BY LAURA LUNDQUIST

PHOTOGRAPHY BY LIDO VIZZUTTI

Gayla Nicholson walks near the Elbow Lake cabin she owns with her husband, Jeff Dickerson. In December 2022, the state told residents in the area that test pits would be dug for possible gravel mining.

THE PITS

Widespread opencut mining in Montana—and a newly opaque process of approving it, much less challenging it—riles neighbors and others

OWNING A CABIN ON A LAKE IS A DREAM FOR MANY AMERICANS, but that's often as far as it goes. There are only so many accessible scenic lakes, and few cabins come up for sale.

Gayla Nicholson didn't think she'd ever find one. Fortunately, her sister was able to get a state cabin lease in 1993 on Elbow Lake south of Seeley Lake, and it became a beloved family gathering spot. In Montana, the state owns lots around various lakes and rivers that it leases to raise school trust money. Then, a few years ago, some long-time members of the Elbow Lake community finally decided to sell their cabin but wanted to find a buyer who would treasure its rustic nature. Nicholson and her husband, Jeff Dickerson, didn't hesitate.

"It's the original cabin; we call it 'the wooden tent.' Mission accomplished on the rustic. But it's a wonderful place to be," Nicholson says.

The cabin was theirs, but it sat on land leased from the Department of Natural Resources and Conservation. So the couple put a bid into the DNRC auction process, and after an arduous closing process in 2020, they finally owned their dream. But about a year later, a state decision to permit a gravel pit threatened to blanket that dream with dust.

In December 2022, Nicholson was already overwhelmed, dealing with a seriously ill father, when the DNRC informed Elbow Lake residents that it was digging test pits for possible gravel mining on state land just uphill from the lake. The couple was surprised since the land abuts the Blackfoot-Clearwater Wildlife Management Area. Mining didn't seem to mesh with a wildlife corridor.

"We thought, 'What the heck?' There'd been no mention of a gravel pit during a year of trying to figure out how to do the closing documents on our sale," Nicholson says. "In 2017, test pits were dug, and then the applicant abandoned the permit request. We thought the DNRC hadn't approved it, so we thought it wouldn't happen."

Kalispell-based LHC Inc. had applied for the permit to mine 21 acres of the Clearwater State Forest above Elbow Lake on March 23, 2023. Montana's Opencut Mining Law doesn't allow the state to deny an opencut permit. So the ball was rolling.

No, it was rocketing, because in 2021, legislation further minimized Department of Environmental Quality (DEQ) oversight and gave it less time for analysis. DEQ approved the permit within a month. In mid-April, the DNRC opened a scoping period for a "take-and-remove" state land permit. It was granted on May 15.

Nicholson and other Elbow Lake residents were stunned. They'd received little communication from the DEQ—the few notifications had come from the mining company itself. When they sought legal advice, a few weeks later, they learned they had only 10 days left of a 30-day period to appeal the permit to the Board of Environmental Review, a citizen group that oversees the DEQ.

"We almost missed the deadline because we didn't understand it," Nicholson says. "So in 10 days, we hired an attorney, formed a nonprofit and appealed to the [board]. We built the car while we were driving it. I really don't know how we did it, but we had really good counsel and motivated people."

Thus, Protect the Clearwater was born. Over the past year or two, similar groups have sprouted across the state—Arlee, Gallatin Gateway, Ennis, Emigrant, Helena, and Libby, to name a few—as quickly as the gravel pits they seek to prevent. But with the current administration's drive to "cut red tape," the only recourse for Montana citizens may be the courts.

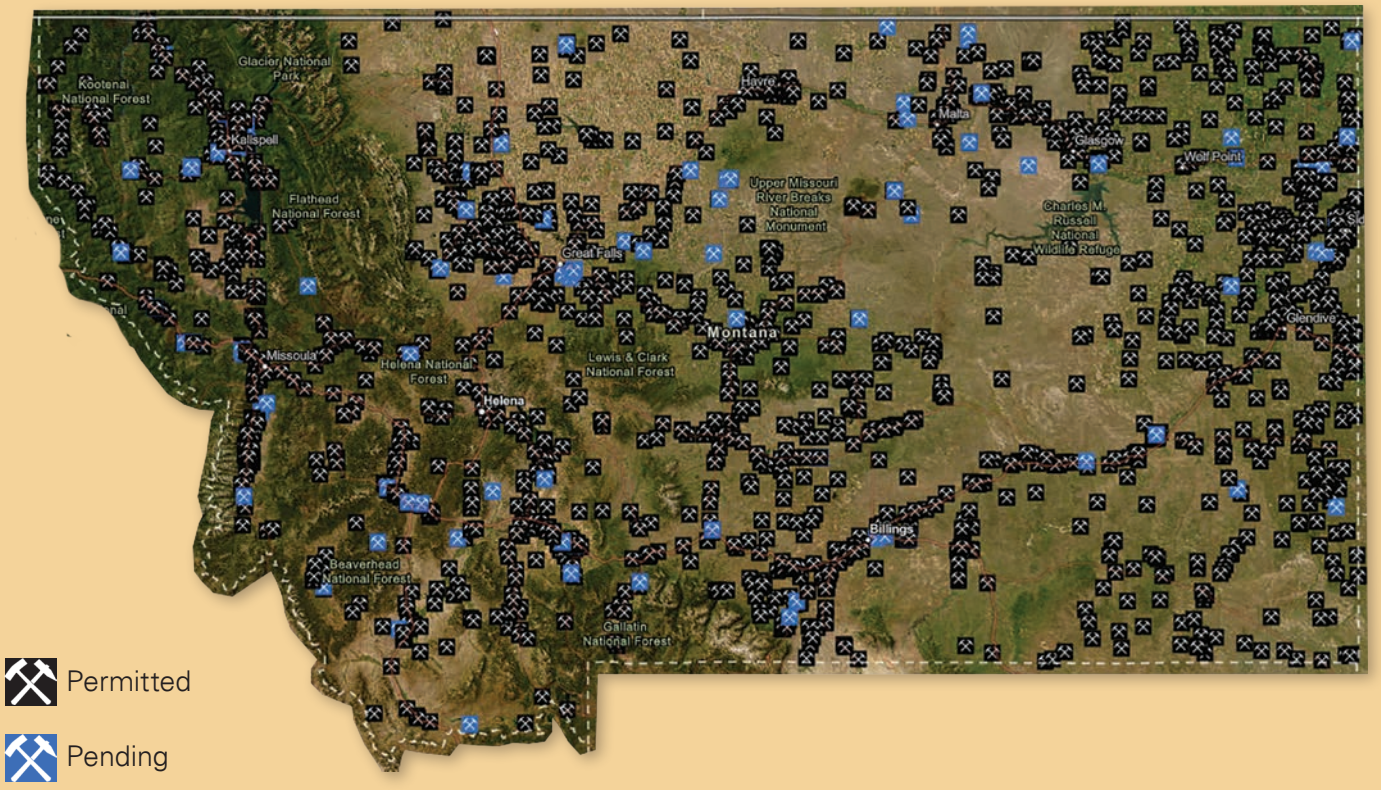
GRAVEL IS UBIQUITOUS IN MODERN SOCIETY AS A component of concrete, asphalt and other materials used in buildings and roads. It also has agricultural and landscaping uses.

But over the past decade or so, U.S. companies have more than tripled production of gravel, and the average price has steadily increased from $7 a ton to $11 a ton,

This opencut mine west of Bozeman shows the extent of disturbance a long-term gravel pit can cause.

CHRIS BOYER/ KESTRALAERIAL.COM

They're Everywhere: Opencut Mining Sites in Montana



Source: Montana Department of Environmental Quality; image captured Feb. 10, 2024

Isolated from neighbors, this gravel pit southeast of Livingston provides materials for roads and construction projects in growing Park County without drawing much controversy.

CHRIS BOYER/ KESTRALAERIAL.COM

A gravel company has begun removing trees and preparing operations for a gravel mine near Seeley Lake, Montana, despite heated opposition from neighbors.

Some Montanans are getting a sudden, unpleasant education after they learn that gravel pits are imminent nearby. Often, their only notification has been a panicked email or phone call from a neighbor. With the DEQ no longer responsible for notifications, some gravel companies make minimal effort.

according to a 2023 report by *Statistica*, an online market-data consolidator. In 2016, the U.S. Geological Survey reported that construction sand and gravel beat out gold and copper in generating the third-highest mineral revenue. Crushed stone was number one.

So, the mining of gravel—also called aggregate—is becoming bigger, and market analysts predict steady growth through 2030 due to urban growth and more infrastructure projects bolstered by the 2021 Infrastructure Investment and Jobs Act. The rush is on, and public companies are buying up regional suppliers as construction activity increases, according to *Rock Products News*.

Local governments know their annual gravel needs and rarely need a sudden infusion unless there's a special project. For example, Missoula County Public Works engineer Erik Dickson knows his county uses about 25,000 tons of gravel annually, 7,000 of which goes into maintaining about 450 miles of road. For that reason, the county owns two pits near Missoula, which has the greatest demand. It also leases three pits in other parts of the county to reduce transport costs.

In 2023, DEQ issued more than 40 dryland permits and 22 standard permits, with another 14 standard permits awaiting approval. That's in addition to hundreds of opencut pits that already pepper the state, and some are permitted to run for decades. Most counties have their own gravel pits, but the majority of permits belong to private companies. So some

question whether Montana's current proliferation of gravel pits, formally called opencut mines because they're basically small strip mines, is really needed or just represents a rush for resources.

Prior to 2021, the DEQ Opencut Mining Division oversaw permits differently. Employees were allowed more time to evaluate proposed sites. They notified neighbors if a site was being considered, and those people had more opportunity to request a hearing. That didn't mean a permit would be stopped, but the DEQ could put some safeguards in place to address neighbors' concerns.

That changed with House Bill 599 (HB 599), which passed the 2021 Legislature on party-line votes and was signed by Governor Greg Gianforte as part of his "Red Tape Relief" initiative. The bill limited public engagement, reduced the amount of time DEQ employees could spend on assessments before issuing permits, and removed the agency's authority to require noise mitigation, restrict hours of operation, and assess effects on air and water.

Most Montanans didn't know about the bill, and most will likely remain unaware. But some are getting a sudden, unpleasant education after they learn that gravel pits are imminent nearby. Often, their only notification has been a panicked email or phone call from a neighbor. With the DEQ no longer responsible for notifications, some gravel companies make minimal effort.

That happened not only at Elbow Lake but also in Arlee. In May 2022, Jennifer Knoetgen started knocking on neighbors' doors upon learning a 157-acre gravel pit was proposed on private land just outside her backdoor near Arlee on the Flathead Reservation. She had only 30 days to get at least half of her 29 neighbors living within a half-mile of the pit (the law used to require only a third of them) to request a public hearing. They missed it by one or two. The law previously included residents within 2 miles, but now, those living just outside the half-mile radius could only watch.

"My biggest concern is going to be noise, given our proximity. They're going to be crushing gravel, which is a loud thing, I'm sure, and having an asphalt plant, and all of it continuously running. And to imagine 100,000 to 200,000 dump trucks going up and down White Coyote Road, right past the Garden of One Thousand Buddhas—that is a lot," Knoetgen said.

For a standard permit, the DEQ can identify deficiencies in the application, and applicants have up to a year to respond before the application is voided. Before 2021, the DEQ could have limited operations to daylight hours, but that's no longer possible, and its January 2023 environmental assessment found nothing to preclude a pit near Knoetgen's home.

A year later, Riverside Contracting got its permit. The company, which contracts for the state and holds opencut permits for 69 sites around Montana, said it doesn't intend to dig right away, awaiting roadwork on U.S. Highway 93. In the meantime, residents around Arlee formed Friends of the Jocko, which sued the DEQ in June under the Montana Environmental Policy Act for failing to take a "hard look" at how a gravel pit could affect the environment, including groundwater, surface water, air quality and local aesthetics.

For Friends member Jim Coefield, the lawsuit isn't just about gravel pits; it's about the state violating Montanans' constitutional rights. He pointed to the myriad of recent lawsuits that are taking the DEQ to task.

"We don't want this to be seen as just another NIMBY issue. Because what is going on here is indicative of what can go on anywhere in the state, whether it's a gravel pit or a septic treatment system or fracking," Coefield said. "A lot of things are going on that pit our constitutional rights against the unfettered ability of private corporations to develop whatever they want. We're pushing hard to put the balance back in the people's court."

Friends of the Jocko attorney Graham Coppes said the Arlee case could be difficult, because it deals with a standard permit, which still has a few environmental constraints, and it's on private land. The pit near Gallatin Gateway is similar and may also end up in court if approved. But across the Mission Mountains near Elbow Lake, LHC Inc. applied for a dryland permit, and based on a recent court ruling, the reduced requirements are easier to challenge.

A "dryland permit," formerly called a rural permit, allows applicants to bypass most DEQ requirements as long as they verify that ground or surface water won't be affected and that fewer than 10 occupied dwellings are within a half-mile. The problem is some of the best gravel deposits are along existing or former rivers and floodplains, where the action of water has ground and deposited rock over millennia. These are also areas where mining activities would likely affect water. Of the 42 dryland permits issued since December 2022, 11 are 50 to 1,000 feet from a stream, and two are on another wildlife management area near Holter Reservoir.

HB 599 gave DEQ employees just 15 days to identify deficiencies or approve dryland permits, which made oversight almost impossible for the agency's limited staff. All the assessments for dryland permits issued since December 2022 include a standard phrase saying a site was not inspected "due to statutory timeframes not allowing time for field work." A few add that it is "unknown whether impacts to water quality or quantity would be significant."

Interestingly, both the bill's sponsor, Representative Steve Gunderson (R-Libby), and Friends attorney Coppes say the DEQ is misinterpreting HB 599, but for different reasons. Gunderson says standard permits shouldn't have been affected. Ironically, Gunderson's constituents were some of the first to discover how HB 599 worked against them, when Thompson Contracting applied for a standard permit in early 2022 to mine a 14-acre gravel pit surrounded by 50 residences.

"We argue if a state agency doesn't have the time to make a decision that's necessary to issue a permit, then they should deny the permit and go to the Legislature and ask for more time. They should be erring on the side of caution instead of issuing permits," Coppes says.

GRAVEL-PIT NEIGHBORS NOT ONLY HAVE TO EDUCATE themselves on the Opencut Mining Law but also have to fight a two-front battle if they try to stop a permit.

Citizens must first appeal a DEQ decision to the Board of Environmental Review (BER), because administrative appeals have to be exhausted before going to the courts. Since both Friends of the Jocko and Protect the Clearwater started that process in May 2023, Gayla Nicholson was startled at the end of June to look up and see dust billowing uphill from Elbow Lake. Large equipment had started felling large ponderosa pines and scraping the land above her cabin. The Salmon Lake Highway Reconstruction Project had started a mile or so north on U.S. Highway 83, so LHC's gravel production was underway.

"It illustrates the fundamental problem of this process," Coppes says. "When DEQ issues these permits, they become 'live'—they grant a right to the company to begin mining that day. When you file an appeal with the BER, the company can keep mining while you're trying to say DEQ didn't meet the requirements for the permit in the first place. But this is backward. Normally, all objections are dealt with before a permit is issued."

The only way to stop LHC from mining was to get a court injunction, which is called a hold, so Nicholson's group filed in Missoula County district court. The mining continued for three weeks before the judge issued a restraining order and scheduled an injunction hearing a few days later.

Coppes and his co-counsel Kim Wilson of Helena argued that a dryland permit was not authorized because of unknown groundwater levels and the proximity to Elbow Lake. But to get an injunction, they had to show they're likely to win an eventual trial. So they had to outline their whole case, bring in experts and ask their clients to explain how they're being harmed. Even though they'd been on the case for just a few

Gayla Nicholson walks through her neighborhood near Seeley Lake, where a proposed gravel pit would reduce property values and disrupt wildlife.

That's about the time the Supreme Court might issue a ruling.

With an administrative appeal and lawsuit going simultaneously, legal fees can mount up fast. Over the past six months, Protect the Clearwater has had to spend about $10,000 a month on legal work. Some groups have set up GoFundMe accounts and webpages appealing to other Montanans for help. The DEQ and LHC have also spent a lot of time and money researching the groundwater levels near the gravel pit to defend their permit. If they'd done even half that before the permit was granted, they could have made a better decision, Coppes says.

Anne Hedges agrees. As director of the Montana Environmental Information Center, she tried to get legislators to oppose or at least minimize the changes in HB 599, which was written by the industry.

"Whether we go back to pre-2021 or not, the bottom line is we need balance," Hedges says. "The people who are neighbors of these facilities—they have rights. There's going to be so much hardship between now and whenever we fix these laws because of all the litigation that everyone is going to go though. It's time-consuming and expensive for the companies, for the neighbors and for DEQ. There are no winners here. And certainly the resources are not the winners."

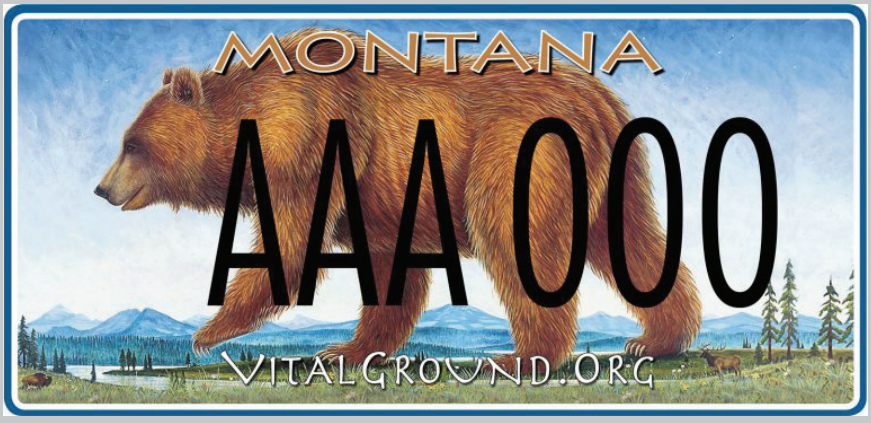
months, Coppes and Wilson were able to convince District Judge John Larson that neither the DEQ nor LHC knew if the pit would affect groundwater or not.

"Tasked with managing Montana's valued natural resources, it is imperative the DEQ act within the bounds of its authority. The plain language of the Opencut Act does not provide DEQ with discretion to categorically determine that a site will not affect groundwater when there is not scientifically reliable evidence to support that conclusion," Larson wrote in his August 8, 2023, ruling granting the injunction.

The DEQ and LHC have appealed to the Montana Supreme Court, claiming that the district court shouldn't have been allowed to step in because the administrative process hadn't played out. That administrative process might not finish until summer 2024, if then, since the Board of Environmental Review only meets every two months and the hearing examiner is still going over documents.

"Where the grizzly can walk, the Earth is healthy and whole."

-Lynne Seus, Vital Ground co-founder



The Vital Ground Foundation is a Montana land trust that conserves and connects habitat for grizzly bears and all things wild. Learn more and get involved at **vitalground.org**.

License plate art: "Great Bear" by Monte Dolack
Support wildlife conservation by ordering the plate when you register your Montana vehicle.