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MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

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

Plaintiffs,

v.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY and CHRIS  
DORRINGTON, Director of the Montana  
Department of Environmental Quality,

Defendants;

Case No. ADV-2018-363  
Judge: Hon. Mike Menahan

**INTERVENORS' RESPONSE TO DEQ'S  
MOTION TO DISMISS**

FORT BELKNAP INDIAN COMMUNITY and  
KSANKA KUPAQA XA'ŁÇIN,

Proposed Defendant-Intervenors;

EARTHWORKS, MONTANA  
ENVIRONMENTAL INFORMATION  
CENTER, CLARK FORK COALITION, ROCK  
CREEK ALLIANCE, SAVE OUR CABINETS,  
and MONTANA CONSERVATION VOTERS;

Defendant-Intervenors.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Third-Party Plaintiff and Counterclaim  
Plaintiff;

FORT BELKNAP INDIAN COMMUNITY and  
KSANKA KUPAQA XA'ŁÇIN,

Proposed Third-Party/Counterclaim  
Plaintiff-Intervenors;

EARTHWORKS, MONTANA  
ENVIRONMENTAL INFORMATION  
CENTER, CLARK FORK COALITION, ROCK  
CREEK ALLIANCE, SAVE OUR CABINETS,  
and MONTANA CONSERVATION VOTERS,

Third-Party/Counterclaim Plaintiff-  
Intervenors;

v.

PHILLIPS S. BAKER, JR., HECLA MINING  
COMPANY,

Third-Party Defendants;

RC RESOURCES, INC., MONTANORE  
MINERALS CORP., PHILLIPS S. BAKER, JR.,  
and HECLA MINING COMPANY,

Counterclaim Defendants.

## **INTRODUCTION**

Intervenors are disappointed in DEQ's motion to dismiss and the spurious reasons the agency proffers for abdicating its responsibility to protect Montanans from corporate bad actors. DEQ's decision not to enforce Montana law and safeguard the interests of the people of Montana is also unlawful. DEQ is technically correct that in this case Intervenors do not have independent claims against DEQ or the mining companies and therefore cannot stand in the way of DEQ's requested dismissal, and for that reason ultimately take no position on DEQ's motion. Nevertheless, Intervenors cannot allow DEQ's spurious arguments in support of dismissal to stand un rebutted and so respond to each of them here. In addition, Intervenors believe that DEQ's election to forego enforcement of Montana's bad actor statute violates the agency's clear legal duties. Intervenors intend to challenge that violation by initiating independent litigation against DEQ.

## **DISCUSSION**

At the outset, DEQ's dismissal of this case results in the unjust and untenable outcome that Montana's constitution forbade when it mandated that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed." Mont. Const. Art. IX § 2. The Legislature undertook to ensure such reclamation by enacting the "bad actor" provisions of the Metal Mine Reclamation Act ("MMRA"). MCA §§ 82-4-331(3), 82-4-335(9), 82-4-360(1). As DEQ itself previously explained, this case epitomizes the circumstances in which those provisions are intended to apply. The MMRA's "bad actor provisions" were designed to require companies and their executives to complete past cleanup operations or reimburse the state for cleanup costs before they can acquire new mining permits. In short, the polluter—not the public—pays. Thus, DEQ has a mandatory duty to enforce the MMRA, including its bad actor provisions. MCA §§ 82-4-

360(1), 361(1). In enacting the MMRA, the Legislature recognized that enforcing appropriate reclamation standards is imperative for the State to benefit from hard rock mining activity and protect the public interest. MCA § 82-4-301(3). DEQ's decision to dismiss this case flies in the face of its statutory duties and, in effect, allows and encourages mining executives whose companies walk out on their clean-up bill to return to Montana and pocket more of the state's riches while the public shoulders the burden of their abandoned mines.

None of DEQ's arguments remedy this abdication of responsibility and grave injustice. First, DEQ's brief contains consequential inaccurate statements. DEQ misstates the current status of the mining permits at issue in this litigation, asserting that "the Montanore Mine and Rock Creek Mine are not currently authorized to mine" and, further, that "no licenses or permits have yet been issued." DEQ's Br. in Supp. of Mot. to Dismiss 5, 7 (filed Jul. 14, 2021) ("DEQ Br."). These statements are false, as admitted in DEQ's own pleadings. Since the filing of its original complaint in 2018, Plaintiff Montanore Minerals Corp. has held "Exploration License No. 00648 and Operating Permit No. 00150 . . . for construction and operation of an underground copper and silver mine." Pls' First Amended Complaint for Declaratory and Injunctive Relief ¶ 3 (filed Mar. 23, 2018); DEQ Answer to Second Amended Complaint ¶ 3 (filed Aug. 18, 2018). Likewise, Plaintiff RC Resources has held "Exploration License No. 00663. . . for an exploration adit aimed at potential underground copper and silver deposits approximately five miles northeast of Noxon, Montana." Pls' First Amended Complaint for Declaratory and Injunctive Relief ¶ 5; DEQ Answer to Second Amended Complaint ¶ 5. Consequently, DEQ's suggestion that there is no need or urgency for DEQ to enforce the bad actor provisions in this matter is mistaken.

DEQ's stated concerns regarding the fear of expending "substantial resources" to move forward with enforcement are also simply not credible. DEQ Br. 5. DEQ itself admits that to date, the State of Montana has paid more than \$30 million in costs to reclaim the abandoned Zortman and Landusky mines and that these costs will continue to accumulate in perpetuity. DEQ Br. in Supp. of Mot. Summ. J. at 5 (filed Jan. 22, 2019). Hecla's CEO, Phillips S. Baker, Jr. was a principal of the Pegasus entities that defaulted on their obligations to reclaim the Zortman/Landusky mines, among others. *Id.* at 6. This is a substantial demand on state resources. By contrast, litigation costs in this matter will not exceed, or even approximate, the millions of taxpayer dollars in state resources that have been and will continue to be expended on clean-up for the previous mining efforts at the Zortman/Landusky mines. This is because DEQ's previous counsel, among the most highly regarded attorneys in the State of Montana, was prosecuting this case on a *pro bono* basis—at no cost to the state. DEQ cannot credibly fire its *pro bono* attorney and then complain about litigation costs. On the contrary, DEQ's decision to walk away from enforcing the bad actor provisions likely will cost the state and, importantly, the taxpayers of Montana, far more in the long run than would litigating this matter to completion.

Nor are DEQ's asserted procedural concerns convincing. DEQ purports to worry about potential motions practice related to venue. DEQ Br. at 4. Setting aside the two prior rulings finding venue proper in this district, if the mere prospect of motions practice is sufficient to justify dismissal, it is hard to see how DEQ could ever bring an enforcement action again. The same point applies to DEQ's newfound concern about "issues with service of process." *Id.* at 5. Again, setting aside DEQ's prior briefs rejecting any concerns about the adequacy of service, e.g., DEQ Br. in Supp. of Mot. Summ. J. at 8 & n.1, if merely raising "issues" is sufficient to

obtain dismissal, corporate defendants will have a magic bullet for avoiding any enforcement action by DEQ.

DEQ's statement that it "would prefer to address the problem of bad actors and achieve the goal of protecting Montana from them, through collaborative development of more comprehensive and current legislation applicable broadly, rather than litigation" also fails to withstand scrutiny. DEQ Br. at 5. The MMRA as currently formulated directly addresses the case at hand and DEQ offers no explanation for how additional legislation would aid in the agency's "ultimate goal . . . to prevent bad actors from operating in Montana." *Id.* Indeed, as DEQ itself has explained, the agency's long-standing and plain language reading of the bad actor provision recognizes that it applies directly to the fact pattern in this case. DEQ Br. in Supp. of Mot. Summ. J. at 16. Instead, DEQ's dismissal of its enforcement action nearly guarantees that bad actors in Montana will profit from additional mining without cleaning up their past messes. Worse, it encourages mining companies to walk away from reclamation obligations and use corporate forms to force the Montana public to clean up their messes. It goes without saying that DEQ cannot "prevent bad actors from operating in Montana," DEQ Br. at 5, by allowing bad actors to operate in Montana.

Further, while DEQ claims to have "taken a very careful look at the entire record in this case," DEQ Br. at 4, the agency's motion to dismiss is confusing and inconsistent. At one point, DEQ "asks the Court to dismiss the remainder of its claim with prejudice," *id.* at 6. The agency later "asks the Court to dismiss the case in its entirety, without prejudice." *Id.* at 8. It is therefore not even clear what action the agency is asking this Court to take.

Ultimately, the most telling statement in DEQ's brief is its acknowledgement that "Montana received a new Governor, who appointed a new Director of DEQ." *Id.* at 4. Through

its request to dismiss the previous Governor's effort to enforce the bad actor provision, the current administration has made clear that it is prioritizing accommodation of mining interests over corporate accountability, reclamation of chronic pollution, and injustice to aggrieved parties, including, in particular, the tribal communities whose central cultural sites are tainted with mining waste as a result of defendant Baker's past Zortman/Landusky operations. This is a dereliction of duty and, indeed, an assault on the rule of law. Intervenors do not intend to let it stand unaddressed, and will pursue independent legal action to achieve the enforcement of Montana's bad actor statute that DEQ now shirks.

### CONCLUSION

In sum, Intervenors disagree with DEQ's decision to dismiss the current litigation. DEQ's proffered reasons in support of that motion are superficial and inconsistent, and its refusal to enforce the bad actor provision is unlawful. As noted, however, Intervenors do not have independent claims against DEQ or the mining companies in this action. Thus, DEQ's unlawful failure to enforce the bad actor provision will have to be prosecuted in a separate action. Accordingly Intervenors offer no position on DEQ's motion to dismiss.

Respectfully submitted this 2nd day of August 2021.

/s/ Shiloh S. Hernandez

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## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2021, I served the foregoing document by first-class mail, postage prepaid, to the following:

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