

Bitterroot Law
PO Box 1312
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406-360-7336
tom@bitterrootlaw.com



February 21, 2018

Susan Byroth Fox
Executive Director
Legislative Services Division
State of Montana
P. O. Box 201706
State Capitol Campus
Helena, Mt. 59620-1706

Corey Stapleton
Secretary of State
State of Montana
P.O. Box 202801
Helena, MT 59620-2801

Hand-Delivered on February 21, 2018 to each office

Dear Ms. Fox and Mr. Stapleton:

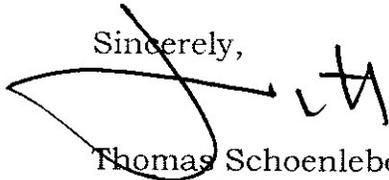
We write to begin the required review process for submission of an initiative to a vote by citizens, the proposed text of which initiative accompanies this letter. The draft ballot statement appears as the introduction to the proposed text. We believe that this information is sufficient to comply with the requirements of §13-27-202 MCA such that the agency review process can begin.

We submit this initiative on behalf of the ballot issue proponent, that being an as-yet unnamed ballot committee of Montana citizens. We are anxious to take this text to the further review levels so please submit the §13-37-202(2)(a) responses to us via email at jmotl47@gmail.com and tom@bitterrootlaw.com. If you prefer to respond by US mail we ask that you call Jon Motl (431-5513) so that he can come in and pick up a copy of the response letter thereby lessening mail time.

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We thank you in advance for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to be 'T. Schoenleben', written over the word 'Sincerely,'.

Thomas Schoenleben
Attorney at Law
Jonathan Motl
Initiative Project Associate

C

Initiative Proponents

STATUTORY INITIATIVE NO: _____

SPONSOR:

As yet unnamed ballot committee
Acting through
Jonathan Motl
Associated with the
Law Offices of Thomas Schoenleben
Bitterroot Law
PO Box 1312
Hamilton, MT 59840
406-360-7336
tom@bitterrootlaw.com

SPONSOR'S PROPOSED STATEMENT OF PURPOSE AND IMPLICATION

I-xxx requires new hardrock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead or mercury.

SPONSOR'S PROPOSED YES AND NO STATEMENTS

- YES ON INITIATIVE I-XXX
- NO ON INITIATIVE I-XXX

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA

Section 1. Section 82-4-336, MCA, is amended to read:

Reclamation plan and specific reclamation requirements.

- (1) Taking into account the site-specific conditions and circumstances, including the postmining use of the mine site, disturbed lands must be reclaimed consistent with the requirements and standards set forth in this section.
- (2) The reclamation plan must provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance.
- (3) In the absence of an order by the department providing a longer period, the plan must provide that reclamation activities must be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.
- (4) In the absence of emergency or suddenly threatened or existing catastrophe, an operator may not depart from an approved plan without previously obtaining from the department written approval for the proposed change.

(5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.

(6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.

(7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:

(a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

(9) (a) With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas. This standard may not be applied to require the removal of mine-related facilities that are valuable for postmining use. If the reclamation plan provides that mine-related facilities will not be removed or that the disturbed land associated with the facilities will not be reclaimed by the permittee, the following apply:

(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

(c) The use of backfilling as a reclamation measure is neither required nor prohibited in all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

(10) The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13)(a) Except in the case of a proposed amendment to a reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018, the reclamation plan must contain measures sufficient to prevent the pollution of water and the degradation of adjacent lands without the need for perpetual treatment.

(b) Perpetual treatment includes activities necessary to treat acid mine drainage or contaminants, including arsenic, mercury, and lead.

~~(14)~~(13) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377.

Section 2. 82-4-351 is amended to read: Reasons for denial of permit.

(1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) Except as stated in subsection 3, A denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) An application for a permit or an application for an amendment to a permit must be denied unless the department finds, in writing and based on clear and convincing evidence, that the permit applicant has satisfied the requirements of 82-4-336(13).

NEW SECTION. Section 3. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 4. Effective dates. This Act is effective on passage and approval.

NEW SECTION. Section 5. Applicability. The requirements of Section 1, subsection 13 apply after November 6, 2018.

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February 21, 2018

original

Susan Byroth Fox
Executive Director
Legislative Services Division
State of Montana
P. O. Box 201706
State Capitol Campus
Helena, Mt. 59620-1706

Hand Delivered

2-21-18

Corey Stapleton
Secretary of State
State of Montana
P.O. Box 202801
Helena, MT 59620-2801

Hand-Delivered on February 21, 2018 to each office

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We thank you in advance for your consideration.

Sincerely,

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Thomas Schoenleben
Attorney at Law
Jonathan Motl
Initiative Project Associate

C

Initiative Proponents

STATUTORY INITIATIVE NO: _____

SPONSOR:

As yet unnamed ballot committee
Acting through
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YES ON INITIATIVE I-XXX

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(i) The postmining use of the mine-related facilities must be approved by the department.

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(2) Except as stated in subsection 3, A denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

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NEW SECTION. Section 4. Effective dates. This Act is effective on passage and approval.

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Montana Legislative Services Division
Legal Services Office

March 2, 2018

Thomas Schoenleben
PO Box 1312
Hamilton, MT 59840

Re: Proposed Statutory Initiative Relating to Hard Rock Mining

Dear Mr. Schoenleben,

On February 21, 2018, the Legislative Services Division received the text of your submitted statutory initiative to require that reclamation plans for hardrock mines provide that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants. This letter constitutes the Legislative Services Division's review of the documents submitted. This letter contains a revised draft of the initiative.

The text of the initiative and the ballot statements were reviewed pursuant to 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. Please note that various aspects of this review include questions regarding intent and purpose of the submitted draft. This letter should raise these issues for further contemplation.

Section 13-27-201(2), MCA, requires the text of an initiative to be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by Legislative Services Division. Section 13-27-202(2)(a), MCA, requires both the text of the initiative and the ballot statements to conform to the Bill Drafting Manual, which is available on the Legislative Branch website at: <http://leg.mt.gov/css/For-Legislators/Publications/default.asp>.

I. Style Issues

A. Statement of Purpose and Implication

The text of the proposed ballot issue and the draft ballot issue statements must comply with 13-27-312, MCA. Ballot statements include: (1) the statement of purpose and implication, which may not exceed 135 words; and (2) the "yes" and "no" statements. Pursuant to 13-27-312(4), MCA, the statement of purpose "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language". In addition, the statement of purpose may not be argumentative or written in a manner that creates prejudice for or against the issue. While it is not always feasible to include a complete explanation of each part of a ballot issue in the statement of purpose, the statement must at least explain both the purpose and implication of the ballot issue in easily understood, nonargumentative language. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 12.

Unless altered by a court pursuant to 13-27-316, MCA, the statement of purpose becomes the title for the ballot issue that is circulated to the electorate and the ballot title if the ballot issue is placed on the ballot. However, proponents of a ballot issue are not entitled "to the ballot statements of their choosing", and the Attorney General and, if necessary, the Supreme Court may alter the proposed statements of purpose and implication to comply with the provisions of 13-27-312, MCA. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 11.

The submitted statutory initiative contains a proposed statement of purpose. It appears to satisfy these statutory requirements; however, I note that the statement does not include measures to prevent the degradation of adjacent land.

B. Yes & No Statements

Statutory initiatives must contain "yes" and "no" statements required under 13-27-312(6), MCA. After 2011, a simple "yes" or "no" on the ballot issue type and number is sufficient. The following language is the standard language used for the "yes" and "no" statements:

NEW SECTION. Section __. Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

- YES on [insert the type of ballot issue and its number]
- NO on [insert the type of ballot issue and its number]

The submitted draft statutory initiative contains a yes and no statement. The attached draft includes the submission to the electorate section last, pursuant to the Bill Drafting Manual.

C. Editorial Changes

Throughout the document and in the draft attached to this letter, I have made minor changes so the draft complies with the Bill Drafting Manual. Many of these changes are aimed at simplifying the language, adding active voice, and correct phrasing.

II. Substantive Issues

The draft submitted to Legislative Services amends 82-4-336 and 82-4-351, MCA. This review will focus on the proposed amendments to each section.

82-4-336, MCA:

The proposed draft inserts new subsection (13) into 82-4-336. The new subsection applies to mines permitted after November 6, 2018, and requires that reclamation plans contain measures sufficient to prevent the pollution of water without the need for "perpetual treatment." Subsection (13)(b) then defines the term "perpetual treatment" to include activities necessary to treat acid mine drainage or contaminants.

As you can see below, I have made stylistic changes to the introductory language in subsection (13) to make it read more clearly. This included drafting the subsection into an outline format and relocating the applicability date to the end of the new subsection.

The changes attempt to retain the original intent of the submitted draft including the term "perpetual treatment." While "perpetual treatment" could conceivably include the entire future of the known universe, I am aware a current statute specifically addresses the perpetual treatment of water, namely 82-4-367, MCA. However, this statute applies to the postpermit reclamation and treatment of water. It exists as a retrospective application. The initiative, however, would be unique in Montana because it would require the department to determine perpetual treatment prospectively.

Additionally, the submitted draft defines "perpetual treatment" to include activities necessary to treat acid mine drainage or contaminants, including arsenic, mercury, and lead. The inclusion of arsenic, mercury, and lead could potentially lead to the exclusion of other contaminants. Moreover, the draft currently does not clarify what activities constitute "treating" acid mine drainage.

Further relating to the definition of "perpetual treatment", I note that the definition of "adjacent lands" is not provided in Title 82. Although it appears in three statutes, 82-4-231, 82-4-302, and 82-4-336, MCA, more detail could provide intent as to scope. For example, is an adjacent land determined by ownership or is it measured by distance?

As stated earlier, the applicability portion has been moved to the end of 82-4-336(13), MCA. However, the draft originally submitted to the Legislative Services Division may be subject to two interpretations relating to proposed the applicability date for amendments to reclamation plans. It is unclear whether you intend the initiative to apply to: (1) only new mines permitted after November 6, 2018; or (2) new mines *and any* amendment permitted after November 6, 2018 - regardless of when the mine was originally approved. The attached draft contains the language originally submitted to the Legislative Services Division. Further contemplation may be required.

Finally, I note that the submitted draft appears somewhat related to other subsections in 82-4-336, MCA. Subsection (3) provides that the plan must provide that reclamation must be completed not more than 2 years after completion or abandonment of the operation. Subsection (7) provides for the formation of acid, toxic, or otherwise pollutive solutions known as "objectionable effluents". Subsection (10) requires reclamation plans to provide sufficient measures to ensure the degradation of adjacent lands. Subsection (12) prohibits objectionable postmining ground water discharges. How these provisions interact with the proposed new subsection is unclear and may require further contemplation.

82-4-351, MCA:

The submitted draft inserts subsection (3) into 82-4-351, MCA. This subsection requires that an application for a permit or an application for an amendment to a permit must be denied unless

the department finds that the permit applicant has satisfied the requirements 82-4-336(13), MCA, by clear and convincing evidence. I have retained most of the language originally submitted to the Legislative Services Division:

82-4-351. Reasons for denial of permit. (1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to this part.

(b) the reclamation plan does not provide an acceptable method of accomplishment of reclamation as required by this part.

(2) ~~A~~ Except as provided in subsection (3), a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny a permit or an application for an amendment to a permit unless it finds in writing and based on clear and convincing evidence that the permit applicant has satisfied the requirements of 82-4-336(13).

However, as described below, the amendments to 82-4-336(3), MCA, could potentially be interpreted in different ways.

1. 82-4-351(3) Requires the Department to Provide Clear and Convincing Evidence for a Denial Based on 82-4-336(13).

The first interpretation is that the exception in 82-4-351(2) and (3), MCA, only apply to the evidentiary standard for department denials. Put simply, the department may generally deny permits based on a preponderance of the evidence. However, if the department denies a permit based on 82-4-336(13), MCA, it must support its denial with clear and convincing evidence. This interpretation essentially puts the burden on the department to provide clear and convincing evidence that a proposed mine will perpetually pollute or require perpetual treatment in violation of 82-4-336(13), MCA, when issuing a denial.

2. 82-4-351(3) Affirmatively Requires the Department to Deny a Permit, Unless a Permit Applicant Can Prove a Proposed Mine Does Not Offend 82-4-336(13) by Clear and Convincing Evidence.

The second interpretation is that the exceptions in 82-4-351(2) and (3), MCA, require the department to deny a permit, unless a permit applicant can establish through clear and convincing evidence that the plan satisfies 82-4-336(13), MCA. This interpretation puts the burden on a permit applicant to provide clear and convincing evidence that the proposed mine will not perpetually pollute or require perpetual treatment.

Evidence to support this interpretation is found by the affirmative language of 82-4-351(3), MCA, specifically:

(3) The department shall deny a permit or an application for an amendment to a permit unless it finds in writing and based on clear and convincing evidence that the permit

applicant has satisfied the requirements of 82-4-336(13). [Emphasis Added]¹

The language appears affirmative: the department *shall deny* a permit *unless* a permit applicant can prove 82-4-336(13), MCA, is satisfied. This interpretation is at odds with the first interpretation because the burden to provide clear and convincing evidence is now on the permit applicant.

Because 82-4-336, MCA, could potentially be interpreted different ways, further contemplation may be required.

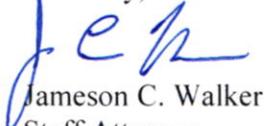
III. Additional actions

The draft originally submitted to the Legislative Services Division provides an applicability section that provides: "the requirements of Section 1, subsection 13 apply after November 6, 2018." Did you also intend the requirements of Section 2, subsection (2) and (3) to apply as well?

Finally, although this is discretionary, the submitted draft contains two duplicative applicability dates. The first is in 82-4-336(13), MCA. The second appears in the uncodified applicability section. While there are reasons to include it in both sections the inclusion is somewhat redundant.

Pursuant to 13-27-202(2)(c), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. After responding to this office, further correspondence should be submitted to the Secretary of State. If you accept the suggested editorial and stylistic changes, the revised text of your proposed initiative would read as attached.

Sincerely,


Jameson C. Walker
Staff Attorney

cc: Corey Stapleton, Secretary of State
Jonathan Motl, Attorney at Law
Thomas Shoenleben, Attorney at Law

¹ This language has been altered to conform with the Bill Drafting Manual to remove passive voice. The original draft submitted to the Legislative Services Division similarly could be interpreted to create a presumption that a permit is denied unless proven otherwise:

(3) An application for a permit or an application for an amendment to a permit must be denied unless the department finds, in writing and based on clear and convincing evidence, that the permit applicant has satisfied the requirements of 82-4-336(13). [Emphasis Added]

Recommended Changes to Proposed Statutory Initiative Relating to Hard Rock Mining Statement of Purpose and Implication:

I-xxx requires new hardrock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require the perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead or mercury.

Complete Text:

Section 1. Section 82-4-336, MCA, is amended to read:

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(5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.

(6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.

(7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:

(a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

(9) (a) With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas. This standard may not be applied to require the removal of mine-related facilities that are valuable for postmining use. If the reclamation plan provides that mine-related facilities will not be removed or that the disturbed land associated with the facilities will not be reclaimed by the permittee, the following apply:

(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

(c) The use of backfilling as a reclamation measure is neither required nor prohibited in

all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

(10) The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13)(a) A reclamation plan must contain measures sufficient to prevent the perpetual:

(i) pollution of water; and

(ii) degradation to adjacent lands without the need for treatment.

(b) For purposes of this subsection (13), the term "perpetual treatment" means activities necessary to treat acid mine drainage or contaminants, including arsenic, mercury, and lead.

(c) This subsection (13) applies except in the case of a proposed amendment to a reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

~~(13)~~(14) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377."

Section 2. Section 82-4-351, MCA, is amended to read:

"82-4-351. Reasons for denial of permit. (1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) ~~▲~~ Except as provided in subsection (3), a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny a permit or an application for an amendment to a permit unless it finds in writing and based on clear and convincing evidence that the permit applicant has satisfied the requirements of 82-4-336(13)."

NEW SECTION. Section 3. {standard} Effective date. [This act] is effective upon approval by the electorate.

NEW SECTION. Section 4. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 5. {standard} Applicability. [This act] applies after November 6, 2018.

NEW SECTION. Section 6. {standard} Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

YES

NO

Bitterroot Law
PO Box 1312
Hamilton, MT 59840
406-360-7336
tom@bitterrootlaw.com



MARCH 7, 2018

JAMESON WALKER
Staff Attorney
State of Montana
P. O. Box 201706
State Capitol Campus
Helena, Mt. 59620-1706

Dear Mr. Walker:

We write on behalf of the initiative proponents in response to your review letter dated March 2, 2018 concerning the proposed text of an initiative setting out certain standards for reclamation plans for hardrock mining permitting. Thank you for the review and comments.

Your letter constitutes the review of initiative text and statements, including suggested revisions, as directed by §13-27-202(2)(a), MCA. This letter constitutes the proponents' response by which they accept, reject or modify each of the recommended revisions, as directed by §13-27-202(2)(c), MCA.

Your letter is five pages in length (pages 1 through 5) and it is accompanied by a four page (pages 6 through 9) text of initiative language, including suggested revisions to the text offered by proponents. We respond as follows:

Page 1

Page 1 is introductory and requires no response.

Page 2

Page 2 reviews the ballot statement (statement of purpose) and comments that the statement of purpose does not discuss the degradation of adjacent land element of the new statutory language set out in the initiative. While this is not a substantive comment the proponents nevertheless accept the comment and respond by dropping the degradation of adjacent land from the new statutory language set out in the initiative.

Page 2 also reviews by adding certain language to the Yes and No statements section. That review is accepted and the suggested language is added.

Page 3

Page 3 (along with the last paragraph of page 2) reviews the amendments to existing statute 82-4-336. Page 3, ¶1 notes that certain stylistic changes were made and those are addressed in the responses, below.

Page 3, ¶¶2, 3 reviews the “perpetual treatment” language set out in subsection (13) by suggesting consideration of further definitions, subsection language structure and language changes related to the new structure, giving shape to the suggestions by adding a new subsection 13(c) and offering a different style and different language to subsection (13)(a). The sponsors first note that dropping “degradation of adjacent lands” from subsection (13)(a) makes the language simpler. Noting that change the sponsors accept the remaining suggested language structure of subsection 13(a), including the listing of the exception as subsection 13(c). This leaves subsection 13(b) and the sponsors accept the stylistic changes but retain the active word “includes” rather than the suggested word “means.” In response to the definition comment, the sponsors added the words “perpetual leaching” to 13(b) and note that any further definition, if needed, is within the scope of agency rulemaking.

Page 3, ¶4 reviews “adjacent lands” suggesting further definition. The suggestion is accepted and the sponsors entirely removed the language of “adjacent lands” from the new language of the initiative.

Page 3, ¶5 (along with pages 4 and 5) reviews the 82-4-351(3) requirements to amendments to a reclamation plan, suggesting further definition and offering revised language providing further definition. The sponsors accept the suggested format and further revise the language to address the concerns stated. Having so acted, the sponsors believe it is clear (taking into consideration 82-4-351) that the requirements apply to any original or amended reclamation plan unless the mine was permitted on or before November 6, 2018.

Page 3, ¶6 reviews the interplay among the several subsections of 82-4-336 and suggests consideration of coordination language. This does not appear to be a substantive suggestion (the operative word “may” is used) but to the extent it is substantive the suggestion is rejected as the sponsors believe the agency has the authority to coordinate and give meaning to each subsection and does so already with the existing law.

Pages 4 and 5

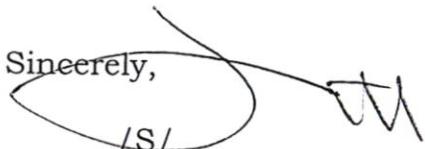
Pages 4 and 5 review the language added by the initiative to 82-4-351(3) and suggest consideration of clarifying language as to when the clear and convincing language applies. We have responded to this suggestion, above.

Page 5 also notes and comments on the applicability date. The sponsors accept the suggestion that the applicability apply generally to [this act] and have incorporated that language into the initiative text.

Initiative Language

The sponsors' post-review initiative text accompanies this letter. Thank you again for your prompt and thorough review.

Sincerely,



/S/
Tom Schoenleben
Jonathon Motl

Bitterroot Law
PO Box 1312
Hamilton, MT 59840
406-360-7336
tom@bitterrootlaw.com



MARCH 7, 2018

COREY STAPLETON
Montana Secretary of State
P. O. Box 202801
State Capitol Campus
Helena, Mt. 59620-2801

Attn: Elections and Voter Services

Dear People:

We write on behalf of the initiative proponents in regard to an as-yet unnumbered statutory initiative.

We attach a copy of the proponents' responsive letter following Legislative Services review, as directed by §13-27-202(2)(c), MCA. We intend that this attached letter satisfy the requirements of §13-27-202(3), MCA. We also attach "the final text of the proposed issue and ballot statements", as directed by §13-27-202(4), MCA.

On behalf of the proponents we ask that the Secretary of State forward a copy of the proposed issue and statements to the attorney general, again as directed by §13-27-202(4), MCA. We are anxious to expedite the review process. Please let us know if there is anything we can do to further assist this review.

Thank you.

Sincerely,

_____/S/



Tom Schoenleben (406-280-0024)

Jonathan Motl (406-431-5513)

C
Legislative Services

SPONSORS' PROPOSED STATEMENT OF PURPOSE AND IMPLICATION

I-xxx requires new hardrock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead or mercury.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA

Section 1. Section 82-4-336, MCA, is amended to read:

"82-4-336. Reclamation plan and specific reclamation requirements.

- (1) Taking into account the site-specific conditions and circumstances, including the postmining use of the mine site, disturbed lands must be reclaimed consistent with the requirements and standards set forth in this section.
- (2) The reclamation plan must provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance.
- (3) In the absence of an order by the department providing a longer period, the plan must provide that reclamation activities must be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.
- (4) In the absence of emergency or suddenly threatened or existing catastrophe, an operator may not depart from an approved plan without previously obtaining from the department written approval for the proposed change.
- (5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.
- (6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.
- (7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:
 - (a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

(9) (a) With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas. This standard may not be applied to require the removal of mine-related facilities that are valuable for postmining use. If the reclamation plan provides that mine-related facilities will not be removed or that the disturbed land associated with the facilities will not be reclaimed by the permittee, the following apply:

(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

(c) The use of backfilling as a reclamation measure is neither required nor prohibited in all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

(10) The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13)(a) The reclamation plan must contain measures sufficient to prevent the pollution of water without the need for perpetual treatment.

(b) For purposes of this subsection (13), the term "perpetual treatment" includes activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury and lead.

(c) This subsection (13) applies except in the case of a proposed amendment to a reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

~~(13)~~ (14) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377."

Section 2. Section 82-4-351, MCA, is amended to read:

"82-4-351. Reasons for denial of permit.

(1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) ~~(A)~~ Except as stated in subsection 3, a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny an application for a permit or an application for an amendment to a permit unless the department finds, in writing and based on clear and convincing evidence, that the reclamation plan meets the requirements of 82-4-336(13)."

NEW SECTION. Section 3. {standard} Effective dates. [This Act] is effective upon approval by the electorate.

NEW SECTION. Section 4. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 5. {standard} Applicability.** [This act] applies after November 6, 2018.

NEW SECTION. **Section 6. {standard} Submission to Electorate.** [This Act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

YES

NO



Montana Legislative Services Division
Legal Services Office

March 20, 2018

Thomas Schoenleben
P.O. Box 1312
Hamilton, MT 59840

Re: Proposed Statutory Initiative Relating to Hard Rock Mining

Dear Mr. Schoenleben,

On March 16, 2018, the Legislative Services Division received the text of your resubmitted statutory initiative to require that reclamation plans for hardrock mines provide that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants. This letter constitutes the Legislative Services Division's review of the documents submitted. Please note that since the resubmission is similar to the previous draft, please refer to the Legislative Services Division's March 2, 2018, review. This letter contains a revised draft of the initiative.

The text of the initiative and the ballot statements were reviewed pursuant to 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. Please note that various aspects of this review include questions regarding intent and purpose of the submitted draft. This letter should raise these issues for further contemplation.

Section 13-27-201(2), MCA, requires the text of an initiative to be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by Legislative Services Division. Section 13-27-202(2)(a), MCA, requires both the text of the initiative and the ballot statements to conform to the Bill Drafting Manual, which is available on the Legislative Branch website at: <http://leg.mt.gov/css/For-Legislators/Publications/default.asp>.

I. Style Issues

A. Statement of Purpose and Implication

The text of the proposed ballot issue and the draft ballot issue statements must comply with 13-27-312, MCA. Ballot statements include: (1) the statement of purpose and implication, which may not exceed 135 words; and (2) the "yes" and "no" statements. Pursuant to 13-27-312(4), MCA, the statement of purpose "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language". In addition, the statement of purpose may not be argumentative or written in a manner that creates prejudice for or against the issue. While it is not always feasible to include a complete explanation of each part of a ballot issue in the statement of purpose, the statement must at least explain both the purpose and implication of the ballot issue in easily understood, nonargumentative language. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 12.

Unless altered by a court pursuant to 13-27-316, MCA, the statement of purpose becomes the title for the ballot issue that is circulated to the electorate and the ballot title if the ballot issue is placed on the ballot. However, proponents of a ballot issue are not entitled "to the ballot statements of their choosing", and the Attorney General and, if necessary, the Supreme Court may alter the proposed statements of purpose and implication to comply with the provisions of 13-27-312, MCA. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 11.

The submitted statutory initiative contains a proposed statement of purpose. It appears to satisfy these statutory requirements.

B. Yes & No Statements

Statutory initiatives must contain "yes" and "no" statements required under 13-27-312(6), MCA. After 2011, a simple "yes" or "no" on the ballot issue type and number is sufficient. The following language is the standard language used for the "yes" and "no" statements:

NEW SECTION. Section __. Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

- YES on [insert the type of ballot issue and its number]
- NO on [insert the type of ballot issue and its number]

The submitted draft statutory initiative contains a yes and no statement that complies with the Bill Drafting Manual.

C. Editorial Changes

Since this draft is resubmitted, editorial changes have been minimal in order to comply with the Bill Drafting Manual.

II. Substantive Issues

The draft submitted to Legislative Services amends 82-4-336 and 82-4-351, MCA. This review will focus on the proposed amendments to each section.

82-4-336, MCA:

The proposed draft inserts new subsection (13) into 82-4-336. The new subsection applies to mines permitted after November 6, 2018, and requires that reclamation plans contain measures sufficient to prevent the pollution of water without the need for "perpetual treatment." Subsection (13)(b) then defines the term "perpetual treatment" to include activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury and lead. Subsection (13)(c) states that the initiative applies except in the case of a proposed amendment to a reclamation plan pursuant to which a mine has been permitted on or before November, 6, 2018.

The resubmitted draft incorporates the stylistic revisions previously suggested by the Legislative Services Division. It also eliminates the provision relating to damage to adjacent lands. However, it now includes the perpetual leaching of contaminants, including arsenic, mercury, and lead. The attached draft complies with the Bill Drafting Manual.

Due to the similarities in the drafts, please refer to the comments made by the Legislative Services Division in its March 2, 2018, review of the first initiative submission. However, it should be noted that the applicability provision may still be subject to multiple interpretations. Ultimately, it is unclear whether the initiative applies to amendments approved after November 6, 2018, to reclamation plans that were originally approved prior to November 6, 2018. The plain language appears to exempt these amendments.

The resubmission includes new language relating to the perpetual leaching of contaminants. A review of the term in the Montana Code Annotated reveals that the term "leaching" appears in six statutes in Title 82. These statutes apply to measures undertaken by a mining operation to extract materials through leaching. The new language in the resubmission complies with the Bill Drafting Manual.

82-4-351, MCA:

The resubmitted draft inserts subsection (3) into 82-4-351, MCA. This subsection requires that the department shall deny an application for a permit or an application for an amendment to a permit unless the department finds in writing and based on clear and convincing evidence that the reclamation plan meets the requirements of 84-4-336.

The resubmission contains active voice and proper use of language as required by the Bill Drafting Manual. Please refer to the comments made by the Legislative Services Division in its March 2, 2018, review of the first initiative submission.

III. Additional actions

The resubmitted draft amended the applicability section to include both sections 1 and 2. It complies with the bill drafting manual.

Pursuant to 13-27-202(2)(c), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. After responding to this office, further correspondence should be submitted to the Secretary of State. If you accept the suggested editorial and stylistic changes, the revised text of your proposed initiative would read as attached.

Sincerely,

Jameson C. Walker
Staff Attorney

cc: Corey Stapleton, Secretary of State

**Recommended Changes to Proposed Statutory Initiative Relating to Hard Rock Mining
Statement of Purpose and Implication:**

I-xxx requires new hardrock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require the perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead, or mercury.

Complete Text:

Section 1. Section 82-4-336, MCA, is amended to read:

"82-4-336. Reclamation plan and specific reclamation requirements. (1) Taking into account the site-specific conditions and circumstances, including the postmining use of the mine site, disturbed lands must be reclaimed consistent with the requirements and standards set forth in this section.

(2) The reclamation plan must provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance.

(3) In the absence of an order by the department providing a longer period, the plan must provide that reclamation activities must be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.

(4) In the absence of emergency or suddenly threatened or existing catastrophe, an operator may not depart from an approved plan without previously obtaining from the department written approval for the proposed change.

(5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.

(6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.

(7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:

(a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or

be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

(9) (a) With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas. This standard may not be applied to require the removal of mine-related facilities that are valuable for postmining use. If the reclamation plan provides that mine-related facilities will not be removed or that the disturbed land associated with the facilities will not be reclaimed by the permittee, the following apply:

(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

(c) The use of backfilling as a reclamation measure is neither required nor prohibited in all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

(10) The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13) (a) A reclamation plan must contain measures sufficient to prevent the pollution of water without the need for perpetual treatment.

(b) For purposes of this subsection (13), the term "perpetual treatment" includes activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury, and lead.

(c) This subsection (13) applies except in the case of a proposed amendment to a reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

~~(13)~~(14) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377."

Section 2. Section 82-4-351, MCA, is amended to read:

"82-4-351. Reasons for denial of permit. (1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) ~~A~~ Except as provided in subsection (3), a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny an application for a permit or an application for an amendment to a permit unless the department finds, in writing and based on clear and convincing evidence, that the reclamation plan meets the requirements of 82-4-336(13)."

NEW SECTION. Section 3. {standard} Effective date. [This act] is effective upon approval by the electorate.

NEW SECTION. Section 4. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 5. {standard} Applicability. [This act] applies after November 6, 2018.

NEW SECTION. Section 6. {standard} Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

YES

NO

CI0425 8079jwea.

Bitterroot Law
PO Box 1312
Hamilton, MT 59840
406-360-7336
tom@bitterrootlaw.com



RECEIVED NTSSOS
4 APR '18 AM 9:13

APRIL 4, 2018

COREY STAPLETON
Montana Secretary of State
P. O. Box 202801
State Capitol Campus
Helena, Mt. 59620-2801

Attn: Elections and Voter Services

Dear People:

We write on behalf of the initiative proponents in regard to an as-yet unnumbered statutory initiative. We hereby submit a new statutory initiative and ask that it be lodged with your office and advanced to Legislative Services for review as directed by §13-27-202, MCA.

In way of explanation, this new ballot issue is a revision of the statutory initiative (2018 ballot issue No. 12) dealing with mining waste that is now lodged at the Attorney General's office for review prior to returning to the Secretary of State. We are filing this new initiative version because the fiscal note on ballot issue No. 12 raised language interpretation concerns related to regulation of existing mines. Ballot issue No. 12 language was intended to regulate new mines, not existing mines, and we believe the existing language of ballot issue No. 12 makes this distinction. Nevertheless, this is an important distinction and for that reason we are filing this new initiative with further clarifying language.

Given the very tight time limits left for ballot issue qualification we continue to advance ballot issue No. 12 as well as this new initiative. We will withdraw one or the other, depending on the timing (swiftness) of agency review of this new initiative. Please let us know if there is anything we can do to further assist this review. Thank you.

Sincerely,

_____/S/_____
Tom Schoenleben (406-280-0024)
Jonathan Motl (406-431-5513)

C Legislative Services

SPONSORS' PROPOSED STATEMENT OF PURPOSE AND IMPLICATION

I-xxx requires new hardrock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead or mercury.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA

Section 1. Section 82-4-336, MCA, is amended to read:

"82-4-336. Reclamation plan and specific reclamation requirements.

- (1) Taking into account the site-specific conditions and circumstances, including the postmining use of the mine site, disturbed lands must be reclaimed consistent with the requirements and standards set forth in this section.
- (2) The reclamation plan must provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance.
- (3) In the absence of an order by the department providing a longer period, the plan must provide that reclamation activities must be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.
- (4) In the absence of emergency or suddenly threatened or existing catastrophe, an operator may not depart from an approved plan without previously obtaining from the department written approval for the proposed change.
- (5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.
- (6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.
- (7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:
 - (a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

(9) (a) With regard to disturbed land other than open pits and rock faces, the reclamation plan must provide for the reclamation of all disturbed land to comparable utility and stability as that of adjacent areas. This standard may not be applied to require the removal of mine-related facilities that are valuable for postmining use. If the reclamation plan provides that mine-related facilities will not be removed or that the disturbed land associated with the facilities will not be reclaimed by the permittee, the following apply:

(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

(c) The use of backfilling as a reclamation measure is neither required nor prohibited in all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

(10) The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands.

(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13)(a) The reclamation plan must contain measures sufficient to prevent the pollution of water without the need for perpetual treatment.

(b) For purposes of this subsection (13), the term "perpetual treatment" includes activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury and lead.

(c) This subsection (13) applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

~~(13)~~ (14) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377."

Section 2. Section 82-4-351, MCA, is amended to read:

"82-4-351. Reasons for denial of permit.

(1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) (A) Except as stated in subsection 3, a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny an application for a permit or an application for an amendment to a permit unless the department finds, in writing and based on clear and convincing evidence, that the reclamation plan meets the requirements of 82-4-336(13). This subsection (3) applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

NEW SECTION. Section 3. {standard} Effective dates. [This Act] is effective upon approval by the electorate.

NEW SECTION. Section 4. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 5. {standard} Applicability. [This act] applies after November 6, 2018.

NEW SECTION. Section 6. {standard} Submission to Electorate. [This Act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

YES

NO



Montana Legislative Services Division
Legal Services Office

April 6, 2018

Thomas Schoenleben
P.O. Box 1312
Hamilton, MT 59840

Re: Proposed Statutory Initiative Relating to Hard-rock Mining

Dear Mr. Schoenleben,

On April 4, 2018, the Legislative Services Division received the text of your resubmitted statutory initiative to require that reclamation plans for hard-rock mines provide that the mine will not require perpetual treatment of water polluted by acid mine drainage or other contaminants. This letter constitutes the Legislative Services Division's review of the documents submitted. Please note that since the resubmission is similar to the previous draft; please refer to the Legislative Services Division's March 2, 2018, and March 19, 2018, review. This letter contains a revised draft of the initiative.

The text of the initiative and the ballot statements were reviewed pursuant to 13-27-202, MCA, for clarity, consistency, and other factors normally considered when drafting proposed legislation. Please note that various aspects of this review include questions regarding intent and purpose of the submitted draft. This letter should raise these issues for further contemplation.

Section 13-27-201(2), MCA, requires the text of an initiative to be in the bill form provided in the most recent issue of the Bill Drafting Manual furnished by Legislative Services Division. Section 13-27-202(2)(a), MCA, requires both the text of the initiative and the ballot statements to conform to the Bill Drafting Manual, which is available on the Legislative Branch website at: <http://leg.mt.gov/css/For-Legislators/Publications/default.asp>.

I. STYLE ISSUES

A. Statement of Purpose and Implication

The text of the proposed ballot issue and the draft ballot issue statements must comply with 13-27-312, MCA. Ballot statements include: (1) the statement of purpose and implication, which may not exceed 135 words; and (2) the "yes" and "no" statements. Pursuant to 13-27-312(4), MCA, the statement of purpose "must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language". In addition, the statement of purpose may not be argumentative or written in a manner that creates prejudice for or against the issue. While it is not always feasible to include a complete explanation of each part of a ballot issue in the statement of purpose, the statement must at least explain both the purpose and implication of the ballot issue in easily understood, nonargumentative language. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 12.

Unless altered by a court pursuant to 13-27-316, MCA, the statement of purpose becomes the title for the ballot issue that is circulated to the electorate and the ballot title if the ballot issue is placed on the ballot. However, proponents of a ballot issue are not entitled "to the ballot statements of their choosing", and the Attorney General and, if necessary, the Supreme Court may alter the proposed statements of purpose and implication to comply with the provisions of 13-27-312, MCA. *See Mont. Consumer Fin. Ass'n v. State*, 2010 MT 185, ¶ 11.

The submitted statutory initiative contains a proposed statement of purpose. It appears to satisfy these statutory requirements.

B. Yes & No Statements

Statutory initiatives must contain "yes" and "no" statements required under 13-27-312(6), MCA. After 2011, a simple "yes" or "no" on the ballot issue type and number is sufficient. The following language is the standard language used for the "yes" and "no" statements:

NEW SECTION. Section __. Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

- YES on [insert the type of ballot issue and its number]
- NO on [insert the type of ballot issue and its number]

The submitted draft statutory initiative contains a yes and no statement that complies with the Bill Drafting Manual.

C. Editorial Changes

Since this draft is resubmitted, editorial changes have been minimal in order to comply with the Bill Drafting Manual.

II. SUBSTANTIVE ISSUES

The draft submitted to Legislative Services amends 82-4-336 and 82-4-351, MCA. This review will focus on the proposed amendments to each section.

82-4-336, MCA:

The proposed draft inserts new subsection (13) into 82-4-336. The new subsection applies to mines permitted after November 6, 2018, and requires that reclamation plans contain measures sufficient to prevent the pollution of water without the need for "perpetual treatment." Subsection (13)(b) then defines the term "perpetual treatment" to include activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury and lead. Subsection (13)(c) states that the initiative applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

The resubmitted draft incorporates the stylistic revisions previously suggested by the Legislative Services Division. The draft now clarifies that the initiative applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018. The attached draft complies with the Bill Drafting Manual. Due to the similarities in the drafts, please refer to the comments made by the Legislative Services Division in its March 2, 2018, and March 19, 2018, reviews of the proposed statutory initiatives.

Relating to the new language inserted in subsection (13)(c), to be clear, the language of the draft appears to apply to new mines permitted after November 6, 2018. The draft also appears to apply to amendments to operating permits or reclamation plans for new mines permitted after November 6, 2018. However, the draft appears to not apply to mines permitted before November 6, 2018. Similarly, the draft appears to not apply to amendments to operating permits or reclamation plans for mines permitted before November 6, 2018 -- even if those amendments are approved after November 6, 2018. While the attached language complies with the Bill Drafting Manual, more detail and clarifying language is a possibility.

82-4-351, MCA:

The resubmitted draft inserts subsection (3) into 82-4-351, MCA. This subsection requires that the department shall deny an application for a permit or an application for an amendment to a permit unless the department finds in writing and based on clear and convincing evidence that the reclamation plan meets the requirements of 84-4-336. The draft inserts a new second sentence in subsection (3), essentially providing the applicability statement appearing in 82-4-336(13)(c).

Please refer to the comments made by the Legislative Services Division in its March 2, 2018, and March 19, 2018, reviews of the proposed statutory initiatives. Additionally, please refer to the comments above relating to what the draft appears to apply to and what it exempts.

III. ADDITIONAL ACTIONS

Pursuant to 13-27-202(2)(c), MCA, you are required to respond in writing to this office accepting, rejecting, or modifying the recommended changes before submitting a sample sheet of the petition to the Secretary of State. Your response will terminate the role of this office in this process. After responding to this office, further correspondence should be submitted to the Secretary of State. If you accept the suggested editorial and stylistic changes, the revised text of your proposed initiative would read as attached.

Sincerely,

Jameson C. Walker
Staff Attorney

cc: Corey Stapleton, Secretary of State
Jonathan Motl, Attorney at Law
Thomas Shoenleben, Attorney at Law

**Recommended Changes to Proposed Statutory Initiative Relating to Hard-Rock Mining
Statement of Purpose and Implication:**

I-xxx requires new hard-rock mines in Montana to have a reclamation plan that provides clear and convincing evidence that the mine will not require the perpetual treatment of water polluted by acid mine drainage or other contaminants such as arsenic, lead, or mercury.

Complete Text:

Section 1. Section 82-4-336, MCA, is amended to read:

"82-4-336. Reclamation plan and specific reclamation requirements. (1) Taking into account the site-specific conditions and circumstances, including the postmining use of the mine site, disturbed lands must be reclaimed consistent with the requirements and standards set forth in this section.

(2) The reclamation plan must provide that reclamation activities, particularly those relating to control of erosion, to the extent feasible, must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance.

(3) In the absence of an order by the department providing a longer period, the plan must provide that reclamation activities must be completed not more than 2 years after completion or abandonment of the operation on that portion of the complex.

(4) In the absence of emergency or suddenly threatened or existing catastrophe, an operator may not depart from an approved plan without previously obtaining from the department written approval for the proposed change.

(5) Provision must be made to avoid accumulation of stagnant water in the development area to the extent that it serves as a host or breeding ground for mosquitoes or other disease-bearing or noxious insect life.

(6) All final grading must be made with nonnoxious, nonflammable, noncombustible solids unless approval has been granted by the department for a supervised sanitary fill.

(7) When mining has left an open pit exceeding 2 acres of surface area and the composition of the floor or walls of the pit are likely to cause formation of acid, toxic, or otherwise pollutive solutions ("objectionable effluents") on exposure to moisture, the reclamation plan must include provisions that adequately provide for:

(a) insulation of all faces from moisture or water contact by covering the faces with material or fill not susceptible itself to generation of objectionable effluents in order to mitigate

the generation of objectionable effluents;

(b) processing of any objectionable effluents in the pit before they are allowed to flow or be pumped out of the pit to reduce toxic or other objectionable ratios to a level considered safe to humans and the environment by the department;

(c) drainage of any objectionable effluents to settling or treatment basins when the objectionable effluents must be reduced to levels considered safe by the department before release from the settling basin; or

(d) absorption or evaporation of objectionable effluents in the open pit itself; and

(e) prevention of entrance into the open pit by persons or livestock lawfully upon adjacent lands by fencing, warning signs, and other devices that may reasonably be required by the department.

(8) Provisions for vegetative cover must be required in the reclamation plan if appropriate to the future use of the land as specified in the reclamation plan. The reestablished vegetative cover must meet county standards for noxious weed control.

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(i) The postmining use of the mine-related facilities must be approved by the department.

(ii) In the absence of a legitimate postmining use of mine-related facilities upon completion of other approved mine reclamation activities, the permittee shall comply with the reclamation requirements of this part and the reclamation plan within the time limits established in subsection (3) for mine-related facilities that had previously been identified as valuable for postmining use.

(b) With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:

(i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;

(ii) that affords some utility to humans or the environment;

(iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

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(c) The use of backfilling as a reclamation measure is neither required nor prohibited in all cases. A department decision to require any backfill measure must be based on whether and to what extent the backfilling is appropriate under the site-specific circumstances and conditions in order to achieve the standards described in subsection (9)(b).

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(11) A reclamation plan must be approved by the department if it adequately provides for the accomplishment of the requirements and standards set forth in this section.

(12) The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

(13) (a) The reclamation plan must contain measures sufficient to prevent the pollution of water without the need for perpetual treatment.

(b) For purposes of this subsection (13), the term "perpetual treatment" includes activities necessary to treat acid mine drainage or perpetual leaching of contaminants, including arsenic, mercury, and lead.

(c) This subsection (13) applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018.

~~(13)~~(14) The reclamation plan must include, if applicable, the requirements for postclosure monitoring of a tailings storage facility agreed to by a panel pursuant to 82-4-377."

Section 2. Section 82-4-351, MCA, is amended to read:

"82-4-351. Reasons for denial of permit. (1) An application for a permit or an application for an amendment to a permit may be denied for the following reasons:

(a) the plan of operation or reclamation conflicts with Title 75, chapter 2, as amended, Title 75, chapter 5, as amended, Title 75, chapter 6, as amended, or rules adopted pursuant to these laws;

(b) the reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this part.

(2) ~~A~~ Except as provided in subsection (3), a denial of a permit must be in writing, state the reasons for denial, and be based on a preponderance of the evidence.

(3) The department shall deny an application for a permit or an application for an amendment to a permit unless the department finds, in writing and based on clear and convincing

evidence, that the reclamation plan meets the requirements of 82-4-336(13). This subsection (3) applies except in the case of a proposed amendment to an operating permit or reclamation plan pursuant to which a mine has been permitted on or before November 6, 2018."

NEW SECTION. Section 3. {standard} Effective date. [This act] is effective upon approval by the electorate.

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NEW SECTION. Section 6. {standard} Submission to electorate. [This act] shall be submitted to the qualified electors of Montana at the general election to be held in November 2018 by printing on the ballot the full title of [this act] and the following:

YES

NO

CI0425 8096jwea.