IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause: DA 23-0524

PROTECT THE CLEARWATER
Plaintiff/Appellee.

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, and LHC, INC.

Defendants/Appellants.

APPELLEE'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County
District Court Cause No. DV-23-776
Honorable John W. Larson, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF ISSUES

1. Whether the preliminary injunction standards at § 27-19-201, MCA, apply to an action to enjoin a dryland gravel pit permitted under § 82-4-432, MCA.
2. Whether a 16-page pleading titled "Application for Emergency Ex Parte Temporary Restraining Order and Preliminary Injunction", that was served on all opposing parties, was sufficient to institute this action.
3. Whether the District Court applied the correct burden of proof and properly found that Protect the Clearwater was likely to succeed on its claim that LHC and the Department of Environmental Quality violated § 82-4-432, MCA.

STATEMENT OF THE CASE

This case involves a challenge to a gravel mining permit issued by Montana Department of Environmental Quality (DEQ) on state trust lands administered by the Montana Department of Natural Resources and Conservation (DNRC), brough by Protect the Clearwater (PTC) a group of landowners, DNRC leaseholders and others concerned about the impacts of the proposed gravel mine on their properties, on the cherished Clearwater River and on the environment. In this case, the Court will get a glimpse of the procedural morass that the Montana Legislature has created for citizens who seek to protect their constitutional rights by challenging gravel mining operations near their property.

DEQ issued the Opencut permit at issue on April 27, 2023. Pursuant to § 82-4-427, MCA, on May 27, 2023, PTC filed a formal administrative appeal with the Board of Environmental Review. *In the Matter of: Appeal and Hearing Request by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473, Mont. Board of Env. Review, Cause No. BER 2023-03 OC*. FOF, ¶ 21. PTC also filed a separate lawsuit challenging the adequacy of the Environmental Assessment (EA) under the Montana Environmental Policy Act (MEPA). *PTC v. Montana Dept. of Environmental Quality*, Mont. Fourth Jud. Dist. Ct., Missoula County, Case No. DV 32-2023-0000717-DK. Under MEPA, PTC was required to file a lawsuit separate from the BER proceeding. Section § 75-1-201, MCA. PTC was not required to name LHC as a party in either the BER or MEPA cases. Section 82-4-427, MCA; § 75-1-201 (5), MCA.

Because the operator immediately began to mine, and because the BER process does not contain any provision for a stay or injunction, PTC was then forced to file the separate – and third – action, for injunctive relief, now before this Court, seeking a temporary restraining order and preliminary injunction to enjoin the mining of gravel under Opencut Permit #3473. LHC was named in this action.

On July 17, 2023, the District Court granted a restraining order and all parties appeared for a hearing on July 21, 2023. On August 8, 2023, the District Court issued a Preliminary Injunction. LHC's and DEQ's appeals followed.

STATEMENT OF THE FACTS

This appeal arises from DEQ and LHC failing to abide by the requirements of § 82-4-432, MCA, and to ensure that the waters in the Clearwater-Blackfoot watershed would not be affected by a significant industrial gravel pit adjacent to residential development, the Clearwater River, and in the middle of a wildlife corridor.

At the root of this case, is LHC's desire to place a gravel pit in an area of pristine beauty and bountiful natural resources. The mine site is approximately 1,000 feet away from the Clearwater River, a tributary of the Blackfoot river that is home to a number of trout species – including the endangered bull trout. Beyond fish, the area is a prime corridor for elk, deer, grizzly bear, and other large animals traversing the Blackfoot-Clearwater Game Range across Highway 83, and west over the Clearwater. (Dkt 1 (Application for TRO), Ex. A (EA), pp. 10-16.)

Directly to the west of the site are numerous residences. Some of them are owned in fee simple, while others are leased from DNRC. Both the private and lease sites include residences that are occupied year-round. Their water is supplied by wells, and each home's wastewater is treated via septic systems. (Dkt. 1, Nicholson and Langston Affidavits.)

Despite the serenity of the area, LHC applied for a dryland opencut permit to remove gravel and process it into asphalt on March 23, 2023. (Dkt. 14, Findings of

Fact, Conclusions of Law and Order, FOF ¶ 1.[1] Its plan was to develop a pit up to 20' deep, to process gravel and produce asphalt. Dkt. 1, Ex. A, p. 4.The purpose of the application, the pit, and processing facility was to provide aggregate and asphalt to a nearby project on Highway 83. LHC won a bid to provide these products to the highway project, being completed by Kiewit Construction. FOF, ¶¶ 14, 63. LHC's bid was based on providing gravel product and asphalt from a facility located 9 miles east of Ovando. It was not based on opening the pit on Highway 83. FOF, ¶¶ 65 & 66.

Even though LHC did not need the pit at issue here, it requested that DEQ approve its application for a dryland opencut permit. That process requires that LHC certify to DEQ that the pit will not *affect* ground or surface water and that it is not within one half-mile of 10 or more occupied dwellings. FOF, ¶ 7. When it applied for the permit, LHC made this certification. FOF, ¶ 48. The certification, though, was made without baseline information about the hydrogeology of the area FOF, ¶¶ 52, 53, 59-60.

With respect to water, LHC did not conduct, or undertake, any serious analysis of the project area. It did not conduct a hydrologic or hydrogeologic study to determine the directional flow of groundwater. *Id.* Instead, it relied on

[1] Hereafter findings or conclusions from the August 8th Order will be referred to as "FOF" or "COL", as appropriate. The District Court referenced documents before it, or testimony, for each of its FOF as applicable.

groundwater well information from wells dug in the surrounding area, but not on the project site. Some of those wells had shallow depth to groundwater. FOF, ¶¶ 54, 61. Even though the proposed gravel excavation depth would reach 20 feet, LHC only dug three test pits to 14 feet deep. FOF, ¶¶ 37-38. In short, LHC had no idea how deep the static water level was, or where it flowed or whether the mine would impact surface water. Yet, it still certified that a dryland permit was appropriate, claiming there would be no "affect" on groundwater.

Similarly, LHC did not know the number of individuals residing in the area as residents. COL, ¶¶ 55-56 LHC, nevertheless, certified that there were not 10 or more occupied dwellings as part of its application to DEQ. FOF, ¶ 33. This certification had no factual basis. *Id.*

In response to the application, DEQ initially requested more information. FOF, ¶ 30. But that request simply requested that LHC "certify" that there were not more than 10 occupied dwellings within one half-mile. It did not require any additional on the ground information or studies regarding water or actual information regarding the residents of the area. Unsurprisingly, LHC provided the additional certifications. But DEQ is still unaware of whether there are ten occupied dwellings within one half-mile of the project site. FOF, 31-33.

Simultaneous with evaluating the application, DEQ undertook an environmental analysis of the proposed gravel pit. As part of the EA and the

review of the permit application, DEQ employee Ruby Hopkins visited the pit location on April 22, 2022. FOF, ¶ 29. She visually inspected the property, and observed distance to surface water. FOF, ¶ 35.She also reviewed offsite well data. However, she did not make any determinations of depth to groundwater. FOF, ¶ 36. Nor did she consult any hydrologists or hydrogeologists; conduct any groundwater studies; dig any test pits; or do any additional evaluations. *Id.* At the time the ground was also frozen, so she could not evaluate any soil data or other soil/water interactions. FOF, ¶ 29.

Indeed, DEQ failed to take any additional analysis. DEQ knew that the pit was up to 20' deep, but the on-site test pits were only dug to 14' feet. FOF, ¶ 57. DEQ knew there were no wells with groundwater data located on site but allowed LHC to rely on data from surrounding wells. FOF, ¶¶ 72-73. And DEQ knew it had no knowledge of the depth to groundwater or hydrology of the area FOF, ¶ 38, but it allowed LHC to certify there would be no affect to water. DEQ could have asked for more information, but simply chose not to.

Nevertheless, DEQ concluded in the EA that, in relation to water quality, "[d]uring the beginning stages of mining surface water may leave the site during a heavy storm event could carry sediment...." Dkt. 1, Ex. A, EA, p. 8. The EA continued, and later explained that "[i]mpacts to water quality would be short term and would be negligible...." *Id.,* p. 9. It also noted that "Although Dryland Opencut

applications do not specify site topography or drainage patterns during or after mining, the depression caused by mining activities would likely cause runoff to drain internally into the site. Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface." *Id.*, p. 8. Put simply, the EA highlighted the affect of the mine on ground and surface water.

As with water, DEQ took no initiative to determine whether there were 10 occupied dwellings within one half-mile of the project site. In fact, DEQ does nothing to verify that an applicant, like LHC, is correct when it certifies that there are not sufficient occupied dwellings to trigger a standard opencut permit. FOF, ¶ 37. Ultimately, neither DEQ nor LHC have any idea how many occupied dwelling units are in the area. Yet both agree that a dryland permit is appropriate.

After DEQ's nominal review, it granted LHC its opencut permit on April 27, 2023. The permit is simply a one-page document, with the application attached and incorporated as part of the permit. LHC's permit is Opencut Permit #3473. FOF, ¶ 5.

Thereafter, LHC began moving equipment and clearing the site for mining. Upon operations beginning, PTC initiated this suit to enjoin and/or stay the approval of Opencut Permit #3473. On July 21, 2023, the District Court held a hearing with testimony presented by DEQ, LHC and PTC. PTC called three

witnesses. Two of them, Gayla Nicholson and Jon Watson, reside in the area. Mr. Watson leases his land from DNRC and Ms. Nicholson owns hers in fee simple.

After the pit clearing began, but before actual rock crushing began, Jon Watson began experiencing the impacts of the pit. FOF, ¶¶ 83-84. He observed fine dust spreading everywhere across his property and settling on the Clearwater River at Elbow Lake. *Id.* The fine dust not only affected the environment, but it began exacerbating his respiratory disease. Mr. Watson was particularly concerned that if the pit continued to operate, and started crushing rock into aggregate, that there will be significantly more dust. His concern was based on his former experience with gravel pits as a highway engineer for the Montana Department of Transportation. *Id.,* ¶ 84.

He also expressed serious concern about the projects potential to impact wildlife, which included various deer, elk, and grizzly bear. FOF, ¶ 85. Gayla Nicholson reiterated these concerns, but also highlighted that the old growth trees had already been cleared. FOF, ¶ 87.

In contrast, LHC and DEQ further confirmed that neither entity knew whether the project would have an affect on water or who lived in the area. FOF, ¶¶ 33, 37-45, 59. Neither knew where the static groundwater level was, neither knew the hydrology of the area, neither had dug test pits to the depth of the pit, and neither had conducted any further hydrologic or hydrogeologic studies of the area.

FOF, ¶¶ 33, 37-45, 52-53, 59. And neither could confirm that there were less than ten occupied dwelling units. FOF, ¶¶ 32-33,

This lack of information belies LHC certification there would be no affect on water. At the hearing, PTC called David Donahue, a professional hydrogeologist to opine about the lack of data. He ultimately concluded that neither DEQ nor LHC's actions, and their reliance on offsite unverified data, was not sufficient to "certify" that there would be no impact to water. FOF, ¶ 73.

With respect to the wells, LHC and DEQ looked at 25 surrounding wells. The data for those wells was created by the individuals who drilled the wells and entered into the Groundwater Information Center (GWIC). That well data ostensibly includes where water is first encountered. But that information is not verified at the time of entry, and neither DEQ nor LHC field verified it here. FOF, ¶ 69. This well log information may be useful, but it cannot be relied on to determine aquifer characteristics – such as the depth to shallow groundwater interception, the transmissivity (i.e., speed) of groundwater movement, or the direction of groundwater flow - they do provide general information which is relevant. FOF, ¶ 70.

More significantly, the well log data indicates that this area is typified by significant heterogeneity in aquifer characteristics, meaning there is significant variation in the depth and location of groundwater resources near the mine. FOF, ¶

70. So, relying on unverified well logs outside the project site is inherently unreliable. FOF, ¶ 71. This unreliability was further highlighted by the diversity of information in the well logs. FOF, ¶ 72. There was significant variability between surface elevations, depth to groundwater, static water level within the wells located from GWIC database and it has not been field verified, and neither have the locations of the wells. FOF, ¶ 72. Accordingly, for LHC to be able to "certify" that groundwater would not be affected by the mining operation, it would need to conduct on-site evaluations and not simply rely on well log data. FOF, ¶ 73

Further, without knowing the depth to groundwater, LHC's project created substantial environmental risks. Namely, the diesel, gasoline and heavy hydrocarbon fuels being used by different vehicles and as a part of the mining and production processes could contaminate the groundwater. Mr. Donohue testified that the hydrocarbons used in asphalt production could similarly negatively impact groundwater. FOF, ¶ 74. DEQ did not look at the water quality impacts of these chemicals infiltrating the groundwater. FOF, ¶ 75. But if this water carries the toxic hydrocarbon fuels or materials into the groundwater, which generally could flow towards banks of the Clearwater River and Elbow Lake, the contaminants could also make it to these surface water bodies. FOF, ¶ 76.

Based on the foregoing, Mr. Donahue's ultimate opinion was that a Dryland permit was inappropriate for this site because there is no reliable evidence in the

record which supports the scientific conclusion that the Clearwater mine will not have some "[a]ffect" on ground or surface water – i.e. there would *not* be no affect. He testified that the only way to appropriately determine if an effect on ground or surface water may exist is for a detailed assessment of the hydrogeology to be conducted – an assessment that neither LHC nor DEQ conducted. FOF, ¶ 78. And no professional hydrologist or hydrogeologist would rely on data that was as uncertain as that relied on by LHC and DEQ. FOF, ¶ 79.

In addition to the probable impacts to water, LHC did not establish economic impacts or dispute the dearth of information related to the local or state economy. As for the state economy, DNRC expected to gain $180,000 for the Pine Hills School from the project. FOF, ¶ 48. However, the State already has a constitutional obligation to fund schools, and that $180,000 was likely not relied on for any current budgets. Similarly, LHC claimed that it would suffer economically; however, that was belied by its testimony at the hearing. LHC testified that its bid for the project on Highway 83 was based on providing aggregate and asphalt from the *Ovando* pit site, *not* the site at issue here. FOF, ¶ 66. And relying on the Ovando pit would result in only 50 additional miles per trip. DNRC, in its EA for the project, highlighted the insignificance of this distance. FOF, ¶ 67. In all, these impacts are outweighed by potential harm to the Clearwater River, Elbow Lake, and the residents nearby.

On August 8, 2023, the District Court issued is ruling in favor of PTC. The Court ruled that the appropriate standard for an injunction was that found in § 27-19-201, MCA, and not § 75-1-201, MCA, because the suit asked for an injunction of a permit issued under § 82-4-432, MCA, and not the environmental review under Title 75. Based in this finding, and the *Winter v. NRDC,* 555 U.S. 7, (2008) factors, Judge Larson concluded that PTC was likely to succeed on the merits, that PTC would suffer irreparable harm, that the equities tip in PTC's favor and that an injunction was in the public interest. In addition, Judge Larson issued a specific finding related to the state and local economies. He noted that the loss of the pit site would not have a significant impact on the local economy, but by granting the injunction local and state economies would be positively impacted. Indeed, the gravel pit's existence decreases the taxable values of adjacent properties, thereby decreasing state and local tax revenue – i.e., hurting local and state economies.

STANDARD OF REVIEW

"District courts are vested with a high degree of discretion to grant or deny preliminary injunctive relief*." Caldwell v. Sabo*, 2013 MT 240, ¶ 18, 371 Mont. 328, 308 P.3d 81. This Court, therefore, reviews the grant of a preliminary injunction for manifest abuse of discretion. *Oberlander v. Hennequin,* 2023 MT 45, ¶ 13, 411 Mont. 320, 525 P.3d 1176. To that end, this Court will only disturb a district court's decision regarding a preliminary injunction upon a showing of a

manifest abuse of discretion. *Id.* "A manifest abuse of discretion is one that is obvious, evident, or unmistakable." *Caldwell,* ¶ 18. When the grant of a preliminary injunction is based on a court's conclusions of law, the Supreme Court will review the court's conclusions for correctness. *Caldwell*, ¶ 19.

SUMMARY OF ARGUMENT

The District Court did not err in granting PTC injunctive relief under the general injunction provisions in Title 27, instead of the injunction provisions of MEPA. Appellees were seeking to enjoin the validity of the permit under the Opencut Mining Act, not under MEPA. However, even if the MEPA provisions were applicable, the District Court's decision granting the injunction documents compliance with those requirements as well.

The District Court did not err in granting an injunction here without an underlying "complaint" given this Court's ruling in *Forbes v. City of Great Falls*, 2011 MT 12, 359 Mont. 140, 247 P.3d 1086. Additionally, the Application here met notice pleading requirements for a complaint. Moreover, PTC was not required to "exhaust" administrative remedies here as the administrative process contains no provision for injunctive relief.

Finally, the District Court properly reviewed the request for injunctive relief under the *Winter* requirements and did not improperly shift the burden to LHC or DEQ.

ARGUMENT

A. The District Court did not err in granting PTC an injunction under Title 27. But even if it did, the elements required under Title 75 were met so affirming the District Court's injunction decision is appropriate.

LHC's argument that the Court erred when it relied on Title 27 instead of the injunction standards under MEPA, Title 75, is without basis. The District Court conclusion that Title 27 was the appropriate mechanism for an injunction was not in error. However, even if the District Court should have relied on Title 75, PTC established that it was entitled to a preliminary injunction based on the standards in Title 75, as fully documented in the District Court's decision.

1. The District Court Properly Issued an Injunction Under Title 27

The District Court's reliance on the injunction standards under § 27-19-201, MCA, (COL ¶¶ 5-9) was appropriate. This case is not about the adequacy of the Environmental Assessment (EA), or the MEPA review, but rather whether DEQ and the LHC could certify, and demonstrate, that the mining operation would have no effect on ground or surface water to qualify for a dryland permit under the Opencut Act, §§ 82-4-401, et seq., MCA. To the extent the Plaintiffs cite to environmental harms, those are for the purpose of satisfying the irreparable injury prerequisite for an injunction.

LHC relies on the 2023 legislatives changes to § 75-1-201, MCA to wrongly assert that the PTC can only obtain injunctive relief under title 75. In interpreting §

75-1-201, MCA, the Court first looks to its plain language. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 34, 344 Mont. 1, 185 P.3d 1003. If that language is "clear and unambiguous, the statute speaks for itself and there is nothing left for the Court to construe." *Id.* As a corollary, the Court should not examine the legislative history of a statute unless a law is ambiguous. *Christenot v. State*, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995). It is the court's job to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Statutes must be construed "according to context" and not in isolated subsections. Section 1-2-106, MCA

Despite these clear statutory construction guidelines, LHC takes Section 75-1-201(6)(c), MCA, out of context to attempt to discredit the District Court's reliance on § 27-19-201, MCA.

When interpreted correctly, these MEPA injunction standards only apply to attempts to void permits *based on an agency's failure to comply with MEPA*. For example, section 5(a)(i), allows a person to "challenge an agency's environmental review under [§ 75-1-201, MCA]." Section 75-1-201(5)(a)(i), MCA (2023).[2] That challenge to "the final agency action alleging failure to comply with or inadequate

[2] SB 557 passed the 2023 Legislature and amended § 75-1-201, MCA. A copy of SB 557 can be found at: https://leg.mt.gov/bills/2023/billpdf/SB0557.pdf

compliance with a requirement of [MEPA]" must be brought in district court or federal court within 60 days. Section 75-1-201(5)(a)(ii), MCA (2023). Similarly, § 75-1-201(6)(a)(i), MCA (2023), specifies that an action alleging "noncompliance or inadequate compliance with [MEPA]" requires the filing of an administrative record. Sections 75-1-201(6)(a)(ii & iii), MCA again refer to an action alleging noncompliance or inadequate compliance with MEPA. Subsection 6(b) contains similar language pertaining to challenging an agency's MEPA review. And, finally, § 75-1-201(6)(c)(i), MCA applies to challenges brought "to a decision of the agency or the adequacy of the statement" based on the environmental review.

Based on each of these subsections, it is clear that the exclusive remedy to challenge an agency's compliance *with MEPA* is found in § 75-1-201, MCA. In other words, the provisions do not apply if the challenge to an action that is not a challenge of the agency's "noncompliance or inadequate compliance" with MEPA.

LHC wrongly claims that § 75-1-201(6)(c)(ii), MCA, provides the exclusive injunctive standards for MEPA *and* non-MEPA claims alike regarding the issuance of a permit. Adopting this interpretation would sever § 6(c)(ii), from the remainder of the provisions of § 75-1-201, MCA, which are specific to MEPA based challenges. When read together with § 6(c)(i), and § 5(a), the reference "merits of its complaint" can only relate to the case challenging a MEPA review. Read any other way would fail to account for the context of the statute and the other

limitations on challenges to an agency's compliance with MEPA. An outcome this Court is countenanced to avoid. Section 1-2-106, MCA.

This interpretation finds support in Title 82, which provides separate remedy provisions. While LHC argues that the remedies in § 75-1-201(5) and (6) are the exclusive remedies to challenge an agency decision or the adequacy of the environmental review, § 82-2-427, MCA, requires that any challenges to an Opencut permit go through the Board of Environmental Review (BER), and then a judicial review. If LHC's analysis is accurate, then § 82-2-427, MCA would be unnecessary. The same problems arise with the Metal Mine Reclamation Act, which allows actions based on the grant or denial of an operating permit, § 82-4-349, MCA. *See also*, § 82-11-145, MCA (setting forth separate injunctive standards for claims against the Board of Oil and Gas Conservation); § 82-11-144, MCA, (claims allowed based on Board of Oil and Gas Conservation decisions). Each of these remedy provisions would be meaningless if LHC's exclusivity argument were accepted; an interpretation that must be rejected. *Am. Linen Supply Co. v. Dep't of Revenue*, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980) ("The legislature does not perform useless acts. Section 1-3-223, MCA. An interpretation that gives effect is always preferred over an interpretation that makes the statute void or treats the statute as mere surplusage.")

The logical and consistent interpretation of the two statutes, and the one adopted by the District Court, demonstrates that § 75-1-201(5) and (6), MCA only apply to challenging an agency decision based on its MEPA analysis – not based on challenges to the underlying permitting process. This reading would give effect to both § 75-1-201, MCA, and § 87-2-427, MCA, as well as other remedy provisions in Title 82.

In all, § 75-1-201, MCA, does not apply to this matter because the court is tasked with interpreting compliance with § 82-4-432, MCA and not DEQ's MEPA analysis.[3]

2. *Even if the court believes that MEPA injunction standards apply, Plaintiffs have satisfied those requirements here.*

LHC only marginally argues that the Plaintiffs did not satisfy the injunction requirements under § 27-19-201, MCA. Those elements are not particularly distinct from those found under § 75-1-201, MCA (2023). Thus, even if the District Court erred in using the wrong standard, this Court may still affirm the District Court because the elements of § 75-1-201, MCA were met here. *Mont. Democratic Party v. State*, 2020 MT 244, ¶ 6, 401 Mont. 390, 393, 472 P.3d 1195, 1197 (the Supreme Court "will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason.")

[3] Plaintiffs do have the separate case under MEPA, and had they sought an injunction in that matter *based on the State's failure to comply with MEPA,* then § 75-1-201, MCA, would control.

Both standards require a demonstration that the movant is likely to prevail on the merits; that the applicant will suffer irreparable harm, and that the requested relief is in the public interest – which requires economic considerations. *Compare* § 75-1-201(6)(c)(ii), MCA, *with* § 27-19-201, MCA. While MEPA does not specify that the Court balance the equities, that balancing is implied in the public interest analysis, and the requirement that the court narrowly tailor any injunctive relief.

First, Plaintiffs are likely to succeed on the merits[4], because the dryland permit application was not acceptable. Indeed, a permit application is only "acceptable if the materials and information provided to [DEQ] demonstrate that the proposed opencut operation complies with the requirements of [the Opencut Act]." Admin. R. Mont. 17.24.212. One of those requirements for a dryland permit is that it does not affect ground or surface water. Based on the affidavits and testimony, neither DEQ nor LHC can demonstrate that there is no affect because they lack adequate data. *See* COL ¶ 15. And, in fact, in the EA, DEQ admits that there will be "an affect" on ground and/or surface water. *See* FOF, ¶¶ 14-15).

Second, Plaintiffs are at risk of irreparable harm. LHC asserts that the only potential harm is the possibility of ground or surface water contamination. LHC Br

[4] Petitioners will separately address in detail the merits argument in response to DEQ's Brief.

at 29. That argument ignores a large portion of the District Court's order. Indeed, the Court found that:

> '(E)establishing irreparable harm should not be an onerous task for plaintiffs' that seek to protect the environment, because '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable'.

COL ¶ 25 (*citing Amoco Prod. Co. v. Vill. Of Gambell,* 480 U.S. 531, 545 (1987))

Supporting this conclusion, in Montana, is that potential harm to the environment may constitute an irreparable injury because it interferes with PTC's fundamental constitutional right to a clean and healthful environment. *Netzer Law Office, p.c. v. State*, 2022, MT 234, §§ 21-22, 410 Mont. 513, 520 P.3d 335. In its appeal, LHC has not challenged these conclusions of law.

Additionally, the District Court correctly noted that there are several indicia of irreparable harm. The Court noted the loss already of old growth trees, a loss it considered irreparable. (COL, ¶ 27.) PTC established that the State and LHC admit there will be "an affect" on groundwater – not simply a potential impact. That impact has already happened: particulate matter is impacting the Clearwater River and Elbow Lake. (COL, ¶ 28.) Such contamination is considered irreparable. *See, e.g., Diné Citizens Against Ruining Our Env't v. Jewell*, 2015 U.S. Dist. LEXIS 109986, at *151-54 (D.N.M. Aug. 14, 2015). In addition to the known water-related impacts, the District Court also found irreparable injuries based on

destruction of a meadow, health-related impacts, and harm to wildlife. *Conservation Council v. United States Forest Serv.*, 413 F. Supp. 3d 973, 980 (D. Alaska 2019); *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) ("The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage.")(Cited by District Court, COL ¶ 27); *See, e.g., Basank v. Decker*, 613 F. Supp. 3d 776, 795 (S.D.N.Y. 2020).

LHC does not challenge these findings on appeal. Thus, the second element under Title 75-1-201(6)(c)(ii)(A), MCA, was met.

Third, the District Court found that the injunction was in the public interest as required by Section 75-1-201(6)(c)(iii), MCA. In reaching that conclusion, the District Court found that enjoining the permit was necessary "to protect the environment and water resources from degradation, but also to protect the public's interest in holding its administrative agencies accountable." COL ¶ 44. This is particularly true with respect to agencies managing scarce resources. *Id*., ¶ 45. Indeed, an agency's failure to comply with permitting laws "invokes a public interest of the highest order: the interests in having government officials act in accordance with the law." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Was. 1991)

This public interest is heightened in Montana because of the State's constitutional protections. Not only does the constitution provide a right to a clean and healthful environment, but it also requires that the State protect environmental life support systems. Mont. Const. Art. II, § 3; Mont. Const. Art. IX, § 1.. These constitutional protections are also embedded within the opencut mining act's statement of purpose. Section 82-4-402(1), MCA.

The District Court weighed the potential impacts of the project, with the public interest in allowing the mine. The Court concluded that while DEQ asserted that the loss of revenue to the state trust will be significant, that revenue did not exist previously, it was only anticipated, and there was no information on how it would be used. So, there was no evidence of a statewide economic impact. COL ¶ 48. Similarly, LHC did not establish any impacts to the state or local economy. COL ¶ 49. Therefore, the public interest analysis weighed in favor of the injunction.

Recognizing that those elements were met, LHC only argues that the District Court erred by failing to account for "the implications of relief on the local and state economy". Br. at 18. That statement is belied by the District Court's COL ¶¶ 48-51. The Court found that there was no evidence of an impact on the state and local economy, that the only evidence of a local impact was that LHC would have trouble finding hotel rooms, but that this was insignificant because LHC must

provide the gravel with, or without, the permit. COL 49. In contrast, the Court found that enjoining the permit would actually support the local and state economy. COL ¶ 50. Indeed, the Court explained that without the pit, property values remain higher, thereby increasing local and state property revenues. The record clearly shows that the District Court "considered the implications of relief on the local and state economy and ma[de] written findings with respect to both." Section 75-1-201(6)(c)(ii)(B)(II)

In addition, LHC provided no information detailing the impacts on the local and state economy. At best, LHC has indicated it may lose some money, but that the subcontract with Kiewit Construction was based on gravel coming from a different site than the proposed pit. DEQ noted that the state may lose about $180,000 in funding for schools, but the State has an independent constitutional obligation to provide an education, so that funding must be provided, regardless of this permitting decision. Mont. Const. Art. X, § 1(3). DEQ did not demonstrate how, if at all, the loss of future funds from this project will hurt the State's economy.

In all, even if the District Court had applied § 75-1-201 (6)(c), MCA, its Findings of Fact and Conclusions of Law demonstrate that an injunction still would have been proper. The District Court did not manifestly abuse its discretion.

B. The District Court Properly Granted a TRO and Preliminary Injunction Pursuant to 27-19-201.

In granting the injunction here, the District Court stated "Plaintiffs have brought this separate action because the BER provides no mechanism for them to protect their interest via injunctive relief (*see, e.g.,* §§ 2-4-611 & 612, MCA) while the appeal is pending. The application, here, then is permissible." COL ¶ 10.

LHC argues that the District Court erred in granting the TRO and preliminary injunction without an underlying complaint. Its arguments are without merit, and the District Court was correct.

1. *The general injunction statutes in Title 27, as amended in 2023, do not on their face require filing an underlying complaint for injunctive relief.*

LHC's argument is contrary to the plain language of the statute as interpreted through canons of statutory construction. "The starting point for statutory interpretation is the plain language of the statute itself." *Smith v. Burlington N. & Santa Fe Ry. Co*., 2008 MT 225, ¶ 22, 344 Mont. 278, 187 P.3d 639 (citing *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999); 1260); *Goble v. Montana State Fund*, 2014 MT 99, ¶ 21, 374 Mont. 453, 325 P.3d 1211 ("The Court's first step in interpreting a statute is to look at its plain language, and if the language is clear and unambiguous, no further interpretation is required.") (citations omitted). "Furthermore, while legislative history may be helpful to interpret ambiguous terms of statutory law, *we will not rely on legislative history to*

contradict the plain language of statutory law when it is clear on its face*." Haney v. Mahoney*, 2001 MT 201, ¶ 7, 306 Mont. 288, 32 P.3d 1254, (emphasis added).

A statute must also be read and interpreted as a whole. *W. Montana Water Users Ass'n, LLC v. Mission Irr. Dist*., 2013 MT 92, ¶ 28, 369 Mont. 457, 299 P.3d 346. It is longstanding precedent that the Court should "not read into statutes something that is not there." *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907 (citing *Strzelczyk v. Jett,* 264 Mont. 153, 157, 870 P.2d 730, 732–33 (1994). Courts cannot "insert what has been omitted or to omit what has been inserted." *Goble*, ¶ 21 (citing § 1–2–101, MCA).

There is no explicit requirement in provision in Title 27, Chapter 19 that an applicant first file an underlying complaint to obtain injunctive relief. This is not for lack of consideration. Other sections in Title 27 impose certain procedural requirements. *See* Section 27-19-301, MCA (requiring "reasonable notice to the adverse party of the time and place that application for the injunction order was made"); § 27-19-303, MCA (requiring that a hearing be held prior to granting injunction order); §27-19-315, MCA (requiring applicant to certify to the court in writing efforts made to provide notice or why notice should not be required). Importantly, some of these sections were recently amended by legislature.

The legislature is presumed to be aware of the state of the law. *Baitis v. Dep't. of Revenue*, 2004 MT 17, ¶¶ 22–24, 319 Mont. 292, 83 P.3d 1278. If this

procedural requirement was of concern to the legislature, they would have explicitly amended the statute to reflect such a departure from the forty-plus year precedent, as it did when incorporating the federal *Winter* factors in 2023, as discussed below.

This Court has previously held that no "complaint" is necessary to obtain injunctive relief. In *Forbes v. City of Great Falls*, 2011 MT 12, 359 Mont. 140, 247 P.3d 1086, this Court observed previous iterations of the injunction statutes expressly included the following language:

> Section 27–19–301, MCA (1978), had provided that an injunction could be issued at the discretion of the court with or without notice "**unless the defendant has answered**." Section 27–19–303, MCA (1978), had provided that the preliminary injunction could be granted "at the time of **issuing the summons upon the complaint or at any time afterward**." Further, a preliminary injunction could "**not be granted on the complaint alone" unless it was "duly verified"** and the material allegations of the complaint were made "positively and not upon information and belief." Section 27–19–303,MCA(1978).

City of Great Falls ,¶ 13 (emphasis added).

This Court, however, then went on to find that the "1979 amendments repealed these express references that had connected preliminary injunctions to civil actions **commenced by complaint,** summons, and answer. The legislative history of the 1979 amendments additionally indicates that an injunction could be issued upon application and notice **without filing a complain**t." *Id.* ¶14, emphasis added. The Court went on "(S)pecifically, the amendments proposed to allow a

party to obtain an injunction 'without filing a lawsuit'". *Id.* In *Forbes* the Court found that the City "followed the proper procedure. . . , by filing an application for an injunction, requesting that the District Court set a hearing date, and providing reasonable notice to Forbes." *Id.,* ¶ 15; *See also Heart K Land & Cattle Co., LLC v. Mont. Rail Link*, 2013 U.S. Dist. LEXIS 115272, *6 at n. 1 (D. Mont. Aug. 14, 2013).

Notably, § 27-19-301, MCA was revised during the 2023 legislature; however, no effort was made to re-insert similar express language from 1978 statute. When interpreting statutes, this Court must assume the "legislature knew what it was doing," *Dep't of Revenue v. Burlington N. Inc*., 169 Mont. 202, 211, 545 P.2d 1083, 1088 (1976). As amended, the plain language in Title 27 does not tie the issuance of a preliminary injunction order to civil actions commenced by complaint and therefore, the district court properly relied on § 27-19-201, MCA in issuing its injunction order.

2. *Section 27-19-201(4), MCA, as recently amended, does not require an applicant to file an underlying complaint.*

LHC overemphasizes the breadth and scope of the recent amendments to §27-19-201(4), MCA and unreasonably interprets the term "federal preliminary injunction standard." That provision reads: "It is the intent of the legislature that the language in subsection (1) mirror the federal preliminary injunction standard,

and that interpretation and application of subsection (1) closely follow United States supreme court case law."

The referenced subsection (1) states "[a] preliminary injunction order or temporary restraining order may be granted when the applicant establishes that: (a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest. § 27-19-201(1), MCA. These factors are derived from the United States Supreme Court ruling in *Winter v. NRDC,* 555 U.S. 7 (2008), referred to as *Winter* factor(s).

As plainly read the *Winter* factors do not expressly address the filing of an underlying complaint in the same cause of action. Subsection (1)(a) includes the term "likely to succeed on the merits[,]" but is silent as to which merits or where they may originate. LHC attempts to define "merits" by extrapolating the legislature's intent under § 27-19-201(4), MCA. In doing so, LHC unreasonably interprets "federal preliminary injunction standard" to include any and all potentially related federal procedural rules and case law.

LHC' interpretation is unreasonable because it renders other sections of Title 27, Chapter 19 superfluous. *State v. Heath*, 2004 MT 126, ¶ 31, 321 Mont. 280, 90 P.3d 426 (this Court is "required to avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words

used.") "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898, 3 (citing *Mont. Sports Shooting Ass'n*, ¶ 11).

Under LHC's broad interpretation, contradictory federal rules and jurisprudence would apply. For example, F.R.C. P. Rule 65(b)(2) allows a temporary restraining order to remain effective for 14 days, while Montana law provides that a restraining order is not enforceable after 10 days. *see* Fed. R. Civ. P. 65(b)(2) and §27-19-316(4), MCA.

Finally, wholly adopting federal jurisprudence could undermine the constitutional rights unique to Montana. Therefore, this Court should narrowly read subsection (4) as strictly applying to the federal case law that relates only to the four *Winter* factors.

3. *Appellees' application for TRO and preliminary injunction contained sufficient information and allegations to apprise the District Court of the merits at issue.*

Even if the Appellees were required to file an underlying complaint, their *application* for TRO and preliminary injunction meets the requisite pleading standards and adequately apprises the court of the merits at issue. Montana law requires each allegation be "simple, concise, and direct. No technical form is required." M. R. Civ. P. 8(d). The purpose of Rule 8 is twofold: "provide the defendant fair notice of the claim and the grounds upon which it rests so that the

defendant may prepare a responsive pleading." *Cossitt v. Flathead Indus., Inc.,* 2018 MT 82, ¶ 8, 391 Mont. 156, 415 P.3d 486 (citing *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323, ¶ 20, 377 Mont. 244, 339 P.3d 602). Montana courts "follow liberal rules of pleading to allow for compliance with the spirit and intent of the law, **rather than a rigid adherence to formula or specific words**." *Cossitt*, ¶ 9 (citing *McKinnon v. W. Sugar Co-Op. Corp.*, 2010 MT 24, ¶ 17, 355 Mont. 120, 225 P.3d 1221) (emphasis added).

The substance of a filing can hold more weight than its given title. *See Mallak v. State*, 2002 MT 35, ¶ 15, 308 Mont. 314, 42 P.3d 794 ("This Court has held on numerous occasions that the substance of a document controls, not its caption."); *see also Miller v. Herbert*, 272 Mont. 132, 136, 900 P.2d 273, 275 (1995); *Carr v. Bett*, 1998 MT 266, ¶ 52, 291 Mont. 326, 970 P.2d 1017, (Nelson, J. concurring). In these instances, this Court "shall look to the substance of a [pleading], not just its title, to identify what …has been presented." *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1, ¶ 106, 368 Mont. 143, 292 P.3d 432.

In this case, Appellees filed a 16-page pleading titled "Application for Emergency Ex Parte Temporary Restraining Order and Preliminary Injunction" with the district court. This "application" certified that that notice has been given to all affected parties. Dkt. 1, at 2. The application also included almost fifty pages of affidavits and exhibits. Dkt. 1, pp. 17-65. LHC filed a motion in opposition to

the application, that included responses to the allegations and corresponding affidavits. Dkt. 3. Within 10 days the district court held a hearing and all parties attended. At the hearing LHC was afforded the opportunity to testify and put forth its own evidence and witnesses. LHC submitted post-hearing proposed findings and fact and conclusions of law. Dkt. 9.

Appellees application for all intents and purposes, served as both its complaint and application for TRO and preliminary injunction. It provided LHC fair notice of the claims and the grounds upon which it rests, so that LHC was able to, and did, file its response and defend the allegations. Furthermore, the district court was able to ascertain the issues before it and rule accordingly. Given the contents of Appellee's application, and LHC's full participation, requiring a separate underlying complaint in these circumstances would exalt form over substance.

4. The Exhaustion Doctrine does not preclude preliminary injunction.

LHC incorrectly argues at pp. 23-24 of its brief that the Appellee's failure to exhaust its administrative remedies divests the district court of its jurisdiction to issue a preliminary injunction. Throughout its argument, LHC conflates the district court's ruling that Appellees are likely to succeed on the merits at the BER with an ultimate determination of whether the DEQ properly and lawfully approved LHC's permit. LHC reliance on the exhaustion doctrine is wholly misplaced.

"Subject matter jurisdiction is simply the power of the court to hear and adjudicate the claim before it." *Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶ 31, 321 Mont. 338, 92 P.3d 1160 (citing *In re B.F.,* 2004 MT 61, ¶ 18, 320 Mont. 261, 87 P.3d 427,). "Both the Montana Constitution, Article VII, Section 4, and § 3–5–302, MCA, provide a district court with original jurisdiction in all civil matters, and in all cases arising at law and in equity." *Id.*

"While the distinction is subtle, failure to exhaust administrative remedies as required by § 2-4-702(1)(a), MCA, does not deprive a district court of the subject matter jurisdiction provided by § 2-4-702(1), MCA, i.e., the power to adjudicate that type of case or controversy." *N. Star Dev., LLC v. Montana Pub. Serv. Comm'n*, 2022 MT 103, ¶ 23, 408 Mont. 498, 510 P.3d 1232. Section 2-4-702(1)(a), MCA, rather precludes *exercise* of that jurisdiction until all available administrative remedies have been exhausted. *Id*. The exhaustion doctrine is therefore predicated on whether the agency's decision is ripe for review. An agency's decision becomes ripe for review when "legal consequences, rights or duties flow from an agency's action[.]" *Qwest Corp. v. Montana Dep't of Pub. Serv. Regul*., 2007 MT 350, ¶ 21, 340 Mont. 309, 174 P.3d 496. "Courts may intervene in agency process only when a specific final agency action has an actual or immediately threatened effect." *Quest Corp.*, ¶32 (citing *Lujan v. National Wildlife Federation,* 497 U.S. 871, 894 (1990)). Importantly, the law does not

require useless acts, and courts therefore do not require exhaustion of administrative remedies when recourse to an administrative remedy would be futile. *Mt. Water Co. v. Mont. Dep't of Pub. Serve. Regulation,* 2005 MT 84 ¶¶ 15-16, 326 Mont, 416, 110 P.3d 20, 22 (citing § 1-2-223. MCA). Here, waiting for the years' long BER process to play out, without a stay or injunction, would obviously be futile given the applicant's desire to use the gravel for current projects.

To be clear, Appellees did ***not*** request the district court to judicially review DEQ's issuance of the permit or intervene in the BER process. Rather, as found by the District Court, Appellees "brought this separate action because the BER provides no mechanism for them to protect their interest via injunctive relieve (*see e.g.,* §§ 2-4-611 & 612, MCA) while the appeal is pending." COL, ¶ 10. The district court's order only enjoins LHC from using the permit *while the BER appeal is pending*.

Under the Opencut law, final permits are issued *prior to* the administrative review process, *and* that administrative review contains no provision for injunctive relief. It is undisputed that the issuance of LHC's permit conferred legal rights to immediately start mining. § 82-4-432(1)(c), MCA. While it is true the administrative process "allows a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes[,]" *Flowers v. Bd. of Pers. Appeals*, 2020 MT 150, ¶¶ 8-9, 400 Mont. 238, 465 P.3d

210 (citations omitted), it is also true that without a preliminary injunction from the District Court here, there would be no way to prevent irreparable harm because the BER has no provision for a stay or injunction. In effect, there was no process – injunction – to "exhaust" here.

5. *MEPA's injunction provisions have separate and distinct requirements from Title 27, MCA*

LHC argues that the MEPA requirement for an underlying complaint should have been applied here to prevent an injunction, because in its view, there was no underlying complaint. Appellees have previously addressed the inapplicability of the MEPA process here, *supra* pp. 16-23. However, addressing LHC's argument, just because one type of injunction identifies the existence of "pleadings" or a "complaint" does not inherently mean it is a requirement for injunction here. Section75-1-201(6)(c)(ii), MCA, does indeed address the relationship between Title 27 injunctions and specific MEPA requirements, however just not in the way LHC implies. Br. at 26.

The injunction requirements of MEPA provide:

> **Notwithstanding the provisions of 27-19-201 and 27-19-314**, a court having considered the pleadings of the parties and intervenors opposing a request for a temporary restraining order, preliminary injunction, permanent injunction, or other equitable relief may not enjoin the issuance or effectiveness of a license or permit or part of a license or permit issued pursuant to Title 75 or Title 82 unless the court specifically finds that the party requesting the relief is more likely than not to

> prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law . . . .

Section 75-1-201(6)(c)(ii), MCA (emphasis added)

This provision begins explicitly by delineating the two types of injunctions with the term "notwithstanding." When interpreting a statute, this Court "consider[s] the term to have its plain and ordinary meaning." *Bullock v. Fox*, 2019 MT 50, ¶ 53, 395 Mont. 35, 435 P.3d 1187. The ordinary meaning of "notwithstanding" is "in spite of" or "despite." Black's Law Dictionary (11th ed. 2019); "Notwithstanding" also means "[w]ithout opposition, prevention, or obstruction from [.]" Complete Dictionary of the English Language 894 (Webster's 1886); *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 301 (2017) (explaining that the ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by"). By ordinary meaning, the opening language provides that the requirements of 75-1-201(6)(c)(ii) should apply *despite what* §§ 27-19-201 and 27-19-314, MCA may require. In other words, §§ 27-19-201 and 27-19-314, MCA, do not limit the requirements of § 75-1-201(6)(c)(ii), MCA.

This distinction elucidates the legislature's acknowledgment that there are separate and distinct requirements for injunctions *not* brought pursuant to MEPA, as discussed above. This is further bolstered by the fact that both statutes were amended during the 2023 legislatures and earlier iterations of the SB 191 included

both proposed amendments in a single document[5]. SB 577 was then introduced separately from the proposed Title 27 amendments. Despite significantly amending § 27-19-201, MCA at the same time as § 75-1-201, MCA, the legislature did not amend Title 27 to include similar language or terms that it imposes under MEPA.

This Court "will not read into statutes something that is not there." *Strzelczyk*, 264 Mont. at 157, 870 P.2d at 732–33. Had the legislature intended that a "preliminary injunction or temporary restraining order may be granted [having considered the pleadings of the parties] when the applicant establishes" subsections (1)(a)-(d) or "the applicant is likely to succeed on the merits [of its complaint]" it could have included the exact same language, contained in its MEPA remedy provisions, in the general injunction statutes. It did not do so, and LHC's argument is without merit.

C. The District Court did not Improperly Shift the Burden of Proof to DEQ and LHC

Lastly, LHC argues that the District Court "improperly shifted the burden of proof to" DEQ and LHC. Br. at 27 They rely on the District Court's statement that "DEQ and LHC have not met their burden to establish that the operation will not affect surface or groundwater." COL 18. LHC misconstrues the District Court's decision, and the law.

[5] https://leg.mt.gov/laws/bills/2023/SB0199/SB0191

First, the standard for a preliminary injunction has been discussed above. LHC's argument on shifting the burden of proof implies the underlying standard for challenging a permit applies here. It does not.

However, PTC will address LHC's argument because even on its face, it fails. To qualify for a dryland permit, the *operator,* though the application process, must show that the proposed project "will not affect ground water or surface water. . ." 82-4-432(1)(b)(i), MCA, cited by the District Court in COL, ¶ 11.

In discussing whether PTC would prevail on the merits, the District Court stated:

> Adopting this definition, then, means that a pit must merely have an influence on groundwater or surface water, and not that it "intersects" it. **Based on the testimony provided, it is patently clear that neither DEQ, nor the permittee LHC know the answer to this question**. This in and of itself provides this Court with the evidence necessary to find that Plaintiffs are likely to succeed on the merits. **If neither the applicant for a mining permit, nor the DEQ tasked with reviewing that application conduct the due diligence necessary to determine the legal threshold for applicability of the permit, then the permitting decision must fail as an arbitrary and capricious decision.**

COL, ¶ 15 (emphasis added).

The District Court then cited additional evidence in the record to support its position that Plaintiffs were likely to prevail on the merits. Then in ¶ 18, the District Court "additionally" made the statement that DEQ and LHC had not met their burden "to establish that the operations will not affect surface or

groundwater." *Id.* That DEQ and LHC have that initial burden is clear. Requiring that the record show that Defendants complied with the statute does not put them in the "impossible position of proving a negative." LHC Brief, p. 28. In the recent decision in *MEIC v. Westmoreland,* 2023 MT 224, 414 Mont. 80, 2023 Mont. LEXIS 1177, the Court addressed this very issue.

> Thus, Conservation Groups were required to show before the Board **that DEQ's decision violated the law,** by methods including evidence or argument sufficient to show that DEQ's **conclusion**—**that Westmoreland's application had produced enough evidence to bear its burden of proving that the proposal was designed to prevent material damage**—was in **error**. *See MEIC 2005*, ¶ 16.

Id., ¶ 21 (emphasis added).

Here, likewise, it was Plaintiffs' burden to show that DEQ's decision to approve the Permit violated the law – by showing that DEQ's determination that LHC's application had produced enough evidence to bear its burden to show that the mine would not affect ground or surface water was in error. Here, the Court was merely demonstrating, through evidence and testimony in the record submitted by Plaintiffs, that there was insufficient information for the agency to issue the permit (and thus Plaintiffs were likely to prevail on the merits) – precisely in keeping with the standard set forth in *Westmoreland.*

CONCLUSION

For the reasons set forth herein, PTC requests that the Court uphold the District Court's decision and deny LHC's appeal.

DATED this 28th day of February, 2024.

By: /s/ David K.W. Wilson
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2008 for Mac is **9,267**, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 28th day of February, 2024.

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