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MONTANA FOURTEENTH JUDICIAL DISTRICT COURT

MEAGHER COUNTY

_____)	
MONTANA ENVIRONMENTAL)	Case No. _____
INFORMATION CENTER and)	
EARTHWORKS,)	
)	
Plaintiffs,)	
)	VERIFIED COMPLAINT FOR
v.)	DECLARATORY RELIEF AND
)	APPLICATION FOR WRIT OF
MONTANA DEPARTMENT OF)	MANDATE
ENVIRONMENTAL QUALITY and TINTINA)	
ALASKA EXPLORATION, INC.,)	
)	
Defendants.)	
)	
_____)	

INTRODUCTION

1. This case challenges a decision by the Montana Department of Environmental Quality (“DEQ”) that has the potential to impair the ecological integrity and recreational value of the renowned Smith River and its tributaries. Specifically, this case challenges DEQ’s decision to approve Tintina Alaska Exploration Incorporated’s (“Tintina”) application to amend its exploration license to gain underground access to a mineral deposit at the Black Butte Copper

Project near White Sulphur Springs, Montana, without adequately assessing the environmental impacts of such exploration activities—including potential impacts to the Smith River watershed—and in violation of DEQ’s clear legal duties.

2. On November 7, 2012, Tintina submitted an exploration license amendment proposal to expand exploration activities on its Black Butte Copper Project property, located approximately 15 miles north of White Sulphur Springs in Meagher County, Montana. As proposed, Tintina’s amended license would allow for the construction of an exploration tunnel, or “decline,” that would extend underground for nearly a mile into the upper Johnny Lee copper-cobalt-silver deposit zone. The decline is expected to produce a 10,000-ton bulk sample of rock for metallurgical testing.

3. The Black Butte Copper Project is situated in the Sheep Creek watershed. Sheep Creek is a tributary of the Smith River, which in turn is a tributary of the Missouri River. Sheep Creek originates in the Little Belt Mountains at an elevation of approximately 7,600 feet, and discharges into the Smith River about 23 river miles to the west of Black Butte.

4. The Black Butte Copper Project is located approximately 17 air miles above the confluence of Sheep Creek and the Smith River. The Smith River is vital to central Montana’s tourism economy. The river is Montana’s only permitted recreational river. It is renowned for its spectacular scenery, world-class trout fishing opportunities, and unique and highly coveted recreational float trip experience.

5. The Smith River and its tributaries also provide important habitat and spawning grounds for regional trout fisheries. Tributaries in the Sheep Creek drainage (including Sheep Creek, Calf Creek, and Moose Creek) account for over half of tributary spawning of rainbow trout in the Smith River drainage, and rainbow trout have been known to travel nearly 200 miles

round-trip to spawn in Moose Creek. Letter from M. Jeff Hagener, Director, Montana Fish, Wildlife & Parks, to Herb Rolfes – EMB, Montana Dep’t of Env’tl. Quality, Re: Comments of Montana Fish, Wildlife & Parks on the Draft EA for the Tintina Alaska Exploration, Inc. Amended Exploration Permit for the Black Butte Copper Project (Aug. 26, 2013) [“FWP Draft EA Comment Letter”].

6. Despite the waterways’ ecological importance, stream flows in Sheep Creek and the Smith River often are insufficient to fully support the fisheries. See id. Tintina’s proposed exploration activities require massive dewatering of groundwater in the project area, which threatens to exacerbate existing low stream flow conditions and further reduce flows in this important fish habitat. In addition, Tintina’s exploration activities are likely to degrade surface and groundwater quality by allowing for the introduction of carcinogenic and toxic chemicals including arsenic, strontium, and thallium at concentrations exceeding background levels.

7. DEQ’s failure to adequately assess these environmental impacts violates clear legal duties contained in the Montana Environmental Policy Act (“MEPA”), Mont. Code Ann. § 75-1-101 et seq.; Montana Metal Mine Reclamation Act (“MMRA”), Mont. Code Ann. § 82-4-301 et seq.; Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq.; and Article II, section 3 and Article IX, section 1 of the Montana Constitution.

8. For these reasons, and as described more fully herein, Plaintiffs Montana Environmental Information Center (“MEIC”) and Earthworks respectfully request that this Court remand the Mitigated Final Environmental Assessment for additional analysis in accordance with DEQ’s legal duties, set aside as void DEQ’s approval of the incomplete amended exploration license application, and mandate that DEQ perform the requisite nondegradation review.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Plaintiffs' claims pursuant to MEPA, Mont. Code Ann. § 75-1-201(5)(a)(i); the MMRA, Mont. Code Ann. § 82-4-349(1); the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; the Mandamus Act, Mont. Code Ann. § 27-26-102(1); and the Montana Constitution Article II, section 3, and Article IX, section 1. See also Mont. Env'tl. Info. Ctr. v. Dep't Env'tl. Quality, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (exercising jurisdiction over claim that statutory provision was unconstitutional); Ravalli County Fish & Game Ass'n, Inc. v. Mont. Dep't of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995) (exercising jurisdiction over claim that agency failed to comply with MEPA).

10. Venue is proper in this District under Mont. Code Ann. §§ 75-1-108 and 82-4-349 because the Black Butte Copper Project exploration activity that is the subject of this action is located in Meagher County.

PARTIES

11. Plaintiff MEIC is a member-supported advocacy and public education organization based in Helena, Montana, that works to protect and restore Montana's natural environment. Nearly 5,000 individuals in Montana and around the country support MEIC as members, both financially and with their activism. Since its founding in 1973, MEIC has lobbied and litigated both at the state and federal level to prevent degradation of air and water quality and natural resources. MEIC is also dedicated to assuring that state officials comply with and fully uphold the laws of Montana that are designed to protect the environment from pollution. MEIC's advocacy work has included the protection of water resources from surface and groundwater contamination, misuse, and over-appropriation from hardrock mining activities. MEIC has worked with citizens to identify the many impacts associated with Tintina's

application to amend its exploration license, provided comments during the public hearing, submitted comments to the DEQ on the proposed amendment, and encouraged our membership to do the same.

12. Plaintiff Earthworks is a non-profit organization dedicated to protecting communities and the environment against the adverse impacts of hardrock mining. For over 25 years, Earthworks has partnered with local communities, state and national organizations to promote more responsible mining policies and practices at the state and national level. Earthworks has offices in Montana, Colorado, Texas, California, New York and Washington D.C. Earthworks' Montana office has litigated and lobbied to protect and restore Montana's natural environment, and submitted comments on the draft Environmental Assessment for the Black Butte Copper Project's exploration license amendment application.

13. DEQ's approval of Tintina's application to amend its exploration license to gain underground access to a mineral deposit at the Black Butte Copper Project threatens to adversely affect Plaintiffs' organizational interests in protecting watershed integrity, water quality, fishery health, and recreational opportunities. In addition, Plaintiffs' interests were harmed by DEQ's failure to adhere to all of the requirements of MEPA in its decision-making process. DEQ's approval of Tintina's amended exploration license adversely impacts Plaintiffs' members and their shared interest in healthy stream flows and fisheries, clean water, and exceptional recreational opportunities. Plaintiffs' members include landowners who live and work in and near White Sulphur Springs, Montana, and individuals who fish and recreate in and around the area that will be adversely affected by underground exploration activities at the Black Butte Copper Mine. Groundwater and surface water depletion and contamination originating from the Tintina activities approved by DEQ threaten the health, livelihood, and recreational enjoyment of

Plaintiffs' members.

14. Plaintiffs' aesthetic, conservation, economic, and recreational interests have been, are being, and—unless their requested relief is granted—will continue to be adversely and irreparably injured by defendants' failure to comply with governing law. These are actual, concrete injuries, traceable to defendants' conduct that would be redressed by the requested relief.

15. Defendant DEQ was established by the Montana legislature in Chapter 418, Laws of 1995 (SB 234). DEQ is responsible under Montana law for protecting water quality and issuing hard rock mining permits. Mont. Env'tl. Info. Ctr., 1999 MT at ¶ 5, 296 Mont. at 210-11, 988 P.2d at 1237. DEQ's "mission is to protect, sustain, and improve a clean and healthful environment to benefit present and future generations." Mont. Dep't Env'tl. Quality, Mission Statement and Guiding Principles (2012), at <http://deq.mt.gov/about/mission.mcp>x. The agency's main office is located in Lewis and Clark County.

16. Defendant Tintina Alaska Exploration, Inc., is a subsidiary of Tintina Resources Inc. Tintina Resources Inc. is a Vancouver, British Columbia-based resource exploration and development company that is publicly traded on the Toronto Stock Exchange. Tintina Alaska Exploration, Inc. is incorporated under the laws of Delaware.

FACTUAL BACKGROUND

I. WHITE SULPHUR SPRINGS & THE SMITH RIVER

17. The Black Butte Copper Project is located approximately 15 miles north of White Sulphur Springs in Meagher County, Montana.

18. Primary land uses in the area are agriculture, including hay and livestock production, and outdoor recreation, including big game hunting and fishing.

19. The White Sulphur Springs area is a major outdoor recreational destination surrounded by several mountain ranges, including the Little Belt Mountains, Big Belt Mountains, and Castle Mountains. The town is located on the King Hills Scenic Byway (Highway 89) between Yellowstone National Park to the south and Glacier National Park to the north. The Byway is known as one of the most scenic drives in Montana.

20. White Sulphur Springs is located at the headwaters of the Smith River. The Smith River, a tributary of the Missouri River, is an important contributor to Montana's tourism economy. The river is renowned for its spectacular scenery, winding its way through a remote, steeply walled limestone canyon and a panorama of grassy hills. The Smith River offers exceptional trout fishing opportunities, as well as a unique and highly-coveted recreational float trip experience. Float trips down the Smith River are in such high demand that the state of Montana limits access via an annual lottery system. In 2014, only 15% of applicants were awarded a float permit.¹

21. In addition to providing an exceptional recreational experience, the Smith River is a vital resource for the region's economy. Montana Fish, Wildlife and Parks estimates that the average revenue generated by recreational float trips on the Smith River is over \$1,200,000 annually.

22. One of the major tributaries to the Smith River, Sheep Creek, provides crucial habitat for resident fisheries and is an important spawning ground for Smith River and Missouri River trout fisheries. Stream flow in Sheep Creek often falls short of existing instream water rights, preventing the fisheries from achieving their full potential.

¹ In 2014, 1,122 permits were awarded from a pool of 7,373 applications. Smith River Permit Winners Named, Great Falls Trib. (Mar. 4, 2014), available at <http://www.greatfallstribune.com/article/20140304/NEWS01/303040020/Smith-River-permit-winners-announced>.

II. THE BLACK BUTTE COPPER PROJECT & ITS ENVIRONMENTAL IMPACTS

23. Underground exploration activities at the Black Butte Copper Project site have the potential to significantly degrade the environment and reduce human welfare.

A. Black Butte Copper Project

24. The Black Butte Copper Project encompasses a proposed surface disturbance area of 46.5 acres on the Bar Z Ranch and Hanson properties in sections 23, 24, 25, 26, 28, 32, 33, 34, 35, and 36, Township 12 North, Range 6 East; sections 19, 29, 30, and 32, Township 12 North, Range 7 East; sections 1, 2, 6, and 7, Township 11 North, Range 6 East; sections 1 and 12, Township 11 North, Range 5 East.

25. Tintina's exploration license amendment would allow the company to expand exploration activities by constructing an 18-foot wide by 18-foot high, 5,200-foot long exploration decline into the upper Johnny Lee copper-cobalt-silver deposit zone. The decline would provide access for an underground development drilling program that would result in the collection of a 10,000-ton bulk sample for metallurgical testing. The purpose of the decline is to determine the potential of the Black Butte Copper Project for future mining, and to assess the environmental consequences of mining—including impacts to ground and surface waters—should Tintina decide to apply for an operating permit.

26. Once the proposed decline reaches a depth of approximately 1,700 feet, it will drop below the water table. Accordingly, water must continuously be pumped out of the decline to prevent flooding. Under Tintina's project plan, water pumped from the decline would be stored in a so-called non-acid-generating waste ("NAG") pond. This water ultimately would be discharged to surface and subsurface land application disposal areas ("LADs").

27. The pumping of groundwater out of the decline will depress the local groundwater

table. See DEQ, Final Mitigated Environmental Assessment: Tintina Alaska Exploration, Inc., Black Butte Copper Project, Meagher County, MT, Exploration License #00710, at 37 (Jan. 2014) [“Final Mitigated EA”]. This depression results because the dewatering of the decline changes the flow direction of groundwater in the area. Rather than flowing in its natural direction, the groundwater in the area of influence will flow toward the area of the pumping. This drawdown produces a feature called the cone of depression.

28. The mine dewatering may effect a drawdown in the Sheep Creek alluvial aquifer. This potential result was confirmed by a modeling exercise that DEQ relied upon in approving the project. See Final Mitigated EA at 38, 45 (noting that the model’s peak dewatering scenario shows the cone of depression extending into Sheep Creek’s alluvial gravels).

29. Given the connectivity between groundwater and surface water resources, a drawdown in the Sheep Creek alluvial aquifer threatens to reduce stream flows in Sheep Creek itself. Reduced flows (both overall and during the spawning season) would further strain the Creek’s ability to provide high-quality habitat and spawning grounds for fisheries.

B. The Final Mitigated Environmental Assessment

30. DEQ has jurisdiction to approve and regulate the Black Butte Copper Project under the MMRA, Title 82, Chapter 4, Part 3, of the Montana Code Annotated.

31. Pursuant to this authority, DEQ approved surface exploration activities at the Black Butte Copper Project under Exploration License No. 00710. Tintina has been conducting surface exploration activities under this license since September 2010.

32. On November 7, 2012, Tintina submitted a license amendment proposal to expand exploration activities on its Black Butte Copper Project property to construct the decline described above.

33. DEQ reviewed the exploration license amendment application and issued deficiency letters on January 4, 2013, and March 15, 2013.

34. Tintina submitted an amended final application on April 4, 2013.

35. As part of DEQ's review of an exploration license amendment application, MEPA requires an environmental review of the proposed action (here, the exploration decline).

36. Under DEQ's MEPA regulations, an "agency may, as an alternative to preparing an [Environmental Impact Statement ("EIS")], prepare an [Environmental Assessment ("EA")]" whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. 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." A.R.M. 17.4.607(4).

37. On July 15, 2013, DEQ issued a draft EA on the amended exploration license proposal and received public comments until August 26, 2013.

38. DEQ received over 3,000 public comments on the draft Environmental Assessment in opposition to the Black Butte Copper Project.

39. On January 14, 2014, DEQ issued an approval decision on Tintina's requested exploration license amendment along with a Final Mitigated Environmental Assessment pursuant to A.R.M. 17.4.607(4). See generally Final Mitigated EA.

40. In issuing this Final Mitigated EA, "DEQ ... determined that all of the potential impacts of the proposed action have been accurately identified, that the impacts will be mitigated below the level of significance through project design and stipulations imposed by DEQ as

reflected in the Agency Mitigated Alternative, and that no significant impact is likely to occur.” DEQ, Decision on Application for Amendment of Tintina Alaska Exploration, Inc. Exploration License No. 00710, Black Butte Copper Project, at 1 (Jan. 14, 2014).

41. Of particular relevance to this action, DEQ’s Final Mitigated EA contains certain “enforceable stipulations” to Tintina’s amended exploration license and “monitoring ... to verify DEQ’s determination that significant impacts to surface and groundwater are not likely to occur.” Id.

42. For example, DEQ assumes that surface flows in the Sheep Creek watershed will not be affected by mine dewatering. To verify this assumption, DEQ will require that Tintina monitor groundwater drawdown and surface water flows and mitigate any drawdown that is detected. Id. See also Final Mitigated EA at 36, 38. However, DEQ’s assumption that drawdown will not affect flows in Sheep Creek (and, thus, the Creek’s fisheries) is based on insufficient analysis and is contrary to the modeling analyses that were presented in the Final Mitigated EA. Further, DEQ’s mitigation plan does not account for or attempt to quantify or address any lag times that may occur between drawdown and the detectability of impacts to surface flows.

43. DEQ also outlines a variety of requirements intended to prevent discharged waste water from mixing with surface waters. However, DEQ recognizes the possibility of such mixing and in fact seems to rely on some measure of hydrologic connectivity between ground and surface waters to demonstrate that surface water flows and wetlands will not be affected by mine dewatering. There is no attempt to reconcile these competing postulates.

44. DEQ intends to require groundwater and surface water quality monitoring for certain contaminants, and to hold Tintina responsible for compliance with groundwater

standards. However, even with these monitoring and mitigation programs in place, DEQ will allow for carcinogenic and toxic parameters including arsenic, strontium, and thallium to be discharged to receiving waters at levels that exceed background concentrations in violation of the nondegradation policy outlined in the Montana Water Quality Act and the Montana Constitution's right to a clean and healthful environment.

CLAIMS

FIRST CAUSE OF ACTION (Montana Environmental Policy Act)

45. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 44.

46. Under Montana law, the principal legal mechanism to examine the environmental consequences anticipated to flow from the Black Butte Copper Project is the Montana Environmental Policy Act (“MEPA”), Mont. Code Ann. § 75-1-101, et seq. One of MEPA’s primary purposes is “to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” Id. § 75-1-102(2). MEPA does so by requiring State decisionmakers to fully examine the impacts of proposed actions and to evaluate alternatives that may reduce or avoid those impacts. Id. § 75-1-201. This environmental analysis is an important component of the State’s constitutional obligation to prevent unreasonable environmental degradation. See Mont. Const., Art. II, sec. 3; id. Art. IX, sec. 1; see also Mont. Code Ann. § 75-1-102 (MEPA intended to implement State’s constitutional obligations with respect to environmental protection).

47. Modeled after the National Environmental Policy Act, MEPA requires “the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana

human environment.” Id. § 75-1-201(1)(b)(i)(A). MEPA directs that “it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may ... fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” Id. § 75-1-103(2).

48. “MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands.” Ravalli County Fish & Game Ass’n, Inc., 273 Mont. at 384, 903 P.2d at 1371. Thus, state decisionmakers are prohibited from “reach[ing] a decision without first engaging in the requisite significant impacts analysis.” Id.

Failure to Produce an Environmental Impact Statement (EIS)

49. DEQ’s decision to approve Tintina’s proposed exploration license amendment without first preparing an EIS violated MEPA.

50. Under DEQ’s MEPA regulations, an “agency may, as an alternative to preparing an EIS, prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies.” A.R.M. 17.4.607(4).

51. In approving Tintina’s proposed exploration license amendment, DEQ prepared an EA rather than an EIS on the assumption 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.” Id.

52. However, DEQ’s conclusions 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” are arbitrary as they lacked sufficient analysis and dismissed potentially significant impacts to regional water flows, fisheries, and water quality. In addition, DEQ arbitrarily neglected to include the issue of bonding and several additional regulatory criteria in its analysis of the Proposed Action’s significance.

Impacts to Sheep Creek

53. DEQ arbitrarily concluded that the dewatering impacts to Sheep Creek would be insignificant. In so doing, DEQ rejected the results of the model relied upon in the agency’s analysis, which shows the cone of depression entering the Sheep Creek alluvial aquifer. See Final Mitigated EA at 38, 45.

54. DEQ reasoned that “limitations of the model result in very conservative (high) drawdown predictions” that are unlikely to be borne out, “particularly in outlying areas at the margins of the model domain.” Id. at 38. DEQ’s conclusion rests on the agency’s assumption that re-infiltration of waters discharged to the LAD system would mitigate impacts to the shallow groundwater system. Id. at 38, 45. DEQ further speculates that lateral water movement through highly transmissive alluvial gravels in the vicinity of Sheep Creek, in combination with the high storage capacity of the alluvial aquifer, would further limit drawdown in Sheep Creek. Id. at 46.

55. However, DEQ arrived at these conclusions based on “a simplified assessment” (i.e., the model) that was not intended to quantify drawdown at specific locations. See Tintina Alaska Exploration, Inc., Amendment to Exploration License 00710: Second Deficiency Review, Appendix I (Apr. 2, 2013) [“Appendix I”]. While DEQ claims that the modeling results overstate the drawdown impacts “in outlying areas at the margins of the model domain,” Final Mitigated EA at 38, the model may in fact understate such impacts by failing to account for drawdown impacts of less than five feet, thereby artificially truncating the model domain.

Appendix I, Figs. 3, 4.

56. In addition, DEQ arrived at its conclusion that the dewatering impacts to Sheep Creek would be insignificant without performing the requisite water balance analysis of the alluvial aquifer and its downstream contribution to Sheep Creek. DEQ also failed to consider whether there will be a lag time between mine dewatering and any flow impacts to Sheep Creek. DEQ's conclusion that dewatering impacts to Sheep Creek would be insignificant is thus arbitrary under MEPA.

Impacts to Fisheries

57. Second, DEQ arbitrarily dismissed potential impacts to fisheries. DEQ's entire discussion of fisheries impacts is relegated to two sentences on page 55 of the Final EA: "No critical fishery habitat locations have been identified. Surface water resources and wetlands would not be affected by the proposed exploration program." Final Mitigated EA at 55.

58. In a similarly cursory fashion, DEQ's sole description of fishery resources consists of two sentences on page 49 of the EA: "It is likely that brook trout, rainbow trout, westslope cutthroat trout, and hybrids of rainbow and westslope cutthroat trout are present in waters in the Project area. No critical fishery habitat locations have been identified at this time." Final Mitigated EA at 49.

59. In contrast with DEQ's confidence that fisheries would not be impacted by potential dewatering impacts to Sheep Creek, FWP (in its comments on the Draft EA) expressed grave concern that even minimal flow reduction could harm fish, as "stream flow [in the Smith River Basin] is too often not adequate to fully support the fishery." FWP Draft EA Comment Letter.

60. FWP called upon DEQ to reevaluate the significance of potential diminishment in

Sheep Creek stream flow in light of potential fisheries impacts, as well as conflicts with FWP's prior instream water rights. Id. In response, DEQ cross-referenced a general response to comments that identified a significance threshold for dewatering impacts as "a change of 10 percent to the lowest measured or calculated flow that occurs over a 7-day period during a 10-year cycle." Final Mitigated EA, Appendix A: Tintina Black Butte Copper Project, Response to Comments at 11.

61. However, DEQ engaged in no analysis of whether this threshold—which is a regulatory de minimis exemption from Montana's nondegradation law—is appropriate for determining the significance of dewatering impacts to Sheep Creek fisheries. This oversight is arbitrary and in violation of MEPA.

Impacts to Surface Waters

62. DEQ arbitrarily concluded that there would be no discharge of decline water to surface waters, including Sheep Creek and wetlands downgradient of the LAD area. See, e.g., Final Mitigated EA at 67 ("As designed, this exploration phase of the Black Butte Copper Project would not disturb or impact directly or indirectly any [identified] potential wetland areas"); id. at 68 ("DEQ concludes that surface water and groundwater resources in wetlands would not be impacted by the proposed exploration program"); id. at 69 ("There are no predicted impacts to existing surface water quality and quantity from dewatering associated with construction of the exploration decline").

63. DEQ's conclusion necessarily assumes that the water supplying the wetlands and Sheep Creek will not mix with the LAD water, despite the fact that "[r]e-infiltration of mine water via the LAD system was not simulated." Id. at 45. At the same time, DEQ appears to rely on the possibility that re-infiltration of mine water via the LAD system would prevent drawdown

in Sheep Creek, see Final Mitigated EA at 59, suggesting at least the possibility of hydrologic connectivity between ground and surface waters.

64. DEQ also admits that improper management of LAD areas could result in mounding of groundwater beneath the LAD sites and the ultimate migration of LAD water through the shallow groundwater system and into surface waters. Id. at 71. DEQ proposes a variety of management measures to reduce the probability of such an outcome, and states that if such measures prove insufficient, Tintina will be required to obtain a Montana Pollutant Discharge Elimination System (“MPDES”) permit. Id. at 71-72.

65. In sum, DEQ confuses the possibility and implications of LAD discharges mixing with surface waters. The agency’s incomplete characterization of the flow system underlying the LAD site is an insufficient basis upon which to conclude that no discharge of LAD waters to surface waters will occur, did not allow the agency to fully consider the significance of the proposed action, and as such is arbitrary under MEPA.

Bonding

66. DEQ also violated MEPA by failing to provide information in the EA on the required reclamation bond increase. Tintina must file with DEQ a bond in the sum determined by the agency to cover the cost of reclamation activities before the company may move forward with approved activities. In its January 14, 2014, letter approving Tintina’s exploration license amendment, DEQ stated that it would request that Tintina submit a bond increase within 30 days. However, the amount of the bond increase was nowhere discussed in the Final Mitigated EA.

67. An adequate reclamation bond is necessary to ensure that Tintina will comply with all state environmental laws (including the MMRA and Montana Air and Water Quality Acts) and that mitigation of potentially significant environmental impacts will be completed as

described. See Clark Fork Coal. v. Mont. Dept. of Env'tl. Quality, 2008 MT 407, ¶¶ 46-48, 347 Mont. 197, 210-12, 197 P.3d 482, 492-93 (discussing failure to take a hard look at sufficiency of bonding).

68. Because DEQ failed to evaluate and justify the amount of the required bond increase in the EA, neither the public nor the agency could be assured that environmental impacts would not be significant. DEQ's failure to disclose the amount of Tintina's reclamation bond and to evaluate the potential for significant, unmitigated impacts in light of that bond amount was thus arbitrary and in violation of MEPA.

Failure to Consider Additional Regulatory Criteria

69. In addition, DEQ failed to evaluate additional regulatory criteria in determining whether to prepare an EIS. Specifically, DEQ failed to "consider the following criteria in determining the significance of each impact on the quality of the human environment: ... (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; ... [and] (g) potential conflict with local, state, or federal laws, requirements, or formal plans." A.R.M. 17.4.608(1).

70. DEQ's failure to evaluate these criteria was arbitrary and did not allow the agency to fully consider the significance of the impacts of the proposed action. As such, the agency's actions violated MEPA.

Failure to Take a "Hard Look"

71. Finally, for the reasons described in paragraphs 45-70, supra, DEQ's flawed analysis of the potential impacts of the approved underground exploration activity at the Black Butte Copper Project provides the basis for a claim demonstrating that DEQ failed to take a

“hard look” at the environmental consequences of the approved activity in violation of MEPA. Ravalli Cty. Fish & Game Assn., 273 Mont. at 377, 903 P.2d at 1367. “Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data.” Clark Fork Coal., 2008 MT at ¶ 47, 347 Mont. at 211, 197 P.3d at 492. By failing to do so here, DEQ violated MEPA.

**SECOND CAUSE OF ACTION
(Montana Metal Mine Reclamation Act)**

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

73. The Montana legislature enacted the Metal Mine Reclamation Act (“MMRA”), Mont. Code Ann. § 82-4-301 et seq., to “provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources” in areas where metal mining occurs. Mont. Code Ann. § 82-4-301(1). The statute was enacted to ensure metal mining activities do not violate Montanans’ constitutional right to a clean and healthful environment. Id.

74. The MMRA requires that DEQ issue an exploration license to any applicant who complies with various statutory requirements and who does not have any outstanding violations of the MMRA. Mont. Code Ann. § 82-4-332(1). See also A.R.M. 17.24.105, 17.24.107.

75. However, an application for an exploration license must include “an exploration plan of operations ... in sufficient detail ... to allow the department to adequately determine whether significant environmental problems would be encountered.” A.R.M. 17.24.103(1)(c).

76. Tintina’s exploration plan of operations lacked sufficient detail to allow DEQ to assess potential impacts to surface waters caused by decline dewatering and LAD discharges. DEQ’s approval of Tintina’s incomplete application was thus unlawful.

**THIRD CAUSE OF ACTION
(Montana Water Quality Act)**

77. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 76.

78. The Montana Water Quality Act was enacted in light of the state’s public policies to “conserve water by protecting, maintaining, and improving [its] quality and potability,” and to “provide a comprehensive program for the prevention, abatement, and control of water pollution.” Mont. Code Ann. § 75-5-101(1), (2).

Failure to Undertake Nondegradation Review

79. DEQ unlawfully failed to undertake nondegradation review of Tintina’s proposed groundwater discharges in violation of the Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq.

80. Montana’s nondegradation policy prohibits DEQ from authorizing degradation of high-quality waters, including groundwater, unless the agency makes certain affirmative findings, including a finding that “the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.” Mont. Code Ann. § 75-5-303, (3), (3)(d).

81. DEQ regulations identify discharges that are subject to nondegradation review, including all discharges of carcinogenic substances at concentrations greater than those present in the receiving water. A.R.M. 17.30.715(1)(b). In approving Tintina’s exploration activities, DEQ has authorized discharges of water containing arsenic, a carcinogen, in concentrations that exceed the concentration in the receiving waters.

82. DEQ regulations also require nondegradation review for discharges of toxic parameters which will cause changes that equal or exceed the “trigger values” established in

Circular DEQ-7. See A.R.M. 17.30.715(1)(c). In Circular DEQ-7, the agency has specified for each parameter a “trigger value,” which is used to determine whether a change in water quality is significant for the purposes of compliance with Montana’s nondegradation policy. DEQ has authorized Tintina’s discharges of at least two toxic substances, strontium and thallium, in concentrations that exceed the established trigger values for those pollutants without analyzing whether the resulting receiving water quality would exceed the trigger values.

83. The discharges identified in paragraphs 81-82 are subject to nondegradation review unless a legitimate exemption applies. Mont. Code Ann. § 75-5-303(2).

Unconstitutionality of Exemption for Mineral Exploration

84. DEQ’s actions must be guided by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Article II, Section 3 guarantees Montanans “the right to a clean and healthful environment.” Mont. Const., Art. II, sec. 3. Article IX, Section 1 provides that “[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Id., Art. IX, sec. 1. These constitutional provisions are intended to not “merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment.” Mont. Env’tl. Info. Ctr., 1999 MT at ¶ 77, 296 Mont. at 230, 988 P.2d at 1249. Rather, read together, they provide environmental “protections which are both anticipatory and preventative.” Id.

85. The Montana Water Quality Act was enacted in light of these constitutional obligations. Mont. Code Ann. § 75-5-102(1).

86. While Mont. Code Ann. § 75-5-317(2)(q) exempts from nondegradation review “metallic and nonmetallic mineral exploration that does not result in a discharge to surface water and that is permitted under and performed in accordance with Title 82, chapter 4, parts 3 and 4,”

application of this exemption to Tintina's activities is impermissible because DEQ did not affirmatively demonstrate that Tintina's exploration activities will not result in a discharge to surface waters, and further, application of the mineral exemption in this situation violates the right to a clean and healthful environment provided for by the Montana Constitution. See Montana Constitution Article II, section 3, and Article IX, section 1. See also Mont. Env'tl. Info. Ctr., 1999 MT at ¶ 80, 296 Mont. at 231, 988 P.2d at 1249 (finding that "to the extent § 75-5-317(2)(j), MCA (1995) arbitrarily excludes certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution").

WRIT OF MANDAMUS

87. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 86.

88. DEQ violated clear legal duties under the Montana Metal Mine Reclamation Act, Mont. Code Ann. § 82-4-301 et seq.; Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq.; and Article II, section 3 and Article IX, section 1 of the Montana Constitution. Plaintiffs have no plain, speedy and adequate remedy in the ordinary course of law. Pursuant to the provisions of Montana Code Annotated §§ 27-26-101, et seq., alternative and peremptory writs of mandamus should issue directing the DEQ to properly consider, in accordance with its clear legal duties under Montana law, Tintina's application to amend its exploration license.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that DEQ violated MEPA by approving Tintina's proposed exploration license amendment based on an inadequate environmental analysis;

2. Declare that DEQ violated MEPA by failing to produce a full Environmental Impact Statement;
3. Remand the Final Mitigated Environmental Assessment to DEQ for additional analysis;
4. Set aside as void Tintina's amended exploration license for failure to include a sufficiently detailed exploration plan of operations as required under the MMRA, and mandate that DEQ return the application to Tintina as incomplete and inadequate;
5. Declare that DEQ violated the Water Quality Act by failing to require the requisite nondegradation review and mandate that DEQ perform the required nondegradation analysis;
6. Declare that Montana Code Annotated section 75-5-317(2)(q) as applied violates Article II, section 3 and Article IX, section 1 of Montana's Constitution;
7. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation, in accordance with Montana law; and
8. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted on this 14th day of March, 2014,

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Attorney for Plaintiffs

VERIFICATION

I, James Jensen, Executive Director of MEIC, a Plaintiff named in the foregoing Complaint, verify that I have read the Verified Complaint for Declaratory Relief And Application for Writ of Mandate, and verify that the statements made therein as factual are true and correct to the best of my knowledge, based upon information and belief.



James Jensen

State of Montana
County of Lewis & Clark

Subscribed and sworn to me this 13th day of March, 2014, by Jim Jensen

(SEAL)




Notary Public for the State of Montana
Residing at:
My Commission Expires: