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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWS AND CLARK COUNTY**

<p>MONTANA ENVIRONMENTAL INFORMATION CENTER,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>STATE OF MONTANA, by and through the MONTANA DEPARTMENT OF JUSTICE</p> <p style="text-align: center;">Defendant.</p>	<p>CAUSE NO.</p> <p>COMPLAINT FOR DECLARATORY JUDGMENT AND APPLICATION FOR WRIT OF MANDAMUS</p>
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Comes now, Montana Environmental Information Center (“MEIC”), through counsel, and for its complaint and application for relief against the State of Montana (the “State”) states and alleges as follows:

INTRODUCTION

1. This action challenges the failure of the State of Montana, by and through the Montana Department of Justice (DOJ), to provide public records and an

accompanying privilege log to Plaintiffs in response to an information request, as required by Montana’s fundamental constitutional right to examine public documents under Article II, § 9.

2. The records in question revolve around 414 records regarding DOJ’s communications with Teck Resources, Ltd., DBA Teck Coal, Ltd., (“Teck”) a publicly traded Canadian coal mining corporation that owns and operates coal mines in the Elk Valley of British Columbia. DOJ is refusing to provide *any* public records or a privilege log, and instead is generally asserting that its communications with Vancouver, B.C. headquartered Teck (a foreign, Canadian-regulated, third-party corporation) are protected under a “common interest privilege.”¹

3. For several decades, Teck’s mines have leached selenium pollution from its operations into adjacent waterways, which travel downstream and into Montana’s Lake Koocanusa and the Kootenai River. Over the past 40 years selenium levels have increased dramatically in Canada’s Elk River and the downstream waterbodies. In November 2023, the U.S. Geological Survey characterized the pollution from Teck’s mining operations as “among the largest documented increases in the primary literature,” noting a sixfold increase in Selenium and that water quality standards are “now being regularly exceeded on both sides of the border.”²

4. The transboundary pollution from Teck’s operations is in clear violation of Article IV of the 1909 Boundary Waters Treaty between the United States and Canada. The water pollution problem has become so dire that, on March 11, 2024, the

1 Teck Coal is currently the subject of a sale for its assets in the Elk Valley to Glencore , with closing predicted sometime in the third quarter of 2024.

2 <https://pubs.acs.org/doi/10.1021/acs.est.3c05090>

governments of Canada and the United States agreed to a joint probe to evaluate how to address the pollution through an International Joint Commission (IJC) under the Boundary Waters Treaty. The governments of the Ktunaxa Nation, Montana, Idaho, and British Columbia will also be represented in the recently convened IJC.

5. Excessive selenium pollution is devastating to aquatic species, causing deformities and extremely low reproductive rates. The pollution is specifically threatening to the native West Slope Cutthroat Trout and the endangered White Sturgeon in the Koocanusa Reservoir and Kootenai River.

6. In response to the well-documented selenium impacts to Montana's waters, the Montana Board of Environmental Review ("Board") promulgated ARM 17.30.632(7)(a) on December 24, 2020, setting a site-specific water quality standard, as required by the Clean Water Act, of 0.8 µg/L for Lake Koocanusa. The selenium standard, which was recommended by the Montana Department of Environmental Quality (DEQ) and later approved by the U.S. Environmental Protection Agency (EPA), was scientifically calculated to protect all aquatic species from the harms of selenium pollution.

7. Approximately six months after the rule was adopted, Teck petitioned the Board to review the rule under Montana's Stringency Statute. Section 75-5-203(4), MCA. The Lincoln County Board of Commissioners filed its own petition for review.

8. After a limited review process, the Board issued a Final Order attempting to unlawfully reverse its earlier promulgation of Lake Koocanusa's protective selenium rule and ordered remedies that exceed its statutory authority. The Board's Final Order, which was not based on new facts or science, has generated significant controversy and is

now the subject of two lawsuits pending in the 1st Judicial District regarding the limits of the Board's authority and the final selenium rule. These cases are before Judge Seeley (CDV-2023-21 and CDV-2023-366) and have been consolidated. DOJ has only intervened in CDV-2023-21 as an Intervenor-Respondent and siding with the foreign corporation that is polluting Montana's waters. Discovery in CDV-2023-21 – the only case in which DOJ is a party to – is now closed.

9. On January 4, 2024, MEIC submitted a public records request to DOJ, to turn over its communications with the foreign, Canadian-regulated, third-party corporation that is polluting Montana waters. To date, DOJ has refused to provide *any* records or an associated privilege log, which has violated Plaintiffs Constitutional right to know regarding DOJ's actions. DOJ's actions have resulted in this complaint.

PARTIES, JURISDICTION, AND VENUE

10. Plaintiff MEIC is a non-profit organization with over a half-century of defending the public interest in protecting and restoring Montana's environment. MEIC has thousands of members across Montana and works to ensure that government and private entities abide by Montana's clean water laws and regulations, thereby helping to provide cleaner water for all, as guaranteed by Montana's Constitution. The records sought in this action are requested in direct support of these efforts.

11. Defendant State of Montana, by and through DOJ, is subject to Montana's right to know and public information statutes. DOJ must comply with Article II, § 9, of the Montana Constitution and the Public Records Act, MCA § 2-6-1001 et seq.,

12. Jurisdiction is proper in this Court pursuant to §§ 2-6-101, et seq; 27-8-101, et seq., and 27-26-101, et seq., MCA.

13. Venue is also proper pursuant to § 25-2-126, MCA.

BACKGROUND

14. On January 4, 2024, MEIC sent a request for information to DOJ. The request was sent pursuant to Article II, § 9, of the Montana Constitution, which provides,

Section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

15. In its request to DOJ, MEIC specifically requested, on behalf of itself, from the time period of January 1, 2022, to the present, “All documents, records, information, and materials in the possession of the Montana Department of Justice / Attorney General’s Office related to Teck Coal ...”

16. The request was submitted through a request form on DOJ’s publicly available website, and submitted via mail, per the instructions of the website, to DOJ’s Helena office.³ MEIC subsequently received an automated acknowledgement of receipt from the online form.

17. By January 11, 2024, DOJ had not acknowledged MEIC’s information request, and so MEIC contacted DOJ. DOJ responded on January 16, stating that “our Communications contact will be reaching out to you soon.”

18. On January 17, 2024 the Communications Director for DOJ contacted MEIC, stating that “there are likely many privileged documents that we would need to search and document in a privilege log per your request.”

³ <https://dojmt.gov/about/>

19. A subsequent set of emails were exchanged, and ultimately the request was narrowed to a list of key search terms and individuals that have potentially had communications with Teck.

20. DOJ then responded that the costs associated with simply identifying the universe of documents through a search process, but not reviewing or providing the documents to MEIC, would cost \$463.86. MEIC objected to this “fee” in advance of an actual fee estimate, the latter of which is permissible under statute in order for agencies to offset the costs of fulfilling a records request. MEIC requested that DOJ provide a fee estimate for the full costs of *fulfilling* the records request.

21. After an extended period of silence from DOJ, on February 14, 2024, MEIC was contacted by DOJ’s Executive Assistant to the Attorney General. DOJ offered to “defer payment” of its illegal fee “until after the request is fulfilled.” DOJ then stated that:

Next, the assertion in your January 18, 2024 (10:40am), email to Mr. Nerison that communications between the Attorney General’s office and Teck Coal’s attorneys “will not be privileged” is categorically false. MEIC has specifically requested communications regarding active litigation to which both the Attorney General and Teck Coal are parties. Moreover, MEIC has specifically requested communications with attorneys retained by Teck Coal for this litigation. Please be advised that DOJ considers these items privileged from disclosure and will indicate that on written denials under MCA § 2-6-1009.

22. DOJ identified 414 records that are responsive to MEIC’s request for communications with Teck.

23. On March 1, 2024, DOJ provided MEIC with a fee estimate for the review of 414 records, including:

IT \$72 for 2 hours
Initial sorting \$26 for 6 hours - \$156
Legal Review \$121 for 21 hours \$2,541.00
Total cost - \$2,769.

24. MEIC objected to DOJ including the hourly costs of legal review. However, MEIC remitted payment for the full amount on March 14, 2024, in order for DOJ to process the information request. At this point, MEIC presumed that DOJ would then process the information request and provide the requested documents and an associated privilege log.

25. Instead, on March 20, 2024, MEIC received a letter from DOJ requesting that MEIC withdraw the request, alleging that the requested public information was privileged and that MEIC's request was an abuse of the Public Records Act.

26. MEIC responded on March 27, 2024, declining to withdraw the request, noting that DOJ was obligated to provide public documents and a privilege log, noting that a request for public information concurrent with litigation was an appropriate use of the Public Records Act, and requesting that DOJ respond to the records request by April 26, 2024.

27. On April 5, 2024, DOJ sent an additional letter threatening legal action against MEIC with a 7-day deadline of April 12, 2024, reiterating that it would not comply with the public records request, asserting that it was not required to provide a privilege log, and alleging that its communications with Teck were protected under the common interest privilege. DOJ also offered to rescind MEIC's payment for processing the records request in exchange for DOJ providing what it deemed to be publicly available documents not protected by privilege, along with "a general denial for withholding production of privileged records."

28. To date, DOJ has not fulfilled MEIC's record request and continues to refuse to comply with its obligations under Montana's Constitution.

29. Petitioners have been harmed by the State Defendants' refusal to honor a public information request for public documents. The State's refusal to provide the

requested documents and an associated privilege log has hampered Petitioner's work and advocacy. Petitioners have had to hire counsel to pursue this matter.

COUNT I – VIOLATION OF RIGHT TO KNOW AND IMPLEMENTING STATUTES

30. The preceding paragraphs are realleged as though set forth in full hereunder.

31. Section 2-6-1006(2)(a), MCA, requires the Defendant to respond to a request for information in a timely manner, or to provide an estimate of the costs. DOJ must process a records request after receiving payment, MCA 2-6-1006(c). DOJ has received payment in full.

32. As of April 12, 2024, DOJ has failed to provide *any* information, or an associated privilege log, to MEIC in response to its public information request.

33. Pursuant to § 2-6-1009, MCA, the State's actions violate § 2-6-1001 et seq., and the Montana Constitution at Article II, § 9, and MEIC is entitled to the information requested and a privilege log.

34. MEIC is entitled to a declaration that Defendant has violated the law and Montana's Constitution.

COUNT II – INJUNCTIVE RELIEF AND/OR REQUEST FOR WRIT OF MANDAMUS

35. The preceding paragraphs are realleged as though set forth in full hereunder.

36. DOJ has a clear legal duty, pursuant to MCA § 2-6-1006, to provide the requested information to MEIC or make it available for inspection or copying.

37. The State Defendants have failed to comply with its clear legal duty, as required by § 2-6-1006, MCA, and Article II, Section 9, to provide the requested

documents, and/or the information on time and a written explanation for the denial in the form of a privilege log.

38. MEIC has no other plain, speedy adequate remedy in the course of the law to force the State Defendants to comply with MEIC's lawful document request. The requested documents are otherwise not available to petitioners.

39. MEIC is entitled to alternative and peremptory writs of mandate requiring the State Defendants to provide the information set forth in its information request.

PRAYER FOR RELIEF

WHEREFORE, MEIC prays for this Court to:

1. Declare that DOJ has violated § 2-6-1006, MCA;
2. Order Alternative and Peremptory writs of mandamus, directing DOJ to expeditiously comply with MEIC's public information request, including production of the documents and an associated privilege log;
3. Order production of the documents alleged to be privileged directly to the court for *in camera* review;
4. Order attorney's fees and costs to Plaintiff pursuant to §§2-3-221, 2-6-1009(3), MCA; and/or 27-26-402, MCA;
5. Any other relief the Court deems just and proper.

Dated this 12th day of April, 2024.

By



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