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**FILED**

DEC 07 2018

ANGIE SPARKS, Clerk of District Court  
By **TA PAASO** Deputy Clerk

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

MONTANORE MINERALS  
CORP., TROY MINE INC., and RC  
RESOURCES, INC.,

Plaintiffs,

v.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,  
TOM LIVERS, as the Director of  
the Montana Department of  
Environmental Quality,

Defendants.

Cause No. ADV-2018-363

**ORDER ON MOTION FOR  
PRELIMINARY INJUNCTION AND  
MOTION TO DISMISS**

Before the Court is Plaintiffs Montanore Minerals Corp., Troy Mine, Inc., and RC Resources, Inc.'s motion for preliminary injunction and Defendants Montana Department of Environmental Quality (DEQ) and its Director, Tom Livers' (Livers) motion to dismiss. William W. Mercer, Kyle

1 Anne Gray, and Victoria A. Marquis represent Plaintiffs. James H. Goetz,  
2 Jeffrey J. Tierney, and Keith Strong represent Defendants. Katherine K. O'Brien,  
3 Amanda D. Galvan, and Timothy J. Preso represent Intervenor Earthworks,  
4 Montana Environmental Information Center, Clark Fork Coalition, Rock Creek  
5 Alliance, Save Our Cabinets and Montana Conservation Voters and proposed  
6 Intervenor Ksanka Kupaqa Za'ïçin. Daniel D. Belcourt and David A. Bell  
7 represent proposed Intervenor Fort Belknap Indian Community.

### 8 STATEMENT OF FACTS

9 Plaintiffs are Montanore Minerals Corp, which owns the Montanore  
10 Mine in Lincoln County; Troy Mine, Inc., which owns the Troy Mine in Lincoln  
11 County; and RC Resources, Inc., which owns the Rock Creek Mine in Sanders  
12 County. The Plaintiffs' parent company is Hecla Mining Company. Phillips S.  
13 Baker Jr. (Baker) is the President and Chief Executive Officer of Hecla Mining  
14 Company.

15 On March 20, 2018, DEQ Director Livers informed Plaintiffs that  
16 DEQ had reason to believe Plaintiffs were in violation of the Montana Metal  
17 Mine Reclamation Act (MMRA), Montana Code Annotated § 82-4-301, et seq.,  
18 specifically, the "bad actor" provision contained in Montana Code Annotated  
19 § 82-4-360, which provides:

20 [A] person may not conduct mining or exploration activities in this  
21 state if that person or any firm or business association of which that  
22 person was a principal or controlling member had a bond forfeited  
23 under this part, if the department otherwise received proceeds from a  
24 surety to perform reclamation on that person's behalf, or if the  
25 person's surety completed reclamation on the person's behalf.

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1 In his letter, Livers indicated DEQ viewed Baker as “an Officer,  
2 Director or otherwise a controlling principal” of several mining companies (“the  
3 Pegasus entities”) previously engaged in mining activities in Montana.  
4 According to Livers, DEQ received proceeds from a surety for the Pegasus  
5 entities to perform reclamation work. Because Baker was a principal or  
6 controlling member of the Pegasus entities when DEQ received the surety  
7 proceeds, he is now prohibited from conducting mining and exploration activities  
8 in Montana under the bad actor provision of the MMRA. Baker, as President and  
9 CEO of Hecla, is currently conducting mining and exploration activities in  
10 Montana, in violation of the MMRA.

11 DEQ’s letter recommended two courses of action – Plaintiffs may  
12 reimburse DEQ, with interest, for the reclamation and any additional penalty  
13 amounts; or, Plaintiffs must demonstrate that neither Baker nor entities under his  
14 direction will conduct mining and exploration activities in Montana. If DEQ did  
15 not receive confirmation from Plaintiffs within thirty days, the DEQ indicated it  
16 might issue an administrative order or pursue judicial action. The letter further  
17 indicated DEQ has the authority to suspend exploration licenses and operating  
18 permits under Montana Code Annotated § 82-4-362(1). In conclusion, the letter  
19 contained the following provision: “If you disagree with DEQ’s determination,  
20 you may write a letter stating the nature of your disagreement accompanied by  
21 any supporting documentation. DEQ will consider the information provided  
22 before pursuing further action.”

23 Upon receipt of the letter, Plaintiffs filed their complaint. Plaintiffs  
24 filed an amended complaint three days later seeking declaratory and injunctive  
25 relief. Plaintiffs now seek a preliminary injunction “enjoining the Department

1 from taking any action to suspend, revoke, or otherwise affect exploration  
2 licenses or operating permits under the Metal Mine Reclamation statutes.”

### 3 PRINCIPLES OF LAW

4 Montana Code Annotated § 27-19-201 sets forth the standard Courts  
5 must follow when assessing a motion for a preliminary injunction. The statute  
6 provides, in relevant part, an injunction may be granted in the following  
7 circumstances:

8 (1) when it appears that the applicant is entitled to the relief  
9 demanded and the relief or any part of the relief consists in  
10 restraining the commission or continuance of the act complained of,  
either for a limited period or perpetually;

11 (2) when it appears that the commission or continuance of  
12 some act during the litigation would produce a great or irreparable  
injury to the applicant;

13 (3) when it appears during the litigation that the adverse party  
14 is doing or threatens or is about to do or is procuring or suffering to  
15 be done some act in violation of the applicant's rights, respecting the  
subject of the action, and tending to render the judgment ineffectual;

16 Nonetheless, in *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d  
17 73, the Montana Supreme Court determined “even on proof of any grounds  
18 enumerated in § 27-19-201, MCA, a preliminary injunction should not issue  
19 absent an accompanying prima facie showing, or showing that it is at least  
20 uncertain, that the applicant will suffer irreparable injury prior to final resolution  
21 on the merits.”

22 Montana Code Annotated § 27-19-103 provides that a court may not  
23 issue a preliminary injunction: “(4) to prevent the execution of a public statute  
24 by officers of the law for the public benefit,” or “(6) to prevent the exercise of a  
25 public . . . officer, in a lawful manner. . . .”

1 A district courts lack subject matter jurisdiction to hear declaratory  
2 actions regarding agency decisions where either the decision was not final, or the  
3 aggrieved party has not exhausted her administrative remedies. *Mountain Water*  
4 *Co. v. Mont. Dep't of Pub. Serv. Reg.*, 2005 MT 84, ¶ 14, 326 Mont. 416, 110  
5 P.3d 20. "If the court determines at any time that it lacks subject matter  
6 jurisdiction, the court must dismiss the action." Mont. R. Civ. P. 12(h)(3).

7 In reviewing a motion to dismiss pursuant to Montana Rule of Civil  
8 Procedure 12(b)(6), courts must consider the complaint in the light most  
9 favorable to the plaintiff and accept the allegations in the complaint as true.  
10 *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994).  
11 A complaint should not be dismissed under Rule 12(b)(6) unless it appears  
12 beyond a doubt that the plaintiff can prove no set of facts to support his claim  
13 which would entitle him to relief. *McKinnon v. W. Sugar Coop. Corp.*, 2010 MT  
14 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221. In other words, dismissal is justified  
15 only when the allegations of the complaint itself clearly demonstrate the plaintiff  
16 does not have a claim. *Buttrell v. McBride Land & Livestock Co.*, 170 Mont.  
17 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants  
18 a motion to dismiss for failure to state a claim upon which relief can be granted.  
19 If a complaint lacks specificity, further discovery may be the appropriate remedy,  
20 rather than dismissal. *McKinnon*, ¶ 24.

## 21 ANALYSIS

### 22 Motion for Preliminary Injunction

23 Plaintiffs' motion is unwarranted. First, upon review of the record,  
24 the Court concludes Plaintiffs have not met the threshold criteria demonstrating  
25 they will suffer irreparable injury before their rights can be fully litigated.

1 Second, Montana law precludes a district court from issuing an injunction to  
2 prevent an agency from executing a statute or to prevent a public officer from  
3 exercising his duties. Third, Plaintiffs have not exhausted their administrative  
4 remedies. DEQ has not made a final decision in this matter.

5 Plaintiffs have not met their burden by showing they will likely suffer  
6 irreparable harm if the Court doesn't grant their motion for a preliminary  
7 injunction. In the event DEQ suspends Plaintiffs' exploration licenses and  
8 operating permits, Plaintiffs argue they "will suffer immediate and great  
9 irreparable injury." Plaintiffs further argue that revocation of the permits would  
10 devalue Hecla's assets and cause great uncertainty to the company's operations.  
11 They claim the suspension of operating permits would force Plaintiffs to cease  
12 daily reclamation activities. Based upon the evidence before the Court, however,  
13 these scenarios remain hypothetical and fail to establish irreparable harm  
14 sufficient to warrant a preliminary injunction.

15 Moreover, Plaintiffs fail to demonstrate DEQ will seek to revoke the  
16 permits and licenses unless the Court intervenes by granting Plaintiff's  
17 application for a preliminary injunction. The record simply does not support this  
18 claim. Counsel for DEQ repeatedly maintain the agency is not looking to  
19 suspend any permit or license at this stage of the proceeding. DEQ's violation  
20 letter suggests courses of action it may take and invites response and discussion.  
21 The letter acknowledges DEQ has the authority to suspend licenses under the  
22 MMRA, but the letter is neither a formal nor informal decision to suspend a  
23 permit. The record is devoid of any indication DEQ is or, in the near future, will  
24 seek to revoke or nullify Plaintiffs' permits.

25 /////

1 Even if Plaintiffs could demonstrate DEQ's actions would cause  
2 imminent, irreparable harm, Montana Code Annotated § 27-19-103 precludes this  
3 Court from granting an injunction "to prevent the execution of a public statute by  
4 officers of the law for the public benefit" or "to prevent the exercise of a  
5 public . . . office, in a lawful manner." Both scenarios are at issue here.

6 It appears that by sending the violation letter, DEQ was merely  
7 executing the MMRA for a public benefit. Similarly, Director Livers was  
8 exercising his public office in a lawful manner when he notified Plaintiffs they  
9 might be in violation of the MMRA. Plaintiffs contend DEQ is either grossly  
10 misinterpreting the MMRA in such a manner as to make it unlawful, or the entire  
11 statute is unconstitutional and thus unlawful. These issues are the core of the  
12 declaratory judgment action, and the Court will not adjudicate them in a  
13 preliminary injunction motion. These arguments are premature.

#### 14 **Motion to Dismiss**

15 Defendants argue the Court does not have subject matter jurisdiction  
16 in this matter because the DEQ has not issued a final administrative decision. A  
17 district court lacks subject matter jurisdiction to hear declaratory actions  
18 regarding agency decisions where either the decision was not final or the  
19 aggrieved party has not exhausted its administrative remedies. *Mountain Water*  
20 *Co. v. Mont. Dep't of Pub. Serv. Reg.*, 2005 MT 84, ¶ 14, 326 Mont. 416, 110  
21 P.3d 20. "If the court determines at any time that it lacks subject matter  
22 jurisdiction, the court must dismiss the action." Mont. R. Civ. P. 12(h)(3).

23 This case is premature. Plaintiffs have not exhausted their  
24 administrative remedies. The DEQ letter at issue here does not constitute a final  
25 decision. Montana Code Annotated § 82-4-361 establishes the procedures by

1 which DEQ addresses alleged violations. DEQ is required to send a violation  
2 letter, but may also issue an order, which becomes final thirty days after issuance  
3 if there is no response from the alleged violator. DEQ has not issued an order in  
4 this case or issued a final decision. When an agency has not issued a final  
5 decision, there is no justiciable controversy. *Brisendine v. Dept. of Commerce*,  
6 253 Mont. 361, 365, 833 P.2d 1019, 1021.

7 Plaintiffs have also failed to exhaust their administrative remedies  
8 under Montana Code Annotated § 82-4-361 and the Montana Administrative  
9 Procedures Act. District courts lack subject matter jurisdiction for judicial  
10 review of administrative actions where the complaining party has failed to  
11 exhaust its administrative remedies. *Mountain Water*, ¶ 14. Pursuant to Montana  
12 Rule of Civil Procedure 12(h)(3), having determined that this Court lacks subject  
13 matter jurisdiction, Defendants' motion to dismiss is warranted.

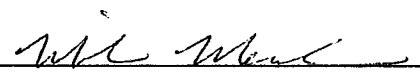
14 Accordingly,

15 **ORDER**

16 IT IS HEREBY ORDERED Plaintiffs' motion for a preliminary  
17 injunction is DENIED

18 IT IS HEREBY ORDERED Defendants' motion to dismiss is  
19 GRANTED.

20 DATED this 7<sup>th</sup> day of December 2018.

21  
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23 MIKE MENAHAN  
24 District Court Judge  
25



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