(6)(c) and (d), MCA, violate Article II, section 3 and Article II, section 8 of the Montana Constitution as applied to this case." DEQ filed a Clarification to their Response making it clear that it was describing the basis for the Plaintiff's Motion in the above-quoted sentence. DEQ clarified that it was not opposing Plaintiffs' Motion based upon the DEQ's determination that the statutory provisions were unconstitutional. DEQ made it clear it is taking no position one way or the other with respect to Plaintiffs' Motion.

III. The Defendant Lucky Minerals' Position

Lucky Minerals filed its Response in Opposition to Plaintiffs' Motion for Vacatur. Lucky Minerals initially emphasizes the legal standard, presuming acts of the Legislature to be constitutional. Lucky Minerals points out that legislative action is not to be declared invalid unless it, "conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt." *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 606, 508-509 (1993). cert. denied, 510 U.S. 1011, 114 S. Ct. 600, 126 L. Ed. 2d 566 (1993). Lucky Minerals argues that the Plaintiffs have misread the applicable law and have misconstrued the Constitution.

Lucky Minerals points to language in the intent and purpose section of MEPA stating that it is procedural. It argues that, in this case, the Court has determined that DEQ's Environmental Assessment was out of compliance, ordered that it be remanded to DEQ for further review, and that ends the matter. Lucky Minerals' position is that MEPA is a "procedural statute with a procedural remedy".

Lucky Minerals believes that Plaintiffs are misapprehending the Legislature's stated purpose in the MEPA Amendments, which were designed to foreclose the very type of litigation that is before the Court. Lucky maintains that, "[i]t is perfectly appropriate for the Legislature to balance Montana's economic interests with other fundamental rights and declare that MEPA is indeed purely procedural as the statute itself has proclaimed for nearly 50 years." It argues that MEPA was not intended to be a regulatory Act and that other statutes exist for the purpose of regulating water quality, air quality and pollution from mining activity. In the event that an exploration project succeeds and a mineral resource is located that is suitable for mining, an entirely new statutory scheme for obtaining an operating permit is triggered, which operations are heavily regulated.

Lucky Minerals rejects Plaintiffs' argument that Article II and Article IX of the Montana Constitution are violated by the 2011 Amendments to MEPA. Lucky points to Montana's Bill of Rights that, in addition to providing for a clean and healthful environment as an inalienable right; also provides for the right to pursue life's basic necessities, which include employment, in addition to enjoying private property and seeking health and happiness in all lawful ways. *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1176 (1996).

Lucky maintains that Plaintiffs' assumption that Article II and Article IX are self-executing is mistaken and that there is no remedy provided that arises directly from the Constitution. The Constitution, Lucky argues, instructs the Legislature to "provide for the administration and enforcement" of the duty to "maintain and improve a clean and healthful environment in Montana . . ." *MEIC v. DEQ*, 1999, MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. Lucky reasons that the Legislature has done so by passing and amending MEPA. Lucky maintains that, where Plaintiffs' cause of action arises solely from MEPA, Plaintiffs only remedy is MEPA's remedy, which is remand.

Lucky Minerals further takes issue with Plaintiffs' Article II, Section 8 argument. Lucky points out that Plaintiffs and Plaintiffs' members commented at length on DEQ's Environmental Assessment. The right to comment and be involved in the decision-making process is integral to MEPA. Lucky points out that the same statutory right to be involved in the MEPA process will be available to the Plaintiffs on remand. Lucky maintains that this is the Plaintiffs' remedy— participation in the MEPA process on remand.

IV. The Position of the State of Montana, Intervenor

The State first maintains that strict scrutiny does not apply to Plaintiffs' constitutional challenge because the Court must balance the competing rights of the Plaintiffs to a clean and healthy environment with Lucky Minerals' private property rights. The State asserts that these rights are on equal footing. The right to a clean and healthful environment is entitled to no greater protection than the rights of private landowners to possession and use of their private property. See *Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987), holding that the real property interests of private landowners are important, as are the public's property interest in water.

The State points to the Court's duty to review the statute at issue and determine whether it adequately balances the competing fundamental rights of Plaintiffs and Lucky Minerals. The State maintains that the Court is obligated to presume the statute is constitutional and cannot find the MEPA amendment invalid unless, in the judgment of the Court, it conflicts with the Constitution beyond a reasonable doubt. Plaintiffs bear the burden of proving the statute unconstitutional beyond a reasonable doubt and every presumption must be indulged in favor of the statute.

The State's analysis is that a MEPA injunction is not necessary, given the environmental protections under the Metal Mine Reclamation Act (MMRA). The State maintains that the rigorous environmental protections of the MMRA, during the exploration phase, ensure protection of the right to a clean and healthful environment. The State cites to ARM 17.24.105 that governs activities during the exploration phase. The MMRA also provides for rigorous environmental protections during the post-exploration reclamation phase, which the State advances as ensuring protection of the right to a clean and healthful environment.

The State argues that the MMRA provides ample environmental protections and remedies, including injunctive relief in the event that the operator fails to comply with the MMRA safeguards.

The State maintains that, given the MMRA protections and available remedies, removal of the MEPA injunction remedy has not compromised the right to a clean and healthful environment.

In terms of the Plaintiffs' argument concerning the right of public participation, the State responds by pointing out that the public had the right to participate in the legislative process that led to elimination of the remedy of an injunction under MEPA. The State points to the public participation in the EA process undertaken by DEQ. Finally, the State submits that if, after the exploration phase, Lucky Minerals applies for an operating permit, an EIS is a certainty and the public will have exhaustive opportunities to fully participate.

V. Plaintiffs' Position in Reply

In their Reply Brief, Plaintiffs take issue with Lucky's position that Plaintiffs' rights are protected by remand of the Environmental Assessment. Plaintiffs point out that after remand, the DEQ would evaluate the potential impacts of actions that would have already occurred. Plaintiffs argue that the remand without injunctive relief would turn the MEPA review into a "meaningless paper exercise".

Plaintiffs rely upon the purpose of MEPA's procedures being to "prevent or eliminate environmental damage", *Pompey's Pillar Historical Ass'n v. Mont. Dep't of Env'tl. Quality*, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148, and ensure that agencies "may make informed decisions" about our state's natural resources. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 Mont. 234, ¶ 14, 366 Mont. 399, 288 P.3d 169.

Plaintiffs continue to maintain that the Legislature has already balanced the competing interests of the right to a healthful environment and the right to use private property free of undue government regulation in adopting MEPA. However, Plaintiffs argue that the requirement that these interests be balanced was obliterated by the 2011 Amendments.

Plaintiffs point to *MEIC, supra*, as well as *Cape-France Enters. v. Estate of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011, to refute Lucky Minerals' claim that Plaintiffs have no remedy under the clean and healthful provision of the Montana Constitution because those provisions are not "self-executing". The Supreme Court has made it clear that statutes that implicate these rights should be declared unconstitutional if they do not withstand strict scrutiny. *MEIC*, ¶¶ 80, 81.

Plaintiffs take issue with Lucky Minerals' argument that other environmental regulations provide the protection sought by the Plaintiffs, such as the Montana Water Quality Act and provisions of the MMRA. Plaintiffs argue that the Legislature determined that, in addition to such statutes, MEPA's requirement that environmental impacts be studied before action is taken was necessary to implement the right to a clean and healthful environment. Plaintiffs argue that requirement cannot be arbitrarily discarded. Plaintiffs cite § 75-1-102(1) (MEPA enacted to implement the constitutional environmental rights); Mont. Laws 2003, Ch. 361 (HB 437) (providing for the legislative implementation of Article II, Section 3 and Article IX of the Montana Constitution through a number of statutes, including the Montana Water Quality Act, the Montana Clean Air Act, mine permitting laws, and MEPA).

Plaintiffs refute Lucky Minerals' argument that there is no violation of Plaintiffs' right to public participation by the Amendments because Plaintiffs will have an opportunity to participate in the MEPA process on remand. Plaintiffs point to the language of the Constitution guaranteeing "participation . . . *prior* to the [agency's] final decision." Mont. Const., Art. II, Section 8. (emphasis added). Plaintiffs argue that the 2011 Amendments prohibit meaningful participation.

In Reply to the Intervenor's Brief, Plaintiffs disagree with the emphasis on Lucky Minerals' private property rights, given that Lucky's right to use and enjoy its property is subject to reasonable environmental regulation, including MEPA's environmental review requirement.

Plaintiffs argue that the State acknowledges as much by asserting that the MMRA imposes, “exhaustive environmental safeguards” on operators like Lucky Minerals.

To the extent that Lucky argues that vacatur would constitute a deprivation of its enjoyment of protected property interests, Plaintiffs point to this same remedy being available under the MMRA, and the fact that MEPA did not face a constitutional challenge over the forty years it existed with no limit on a vacatur remedy.

VI. Court’s Analysis

A. Construing Plaintiffs’ Constitutional Challenges

The fundamental purpose, “in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it”. *General Agric. Corp. v. Moore* (1975), 166 Mont. 510, 518, 534 P.2d 859, 864. Accordingly, the Court, “should keep in mind the object sought to be accomplished . . . and proper regard should be given to the evils, if any, sought to be prevented or remedied. . .”. *Id.*

The legal standard is that acts of the Legislature are presumed to be constitutional. Legislative action is not to be declared invalid unless it, “conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.” *Stratemeyer v. Lincoln County*, 259 Mont. 147, 150, 855 P.2d 606, 508-509 (1993). cert. denied, 510 U.S. 1011, 114 S. Ct. 600, 126 L. Ed. 2d 566 (1993).

The Plaintiffs’ challenge to the constitutionality of the Amendments is based upon violations of Article II, Section 3 and Article IX, Section 1 of the Constitution.

Article IX, of the Constitution of the State of Montana, at Section 1 provides:

ENVIRONMENT AND NATURAL RESOURCES

Section 1. Protection and improvement.

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

Article II of the Constitution of the State of Montana, at Section 3, sets forth certain

Inalienable Rights, as follows:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment, and enjoying the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

B. The Level of Scrutiny

“In order to be fundamental, a right must be found within Montana’s Declaration of Rights or be a right without which other constitutionally guaranteed rights would have little meaning”. *In re C.H.* (1984), 210 Mont. 184, 201, 683 P.2d 931, 940. In *Armstrong v. State*, 1999 MT 261, ¶ 41, 296 Mont. 361, 986 P.2d 364, the Court addressed the fundamental right of individual privacy under Montana’s Constitution requiring that the government demonstrate a “compelling state interest for infringing this right.” The Court noted that, “[w]e have not, heretofore, specifically defined what makes a state interest ‘compelling’, rather leaving that determination to be made case by case.” *Id.* The Court went on to hold that,

Nonetheless, we agree with the United States Supreme Court’s test in the First Amendment free exercise cases that to demonstrate that its interest justifying infringement of a fundamental constitutional right is ‘compelling’ the state must show, at a minimum, some interest ‘of the highest order and . . . not otherwise served, see *Wisconsin v. Yoder*, (1972), 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15, or “the gravest abuse[], endangering [a] paramount [government] interest[],” *Thomas v. Collins*, (1945), 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430.

In the case before the Court, the parties dispute the standard to be applied in addressing the constitutionality of the Amendments. The Plaintiffs argue that, given the fundamental right to a clean and healthful environment is implicated, the Court must strictly scrutinize the Amendments at issue and determine whether there is a compelling state interest for them. Lucky Minerals and the State both argue that the Court must balance the competing interests of the right to a clean and healthful environment against Lucky Minerals' private property rights.

The State relies upon *Galt v. State*, 225 Mont. 142, 148, 731 P.2d 912, 916 (1987), where the Court addressed the real property interests of private landowners and the public's interest in water. The Court held that both such rights are constitutionally protected, and that, "[t]hese competing interests, when in conflict, must be reconciled to the extent possible." The Court found the portion of §23-2-311(3)(e) MCA, requiring landowners to bear the cost of constructing a portage route around artificial barriers on water courses to be unconstitutional. The Court found the unconstitutional portions of the statute to be subject to severance and therefore, left the balance of the statute intact.

The State further relies upon the "right to know" cases, where the Court has balanced the right to know provisions of Article II, Section 9 against the right of privacy found in Article II, Section 10. *Bozeman Daily Chronicle v. City of Bozeman Police Dept.*, 260 Mont. 218, 224, 859 P.2d 435, 439 (1993). See also *Krakauer v. State*, 2016 MT 231, 384 Mont. 527, 381 P.3d 524.

However, in more recent decisions, our Supreme Court has addressed the level of scrutiny to be applied in cases involving the right to a clean and healthful environment where private property interests were also at stake. In *Mont. Env'tl. Info. Ctr. V. Dep't of Env'tl. Quality*, ("MEIC"), 1999 MT 248 ¶¶ 63-65, 296 Mont. 297, 988 P.2d 1236, the Court addressed a constitutional challenge to § 75-5-317(2)(i) MCA (1995), allowing discharges of water from wells or monitoring well tests,

which degrade high quality waters without review. pursuant to Montana's nondegradation policy found at §75-5-303(3) MCA (1995). The Plaintiff environmental group sued the DEQ and the mining company, Seven-Up Pete Joint Venture subsequently intervened.

In *MEIC*, the Plaintiffs challenged the statute at issue as violating Article IX, Section 1(1) and (3) of the Montana Constitution. The issue on appeal was whether the Plaintiffs had standing to challenge the constitutionality of the statute and whether the statute implicated either Article II, Section 3 or Article IX, Section 1 of the Constitution. The Court held that the Plaintiffs did have standing and applied strict scrutiny in its analysis:

Applying the preceding rules to the facts in this case, we conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path than can be taken to achieve the State's objective.

MEIC, ¶63.

The Court, in *MEIC*, reviewed the record of the Montana Constitutional Convention and concluded that,

[t]he delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.

MEIC, ¶ 77.

Ultimately, the Court, in *MEIC*, held that to the extent § 75-5-317(2)(i), MCA (1995) arbitrarily excluded certain activities from nondegradation review, it violated the environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, as applied to the facts of that case. *MEIC* at ¶80. Significantly, *MEIC* addressed a circumstance where, as here, the mining company having private property interests was a party. The Court nonetheless applied strict scrutiny in its constitutional analysis.

Based upon the Plaintiffs' challenge of the Amendments based upon Article II, Section 3 in addition to Article IX, Section 1, and the authority set forth above, this Court concludes that strict scrutiny must be applied in its constitutional analysis.

C. Application of Strict Scrutiny

In analyzing the constitutionality of the Amendments, the purposes of MEPA are pertinent. MEPA requires that an agency take procedural steps to review “projects, programs, legislation, and other major actions of state government significantly affecting that quality of the human environment” in order to make informed decisions”. §75-1-201(1)(b)(iii); §26.2.643, ARM. One of MEPA’s purposes is to “prevent, mitigate, or eliminate damage to the environment”. § 75-1-102(2) MCA. The Court has reiterated that the purpose of MEPA’s procedures is to “prevent or eliminate environmental damage”. *Pompey’s Pillar Historical Ass’n v. Mont. Dep’t of Envtl. Quality*, 2002 MT 352, ¶17, 313 Mont. 401, 61 P.3d 148.

The Amendments eliminated the injunctive relief that was available under MEPA since its enactment over forty years ago. Under the Amendments, the only remedy for a Court’s determination of a MEPA violation is to remand the matter to the decision-making agency. The agency’s decision, whether it be a permit, license, or other authorization cannot be enjoined, suspended or otherwise affected, pending the remand process. § 75-1-201 (6)(d) MCA.

The Amendments eliminated any ability on the part of a Court to prevent any environmental harm that would ensue from a MEPA violation, while the matter is further addressed by the agency upon remand. The Amendments violate the fundamental right to a clean and healthful environment and directly contravene the State's corresponding obligation to provide adequate remedies to protect that right. The Amendments leave a party who has succeeded in challenging an agency's MEPA decision with a meaningless remedy. The underlying environmental issues and concerns about degradation, leading to a determination that an agency's MEPA decision was insufficient, would unfold for what could be a very considerable period of time, given the remand process and litigation that could follow. The agency would be left evaluating the "potential" impacts of actions that would already have occurred.

Given the Court's determination that the Amendments violate a fundamental constitutional right, the burden shifts to the State to show a compelling state interest for the elimination of injunctive relief. That is, at a minimum, the State must show some interest 'of the highest order and . . . not otherwise served'. *Armstrong, supra*. The Legislators' speculation that the Amendments would stimulate industrial development is not a governmental interest 'of the highest order and not otherwise served' sufficient to justify eliminating public remedies protecting a fundamental constitutional right. Even if the State could demonstrate a compelling interest for the Amendments, they are not "the least onerous path that can be taken to achieve the State's objective". *MEIC* ¶ 63. In passing the Amendments at issue, the Legislature failed to give credence to its constitutional obligation to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources". Mont. Const. Article IX, Section 1.

D. Consideration of Lucky Minerals' Private Property Rights

The Court's decision in *MEIC* did not balance the competing private property rights against the right to a clean and healthful environment. However, from its inception, MEPA itself balanced those competing rights. When adopting MEPA, the Legislature recognized that its purpose is,

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

§75-1-102(2) MCA. This has been the stated purpose of MEPA since it was enacted over forty years ago. Yet, the Amendments upset the balance by rendering the remand process ineffective and meaningless.

The State and Lucky argue that, nonetheless, the Court should balance their private property rights against the right to a clean and healthful environment. The Court recognizes Lucky Minerals' private property interests are fundamental and significant. However, where "regulations are designed to 'have a real and substantial bearing upon the public health, safety, morals and general welfare of a community', such regulations do not unduly interfere with the fundamental nature of private property ownership." *Williams v. Bd. of Cy. Comm'rs of Missoula Cty.*, 2013 MT 243, ¶ 56, 371 Mont. 356, 308 P.3d 88, quoting *Freeman v. Bd. of Adjustment*, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934).

Lucky Minerals' private property interests in terms of mining are subject to regulation, including licensing requirements. Striking the Amendments from MEPA at issue here would not preclude Lucky from exercising its intended use of the property, subject to DEQ's compliance with MEPA. Any delay of Lucky's ability to proceed when balanced with the need for a meaningful,

informed process of agency decision-making is warranted. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 339-342, 122 S. Ct. 1465, 1488-1489, 152 L. Ed. 2d 517, 551-553.

Just as the State and Lucky argue that Lucky Minerals' private property interests would be violated by voiding the Amendments, they also assert that the protections of the MMRA provide adequate environmental protection. This argument fails to appreciate the manner in which MEPA and the MMRA have worked in tandem. Historically, the MEPA process has been used to identify environmental impacts and the DEQ uses that information to propose mitigation measures that reduce environmental impacts. Such mitigation measures have been incorporated into DEQ's final permit decision and the exploration license issued to the permit applicant. The mitigation measures can then be enforced under the MMRA as permit requirements. See § 82-4-361(2)(a) MCA.

Thus, a MEPA process that retains timely public input provides valuable information that helps DEQ to make informed decisions. When the exploration license is finalized, the MEPA review cannot be revisited to correct any errors or shortcomings. This is the value of the vacatur remedy-- to prevent harmful activity until the environmental impacts can be addressed in a meaningful way. Under *MEIC*, "anticipatory and preventative" measures are essential to upholding the right to a clean and healthful environment. *MEIC, supra*, ¶ 77.

Thus, the State and Lucky Minerals' position that the Amendments should stand because the MMRA would provide sufficient environmental protections and uphold their property rights is not well-taken. The State and Lucky have failed to demonstrate a compelling state interest.

Indulging every presumption in favor of their constitutionality, the Amendments, as applied to this case, violate Article II, Section 3, Article II, Section 8 of the Montana Constitution beyond a reasonable doubt.

E. The Lengthy History of Vacatur as a Remedy

When considering Lucky Minerals' private property interests in light of the Amendments at issue, the Court cannot ignore the lengthy history of vacatur as a remedy upon an adjudicated MEPA violation. Prior to the Amendments being passed, MEPA had been in effect since its enactment in 1971, without limitation on a vacatur remedy and with express, if stringent, provisions for injunctive relief. During its long history, MEPA had not been successfully challenged on the basis of these remedies violating constitutional property rights.

Moreover, the National Environmental Policy Act, (NEPA) was enacted in 1970 and the remedy of vacatur remains in effect in NEPA cases. "As the presumption is in favor of remand with vacatur vis-à-vis remand without vacatur, so is the presumption in favor of vacatur vis-à-vis a permanent injunction." *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1113, 2018 U.S. Dist. LEXIS 67855, citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010). Our Court has held that since MEPA is modeled after NEPA, "when interpreting MEPA, we find federal case law persuasive". *Kadillak v. Anaconda Co.* (1979) 184 Mont. 127, 137, 602 P.2d 147, 153.

Without demonstrating a compelling state interest, the Legislature eliminated a long-established remedy under MEPA and, in doing so, upset the balance between the fundamental right to a healthful environment and fundamental property rights that was intrinsic in MEPA from its inception.

F. Violation of Right to Public Participation

The Plaintiffs bring a constitutional challenge to the Amendments based upon Article II, Section 8 of the Constitution of the State of Montana, which provides that:

Section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable

opportunity for citizen participation in the operation of agencies prior to the final decision as may be provided by law.

Legislation that impairs the right to public participation is subject to strict scrutiny. *Reesor v. Mont. State Fund*, 2004 MT 370 ¶ 13, 325 Mont. 1, 103 P. 3d 1019.

Under the Amendments, when a DEQ decision is declared to be in violation of MEPA, and the matter is remanded to DEQ, the public has no meaningful chance to participate in the agency decision. This is so because without a vacatur remedy, the project is allowed to go forward and the initial decision that violated MEPA, as a practical matter, becomes the final agency decision. Although Plaintiffs would not be prevented from participating in the MEPA remand process, their participation would be meaningless.

The State's and Lucky's responses to the Plaintiffs' challenge based upon their right to public participation ring hollow. That Plaintiffs could have participated in the Legislative process that led to the Amendments is of no import here. The fact that the public has participated in the prior EA process does not resolve the issue of the lack of a meaningful right to participate on remand.

The Court concludes that the Amendments, as applied to this case, do violate the Plaintiffs right to participate, in violation of Article II, Section 8 of the Montana Constitution. Indulging every presumption in favor of their constitutionality, the Amendments violate the Plaintiffs' right to participate, as applied to this case, beyond a reasonable doubt.

VII. Conclusion

The Montana Supreme Court has spoken eloquently to this issue:

It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can

conscientiously and with due regard to duty and official oath decline the responsibility... The Constitution apportions the powers of governments but it does not make any one of the three departments subordinate to another when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. ... they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.

State v. Dixon (1923), 66 Mont. 76, 84-85, 213 P. 227, 229.

The environmental protection provided by Montana's Constitution was thought by the drafters, "to be the strongest environmental protection provision found in any state constitution". *MEIC, supra*, ¶77. citing Mont. Const. Convention, Vol. IV at 1200 (Mar. 1, 1972). In passing the Amendments at issue here, the Legislature upset the balance of competing fundamental rights that was inherent in MEPA since its enactment. The Amendments do not survive strict scrutiny. Recognizing Lucky Minerals' private property rights, and the State's desire to stimulate industrial development, the Amendments are not interests that justify eliminating the Plaintiffs' ability to meaningfully challenge MEPA's decision, even where it has been determined to be in violation of MEPA's terms. The Legislature violated its constitutional responsibilities, as applied to this case, under Article IX, Section 1, in passing the Amendments.

The Amendments, as applied to this case, violate Article II, Section 3, Article II, Section 8, and Article IX, Section 1 of the Montana Constitution. Indulging every presumption in favor of their constitutionality, the Court concludes that the Amendments, as applied, violate the Montana Constitution beyond a reasonable doubt.

As such, the decision to issue an exploration license to Lucky Minerals is deemed void. The Plaintiffs' Motion for Vacatur must be granted.

ORDER

I.

The 2011 Legislature's amendments to the Montana Environmental Policy Act set forth in, §75-1-201(6)(c) and (d) MCA are unconstitutional, and violate Article II, Section 3, Article II, Section 8, and Article IX, Section 1 of the Montana Constitution, as applied to this case.

II.

The remaining provisions of §75-1-201 MCA are not affected by this Order and remain in full force and effect.

III.

The Plaintiffs' Motion for Vacatur is granted. The Exploration License that is the subject of this case issued by DEQ to Lucky Minerals, Inc. is void and of no further force and effect.

DATED this 12th day of April, 2019.


HON. BRENDA GILBERT
District Court Judge

Cc: Jenny Harbine/ Joshua R. Purtle
KD Feedback
C. Edward Hayes
Robert Cameron

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