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MONTANA SIXTH JUDICIAL DISTRICT COURT  
PARK COUNTY

PARK COUNTY ENVIRONMENTAL  
COUNCIL and GREATER YELLOWSTONE  
COALITION,

Plaintiffs,

v.

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

Defendants.

PARK COUNTY CLERK  
OF DISTRICT COURT  
JUNE LITTLE

2017 SEP 22 AM 8 35

FILED  
BY        MOLLY BRADBERRY  
CLERK

Case No. DV-17-124

**COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

## INTRODUCTION

1. This case challenges state approval for a plan by Canadian-based Lucky Minerals (“Lucky”) to explore for gold and other minerals in Emigrant Gulch above Montana’s iconic Paradise Valley, approximately 30 miles north of Yellowstone National Park. Lucky’s project aims to pave the way for a large-scale gold mine in this sensitive and scenic area. More than 300 Park County, Montana businesses and thousands of individuals have objected to the project on grounds that it would industrialize a remote area that is home to grizzly bears, wolverines, and other wildlife, and would threaten to dismantle Park County’s tourism economy that depends on clean water and pristine views. However, on July 26, 2017, the Montana Department of Environmental Quality (“DEQ”) determined that the exploratory drilling—which would occur 24 hours each day between July 15 and October 15 for two consecutive years—would not cause any significant environmental impacts and approved the project.

2. DEQ’s determination violated the Montana Environmental Policy Act (“MEPA”), which was enacted “to prevent or eliminate environmental damage” by fostering more informed decision-making by state agencies. Pompeys Pillar Historical Ass’n v. Mont. Dep’t of Envtl. Quality, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148; see also Mont. Code Ann. § 75-1-102(3) (MEPA’s purpose is “to inform the public and public officials of potential impacts resulting from decisions made by state agencies”). Although DEQ acknowledged in its Final Environmental Assessment (“Final EA”) that the drilling project could harm sensitive wildlife and risk pollution of water resources, among other things, DEQ arbitrarily deemed these impacts insignificant without disclosing any legitimate rationale for its determination based on the evidence before the agency. And DEQ failed altogether to evaluate and disclose the potentially severe impacts of full-scale mining in Emigrant Gulch that could result from the exploration

project. Absent a rational finding that exploration in Emigrant Gulch will not cause significant environmental impacts, DEQ was required under MEPA to prepare an environmental impact statement (“EIS”) thoroughly vetting the project’s impacts.

3. In addition to its failure to rationally assess the project’s environmental impacts, DEQ dismissed feasible project alternatives that could reduce the project’s acknowledged impacts, improperly deferring to Lucky’s proposed project scope without an independent assessment of the need for such a large exploration project, as MEPA requires.

4. In sum, DEQ failed to take a hard look at the environmental impacts of mineral exploration in Emigrant Gulch, dismissed evidence of significant impacts requiring preparation of an EIS, and failed to consider potentially reasonable alternatives to the project Lucky has proposed. DEQ’s decision to issue an exploration permit based on this incomplete environmental analysis was therefore arbitrary, capricious, and contrary to MEPA.

### **JURISDICTION AND VENUE**

5. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; and the Montana Environmental Policy Act, Mont. Code Ann. § 75-1-201.

6. Venue is proper in this district because plaintiff Park County Environmental Council is headquartered in this district, Mont. Code Ann. § 25-2-126(1), and the exploration project plaintiffs challenge will occur in Park County, Mont. Code Ann. § 75-1-108.

### **PARTIES**

7. Plaintiff Park County Environmental Council (“PCEC”) is a not-for-profit community organization based in Livingston, Montana, that aims to protect and enhance the quality of life in Park County by working with community members to preserve and restore our

rivers, wildlife, and landscapes. PCEC's vision is to create resilient ecosystems, communities, and economies in Park County by advocating for open lands and clean air and water.

8. Plaintiff Greater Yellowstone Coalition ("GYC") is a regional conservation organization based in Bozeman, Montana, with offices in Idaho and Wyoming and more than 90,000 members and supporters from across the country and within the Northern Rockies. GYC's mission is to protect the lands, waters, and wildlife of the Greater Yellowstone Ecosystem now and for future generations.

9. Plaintiffs' members include residents living in communities throughout Paradise Valley, including Old Chico and Emigrant Gulch, and visitors enjoying the Greater Yellowstone Ecosystem, the Custer Gallatin National Forest, the Yellowstone River, Old Chico and Chico Hot Springs. Plaintiffs' members live, work, and recreate in and around the area that will be affected by the proposed exploration project. Plaintiffs' members seek opportunities to view grizzly bears, wolverines, and other wildlife in Emigrant Gulch and nearby drainages in the Absaroka Mountains. Plaintiffs' members also fish in the Yellowstone River, and rely on the high quality of water in the Yellowstone and its tributaries to support a healthy fish population. Many of plaintiffs' members rely for their livelihoods on the tourism and recreation industries in Paradise Valley and Yellowstone National Park, which depend on the persistence of the unique environmental values the region has enjoyed for thousands of years.

10. Plaintiffs and their members are among the thousands of people who submitted comments to DEQ to urge the agency to thoroughly evaluate the many significant impacts of Lucky's exploration project in Emigrant Gulch through preparation of an EIS. Plaintiffs and their members' aesthetic, conservation, recreational, scientific, educational, economic, and wildlife preservation interests have been, are being, and will continue to be adversely affected by

DEQ's failure to adequately evaluate and disclose all the impacts of the proposed exploration project, and by the proposed exploration project itself.

11. Defendant Montana Department of Environmental Quality ("DEQ") is the agency charged with issuing permits for mineral exploration under the Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-332, and evaluating the environmental impacts of proposed exploration under MEPA, Mont. Code Ann. § 75-1-201. DEQ prepared and issued the Final EA approving the proposed exploration project in Emigrant Gulch.

12. Defendant Lucky Minerals, Inc. is a Canadian-based corporation that holds the mineral exploration license that is challenged in this proceeding, and is therefore a proper party to this action under Mont. Code Ann. § 27-8-301. According to its website, "Lucky Minerals is a venture stage exploration company that is targeting a large-scale porphyry copper-gold-molybdenum system in southern Montana that could potentially host a multi-million ounce gold deposit." See Lucky Minerals, Inc., [www.luckyminerals.com](http://www.luckyminerals.com) (last visited Sept. 21, 2017).

## **BACKGROUND**

### **I. THE PROPOSED EXPLORATION IN PARADISE VALLEY**

13. Lucky Minerals proposes to explore for gold in one of the most spectacular areas of the Custer Gallatin National Forest, just 30 miles north of Yellowstone National Park. Emigrant Peak, near the site of the proposed exploration, is within the Absaroka Mountains and lies just outside the rugged and remote Absaroka-Beartooth Wilderness. The nearly 11,000-foot high peak is one of the most prominent mountain tops visible from the aptly named Paradise Valley, to the west. Emigrant Peak is flanked by Emigrant Creek (the waterbody in Emigrant Gulch) on the north and Sixmile Creek on the south, both of which are tributaries of the Yellowstone River. The Absaroka Mountains, including Emigrant Peak and its adjacent valleys,

are home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, grizzly bears, and wolves. The Absarokas also provide important, occupied habitat for state-listed species of concern, including wolverines and grizzly bears, as well as Canada Lynx, which is a threatened species under the federal Endangered Species Act. Further, as part of the Greater Yellowstone Ecosystem, these public lands constitute part of the largest intact natural areas in the lower-48 United States.

14. For these reasons, Emigrant Peak and its surrounding drainages are important places for people throughout the country. But they are also local treasures. Emigrant Peak is one of the most popular year-round recreation destinations in Montana, including for hiking in the summer and backcountry skiing in the winter. Since 1900, area residents and visitors have soaked in the natural mineral pools of Chico Hot Springs, which sits at the mouth of Emigrant Gulch. These features and the pristine beauty of the area are also important to the local economy, supporting tourism that directly and indirectly employs large numbers of Park County residents.

15. The proposed mineral exploration project would introduce industrial activity into the Emigrant Peak area, which has not seen significant mining or exploration activity for more than 20 years. Lucky proposes to drill 46 boreholes at 23 locations in the so-called St. Julian Claim Block in Emigrant Gulch, just up the road from Chico Hot Springs. Final EA at 19. Each hole would be drilled to depths between 1,000 and 2,000 feet. Id. at 20. To access this area, Lucky proposes to improve the Emigrant Creek Road and certain Forest Service roads, which are currently in poor condition and inaccessible to most vehicles. Road improvements will include “grading in localized areas, as necessary, in order to keep them serviceable for the type of vehicles that would be involved with the Proposed Action;” clearing of rock and other debris

from the road surface; and “slop[ing] to enhance draining and prevent channeling.” Id. at 17. DEQ acknowledges that “[i]mprovements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage,” impacting sensitive species such as wolverines. Id. at 66. Indeed, “[g]iven the low reproductive potential of wolverines, the impacts of improved access to more remote areas may be detrimental to regional populations.” Id. at 66 (citation omitted).

16. Exploration will continue for nearly 24 hours a day over two three-month field seasons. Id. at 16, 20. Lights similar to those used by highway construction crews would light the operation every night, disturbing nearby wolverines, bats, and other wildlife. Id. at 20, 63–66. The project would require use of a D-7 bulldozer, a G-12-14 grader, a JD-50 excavator or backhoe, two LF-70 drilling machines, three diesel- or gas-powered water pumps, two service trucks, one four-by-four pickup truck, and two ATVs. Id. at 17. Ten workers would be present in the project area at all times. Id. at 20.

17. Although significant in its own right, the proposed project is only the first phase of “an aggressive exploration program,” that Lucky proposes to conduct in Emigrant Gulch in the coming years. Lucky Minerals, Technical Report, The Emigrant Mining District Project, at 7 (Mar. 2015). In later phases, Lucky intends to construct new roads and drill at additional locations, on both private property and public land. Id. at 8, 73. Lucky’s “[o]verall target” is a mine capable of producing millions of ounces of gold, copper, and silver. Id. at 73.

18. The affected community in Park County, Montana—including more than 300 businesses—and Montana’s entire congressional delegation have opposed Lucky’s plan for gold mining in Emigrant Gulch. Park County’s newspaper, The Livingston Enterprise, editorialized that, “[a]s we have learned from a long, sordid history of mining in Montana, we must be

selective and critical in determining where companies are given the green light for resource extraction. ... Emigrant Peak is the ideal location for many activities, but a mine exploration project isn't one of them.” Justin Post, There's a place for mines, and it's not on Emigrant Peak, Livingston Enterprise (July 10, 2015). Community meetings in Park County have drawn in hundreds of local residents, revealing substantial opposition to any proposal for exploration drilling in Emigrant Gulch. The vast majority of the more than 3,000 comments DEQ received on its draft environmental assessment for Lucky's proposal highlighted the harm Park County's environment, economy, residents, and businesses will suffer if the exploration project goes forward.

19. Reflecting this opposition to gold exploration in Emigrant Gulch, on November 21, 2016, the U.S. Forest Service and Department of Interior announced a proposal to withdraw 30,000 acres of land in Paradise Valley—including National Forest System lands adjacent to Lucky's proposed project—from mineral exploration and development. See Notice of Application for Withdrawal and Notification of Public Meeting, 81 Fed. Reg. 83,867, 83,867 (Nov. 22, 2016). The proposal had the immediate effect of preventing mining activity, subject to valid existing rights, for two years. Id. If finalized, the withdrawal will prevent mining activity on these lands for as many as 20 years. Id. U.S. Secretary of Interior Ryan Zinke recently announced that the Department of Interior will finalize the withdrawal “as quickly as possible” because “[s]ome places are too precious to mine.” Matthew Brown, Assoc. Press, Zinke urges mining ban near Yellowstone, Billings Gazette (Aug. 28, 2017), [http://billingsgazette.com/news/government-and-politics/zinke-urges-mining-ban-near-yellowstone/article\\_4327a00a-99f1-5b15-a481-523627192298.html](http://billingsgazette.com/news/government-and-politics/zinke-urges-mining-ban-near-yellowstone/article_4327a00a-99f1-5b15-a481-523627192298.html). The withdrawal is intended “to protect and preserve the scenic integrity, important wildlife corridors, and high quality recreation values of the Emigrant Crevice

area located in the Custer Gallatin National Forest, Park County, Montana.” 81 Fed. Reg. at 83,867.

20. Those same values the federal withdrawal seeks to preserve are threatened by the exploration project Lucky intends to conduct on its private claims, which is not precluded by the public lands withdrawal. Given the intensity of the proposed industrial activity within sensitive and remote lands in Emigrant Gulch and the likely significant local and regional impacts, it was critical that DEQ fully and rationally evaluate the project’s environmental impacts as required by MEPA. In addition, there is significant uncertainty about Lucky’s ability to use exploratory drilling on private lands to establish rights to develop a full-scale mine on adjacent National Forest system lands, notwithstanding the withdrawal. DEQ’s MEPA analysis failed to adequately evaluate and disclose all of these direct and indirect impacts, and its decision to issue an exploration license on the basis of such deficient environmental analysis was arbitrary, capricious, and contrary to law.

## **II. MEPA**

21. MEPA was designed “to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” Mont. Code Ann. § 75-1-102(2). To meet this purpose, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a given project or proposal.” Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; see also Mont. Code Ann. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d). The agency must consider, among other things, reasonable alternatives to the proposed action, Mont. Code Ann. §§ 75-1-201(1)(b)(iv)(C), 75-1-201(1)(b)(v); the direct, indirect, and cumulative environmental impacts of the action, id. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.609(3)(d) (requiring an

evaluation of “impacts, including cumulative and secondary impacts, on the physical environment”); and “the economic advantages and disadvantages of the proposal,” Mont. Code Ann. § 75-1-201(1)(b)(iv)(H); see also Admin. R. Mont. 17.4.609(3)(e). In evaluating environmental impacts pursuant to MEPA requirements, “[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal. v. Mont. Dep’t of Env. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

22. DEQ must prepare an environmental impact statement (“EIS”) before granting an exploration license if the proposed project will “significantly affect[] the quality of the human environment.” Admin. R. Mont. 17.4.607(1). DEQ may issue an exploration license without preparing an EIS only if it rationally determines through preparation of an environmental assessment (“EA”) that the project’s impacts will not be significant, see id. 17.4.607(1)(b), or that otherwise significant impacts can be mitigated below the level of significance, id. 17.4.607(4) (“For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur.”). (An EA or EIS is not required for certain limited categories of actions, none of which is relevant here. See Admin R. Mont. 17.4.607(5).)

23. In determining whether the impacts of a proposed action will be significant, the Department must consider:

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

- (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
- (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
- (e) the importance to the state and to society of each environmental resource or value that would be affected;
- (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
- (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

Admin. R. Mont. 17.4.608(1).

24. In addition, “[a]gencies must prepare environmental impact statements whenever a federal action is ‘controversial,’ that is, when ‘substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.’” Nat’l Parks Conservation Ass’n v. Babbitt, 241 F.3d 736 (9th Cir. 2001) (quoting Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1536 (9th Cir. 1997)), abrogated in other part by Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 157 (2010); accord Protecting Paradise v. Mont. Dep’t of Env’tl. Quality, No. DV-12-123, slip. op. at 10–11 (Mont. 6th Jud. Dist. July 16, 2013) (applying “substantial questions” standard in MEPA case). Where an uncertain impact of an agency action is potentially severe, DEQ may not deem it insignificant without “reasonable assurance ... that the impact will not occur.” Admin. R. Mont. 17.4.608(1)(b).

25. As set forth below, DEQ did not meet these legal standards before granting Lucky’s exploration license.

### III. DEQ'S FLAWED MEPA ANALYSIS

26. DEQ began its environmental review after Lucky filed its first exploration license application in April 2015. Final EA at 9. The original application included proposed drilling on both private patented mining claims (the “St. Julian Claim Block”) and adjacent National Forest land. Id. at 9. DEQ and the Custer Gallatin National Forest informed the public of this proposal on June 2, 2015, and requested comments concerning the scope of their environmental review by July 15, 2015. Id. at 10. The agencies later extended the scoping comment period to August 20, 2015. Id. DEQ received roughly 6,250 public comments during the scoping period. Id.

27. On November 30, 2015, Lucky withdrew its initial application and submitted a new proposal to drill on private land only. Final EA at 10. DEQ released a Draft Environmental Assessment (“Draft EA”) for the proposal on October 13, 2016, and accepted public comments on the draft until December 12, 2016. Id. Members of the public submitted 3,384 comments on the Draft EA, primarily opposing the project. See id. at 168.

28. DEQ issued its Final Environmental Assessment (“Final EA”) on July 26, 2017. The Final EA identifies an “agency-modified alternative,” which adopts Lucky’s proposal with slight modifications that, according to DEQ, will “address potential [environmental] impacts.” See Final EA at 21.

29. The Final EA does not, however, rationally evaluate some of the project’s most troubling impacts, or explain how measures included in the agency-modified alternative will ensure those impacts will not be significant. The Final EA also dismisses without any legitimate explanation project alternatives that could mitigate some of the potentially significant impacts DEQ identified.

**A. Road Access Impacts**

30. The EA acknowledges that Lucky would be required to improve the condition of roads—including Emigrant Creek Road and Forest Service roads—in order to access the planned exploration areas, but DEQ made no attempt to analyze the long-lasting impacts of Lucky’s proposed road improvements to wildlife. DEQ’s failure to disclose and evaluate these environmental impacts was arbitrary, capricious, and contrary to MEPA.

31. Numerous comments, including comments submitted by Montana Fish, Wildlife and Parks, raised concerns that road improvements could facilitate greater public access to remote areas in Emigrant Gulch, leading to greater disturbance of wildlife (particularly grizzly bears and wolverines) and potential conflicts between wildlife and humans even after the exploration project has concluded. DEQ dismissed these concerns:

The public currently has access to the base of the St. Julian Claim Block via Emigrant Creek Road and recreationists presently access the area to pursue recreational activities. The improvements to Emigrant Creek Road discussed above would not lead to access to higher elevations and more remote habitat, or additional fragmentation of wildlife habitat. Currently, a four-wheel drive high clearance vehicle is required to get to the St. Julian Claim Block. It is anticipated that the same type of vehicle will be required after Lucky Minerals makes the road improvements and completes its exploration activities.

Final EA at 188–89.

32. DEQ’s resolution of this issue was irrational first because the EA is internally inconsistent with respect to the effect of road improvements. In some sections, the EA claims that Lucky’s proposed improvements to the Emigrant Creek Road and Forest Service roads will not permit greater human access to the drainage, and therefore “there are not expected to be any significant secondary impacts to wildlife” due to road improvements. Final EA at 70. The EA’s discussion of impacts to wolverines, however, contradicts this conclusion, stating that “[i]mprovements to the existing roads would facilitate an increase in motorized access and

hunter access into higher, more remote areas in the drainage.” Id. at 66. DEQ’s conclusion that road improvement will not affect wildlife is therefore not supported by DEQ’s own analysis.

33. Further, the EA’s prediction that “[t]he clearing and localized improvements to Emigrant Creek Road ... will not materially change its character of an unimproved forest road,” Final EA at 62, overlooks record evidence regarding the current and future condition of the road. Emigrant Creek Road is severely eroded in some areas and covered in rockfall in others. See Letter from GYC to Jen Lane, Re: Lucky Minerals, Inc. Proposed Exploration Project, at 13 (Dec. 12, 2016) (photographs documenting current road condition). The EA acknowledges that significant work will be required to make the road accessible to drilling equipment and other vehicles:

The approximate four-mile length of Emigrant Creek Road from Old Chico to the St. Julian Claim Block would be cleared of rock and debris within its original configuration, some of which would include hand picking. The road would not be widened. Emigrant Creek Road may be graded in localized areas in order to keep it serviceable for the type of vehicles that would be involved in the project.

Id. at 62. In short, Lucky’s proposed project would substantially improve the Emigrant Creek Road from its existing rugged condition. DEQ’s conclusion that road improvements will not permit more people to access remote areas deeper in the Emigrant drainage is therefore not supported by the record, and DEQ was required to evaluate and disclose the impacts of improved access before issuing Lucky an exploration license.

## **B. Wolverine Impacts**

34. The Final EA is additionally flawed with respect to its conclusion that potential impacts from the exploration project to wolverines will not be significant. In the lower-48 United States, the wolverine is a rare and elusive resident of high mountain landscapes, including the Absaroka Mountains and Emigrant Peak. The largest terrestrial member of the weasel

family, wolverines are adapted to live in high-altitude and high-latitude ecosystems characterized by deep snow and cold temperatures. Deep snow is particularly important for wolverine reproduction, but wolverines of both sexes rely on these same cold, snowy areas year-round—areas that have become less and less prevalent as Montana winters have warmed. Wolverine reproduction is very slow—one study found that wolverines on average produced less than one kit per female per year—and any disruption of denning wolverines could threaten the persistence of local populations.

35. The EA acknowledges that exploration in Emigrant Gulch will be harmful to local wolverines: “The use of lights during nighttime drilling may also disrupt wolverine use of the area”; “The Proposed Action would represent a disturbance to wolverines and likely would deter wolverines from using the area”; “Copeland (1996) documented three instances when a female and her kits abandoned an area after researchers disturbed wolverines at maternal den sites”; “Given the low reproductive potential of wolverines (Weaver et.al., 1996), the impacts of improved access to more remote areas may be detrimental to regional populations”; “Improvements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage.” Final EA at 65–66.

36. The Final EA’s proposed mitigation does not address these impacts. The EA provides for “pre-exploration surveys prior to each field season to identify potential areas of western toad habitat, bat habitat, and nesting birds in areas of new disturbance on drill pads and laydown area,” but does not provide for a similar survey to detect wolverine presence or habitat use, despite evidence that wolverines may abandon den sites in response to human disturbance. Final EA at 69; see also id. at 56 (“The St. Julian Claim Block is within the home range distance for wolverines that have been documented in the area. However, specific knowledge of the

importance of the St. Julian Claim Block to the wolverines that use it is not known.”). DEQ’s failure to require Lucky to survey the area for wolverines is especially troubling, because Lucky has not disclosed the actual locations of its proposed drilling sites. See id. at 19 (“The locations of the proposed drill sites are conceptual and may change as new information is acquired.”). It is therefore impossible to determine based on the information that DEQ and Lucky have disclosed so far whether drilling will occur near areas of documented wolverine activity. The EA does call for Lucky to “reduce any unnecessary lighting,” id. at 69, but DEQ does not explain whether or how this vague measure will render the harm to wolverines due to “necessary” lighting insignificant. Further, the EA provides no mitigation to avoid or mitigate impacts caused by greater human access to high elevation areas in Emigrant Gulch used by wolverines, despite the EA’s acknowledgement that such impacts will occur.

37. Absent mitigation measures eliminating or significantly reducing the acknowledged impacts to wolverines, DEQ cannot rely on mitigation to conclude that these impacts will not be significant and thereby avoid preparing an EIS. DEQ’s alternative explanation—that the impacts of Lucky’s exploration project overall will be limited in extent and duration, Final EA at 167—does not support a finding that impacts to wolverines are insignificant, where DEQ’s own analysis indicates that even limited disturbance can cause wolverines to abandon maternal den sites, id. at 66. Further, wolverine impacts due to increased motorized access to upper Emigrant Gulch—including incidental trapping mortality due to increased access to wolverine habitat in the area for trappers of other species—could continue long after exploration has ended. In short, DEQ provided no rational explanation why wolverine impacts will not be significant.

### **C. Artesian Well Impacts**

38. The EA further failed to rationally address potential discharges of poor-quality water from artesian boreholes in the project area to the surface waters in Emigrant Gulch. The EA acknowledges that “it is likely that Lucky Minerals would ... encounter artesian conditions during drilling.” Final EA at 118. DEQ states, however, that Lucky will “develop a mitigation plan to effectively contain flow from artesian boreholes during drilling” to address this potential impact. *Id.* at 119; *see id.* (“Containment of flow from an artesian borehole during the entire period of time it is producing water would prevent any potential discharge of water or sediment to surface waters or wetlands, prior to plugging and abandoning the drill hole in accordance with ARM 17.24.106.”).

39. DEQ may not, however, rely on a “plan to make a plan” to support a finding that impacts from artesian borehole discharges will not be significant. *See* Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on “design, or enforceable controls or stipulations or both imposed by the agency or other government agencies” to deem impacts insignificant) (emphasis added). MEPA requires DEQ to explain why proposed mitigation will prevent significant impacts to surface waters and wetlands from harmful artesian discharges, and DEQ cannot rationally do so without identifying what such mitigation will entail.

### **D. Secondary Impacts of Full-Scale Mine Development**

40. In addition to DEQ’s deficient analysis of the exploration project’s direct impacts, DEQ failed altogether to examine the significant environmental consequences of its approval from the full-scale mining it could facilitate on both private and National Forest lands. Numerous commenters implored DEQ to evaluate the significant impacts of such mining to water quality, wildlife, recreation, and the local economy. In dismissing these comments out of

hand, DEQ stated, “[t]he proposed state action is issuance of an exploration license. The Environmental Assessment properly limits its analysis to impacts from the proposed exploration activity.” Final EA at 172.

41. To the contrary, MEPA requires DEQ to evaluate a project’s direct and secondary environmental impacts. Admin. R. Mont. 17.4.609(3)(d). Such secondary impacts include any “further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.” Id. 17.4.603(18). Here, such secondary impacts include full-scale mine development, particularly where Lucky may seek to establish rights to minerals that underlay National Forest lands that are currently subject to the proposed federal mineral withdrawal by “angle drilling” into such federal minerals from Lucky’s patented mining claims. See Final EA at 35 (“The drill holes would be either vertical or angled holes that could extend 1,000 to 2,000 feet from the ground surface, depending on the observed geologic trends and the most effective approach to investigate the subsurface at each site.”). If Lucky were to establish existing rights to federal minerals through its exploration project, it would undermine the environmentally protective purposes of the proposed mineral withdrawal.

42. Although Lucky’s ability to establish rights to federal minerals is uncertain, such uncertainty counsels in favor of preparing an EIS. Protecting Paradise, slip. op. at 10–11 (EIS required “when ‘substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor’”) (citation omitted). At a minimum, DEQ was required to consider “the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment” in describing the environmental impacts of its decision. Admin. R. Mont. 17.4.609(2)(c). Because the consequences of full-scale mining are potentially severe, DEQ could not dismiss these impacts without “reasonable

assurance” they will not occur. Id. 17.4.608(1)(b). DEQ’s environmental review failed to meet these standards.

**E. DEQ’s Range of Alternatives**

43. DEQ further violated MEPA by summarily rejecting two alternatives that would have reduced the extent of the exploration project’s environmental impacts. MEPA’s alternatives requirement ensures that agencies consider alternatives to a proposed project that will accomplish the project’s goals while causing fewer environmental impacts. See Mont. Code Ann. § 75-1-201(1)(b)(v) (agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.”).

44. The first dismissed alternative would have limited Lucky’s exploration license to one field season. The second would have eliminated night drilling. DEQ dismissed these alternatives because, according to DEQ, they would both cause similar impacts to Lucky’s proposal. If Lucky were obliged to complete its exploration in one field season, it would, according to DEQ, simply double the intensity of drilling, using “four, rather than two, drill rigs.” Final EA at 26. If night drilling were prohibited, Lucky would, according to DEQ, extend exploration “for an additional three or four field seasons.” Id. at 27.

45. DEQ’s analysis, however, assumes that Lucky could not reduce the number of holes it will drill. DEQ conducted no independent evaluation of whether Lucky could feasibly reduce the scale of its exploration project, writing that “DEQ has no basis to second-guess Lucky Minerals [sic] need to conduct drilling at all of the proposed locations.” Final EA at 300. However, MEPA does not permit DEQ to reject potentially reasonable project alternatives by blindly relying on a project applicant’s claim about the necessary scope of its project. See Mont.

Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are “economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor”); *id.* § 75-1-201(b)(iv)(C)(II) (“the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor’s comments regarding the proposed alternative”).

**F. DEQ’s No-Significant-Impact Finding**

46. Despite the project’s acknowledged impacts, and based on the irrational analysis and conclusions described above, DEQ concluded that the project will not have significant environmental impacts and, therefore, no EIS was required. Final EA at 168. However, as discussed, DEQ failed to evaluate the impacts of the project’s proposed road improvements or explain why those impacts will not be significant. As to wolverines, DEQ acknowledged impacts to wolverines, but did not rationally explain why those impacts will not be significant, or how DEQ’s wildlife mitigation measures will protect wolverines from significant impacts.

47. With respect to artesian discharges, DEQ stated only that Lucky will develop a mitigation plan at some point in the future; DEQ gave no clue as to what that mitigation plan will contain. DEQ cannot rely on a speculative mitigation plan to conclude that impacts from artesian discharges will not be significant.

48. Further, DEQ did not even evaluate the secondary environmental impacts of exploratory drilling, which may give rise to full-scale mine development on National Forest land currently subject to a federal withdrawal proposal, let alone justify why such impacts are not significant.

49. Because DEQ failed to justify its determination that the project will not cause significant impacts, DEQ's failure to prepare an EIS was arbitrary, capricious, and contrary to MEPA.

**FIRST CAUSE OF ACTION**  
**(Failure to Evaluate Impacts Due to Road Improvements, Mont. Code Ann. § 75-1-201)**

50. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 49.

51. Under MEPA, DEQ is required to “take a ‘hard look’ at the environmental impacts of a given project or proposal.” Mont. Wildlife Fed’n, ¶ 43. This “hard look” must include an evaluation of all of the project’s direct, indirect, and cumulative environmental impacts. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d).

52. DEQ, however, failed to disclose and evaluate the impacts of improvements to the Emigrant Creek Road and connected Forest Service roads, which will facilitate human access to the drainage and increase harassment of wildlife and conflicts between humans and wildlife in this sensitive area.

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

**SECOND CAUSE OF ACTION**  
**(Failure to Rationally Evaluate Impacts to Wolverines, Mont. Code Ann. § 75-1-201)**

54. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 53.

55. MEPA and its implementing regulations require DEQ to evaluate all of the direct, secondary, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must “examine the relevant data and articulate a satisfactory explanation for its action, including a

rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

56. DEQ, however, failed to rationally explain its conclusions concerning the impacts the proposed exploration project will have on wolverines. Although DEQ acknowledges the risk of harm to wolverines from Lucky’s exploration activities, including potential impacts to denning and reproduction, the Final EA does not rationally explain why these impacts are not significant or how DEQ’s proposed mitigation will prevent or reduce these impacts.

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

**THIRD CAUSE OF ACTION**  
**(Failure to Rationally Evaluate Impacts from Artesian Wells, Mont. Code Ann. § 75-1-201)**

58. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 57.

59. MEPA and its implementing regulations require DEQ to evaluate all of the direct, indirect, and cumulative environmental impacts of a proposed project. Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d). In conducting this analysis, DEQ must “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal., ¶ 47).

60. DEQ, however, failed to rationally address impacts from artesian wells, which DEQ expects Lucky will encounter while drilling in the project area. Rather than explain how Lucky will address artesian discharges at the project site, the Final EA provides that Lucky will prepare a mitigation plan at a future time to address those impacts. DEQ cannot rely on a hypothetical mitigation plan to support its conclusion that artesian well impacts will not be significant. See Admin. R. Mont. 17.4.607(4) (allowing DEQ to rely on “design, or enforceable

controls or stipulations or both imposed by the agency or other government agencies” to deem impacts insignificant) (emphasis added).

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

**FOURTH CAUSE OF ACTION  
(Failure to Evaluate Secondary Impacts of Full-Scale Mining, Mont. Code Ann. § 75-1-201)**

62. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 61.

63. MEPA requires DEQ to evaluate a project’s secondary environmental impacts, Mont. Code Ann. 75-1-201(1)(b)(iv)(A); Admin. R. Mont. 17.4.609(3)(d), which include “impact[s] to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action,” Admin. R. Mont 17.4.603(18).

64. Here there are “substantial questions” regarding the potentially significant secondary impacts of full-scale mine development on private lands and National Forest lands that are subject to a federal withdrawal proposal. Protecting Paradise, slip. op. at 10–11. In particular, Lucky may seek to use its exploration project on private lands to establish mining rights on adjacent public lands that would exempt its future mining activities from the effect of the federal withdrawal. While Lucky’s ability to do so is uncertain, the environmental consequences would be severe. Rather than evaluate these impacts or the likelihood they will occur, as MEPA requires, DEQ dismissed them out of hand.

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

**FIFTH CAUSE OF ACTION  
(Failure to Evaluate a Reasonable Range of Alternatives, Mont. Code Ann. § 75-1-201)**

66. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 65.

67. Under MEPA, DEQ is required to consider reasonable alternatives to the proposed project. Mont. Code Ann. § 75-1-201(1)(b)(v). This requirement ensures that DEQ considers all of its options, including options that may cause less harm to the environment, before deciding whether to approve a proposed project. See id.

68. DEQ failed to evaluate reasonable alternatives that would have reduced the scope of the proposed project and, accordingly, its impacts.

69. DEQ dismissed these alternatives based solely on Lucky's unsubstantiated assertions that it must drill a specific number of boreholes. In doing so, DEQ failed to independently evaluate the feasibility of reducing the scale of the project, as required by MEPA. See Mont. Code Ann. § 75-1-201(b)(iv)(C)(I) (agency must consider project alternatives that are "economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor")

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

**SIXTH CAUSE OF ACTION**  
**(Failure to Complete an EIS, Mont. Code Ann. § 75-1-201)**

71. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through \_\_.

72. Under MEPA, if DEQ determines that a project may have any significant impacts, it must prepare an EIS. Mont. Code Ann. § 75-1-201(1)(b)(iv).

73. As discussed above, DEQ has not rationally explained why acknowledged impacts to wildlife, including wolverines, impacts to water quality, or the consequences of full-scale mining are not significant, nor has DEQ explained how its proposed mitigation measures will eliminate otherwise significant impacts.

74. DEQ therefore acted arbitrarily and capriciously in approving the proposed exploration project without preparing an EIS or providing a rational explanation why an EIS is not required.

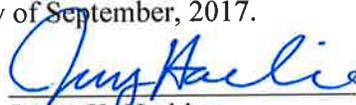
75. The Final EA is therefore arbitrary, capricious, and not in accordance with law and should be set aside.

### **REQUEST FOR RELIEF**

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare unlawful and set aside DEQ's July 26, 2017 EA evaluating mineral exploration in Emigrant Gulch;
2. Order DEQ to conduct a new environmental analysis that complies with MEPA;
3. Declare unlawful and set aside the exploration license permitting Lucky Minerals to conduct mineral exploration in Emigrant Gulch;
4. Grant temporary and/or permanent injunctive relief prohibiting the proposed mineral exploration; and
5. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted this 22nd day of September, 2017.



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