

Amanda D. Galvan  
Shiloh Hernandez  
Earthjustice  
P.O. Box 4743  
Bozeman, MT 59772-4743  
(406) 586-9699 | Phone  
(406) 586-9695 | Fax  
agalvan@earthjustice.org  
shernandez@earthjustice.org

*Counsel for Proposed Intervenors*

Daniel D. Belcourt  
Belcourt Law P.C.  
120 Woodworth Avenue  
Missoula, MT 59801  
(406) 265-0934 | Phone  
(406) 493-6427 | Fax  
danbelcourt@aol.com

*Counsel for Proposed Intervenor Fort  
Belknap Indian Community*

Robert T. Coulter  
Indian Law Resource Center  
602 North Ewing Street  
Helena, MT 59601  
(406) 449-2006 | Phone  
(406) 449-2031 | Fax  
rtcoulter@indianlaw.org

*Counsel for Proposed Intervenor Fort  
Belknap Indian Community*

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MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT PHILLIPS COUNTY

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MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Plaintiff,

v.

LUKE PLOYHAR, BLUE ARC, LLC,  
OWEN VOIGT, AND LEGACY  
MINING, LLC,

Defendants.

CASE NO. DV-2023-10

**TRIBES' AND CONSERVATION  
GROUPS' BRIEF IN SUPPORT OF  
MOTION FOR INTERVENTION**

## INTRODUCTION

Because they have substantial interests that will be affected by the outcome of this case that may, as a practical matter, impair their ability to protect those interests, Proposed-Intervenors Fort Belknap Indian Community (FBIC or the “Tribes”), Montana Environmental Information Center (MEIC), Earthworks, and Montana Trout Unlimited (MTU) (together, “Conservation Groups”) should be granted intervention under the Metal Mine Reclamation Act (MMRA) MCA § 82-4-354(3)(b), and Montana Rule of Civil Procedure 24(a).

The Tribes and Conservation Groups contacted the existing parties regarding this motion. DEQ does not oppose the motion. Defendants oppose the motion.

## BACKGROUND

### I. THE TRIBES’ AND CONSERVATION GROUPS’ INTEREST IN RECLAIMING THE FORMER ZORTMAN MINE

The subject litigation is the unauthorized mining of Luke Ployhar, his company Blue Arc, LLC, Owen Voigt, and his company Legacy Mining, LLC (collectively, “Defendants”) at the former Zortman mine in the Little Rocky Mountains of north-central Montana, adjacent to the Fort Belknap Reservation.

Beginning in the late 1970s, the advent of new mining technology in conjunction with a sharp rise in gold prices prompted the development of open pit mining operations at the Zortman and Landusky mines in the Little Rockies. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 805 (9th Cir. 2006). The Zortman-Landusky mines operated between 1979 and 1998 using open-pit, cyanide heap-leaching technology, which utilizes a cyanide solution to extract microscopic

particles of gold from massive amounts of pulverized ore. *See* Galvan Decl. ¶ 6. Over that period, state and federal agencies approved numerous expansions of the Zortman-Landusky mines. *See id.* ¶ 7. At its largest, the mining complex covered approximately 1,200 acres. *Id.*

The heap-leaching process employed at the Zortman-Landusky mines destroyed vast areas at two separate sites in the Little Rocky Mountains. Pollutants from each site affect both the north side of the mountains, where the Reservation is located, and the south side, where the small mining communities of Zortman and Landusky are located. *Id.* ¶ 10. The process exposed significant portions of previously buried rock containing sulfides to water and air, resulting in acid mine drainage. *Id.* ¶ 8; DEQ Compl. ¶ 18. This cyanide and acid mine drainage contaminated surface and ground waters hydrologically connected to the mines. Galvan Decl. ¶¶ 8, 10–12; DEQ Compl. ¶ 18. Among other impacts, mining operations at Zortman-Landusky diverted stream flows away from the Reservation and contaminated water running onto the southern end of the Reservation with cyanide and acid mine drainage. Galvan Decl. ¶¶ 7–12.

Since mining ceased, acid mine drainage and other contaminants such as cyanide, arsenic, cadmium, copper, selenium, mercury, lead, nitrates, and zinc from the Zortman-Landusky mines persist and continue to pollute the water surrounding the mines. *Id.* ¶ 11–12. The entities that operated the Zortman-Landusky mines filed for bankruptcy in 1998, leaving significant financial liability to the State of Montana and United States Department of Interior. Galvan Decl. ¶¶ 9–14; DEQ

Compl. ¶ 19. The State of Montana has contributed many millions of dollars for reclamation and water treatment since the mines ceased operation, and continued water treatment will be required in perpetuity. Galvan Decl. ¶ 14; DEQ Compl. ¶ 19; Gestring Decl. ¶ 5.

For decades the Tribes and the Conservation Groups have engaged in litigation and other advocacy to oppose harmful operations at the Zortman-Landusky mines and address the resulting environmental and cultural damage. *See* Stiffarm Decl. ¶ 12; Gestring Decl. ¶ 6; Johnson Decl. ¶¶ 4–5; Brooks Decl. ¶¶ 4, 6. As a result of litigation, a Technical Working Group, consisting of representatives from the Tribes, DEQ, and federal agency partners, was formed in the early 2000s to direct ongoing water treatment and cleanup operations at the mines. Galvan Decl. ¶ 15. The Memorandum of Understanding between DEQ and the Tribes that created the Technical Working Group, which is still in effect today, also formalized the Tribes’ ongoing ability to “participate directly in the review and development of plans,” “to address ... water contamination concerns related to the Zortman-Landusky mines,” and to “[e]nsure the Tribes are adequately and timely informed by the DEQ of any new developments” at the Zortman-Landusky mine sites. *Id.*

The Tribes and the Conservation Groups’ efforts to mitigate impacts from the mines have been unable to curb the pollution from the mines, which continues to spread farther onto the Reservation. *See* Stiffarm Decl. ¶¶ 5–8. This spreading pollution has contaminated, and continues to threaten, the Tribes’ ceremonial sites,

powwow grounds, and drinking water sources formerly used by the Tribes and tribal members, as illustrated in the following photographs.



*Figure 1: Polluted water treated at the Swift Gulch Water Treatment Plant in the Little Rocky Mountains is discharged into South Big Horn Creek Photograph courtesy of Karl Puckett and published by the Great Falls Tribune (Sept. 13, 2018), available at <https://www.greatfallstribune.com/story/news/2018/09/13/cleanupcosts-zortman-landusky-goldmines-continue-mount-montana-bad-actor-superfund-acid/1292506002/>.*



*Figure 2: A member of the Fort Belknap Indian Community holds a glass of water contaminated by acidic runoff from the nearby Zortman-Landusky mines. Photograph courtesy of Earthworks and published by Billings Gazette (Oct. 23, 2017) available at [https://billingsgazette.com/news/state-and-regional/cabinet-mine-foes-use-bad-actor-law-to-fight-hecla-permits/article\\_351ef210-4e49-5480-94c2-945fb818b158.html](https://billingsgazette.com/news/state-and-regional/cabinet-mine-foes-use-bad-actor-law-to-fight-hecla-permits/article_351ef210-4e49-5480-94c2-945fb818b158.html).*



*Figure 3: The Tribes' powwow grounds and Sun Dance area are located in the scenic Mission Canyon, pictured above, just downstream from the Zortman-Landusky mines. Acid mine drainage from the mines continues to encroach on these sacred sites. Photograph courtesy of Karl Puckett and published in the Great Falls Tribune (Sept. 13, 2018) available at <https://www.greatfallstribune.com/story/news/2018/09/13/cleanup-costs-zortman-landusky-gold-mines-continue-mount-montana-bad-actor-superfund-acid/1292506002/>.*

### **A. Unauthorized Mining**

In the midst of this persistent toxic legacy from past mining activity, Defendants have pursued new mining activity at the site, submitting three separate applications for exploration licenses with DEQ since 2020. DEQ Compl. ¶¶ 21-60. The Tribes and Conservation Organizations challenged these proposals, including by filing a lawsuit in this Court in April 2021 related to the first application (currently stayed).<sup>1</sup> The Tribes and Conservation Groups also successfully advocated for DEQ's preparation of an EIS, rather than an EA, for Ployhar's third mining proposal, submitted in July 2021. Stiffarm Decl. ¶ 14; Gestring Decl. ¶¶ 7-8.

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<sup>1</sup> Ployhar submitted a second mining proposal in March 2021, which he subsequently withdrew. DEQ Compl. ¶¶ 28, 34.

DEQ based that EIS decision, in part, on comments the agency received in response to a draft EA from individuals and groups who may be considered cultural or religious experts, including multiple Tribal Historic Preservation Officers (THPOs). Galvan Dec. ¶ 16. Those comments stated or indicated that there may be significant impacts on cultural resources from mining activity at the former Zortman site. *Id.* As a result of comments submitted to the agency, both by the THPOs and by other members and officials of the Tribes, DEQ determined on February 2, 2022, that more information was necessary in the form of an EIS to evaluate the impacts of Ployhar's proposed project to social structures and mores. *Id.*

In May 2022, Ployhar challenged DEQ's decision to require an EIS by filing an application requesting the Montana Board of Environmental Review (BER) to exercise its discretion in reviewing DEQ's decision. Galvan Decl. ¶ 17 (attached as Ex. 1). The Tribes and Conservation Groups sought and were granted intervention in the matter in front of the BER in October 2022. Galvan Decl. ¶ 18 (attached as Ex. 2). In its meeting on April 7, 2023, the BER chose not to engage in any review of Ployhar's application, ending the matter. Galvan Decl. ¶ 19.

DEQ discovered in March 2022 that Defendants, rather than proceed through the appropriate regulatory channel of obtaining a permit as required by law, instead unlawfully mined at eight separate locations at the former Zortman mine site. DEQ Compl. ¶¶ 29–60. As a result of Defendants' unlawful actions, DEQ filed this enforcement action against Defendants in April 2023, seeking a permanent injunction against future mining unless and until Defendants obtain necessary

permitting from DEQ, reclaim the unlawful mine sites, pay the penalties for existing violations, and post adequate performance bonds. DEQ Compl. at 28.

The unlawful mining at the heart of DEQ's enforcement action has threatened the ongoing reclamation work at the former Zortman mine site. The largest of these unlawful mining activities is nearly half an acre in area and 17–20 feet deep and located dangerously near the Zortman water treatment plant; two of the unlawful mining sites are located within feet of or within the Zortman Lined Remedial Areas, where liners designed to reduce acid mine drainage from the past Zortman mining were placed; and one of the unlawful mining sites has compromised a groundwater monitoring well that was installed to “investigate the extent of groundwater contamination.” *Id.* ¶¶ 43, 44, 49.

Defendants' unauthorized mining has also damaged reclamation work that had been previously completed at the Zortman mine, creating a substantial risk that untreated water from the Zortman mine will further impact groundwater and downstream surface water. *Id.* ¶ 61. The unauthorized mining further threatens to contribute additional contaminants, including acid mine drainage, to the existing water pollution problems at Zortman. DEQ Compl. ¶ 2; Stiffarm Decl. ¶ 13; Gestring Decl. ¶ 7. The unauthorized mining also conflicts with the Tribes' and Conservation Groups' desires to prioritize fully cleaning up the abandoned mines before considering any future mining in the region. Stiffarm Decl. ¶ 13; Gestring Decl. ¶ 7; Johnson Decl. ¶ 5; Brooks Decl. ¶¶ 4, 6–7.



Members of the affected community, including the members and government officials of the Fort Belknap Indian Community, as well as the Conservation Groups and others familiar with the history of the Zortman mine, have opposed Ployhar's various plans for mineral exploration at Zortman because of the potential for impacts on reclamation efforts as well as the potential introduction of new acid mine drainage. Stiffarm Decl. ¶¶ 13–14; Gestring Decl. ¶¶ 7–8; Johnson Decl. ¶¶ 4–5; Brooks Decl. ¶ 4, 6–7. They also have opposed the projects because Ployhar's mining plans are inconsistent with the reclamation efforts that the tribal government, tribal members, the federal government, and other impacted parties seek to protect and continue. Stiffarm Decl. ¶ 13; Gestring Decl. ¶ 7; Johnson Decl. ¶ 5; Brooks Decl. ¶¶ 4, 6–7. Defendants' unlawful mining at issue in DEQ's complaint specifically threatens to undermine these efforts.

By engaging in unlawful mining, Defendants violated the applicable law. Their actions further compromised an already damaged landscape, threatening grave impacts to both surface and ground water, and undermining the decades of effort that the Tribes and Conservation Groups have expended in mitigating the damage and protecting this sacred area.

## **II. PROPOSED INTERVENORS**

Proposed Intervenorors represent a diverse coalition of stakeholders that collectively have dedicated decades of advocacy to fighting for appropriate reclamation of the abandoned Zortman-Landusky mines. Proposed Intervenorors include the sovereign Fort Belknap Indian Community, whose tribal lands and resources have been profoundly and permanently injured by contamination from the

Zortman-Landusky mines. Proposed Intervenors also include multiple conservation organizations that have played unique and longstanding roles in advocating for appropriate clean-up of the Zortman-Landusky mines. Accordingly, the outcome of this case will directly affect Proposed Intervenors' interests in the areas damaged by the abandoned Zortman-Landusky mines.

**A. Fort Belknap Indian Community**

The Fort Belknap Indian Community consists of the Gros Ventre and Assiniboine Tribes whose seat of government is on the Fort Belknap Indian Reservation in north-central Montana. The Fort Belknap Indian Community Council is the governing body for the FBIC. It is responsible for managing the affairs of the Community and committed to the protection of the environment, human health, and safety of the Fort Belknap Indian Reservation.

The Fort Belknap Indian Reservation was established and set aside for the Tribes' use by Act of Congress on May 1, 1888. 25 Stat. 113 (1888). The original Fort Belknap Reservation included the Little Rocky Mountains, which to this day are the headwaters for much of the Reservation's water resources, are considered sacred by members of the Tribes, and were traditionally used by the Tribes for hunting, fishing, cultural, and spiritual purposes. Though Congress carved the Little Rocky Mountains out of the Reservation by Act of 1896, 29 Stat. 350 (1896), the Tribes received assurances from the United States that the Tribes would retain their rights to all water necessary to fulfill the purposes of the Reservation, including waters originating in the Little Rocky Mountains that the Tribes utilized for

irrigation, domestic supplies, and other purposes. *See Gros Ventre Tribe*, 469 F.3d at 804–05; *see also Winters v. United States*, 207 U.S. 564, 567, 576 (1908) (recognizing Tribes’ right to all waters flowing to and entering Reservation lands, “undiminished in quantity and undeteriorated in quality”).

As discussed above, between 1979 and 1994 state and federal agencies approved the development and several subsequent expansions of the Zortman-Landusky mines within the Little Rocky Mountains adjacent to the Reservation. Among other impacts, mining operations at the Zortman-Landusky mines diverted stream flows away from the Reservation and contaminated multiple streams running onto the southern end of the Reservation with cyanide and acid mine drainage. Today, acid mine drainage from the Zortman-Landusky sites continues to spread into the Reservation, where it has contaminated and desecrated the Tribes’ sacred ceremonial sites, powwow grounds, and drinking water sources formerly used by the Tribes and their members. Stiffarm Decl. ¶¶ 5–8.

As stated by the U.S. District Court for Montana, “[i]t is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, forever. That devastation, and the resulting impact on tribal culture, cannot be overstated.” *Gros Ventre Tribe v. United States*, No. CV 00-69-M-DWM, slip op. at 12 (D. Mont. June 28, 2004). Accordingly, for decades the Tribes have engaged in litigation and other advocacy to oppose harmful operations at the Zortman-Landusky mines and address the resulting environmental and cultural damage,

including by participating in a Technical Working Group with DEQ and federal agency partners to direct ongoing water treatment and cleanup operations at the mines. Stiffarm Decl. ¶ 12; Galvan Decl. ¶ 15.

## **B. Earthworks**

Earthworks is a non-profit organization dedicated to protecting communities and the environment from the adverse effects of mineral and energy development. Gestring Decl. ¶ 2. Earthworks has engaged in extensive advocacy to address the environmental and public health fallout from the abandoned Pegasus mines, including the Zortman-Landusky mines. *Id.* ¶ 5. Earthworks opposes Defendants' unlawful mining, which threatens to undo decades of advocacy and reclamation work. *Id.* ¶ 7. Enforcement of the MMRA—including a requirement for Defendants to adequately reclaim the site and pay penalties sufficient to deter future unlawful mining—would address, at least in part, the interests of Earthworks. *Id.* ¶ 8.

## **C. Montana Environmental Information Center**

Montana Environmental Information Center (MEIC) is a member-supported non-profit organization dedicated to protecting and restoring Montana's natural environment and protecting Montanans' constitutional right to a clean and healthful environment. Johnson Decl. ¶ 2. MEIC has engaged in litigation and other advocacy since the 1990s to address contamination from the Zortman-Landusky mines. *Id.* ¶¶ 4–5. MEIC and its members have an ongoing interest in assuring that Defendants' mining does not reverse extensive reclamation efforts. *Id.* ¶ 5.

Accordingly, MEIC and its members have a weighty interest in assuring that the MMRA is enforced against violators like Defendants. *Id.*

#### **D. Montana Trout Unlimited**

Montana Trout Unlimited (MTU) is a non-profit organization dedicated to conserving, protecting, and restoring coldwater fisheries and their habitats in Montana. MTU is the state-level organization that shares its mission with national Trout Unlimited. Founded in 1964, MTU is the only statewide grassroots organization dedicated solely to conserving and restoring coldwater fisheries. MTU is comprised of 13 chapters representing more than 4,000 members. Throughout its history as an organization, MTU has worked on mining issues that affect or potentially impact coldwater resources across the state including reviewing mining proposals, analyzing permit applications, participating in the NEPA or MEPA processes, supporting citizens or communities adversely affected by mining proposals or operations, promoting more environmentally responsible mining policy and practices, researching the effects of hardrock mining on water resources and fisheries, reviewing and evaluating reclamation and restoration efforts at mine sites, as well as helping to fund, develop and oversee abandon mine cleanup. Brooks Decl. ¶ 2. This has all been done in the interest of pursuing MTU's mission and promoting responsible mining in Montana. MTU has also been involved over the past several years in advocating for protection of reclamation activities at the former Zortman-Landusky mines, including by submitting comments on mining proposals and participating in various stakeholder meetings with state and federal

officials. *Id.* ¶¶ 4–7. MTU has a strong interest in ensuring that DEQ enforces the MMRA against Defendants to prevent further jeopardizing reclamation at the Zortman-Landusky mines and worsening the existing acid mine drainage. *Id.* ¶ 7.

### LEGAL STANDARD

“A person having an interest that is or may be adversely affected may commence a civil action [against a violator] to compel compliance” with the MMRA unless DEQ has already “commenced and is diligently prosecuting a civil action” against the violator. MCA § 82-4-354(3)(b). Where DEQ is already enforcing, as here, the MMRA instead provides for “[a] person having an interest that is or may be adversely affected [to] intervene as a matter of right in the civil action.” *Id.*; Mont. R. Civ. P. 24(a)(1) (allowing intervention of right when a person is “given an unconditional right to intervene by statute,” here the MMRA).

Intervention is also permitted under Montana Rule of Civil Procedure 24(a)(2). A successful motion for intervention under that provision must: “(1) be timely; (2) show an interest in the subject matter of the action; (3) show that the protection of the interest may be impaired by the disposition of the action; and (4) show that the interest is not adequately represented by an existing party.” *Sportsmen for I-143 v. Mont. Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400; *see also* Mont. R. Civ. P. 24(a)(2). Montana’s rule governing intervention as of right “is essentially identical to the federal rule” and is “interpreted liberally.” *Sportsmen for I-143*, ¶ 7 (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)). “While an applicant seeking to intervene

has the burden to show that these four elements are met, the requirements are broadly interpreted in favor of intervention.” *Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation omitted).

The MMRA standard and Rule 24(a)(2) standard are nearly identical and the Tribes and Conservation Groups readily satisfy either standard.

## **ARGUMENT**

### **I. THE TRIBES AND CONSERVATION GROUPS ARE ENTITLED TO INTERVENTION AS OF RIGHT.**

#### **A. The Tribes’ and Conservation Groups’ Motion Is Timely.**

The Rule 24(a)(2) standard requires proposed intervenors to file a timely intervention petition. “Timeliness is determined from the particular circumstances surrounding the action.” *Connell v. State Dep’t of Soc. & Rehab. Servs.*, 2003 MT 361, ¶ 21, 319 Mont. 69, 81 P.3d 1279. Courts assess these circumstances in light of the following four factors: “(1) the length of time the intervenor knew or should have known of its interest in the case before moving to intervene; (2) the prejudice to the original parties, if intervention is granted, resulting from the intervenor’s delay in making its application to intervene; (3) the prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely.” *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 24, 305 Mont. 22, 30, 22 P.3d 646, 651 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–66 (5th Cir. 1977)). “The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.” 7C Wright & Miller,

Federal Practice and Procedure § 1916 (3d ed. Apr. 2021 update); *e.g.*, *Citizens for Balanced Use*, 647 F.3d at 897(holding intervention motion timely where filed “less than three months after the complaint was filed”).

Here, the Tribes’ and Conservation Groups’ motion to intervene is timely. DEQ filed its complaint against Defendants on April 21, 2023. *See* DEQ Compl. A scheduling order has not yet been issued in this matter and no discovery has occurred. The Tribes and Conservation Groups seek intervention less than two months after the complaint was filed. *Citizens for Balanced Use*, 647 F.3d at 897 (holding intervention motion timely where filed “less than three months after the complaint was filed”).

By contrast, the Tribes’ and Conservation Groups’ interests in assisting with enforcement of the MMRA in the face of additional destruction in an area still recovering from the impacts of catastrophic mining would be prejudiced if they were denied intervention in this proceeding. *See supra* Background Part II. Through this proceeding Defendants unlawfully mined, without the benefit of the requisite environmental review and opportunity for public input, creating the potential for significant impacts to an already compromised landscape, including, specifically, damage to historic reclamation efforts and potential risk to both groundwater and surface water near the mine site. DEQ Compl. ¶ 61. In so doing, Defendants flouted the requirements of the MMRA, including the lawful examination of the impacts that will be generated by the mining activities, and failed to provide assurances of



adequate reclamation. Finally, there are no unusual circumstances that would render the Tribes' and Conservation Groups' motion untimely.

Accordingly, the Tribes' and Conservation Groups' motion is timely.

**B. The Tribes and Conservation Groups Have Substantial Interests in This Matter.**

Under both the MMRA standard and the Rule 24(a)(2) standard for intervention, an applicant for intervention must have a “direct, substantial, legally protectable interest in the proceedings” to qualify for intervention as of right. *Sportsmen for I-143*, ¶ 9 (quotation omitted); MCA § 82-4-354 (intervention requires a claim of “an interest...in the civil action”); *see also* Mont. R. Civ. P. 24(a)(2) (intervention as of right requires a claim of an “interest relating to the property or transaction which is the subject of the action”). “To demonstrate a significant protectable interest, an applicant must establish that [its] interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue,” *Citizens for Balanced Use*, 647 F.3d at 897 (citation omitted); *id.* (“no specific legal or equitable interest need be established” (quotation and alteration omitted)).

The Tribes and Conservation Groups satisfy this standard. As discussed *supra*, Background Parts I–II, Proposed Intervenors collectively have documented substantial and legally protected sovereign, cultural, spiritual, environmental, recreational, and aesthetic interests in the areas affected by the unlawful mining. *See, e.g., Citizens for Balanced Use*, 647 F.3d at 897–98 (group’s interest in preserving wilderness study area for members’ use and enjoyment justifies

intervention as of right); *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9<sup>th</sup> Cir. 2006) (Indian tribe possessed legally cognizable interest in protecting areas used by tribal members for cultural and religious ceremonies); *In re Hanna*, 2010 MT 38, ¶ 16, 355 Mont. 236, 227 P.3d 596 (affirming tribes' inherent sovereign authority over their territories).

Accordingly, under both the MMRA and Rule 24(a)(2), the Tribes and Conservation Groups have direct and substantial interests in this proceeding that are sufficient to justify intervention of right.

**C. Ployhar's Illegal Mining Threatens to Harm the Tribes' and Conservation Groups' Interests.**

Having demonstrated significant interests affected by Defendants' actions, it follows that this action threatens to adversely affect the Tribes' and Conservation Groups' interests. *See Citizens for Balanced Use*, 647 F.3d at 898 ("Having found that [the proposed intervenors] have a significant protectable interest, this court had little difficulty concluding that the disposition of the case may, as a practical matter, affect it." (alterations and quotation omitted)); *see also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9<sup>th</sup> Cir. 2011) ("prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation'" (quoting *Cal. Ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9<sup>th</sup> Cir. 2006))).

Here, Defendants have mined unlawfully and without authorization. *See generally*, DEQ Compl. The Tribes and Conservation Groups have advocated at length to protect their interests in the ongoing reclamation of the former Zortman

mine, *see supra* Background Parts I–II, and Defendants’ brazen, unlawful action threatens to undermine this reclamation and worsen pollution from the site, *see supra* Background Parts I.C; *id.* Background Part II; DEQ Compl. ¶ 60.

Enforcement of the MMRA sufficient to deter future unlawful mining by Defendants and adequately reclaim the mine site are integral to protecting the Tribes’ and Conservation Groups’ interests. *See, e.g., Citizens for Balanced Use*, 647 F.3d at 898. And, because DEQ’s enforcement action involves this issue of enforcement, a decision in this matter could adversely impact the Tribes’ and Conservation Groups’ interests.

**D. The Existing Parties Do Not Adequately Represent the Tribes’ and Conservation Groups’ Interests.**

Unlike intervention as of right under Rule 24(a)(2), intervention under the MMRA does not require the Tribes and Conservation Groups to demonstrate the inadequacy of the existing parties in representing their interests. MCA § 82-4-354. Accordingly, the Court can grant intervention under the MMRA here without reaching this analysis. Nonetheless, even if the Rule 24(a)(2) analysis of adequacy applied, the Tribes and Conservation Groups readily satisfy this standard, as discussed.<sup>2</sup>

No party in this action adequately represents the Tribes and Conservation Groups’ interests. Existing parties do not adequately represent a proposed

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<sup>2</sup> The MMRA presumes that the state will not adequately represent individual parties’ interests by creating a right of intervention where the state is already enforcing the statute. MCA § 82-4-354.

intervenor's interests where the parties may not make the same arguments the proposed intervenor seeks to make or where "the intervenor offers a necessary element to the proceedings that would be neglected" by the existing parties.

*Sagebrush Rebellion*, 713 F.2d at 528; *see also Sportsmen for I-143*, ¶ 14 (relying on *Sagebrush Rebellion* in analyzing the adequacy of representation requirement).

Conservation Groups need only show that the representation of their interests by the existing parties "may be" inadequate. *Sportsmen for I-143*, ¶ 14 (quotation marks and citation omitted). "[T]he burden of making this showing is minimal." *Id.* (citation omitted).

Here, none of the existing parties holds the same interests as the Tribes and Conservation Groups. DEQ is a regulatory agency accountable to all Montanans. DEQ is obligated to represent the broader public interest, not only the different and specific interests of the Tribes and Conservation Groups and their members whose interests are directly threatened Defendants' unlawful mining. *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 (1972) (government may not adequately represent a proposed intervenor's interests where the government's duty to represent both broad public interests and narrower interests of intervention applicant are "related, but not identical"). DEQ must consider all affected interests, including those who support mining at the site, and is not solely accountable to those, such as the Tribes and Conservation Groups, who oppose the mining and seek to protect the reclamation work already undertaken at the site. In these circumstances, DEQ cannot adequately represent the Tribes and Conservation

Groups' interests. *See id.*; *Sportsmen for I-143*, ¶¶ 16–17 (reversing denial of intervention motion where proposed intervenors argued they were not adequately represented by Montana Fish, Wildlife & Parks because “the Director of the FWP is a political appointee”). And, clearly, Defendants, who have moved forward with unlawful mining despite significant pushback from the Tribes and Conservation Groups, entirely ignoring the law and the need for appropriate reclamation measures, does not represent the Tribes or Conservation Groups' interests.

Accordingly, no party adequately represents the Tribes' and Conservation Groups' interest in this matter. The Tribes and Conservation Groups therefore meet all requirement of Rule 24(a)(2) and are entitled to intervene as of right.

### CONCLUSION

The Tribes and Conservation Groups should be granted intervention of right under the MMRA and Rule 24(a)(1), (2).

Respectfully submitted this 21<sup>st</sup> day of June, 2023.



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Amanda D. Galvan  
Shiloh Hernandez  
Earthjustice  
313 East Main Street  
P.O. Box 4743  
Bozeman, MT 59772-4743  
(406) 586-9699  
agalvan@earthjustice.org  
shernandez@earthjustice.org

*Counsel for Proposed Intervenors*

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Jessica Wilkerson  
Samuel King  
Montana Department of Environmental Quality  
1520 East Sixth Avenue  
Post Office Box 200901  
Helena, Montana 59620-0901  
Jessica.Wilkerson@mt.gov  
Samuel.king@mt.gov

Kaden Keto  
Jackson, Murdo & Grant, P.C.  
203 North Ewing  
Helena, Montana 59601-4240  
kketo@jmgattorneys.com

Betsy R. Story  
Abigail R. Brown  
PARSONS BEHLE & LATIMER  
3335 Colton Drive, Suite A  
Helena, MT 59602  
Telephone: (406) 410-5050  
abbybrown@parsonsbehle.com  
ecf@parsonsbehle.com

Dated the 21<sup>st</sup> day of June, 2023.

/s/ Chrissy Pepino  
Chrissy Pepino