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MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT  
PHILLIPS COUNTY

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MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Plaintiff,

and

FORT BELKNAP INDIAN COMMUNITY,

Plaintiff-Intervenor,

v.

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

Defendants.

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CASE NO. DV-2023-10

Hon. Yvonne Laird

**FBIC'S RESPONSE IN OPPOSITION  
TO JOINT MOTION TO ADOPT  
CONSENT DECREE AND REQUEST  
FOR HEARING**

Plaintiff-Intervenor Fort Belknap Indian Community ("FBIC"), respectfully objects to the proposed Consent Decree submitted by Plaintiff Montana Department of Environmental Quality ("DEQ") and Defendants and requests a hearing on the joint motion to enter the Consent Decree and FBIC's opposition. FBIC ultimately requests that the Court decline to enter the proposed decree in its current form, because it formally prejudices FBIC by depriving the Tribes of their legal claims without their consent and inadequately addresses the substantial environmental and cultural harm that Defendants' unlawful conduct caused.

## **INTRODUCTION**

FBIC intervened in this litigation to protect the sovereign, environmental, cultural, natural-resource, and governmental interests of the Gros Ventre and Assiniboine Tribes arising from activities associated with the Zortman-Landusky mining complex and related mining operations within the Little Rocky Mountains. The Little Rocky Mountains hold significant cultural, spiritual, historical, and environmental importance to the Fort Belknap Indian Community. For decades, mining activities in and around the Zortman-Landusky mining complex have generated severe environmental impacts, damaging waters, lands, wildlife, and resources relied upon by Tribal members.

DEQ has expressly acknowledged those interests in this litigation. DEQ's First Amended Complaint alleges that "[t]he original Fort Belknap Reservation included the Little Rocky Mountains" within its boundaries, that the Little Rocky Mountains "are the headwaters for much of the Reservation's water resources," that the area is "considered sacred by Tribal members," and that the area was "traditionally used by the Tribes for hunting, fishing, cultural, and spiritual purposes." DEQ Am. Compl. ¶11. DEQ's First Amended Complaint also alleges that toxic acid mine drainage from the historic Zortman-Landusky mines "continues to contaminate surface

water and groundwater hydrologically connected to the mines[,]” and that “[w]ater treatment is expected to continue for the foreseeable future.” *Id.*, ¶¶ 23–24.

When DEQ brought the enforcement action addressing Defendants’ illegal mining activity at issue in this litigation, FBIC intervened as a matter of right and became Plaintiff-Intervenor in this action. FBIC independently alleged violations of the Montana Metal Mine Reclamation Act ("MMRA") and actively participated in this litigation for over five years to ensure meaningful environmental accountability and protection of FBIC’s interests. Importantly, as a Plaintiff-Intervenor, FBIC has independent rights and interests that cannot be prejudiced, released, settled, or dismissed by the proposed Consent Decree without FBIC's consent.

While settlement of an enforcement action can be appropriate when it meets fundamental requirements of fairness, remediation, and deterrence of future unlawful activity, the proposed Consent Decree raises substantial concerns. This proposed settlement was reached without FBIC’s involvement or consent, despite FBIC being a party to the litigation with concrete interests in the health and protection of the areas at issue. The proposed Consent Decree purports to resolve and dismiss FBIC's independent claims despite FBIC's opposition, and grants exceptionally broad releases to Defendants and affiliated parties to prevent any future enforcement related to these violations. The proposed Consent Decree also fails to adequately address long-term environmental concerns and fails to adequately protect FBIC's sovereign, environmental, cultural, and natural-resource interests. The Consent Decree was proposed at an early stage in litigation—before discovery was finished—and therefore the Court is unable to determine that the settlement adequately addresses and remediates the environmental damage resulting from Defendants’ actions. In sum, the proposed settlement not only prejudices FBIC in

improperly depriving the Tribes of their independent claims, but also unlawfully allows for significant environmental degradation without adequate deterrence for future violations.

For these reasons, FBIC respectfully objects to entry of the proposed Consent Decree and asks this Court to deny the Joint Motion to Adopt so that legally adequate settlement terms can be reached or enforcement proceedings can resume. FBIC also respectfully requests a hearing on the Joint Motion to Enter the Consent Decree, and FBIC's opposition, to ensure the Court has a full opportunity to consider the Consent Decree's legal harm to FBIC and its fundamental failure to remedy the environmental and cultural harm Defendants' actions have caused.

### **LEGAL STANDARD**

Though Montana law favors settlement of disputes and disfavors unnecessary litigation, *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶ 14, 337 Mont. 67, 155 P.3d 1278, a proposed consent decree is not entitled to automatic approval simply because certain parties have agreed to its terms. *United States v. Montrose Chem. Corp. of Cal.*, 50 F.3d 741, 747 (9th Cir. 1995). The court retains an independent obligation to ensure a proposed consent decree is “fundamentally fair, adequate and reasonable,” and that it “conform[s] to applicable laws.” *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). This obligation is “heightened” when a consent decree impacts public interests and the “interests at stake were not represented in the negotiating process.” *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005).

Non-settling intervenors are also entitled to certain protections in the settlement process. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528–529 (1986). A non-settling party may challenge a settlement when the party will sustain some “formal legal prejudice” as a result of the terms. *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir.

1987). In doing so, the intervenor is entitled to present evidence and objections to the court during hearings on whether to approve the consent decree. *Local No. 93*, 478 U.S. at 528–529. Further, the settling parties may not dispose of the claims of a nonconsenting party: "[a] court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors." *Id.* at 529.

As such, the Court cannot approve or adopt a consent decree that does not conform to applicable laws—such as the MMRA or the Montana Constitution—or that would prejudice an intervening party.

## **ARGUMENT**

The Court should reject the proposed Consent Decree to avoid repeating the mistakes of the past. The Zortman-Landusky area has long been a victim of a series of bad actors leaving a trail of severe environmental degradation and unfunded reclamation obligations. Federal and state agencies have spent over \$86 million on water treatment and reclamation in the area with expectations of further substantial amounts required for the foreseeable future. DEQ Am. Compl. ¶ 24. FBIC and all Montanans will continue to be forced to pay for these reclamation efforts because of insufficient settlements for amounts that have consistently proven inadequate to remedy the significant environmental harm from past mining.

Unfortunately, the proposed Consent Decree would continue the disastrous practice of failing to properly enforce the MMRA and the Montana Constitution. It would unlawfully fail to remedy existing environmental harm from Defendants' unpermitted activities and fail to prevent future harm. The proposed settlement is not fair, adequate, or reasonable in light of unanswered questions regarding the extent of harm or the adequacy of the proposed penalty. It would also impermissibly bar or impair FBIC's ability to defend its sovereign interests through independent

enforcement of the MMRA. For these reasons, FBIC respectfully requests that the Court reject the proposed Consent Decree.

**I. THE COURT SHOULD REJECT THE PROPOSED SETTLEMENT AS IT FAILS TO REMEDY EXISTING ENVIRONMENTAL HARM OR PREVENT FUTURE HARM, IN VIOLATION OF MONTANA’S CONSTITUTION AND THE MMRA.**

This Court ultimately cannot approve the proposed settlement as it would both leave existing environmental degradation unresolved and fail to deter or prevent future degradation, in violation of the Constitution’s environmental protections and the MMRA.

Against the backdrop of the mining industry’s legacy of pollution in the State, the Montana Constitution’s framers adopted “the strongest environmental protection provision found in any state constitution.” *Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality*, 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.2d 1236. These protections are “both anticipatory and preventative.” *Id.*, ¶ 77. Article II, Section 3 guarantees all persons in the State of Montana the right to a clean and healthful environment. Article IX, Section 1 further provides that the State and each person shall maintain and improve a clean and healthful environment for present and future generations. The Montana Supreme Court has affirmed that the right to a clean and healthful environment is a fundamental constitutional right. *Mont. Env’t Info. Ctr.*, ¶¶ 76–80. Because it is meant to prevent environmental harm, this right does “not require that dead fish float on the surface of our state’s rivers and streams before” it can be invoked. *Park Cnty. Env’t Council v. Mont. Dep’t of Env’t Quality*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288 (quoting *Mont. Env’t Info. Ctr.*, ¶ 77).

The Montana Supreme Court recently reaffirmed that Article II, Section 3 and Article IX, Section 1 of the Montana Constitution provide the strongest environmental protections of any state constitution and that the “anticipatory and preventative” nature of these protections require governmental decision-making that prevents environmental degradation before it occurs. *Held v. State*, 2024 MT 312, ¶¶ 23–25, 419 Mont. 403, 560 P.3d 1235. Where a proposed consent decree

leaves unresolved environmental harm, releases future claims, and limits future accountability, the Court must carefully scrutinize whether the decree fulfills these constitutional obligations.

The MMRA is designed to further implement these constitutional provisions in the mining context. The Montana Legislature enacted the MMRA with the intent to, among other things, “provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” MCA § 82-4-301(2)(a).

The proposed Consent Decree violates Montana’s Constitution and frustrates the MMRA’s purpose because it fails to adequately remedy existing environmental degradation or prevent future degradation. As the parties acknowledge, Defendants’ unpermitted exploration activities exacerbated the already serious environmental degradation resulting from the Zortman-Landusky mining operations. DEQ’s Amended Complaint gives a detailed account of how that historical mining at the Zortman-Landusky mines exposed sulfide-bearing rock to water and air, resulting in toxic acid mine drainage that continues to contaminate surface and groundwater hydrologically connected to the mines. DEQ Am. Compl. ¶ 23. The parties also acknowledge that these environmental harms are still being felt today, as water treatment is expected to continue for the foreseeable future. *Id.*, ¶ 24; *see also* Proposed Consent Decree ¶ 35. Despite this, Defendants’ unpermitted mineral exploration worsened these conditions by damaging previously completed reclamation work, compromised backfilling and capping, removed vegetation, soil, and capping material, and created a substantial risk that untreated water from the Zortman mine will further pollute groundwater and downstream surface water. DEQ Am. Compl. ¶ 71.

The proposed settlement would leave this environmental harm unresolved. Defendants refused altogether to repair their damage, and DEQ's delayed remediation activities left areas of Defendants' unlawful activities unreclaimed for two months—during which pollution may have been exacerbated. Indeed, even following DEQ's remedial activities, two unlawfully disturbed areas remain unreclaimed. *Id.*, ¶ 127. The lack of complete reclamation of the disturbances increases the risks of additional contamination of water and pollutants flowing on to the reservation. Further, due to this settlement occurring in the still early stages of litigation, DEQ has not completed a thorough investigation into the full extent of the damage that Defendants' actions caused to the area's natural resources—raising the possibility that significant, unexamined environmental harm remains. Because of the slow and complex way that water moves through the subsurface, harm or damage to FBIC's interests—especially, but not limited to, water—may not be known for years. As a result, it is possible, and even likely, that FBIC will have claims in the future that stem from the disturbances at issue in this case. Despite this, the Consent Decree does not require further investigation of the harm that Defendants' actions caused and even purports to release Defendants from all claims or damages—known or unknown—that may arise in connection to this case. Proposed Consent Decree ¶¶ 30–31. In light of these cumulative deficiencies, DEQ and Defendants cannot demonstrate that the settlement is adequate to remedy the serious known, as well as still unknown, environmental harm from Defendants' conduct.

Similarly, DEQ is unable to demonstrate that the proposed Consent Decree will adequately deter future environmental violations, as required by the Montana Constitution. As part of the fundamental right to a clean and healthful environment, “Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred,

but to be free of its occurrence in the first place.” *Park Cnty.*, ¶ 62 (emphasis added). To fulfill this mandate and to maintain effective enforcement, DEQ must avoid insufficient penalties: “[i]f the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted.” *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998) (quoting *United States v. Mac's Muffler Shop, Inc.*, No. CIV.A. C85-138R, 1986 WL 15443, \*10 (N.D. Ga. Nov. 4, 1986)). In evaluating whether a penalty has an adequate deterrent effect, the Court must ensure the penalty is “high enough so that the discharger cannot ‘write it off’ as an acceptable environmental trade-off for doing business.” *Idaho Conservation League v. Poe*, No. 1:18-CV-353-REP, 2022 WL 4536465, \*10 (D. Idaho Sept. 28, 2022) (quoting *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993)).

Here, DEQ has offered no evidence to demonstrate that a \$200,000 penalty over five years is an adequate deterrent against future violations. In fact, as noted in more detail below, the original penalty amount that DEQ indicated was an adequate deterrent is \$512,767—more than double the penalty here. DEQ Compl., Exhibit R, 1, 4, 7. Further, the proposed Consent Decree does not require that Defendants acknowledge fault, nor would it register a violation on Defendants’ record. Proposed Consent Decree ¶ 32. Without adequate deterrence, the settlement cannot prevent future violations resulting in the same constitutionally proscribed harm that this site has endured for so long. As the Montana Supreme Court has recognized, “performance of a contract where there is a very real possibility of substantial environmental degradation and resultant financial liability for clean up is not in the public interest; is not in the interests of the contracting parties; and is, most importantly, not in accord with the guarantees and mandates of Montana's Constitution.” *Cape-France Enters. v. Est. of Peed*, 2001 MT 139, ¶ 37, 305 Mont.

513, 29 P.3d 1011. Under these circumstances, consistent with the Court’s own obligation to “to maintain and improve a clean and healthful environment as required by Article IX, Section 1,” the Court must reject the proposed Consent Decree. *Id.*, ¶ 34.

**II. DEQ AND DEFENDANTS CANNOT DEMONSTRATE THAT THE SETTLEMENT IS FUNDAMENTALLY FAIR, ADEQUATE, AND REASONABLE.**

**A. Settling at such an early stage without a full investigation of the environmental damage is against the public interest and not fair, adequate, or reasonable.**

Without sufficient discovery or evidence of the full extent of environmental damages that Defendants’ actions caused, the proposed Consent Decree cannot be determined fundamentally fair, adequate, or reasonable by the Court—and therefore should not be approved. While compromise is inherent in settlement, and parties are allowed to account for the costs and risks associated with litigation, the settlement must nevertheless be “fundamentally fair, adequate and reasonable.” *See United States v. Oregon*, 913 F.2d at 580. In evaluating this, courts have long considered the stage of litigation and extent of discovery completed—holding that parties must have sufficient information to make informed decisions. *See e.g. Slezak v. City of Palo Alto*, No. 16-CV-03224-LHK, 2017 WL 2688224, \*4 (N.D. Cal. June 22, 2017); *Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014); *Montrose Chem. Corp.*, 50 F.3d at 747; *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). In *Montrose*, the court found that it could not properly evaluate the fairness or reasonableness of the settlement penalty amount in an “informational vacuum”—without evidence of the full extent of the natural resource damages—and thus rejected the settlement. 50 F.3d at 747.

Here, like in *Montrose*, there are significant gaps in the record due to the early stage of litigation and as such, the Court cannot deem the settlement to be fundamentally fair, adequate, or reasonable. *Id.* This Consent Decree was proposed during initial discovery requests, and the

discovery process was suspended while DEQ and Defendants finalized the settlement terms. As a result, no parties were able to present testimony on the environmental and cultural harm caused by Defendants' unlawful conduct. Along with independent expert testimony on water degradation, FBIC was prepared to introduce testimony from Tribal Historic Preservation Officer Michael Blackwolf regarding the spiritual and cultural harm that Defendants caused. The testimony would demonstrate that the long history of harmful operations at the Zortman-Landusky mines, along with the latest damage resulting from Defendants' actions, has contaminated, and continues to threaten, the Tribes' ceremonial sites, powwow grounds, and drinking water sources. Without this testimony—and without other evidence of environmental damage Plaintiffs may have discovered in the course of this proceeding—there are substantial gaps in the record covering crucial aspects of the settlement. The record as it stands largely consists of DEQ's factual allegations of Defendants' harm with no evidence to rebut them. While those allegations should be given weight, the substantial lack of actual evidence at this early stage means that the Court has very little evidentiary basis for determining whether this proposed Consent Decree is “fundamentally fair, adequate and reasonable.” *United States v. Oregon*, 913 F.2d at 580.

**B. The proposed Consent Decree does not conform with the MMRA's penalty provisions or requirements to deter future violations.**

The proposed settlement does not constitute adequate enforcement, as the monetary penalty proposed does not account for the MMRA's statutory factors and is insufficient to deter future mining violations. The only evidence of the appropriate penalty before the Court is DEQ's original penalty calculation, which applied the MMRA factors, considered deterrence, and ultimately determined a penalty amount more than double the proposed settlement. Evidence adduced through discovery may have found that an even higher penalty than DEQ's preliminary

calculation is warranted. Absent evidence that a lower penalty is warranted, the Court has no basis on which to find the settlement fair, adequate, or reasonable.

When DEQ has reason to believe a person is in violation of the MMRA or its administrative rules, it must send notice of the violation and, if the violation persists, commence enforcement measures including “judicial action for penalties or injunctive relief.” MCA §§ 82-4-361(1), (2)(c), (7). When assessing penalties, DEQ must take into account several factors:

- (a) the nature, extent, and gravity of the violation;
- (b) the circumstances of the violation;
- (c) the violator's prior history of any violation...
- (d) the economic benefit or savings resulting from the violator's action;
- (e) the violator's good faith and cooperation;
- (f) the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation; and
- (g) other matters that justice may require.

*Id.* § 82-4-1001(1). To satisfy its enforcement obligation, DEQ must “calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit of noncompliance.” ARM 17.4.301(2). These penalties are only effective if they “encourage defendants to discontinue current violations and deter them from committing future ones.” *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 186 (2000). In sum, a penalty that does not adequately account for the statutory factors or that does not adequately deter future violations is unreasonable under the MMRA and applicable law.

DEQ and Defendants do not attempt to demonstrate that the proposed settlement amount is adequate under the statutory penalty factors or that it provides adequate deterrence. The proposed Consent Decree includes just \$40,000 per year in penalties for five years, for a total of \$200,000. Proposed Consent Decree ¶ 20. The Consent Decree does not apply or acknowledge

the required penalty factors despite DEQ explicitly incorporating them into the original penalty sought in its initial complaint.

In contrast with the Consent Decree, DEQ's original penalty calculation explicitly accounted for the mandatory penalty factors under the MMRA. DEQ assessed \$512,767 in total monetary penalties for Defendants' violations: \$485,000 for engaging in mineral exploration without obtaining an exploration license and \$27,767 for failure to file an adequate bond prior to exploration and mining. DEQ Compl., Exhibit R, 1. Notably, as per MCA § 82-4-1001(1), these penalty calculations included increases in the base amount due to the gravity and circumstances of the violation, the economic benefit the violator's realized as a result of the violation, and other matters as justice may require. DEQ determined that the gravity of harm to human health or the environment and the gravity of harm to the agency's administration were both "major"—the most severe classification possible. *Id.* at 2. DEQ also chose the highest possible augmentation under the circumstances factor, raising the base penalty amount by 30%, due to Defendants' failure to reclaim the sites, Defendants' blatant and knowing violation of the law, and the severe risks that a violation of this nature presents to the environment. *Id.* at 3, 6. DEQ further added \$250,000 total to the original penalty requested—\$125,000 for each violation—to address the "other matters as justice may require" factor. *Id.* at 4.

In calculating appropriate penalties, DEQ acknowledged the history of the severe environmental degradation at the Zortman-Landusky site and the serious risk that a violation of this sort poses to the "20 plus years of time, effort and money expended by DEQ and BLM to protect people and the environment." *Id.* DEQ explicitly noted that the area has "significant cultural value to the members of the Assiniboiné and Gros Ventre tribes of the Fort Bel[k]nap Indian Community." *Id.* Ultimately, DEQ stated that a \$250,000 increase in the total penalty was

adequate to “deter future high risk activity at this site and other CERCLA and culturally valuable sites within Montana.” *Id.* Finally, DEQ considered the statutory factors that may lower a penalty and determined that Defendants did not warrant any reductions due to good faith or cooperation or due to money voluntarily spent to remediate the site. *Id.* at 3, 6.

In addition to addressing the statutory penalty factors, the calculation worksheet also addressed the question of what penalty would be adequate to deter future violations. DEQ noted in its original penalty calculations that the agency could have assessed these penalties for each day the violation continued. This would amount to 273 days of violation across 8 sites for the first violation, totaling \$10,920,000 in maximum penalty, and 273 days for the second violation, totaling \$7,098,000 in maximum penalty. *Id.* at 4, 7. DEQ explicitly reduced these maximum penalties as the agency determined they were “greater than what is necessary to provide an adequate deterrent.” *Id.* However, this determination was based on the ultimate penalty of over \$500,000—more than double the total amount included in the proposed Consent Decree. In fact, the amount that DEQ originally attributed to the “other matters as justice may require” factor alone, \$250,000, is greater than the full penalty proposed in the settlement here. Moreover, further investigation and discovery in this case may have supported penalties higher than DEQ’s original \$512,767 assessment. In reflection of this, DEQ amended its initial complaint to remove the \$512,767 penalty number in favor of an open-ended request for penalties up to the maximum amounts noted above: \$7,098,000 and \$10,920,000. DEQ Am. Compl. ¶¶ 140, 145.

In sum, DEQ has offered no basis for determining that a penalty of only \$200,000—less than half of DEQ’s original proposed penalty and a small fraction of the maximum possible penalty—will adequately deter future violations. Because of this, and because there is no

evidence that the proposed settlement incorporated the MMRA's penalty factors, the Consent Decree cannot be approved.

### **III. THE PROPOSED CONSENT DECREE LEGALLY PREJUDICES FBIC BY DISMISSING THE TRIBES' INDEPENDENT MMRA CLAIMS WITHOUT THEIR CONSENT.**

The proposed Consent Decree suffers from another fundamental defect: it attempts to settle and dismiss claims belonging to a party that has not consented to the settlement. FBIC's independent claims, including but not limited to claims to compel adequate enforcement under the MMRA, may not lawfully be extinguished by the proposed Consent Decree without FBIC's consent. It is a fundamental principle of civil procedure that parties choosing to resolve litigation through settlement may not dispose of the independent claims of a nonconsenting intervenor. *Local No. 93*, 478 U.S. at 519–23; *Texas v. New Mexico*, 602 U.S. 943, 953–954 (2024); *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964). Yet the proposed Consent Decree would do exactly that.

In determining whether a consent decree may be entered despite objections from non-consenting intervenors, the Court must first determine whether the party has valid independent claims and then determine whether the proposed Consent Decree would dispose of those claims. *Texas v. New Mexico*, 602 U.S. at 954. When “the answer to each of those questions is yes, the consent decree cannot be approved without the [intervenor's] consent.” *Id.* To do so under the MMRA would be to deny a party environmental remedies designated by statute, violating Montana's constitutional guarantee to a clean and healthful environment. *See Park Cnty. Env't Council*, ¶ 89.

Here, FBIC has an independent right to compel adequate enforcement under the MMRA and should not be deprived of the opportunity to pursue that relief through litigation simply because other parties wish to settle on different terms. FBIC did not merely appear as an

interested governmental entity supporting DEQ's enforcement efforts in this matter. FBIC intervened in this litigation as a matter of right under both the MMRA and Montana Rule of Civil Procedure 24(a). Order on Mot. to Intervene at 5–6. By granting FBIC's intervention as a plaintiff, the Court necessarily recognized that FBIC's interests may be adversely affected by the agency's failure to enforce the MMRA and that DEQ's prosecution of this case does not adequately represent FBIC's independent interests. MCA § 82-4-354(3)(b); Mont. R. Civ. P. 24(a).

The Court recognized that the Tribes have established a legally protectable interest because of “their right to the waters from the Little Rocky Mountains and because of their cultural, spiritual, and historical ties to the site.” Order on Motion to Intervene at 5. As detailed further above, Defendants' violations harmed these interests through increased risk of contamination of the Tribes' waters and natural resources and through damage to existing reclamation efforts. FBIC intervened in this litigation as a matter of right under the MMRA and explicitly alleged several violations of the MMRA in its complaint. FBIC Am. Compl. ¶¶ 38–41, 44–47, 50–52, 60–61. The proposed settlement would improperly extinguish all FBIC's claims relating to this case and, in particular, FBIC's ability to independently pursue enforcement against Defendants for their unlawful conduct under this statute. The MMRA framework provides adversely affected parties, such as FBIC here, with two avenues to enforce its provisions. Both avenues are formally prejudiced by the proposed Consent Decree.

First, the statute contemplates an action in mandamus to compel DEQ to enforce the law; however, the settlement's broad release language would foreclose such relief. The MMRA provides that an adversely affected party may bring notice of a failure to enforce to the government's attention and—in the event the public officer refuses to diligently enforce the

statutory protections—bring an action of mandamus in court. MCA § 82-4-354(1)–(2). However, the proposed Consent Decree purports to release Defendants and a broad array of related persons and entities from all claims or damages—known or unknown—that may arise in connection to this case. Proposed Consent Decree ¶¶ 30–31. As such, if FBIC discovered other violations or harms from Defendants in the future—a very real possibility, as noted above—DEQ would not be able to enforce those violations if they arose in connection with this case. Accordingly, FBIC would not be able to compel such enforcement—frustrating the purpose and function of this mandamus mechanism.

Second, the statute authorizes FBIC to file a civil action directly against Defendants—another action potentially foreclosed by the Consent Decree’s overbroad releases. The MMRA provides that if the government is not diligently prosecuting an action for compliance, an adversely affected party may bring a civil suit against violators directly. MCA § 82-4-354(3). However, because DEQ purports to have diligently prosecuted the violations at issue, FBIC’s clearest legal recourse was through intervention in this litigation. The premature and unreasonable settlement may stymie this enforcement route as well because it purports to resolve and dismiss with prejudice all DEQ and FBIC claims at issue in this case—and all claims that may arise in connection to this case. Proposed Consent Decree ¶¶ 28–31. FBIC has not agreed to these provisions barring the Tribes’ claims, is not a signatory to the proposed Consent Decree, and expressly opposes adoption or approval of the decree. As per *Local No. 93*, the Court cannot approve a settlement that dismisses FBIC’s independent claims without the Tribes’ consent. 478 U.S. at 519–523.

Ultimately, the parties can agree to settle their own dispute, but they cannot ask the Court to use its judicial power to extinguish the rights of a non-consenting sovereign or approve a

decree that is inconsistent with the law. Because entry of a consent decree constitutes an exercise of the Court's equitable authority, the Court must independently determine that the decree is lawful, fair, reasonable, and consistent with the public interest before lending its authority to the parties' agreement. Here, DEQ and Defendants' proposed Consent Decree does not meet that bar.

### **CONCLUSION**

It is no coincidence that the Fort Belknap Indian Community has been actively excluded from the formation of this settlement—the terms of the Consent Decree forsake accountability and justice at the expense of the Tribes and the people of Montana. The proposed Consent Decree not only prejudices FBIC by depriving the Tribes of their legal claims without their consent, it also violates the MMRA and the Montana Constitution through inadequate enforcement and deterrence. For the foregoing reasons, FBIC respectfully requests a hearing to ensure the Court has a full opportunity to consider the Consent Decree's legal harm to FBIC and its fundamental failure to remedy the environmental and cultural harm Defendants' actions have caused. FBIC also respectfully asks that the Court ultimately deny the Joint Motion to Adopt Consent Decree so that adequate settlement terms may be reached—with the involvement and consent of FBIC—or that enforcement proceedings may resume.

DATED this 30th day of July, 2026.

/s/ Terryl T. Matt

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## CERTIFICATE OF SERVICE

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

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Dated this 30th day of July, 2026.

/s/ Terryl T. Matt  
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