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Conservation Voters*

MONTANA NINETEENTH JUDICIAL DISTRICT COURT
LINCOLN COUNTY

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

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY and TOM
LIVERS, Director of the Montana Department
of Environmental Quality,

Defendants;

and

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

Proposed Defendant-Intervenors.

Case No. DV-18-52
Judge: Hon. Matthew Cuffe

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AS
DEFENDANTS**
(Mont. R. Civ. P. 24)

Earthworks, Montana Environmental Information Center, Clark Fork Coalition, Rock Creek Alliance, Save Our Cabinets, and Montana Conservation Voters (collectively “Proposed Intervenors”), hereby seek to intervene in this case to defend the March 20, 2018 determinations by the Montana Department of Environmental Quality (“DEQ”) that Phillips S. Baker, Jr., and Hecla Mining Company (“Hecla”) are in violation of the “bad actor” provisions of Montana’s Metal Mine Reclamation Act (“MMRA”), Mont. Code Ann. §§ 82-4-360, 82-4-361.

Proposed Intervenors are entitled to intervene under Montana Rule of Civil Procedure 24(a). The lawsuit brought by Plaintiffs Montanore Minerals Corp., Troy Mine, Inc., and RC Resources, Inc. threatens Proposed Intervenors’ interests in protecting the regions of the Cabinet Mountains where the Plaintiffs’ proposed projects would be located and ensuring that the “bad actor” provisions of the MMRA are enforced to prevent people and companies who previously failed to complete required mine reclamation in Montana from reaping the benefits of mining in the state, including by mining in areas where Proposed Intervenors’ members live and recreate. No other party adequately represents Proposed Intervenors’ interests in this matter, and Proposed Intervenors’ intervention motion is timely. Accordingly, intervention under Rule 24(a) should be granted. In the alternative, the Court should permit Proposed Intervenors’ intervention under Montana Rule of Civil Procedure 24(b).

BACKGROUND

Proposed Intervenors seek to defend DEQ’s determinations that Mr. Baker and Hecla are in violation of the MMRA’s bad actor provisions based on Mr. Baker’s role as a top leader of Pegasus Gold, Inc., and related entities whose operation of multiple cyanide heap-leach gold mines across Montana into the 1990s—during Mr. Baker’s tenure—caused widespread and damaging pollution of public and private land and waters that persists to this day. When the Pegasus entities declared bankruptcy in 1998—also on Mr. Baker’s watch—they shifted to the

State of Montana and its federal partners responsibility for more than \$80 million in reclamation obligations at the abandoned Pegasus mines—costs that continue to mount and will burden the public in perpetuity. In response to an enforcement request by Proposed Intervenors, DEQ correctly concluded in the challenged determinations that, in light of the unprecedented reclamation failures of Mr. Baker’s former companies, the MMRA’s bad actor provisions prohibit Mr. Baker and his current company, Hecla, from undertaking new mining or exploration activities in Montana, including specifically the proposed Montanore and Rock Creek Mine projects that Mr. Baker and Hecla are pursuing in the Cabinet Mountains.

Proposed Intervenors seek to defend DEQ’s determinations to protect the public lands, waters, and wildlife of the Cabinet Mountains from the serious and permanent harm threatened by these proposed projects; ensure that the substantial remaining pollution at the Pegasus mines is finally remediated; and ensure proper enforcement of the bad actor provisions, which the Legislature enacted to ensure that mining companies and their leaders cannot profit from new mining ventures in Montana while the public continues paying to clean up their past operations.

I. PEGASUS GOLD’S MINING OPERATIONS

Hecla’s top corporate officer, Mr. Baker, previously was a principal official for Pegasus Gold, Inc., and its subsidiaries (collectively, “Pegasus”), which owned and operated multiple gold mines in Montana in the 1990s, including the Zortman-Landusky, Basin Creek, and Beal Mountain mines. O’Brien Aff., Ex. 3 at 1; Ex. 1 at 3, 9, 12-16. The MMRA required the Pegasus entities to reclaim these mines consistent with their reclamation plans and statutory requirements. See Mont. Code Ann. §§ 82-4-336, 82-4-341. But rather than completing the required reclamation, the Pegasus entities filed for bankruptcy in January 1998, defaulted on their reclamation obligations, and left DEQ “responsible for collecting over \$80 million in surety bonds and implementing reclamation plans” at the Zortman-Landusky, Basin Creek, and Beal

Mountain mines. O'Brien Aff., Ex. 2 at 792. As described by DEQ's Environmental Management Bureau Chief, "[n]o previous DEQ reclamation projects had approached the scale of the Pegasus properties." Id. The consequences of Pegasus' default are still felt today. The Beal Mountain site, for example, continues emitting contaminants into the headwaters of the Clark Fork River, damaging water quality and the local trout fishery. See Flynn Aff., ¶¶ 5-7; Randall Aff., ¶ 4; Knudsen Aff., ¶¶ 5-6. Acid mine drainage from the Zortman-Landusky mines continues polluting waters and sacred sites utilized by the Assiniboine and Gros Ventre Tribes of the adjacent Fort Belknap Indian Reservation, see O'Brien Aff., Ex. 5, and ongoing water treatment at the site will cost the public over \$2 million each year in perpetuity, id., Ex. 1 at 5, 12.

At the time of the Pegasus bankruptcy, Mr. Baker was the Vice President, Finance, and Chief Financial Officer of Pegasus Gold, Inc., and also served as a principal officer and director of each of the Pegasus subsidiaries responsible for operating the Zortman-Landusky, Basin Creek, and Beal Mountain mines. Id., Ex. 3 at 1; Ex. 1 at 3, 9, 12-16.

II. HECLA MINING COMPANY

Mr. Baker now serves as President and CEO of Hecla, which is seeking to develop the Rock Creek and Montanore mines in the Cabinet Mountains of northwest Montana. O'Brien Aff., Ex. 3 at 1; see also id., Ex. 6 at 55 (Hecla 2018 Form 10-K stating Hecla has "100% ownership of the Rock Creek project" and "100% ownership of the Montanore project"). As documented in federal and state agency analyses, development of these mines threatens substantial damage to water quality, water quantity, wildlife, and wilderness values in the Cabinet Mountains. See generally, e.g., Save Our Cabinets v. U.S. Fish & Wildlife Serv., 255 F.

Supp. 3d 1035 (D. Mont. 2017) (discussing Montanore Mine); U.S. Forest Serv., Final Supp. Eenvtl. Impact Statement for the Rock Creek Project (June 2017).¹

III. PROPOSED INTERVENORS' ENFORCEMENT REQUEST

In an October 23, 2017 letter, Proposed Intervenors alerted DEQ to Mr. Baker's leadership history with the Pegasus entities responsible for the reclamation defaults at the Zortman-Landusky, Beal Mountain, and Basin Creek mines. O'Brien Aff., Ex. 1. That letter requested that DEQ enforce the MMRA's "bad actor" provisions, Mont. Code Ann. §§ 82-4-331(3), 82-4-335(9); 82-4-360(1), by prohibiting Mr. Baker and his current company, Hecla, from undertaking exploration or mining in Montana unless they repay the state for publicly-funded reclamation work at the Pegasus mines and complete the outstanding reclamation work there, as the statute requires. O'Brien Aff., Ex. 1 at 1-2, 7. The bad actor provisions prohibit a person or company from receiving permits for or conducting exploration or mining activities in Montana if that person, company, or the person's former company failed to complete required mine reclamation and the state or a surety funded or carried out reclamation instead. The Legislature strengthened these prohibitions in 2001 in direct response to the financial and environmental disaster wrought by the Pegasus default. See, e.g., id., Ex. 7 at 14; Ex. 8 (DEQ testimony supporting 2001 MMRA amendments).

As Proposed Intervenors explained in their letter, the bad actor provisions prohibit Mr. Baker and his new company, Hecla, from conducting exploration or mining because, at a minimum: (1) Zortman Mining, Inc., for which Mr. Baker was Vice President and Director, failed to complete required reclamation of the Zortman-Landusky mines and DEQ has received

¹ Available at <https://www.fs.usda.gov/detail/kootenai/home/?cid=stelprdb5327758> (last visited April 2, 2018).

bond proceeds for and completed reclamation of the Zortman-Landusky mines; and (2) Pegasus Gold Montana Mining, Inc., for which Mr. Baker was Vice President and Director, failed to complete required reclamation of the Basin Creek mine and DEQ received bond proceeds from that company's surety to perform reclamation on the company's behalf. Id., Ex. 1 at 7.

Proposed Intervenor asked DEQ to suspend the authorizations for Hecla's Rock Creek and Montanore mines and notify Hecla that it is barred from mineral exploration and mining in Montana. Id.

On March 20, 2018, DEQ responded to Proposed Intervenor's enforcement request by sending the violation letters that are the subject of this lawsuit to Mr. Baker and Hecla, in which DEQ concluded that Mr. Baker and Hecla are in violation of the bad actor prohibitions and presented options for them to return to compliance. O'Brien Aff., Exs. 3 & 4. As DEQ explained, Mr. Baker's leadership role at Pegasus disqualifies him from conducting mining or exploration in Montana under Mont. Code Ann. § 82-4-360(1). Id., Ex. 4 at 1-2. DEQ further concluded that Hecla and its officers and board of directors are facilitating Mr. Baker's MMRA violation, which constitutes a further violation of the statute, Mont. Code Ann. § 82-4-361(2)(a)(ii). Id., Ex. 3 at 1-2. DEQ's letters offered Mr. Baker and Hecla an opportunity to respond by submitting letters explaining any disagreement with DEQ's conclusions, and advised that "DEQ will consider the information provided before pursuing further action." Id., Ex. 3 at 3; Ex. 4 at 2.

Nevertheless, on the same day DEQ issued the violation letters, Hecla's subsidiaries filed this lawsuit.

IV. PROPOSED INTERVENORS

Proposed Intervenor organizations are organizations whose members, supporters, board members, and staff live, own property, and recreate in and around the lands and waters of the Cabinet Mountains that would be adversely affected by Hecla's proposed Rock Creek and Montanore Mines. See Costello Aff., ¶¶ 2, 5-10; Gerth Aff., ¶¶ 3-7; Gestring Aff., ¶¶ 2, 6-10; Jensen Aff., ¶¶ 4-5; Knudsen Aff., ¶¶ 3, 7-8; Randall Aff., ¶¶ 5-7. Further, Proposed Intervenor organizations collectively have dedicated decades of effort to protecting the public lands, waters, and wildlife of the Cabinet Mountains from the adverse effects of these projects. See Costello Aff., ¶¶ 3-4; Gerth Aff., ¶ 2; Gestring Aff., ¶¶ 4-5; Jensen Aff., ¶¶ 3, 11; Knudsen Aff., ¶¶ 3-4; Randall Aff., ¶ 3. In addition, Proposed Intervenor organizations collectively have dedicated decades of effort to ensuring full cleanup of pollution at the abandoned Pegasus mines on behalf of their members, supporters, and partners who live, own property, and recreate on or near the lands and waters affected by those mines. See Gestring Aff., ¶ 11; Jensen Aff., ¶¶ 6-9; Knudsen Aff., ¶¶ 3, 5-6; Flynn Aff., ¶¶ 1-2, 4-7. In furtherance of these efforts, Proposed Intervenor organizations submitted or supported the enforcement request that prompted the DEQ actions challenged in this case. See O'Brien Aff., Ex. 1. DEQ's challenged determinations respond directly to Proposed Intervenor organizations' enforcement request and related advocacy and protect Proposed Intervenor organizations' interests in the areas threatened by the Rock Creek and Montanore Mines and areas affected by pollution from the abandoned Pegasus mines.

A. Earthworks

Earthworks is a non-profit organization dedicated to protecting communities and the environment from the adverse effects of mineral and energy development. Gestring Aff., ¶ 2. Earthworks has advocated for years to protect the Cabinet Mountains, surrounding public lands and waters, and the wildlife that depend on that landscape from the proposed Rock Creek and

Montanore Mines. Id., ¶ 4. In addition, Earthworks has engaged in extensive advocacy concerning the environmental and public health fallout from the abandoned Pegasus mines. Id., ¶ 11. Earthworks members live and recreate in the Cabinet Mountains area where Hecla's Rock Creek and Montanore mines are proposed. Id., ¶¶ 2, 6-10. Earthworks was a party to the October 2017 enforcement request that precipitated the challenged DEQ violation letters. See O'Brien Aff, Ex. 1 at 1.

B. 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. Jensen Aff., ¶ 2. MEIC has litigated numerous cases concerning the adverse effects of metal mining in Montana, including the Pegasus mines. Id., ¶¶ 3, 7. MEIC also has advocated for years to protect the Cabinet Mountains Wilderness, surrounding public lands and waters, and the wildlife that depend on that landscape from the Rock Creek and Montanore project proposals. Id., ¶ 3. MEIC members recreate in and otherwise derive benefit from the public lands and waters in the Cabinet Mountains. Id., ¶¶ 4-5. MEIC was a party to the October 2017 enforcement request that precipitated the challenged DEQ violation letters. See O'Brien Aff, Ex. 1 at 1.

C. Clark Fork Coalition

Clark Fork Coalition (the "Coalition") is a non-profit river conservation organization dedicated to protecting and restoring clean water throughout the Clark Fork River watershed. Knudsen Aff., ¶ 3. Since 1985, the Coalition has worked to improve and protect water quality and restore stream flow and function in the waterways of the Clark Fork River basin, including the Lower Clark Fork River and its tributaries that would be harmed by the proposed Rock Creek and Montanore mines. Id. On behalf of its approximately 3,000 members, the Coalition also has

engaged in extensive advocacy to address the legacy of contamination from Pegasus Gold's Beal Mountain mine. Id. The Coalition's members, board members, and staff use the public lands and waters threatened with pollution, flow reductions, and other adverse impacts from the Rock Creek and Montanore mines, as well as waters affected by contamination from Pegasus Gold's Beal Mountain Mine. Id., ¶¶ 3, 6-7; Flynn Aff., ¶¶ 1-7. The Coalition was a party to the October 2017 enforcement request that precipitated the challenged DEQ violation letters. O'Brien Aff., Ex. 1 at 1.

D. Rock Creek Alliance

Rock Creek Alliance (the "Alliance") is a non-profit organization dedicated to protecting the Clark Fork-Pend Oreille watershed and the Cabinet Mountains Wilderness from the adverse impacts of the proposed Rock Creek mine. Gerth Aff., ¶ 2. Alliance members live, own property, and recreate in and around the Cabinet Mountains, including in the wilderness and National Forest lands and associated waters threatened by the proposed Rock Creek mine. Id., ¶¶ 3-7; Costello Aff., ¶¶ 2, 5-10. Rock Creek Alliance was a party to the October 2017 enforcement request that precipitated the challenged DEQ violation letters. O'Brien Aff., Ex. 1 at 1.

E. Save Our Cabinets

Save Our Cabinets is a Montana non-profit organization dedicated to protecting wild lands, wildlife, and water quality in the Cabinet Mountains of northwest Montana. Costello Aff., ¶¶ 1-2. Save Our Cabinets' supporters, board members, and staff live, own property, and recreate in and around the Cabinet Mountains, including in the wilderness and National Forest Lands and associated waters threatened by the proposed Montanore and Rock Creek mines. Id., ¶¶ 2, 5-10. Save Our Cabinets has engaged in extensive public education and advocacy to protect the Cabinet Mountains region and its waters, native fish, and wildlife from the adverse

effects of the proposed Montanore mine. Id., ¶ 3. Save Our Cabinets was a party to the October 2017 enforcement request that precipitated the challenged DEQ violation letters. O'Brien Aff., Ex. 1 at 1.

F. Montana Conservation Voters

Montana Conservation Voters (“MCV”) is a non-partisan, statewide membership organization that serves as the political voice of Montana’s conservation and environmental community. Ullman Aff., ¶ 3. MCV informs its membership and the broader public about the votes and actions of elected officials that affect clean air and water, open spaces, and public health. Id. MCV works for responsible stewardship of Montana’s unparalleled natural assets by providing voter participation services to over 35,000 conservationists. Id. MCV also fights to protect clean water and air and Montana’s outdoor heritage by involving people in government and advocating for legislative priorities in the Montana Legislature, including bills that would prevent undue environmental harm from hard rock mining and protect Montana’s designated wilderness areas and other federal public lands. Id., ¶¶ 4-5. MCV strongly advocated in favor of the October 2017 MMRA enforcement request made by Save Our Cabinets, Rock Creek Alliance, Earthworks, Clark Fork Coalition, and Montana Environmental Information Center. Id., ¶ 5. MCV participated in discussions with state officials concerning the request, raised awareness about the alleged MMRA violation among MCV’s membership and in the media, and coordinated with the groups that formally requested enforcement action. Id. Ensuring strong and appropriate enforcement of Montana’s hard rock mining laws is central to MCV’s mission and the organization’s broader campaigns to protect Montana’s lands and waters from mining pollution. Id., ¶ 6.

ARGUMENT

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

Proposed Intervenor satisfy the requirements for intervention as of right under Montana Rule of Civil Procedure 24(a). A successful motion for intervention as of right 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, Sheridan Cty., 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400; see also Mont. R. Civ. P. 24(a). 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). Proposed Intervenor’s motion satisfies each of the four elements under this liberal standard.²

A. Proposed Intervenor’s Motion Is Timely

Proposed Intervenor’s motion at this early stage of the litigation is timely. Plaintiffs filed this lawsuit on March 20, 2018, and filed their First Amended Complaint and Motion for Temporary Restraining Order (“TRO”) and for Preliminary Injunction and Motion to Show

² Indeed, given that Proposed Intervenor’s enforcement request prompted DEQ’s challenged determinations, Proposed Intervenor not only are entitled to intervene but are necessary parties under the Uniform Declaratory Judgments Act (“UDJA”), Mont. Code Ann. § 27-8-301. See Williams v. Board of Cty. Comm’rs, 2013 MT 243, ¶¶ 31-33, 371 Mont. 356, 308 P.3d 88 (landowners whose zoning protest prompted litigation necessary parties under UDJA). Granting this intervention motion would facilitate Proposed Intervenor’s participation in this case. See id., ¶¶ 33-35 (dismissal unwarranted where necessary parties granted intervention).

Cause on March 23, 2018. On March 26, this Court entered an Order denying the TRO and ordering responses to the preliminary injunction motion no later than April 9. To ensure their ability to participate in the preliminary injunction proceedings, Proposed Intervenors have promptly filed this motion less than two weeks after the filing of Plaintiffs' operative complaint and within the time provided for Defendants to respond to Plaintiffs' motion for a preliminary injunction, Order, Montanore Minerals. Corp., et al. v. Mont. Dep't of Env'tl. Quality, et al., DV-18-52 (Mar. 26, 2018). See Citizens for Balanced Use, 647 F.3d at 897 (holding intervention motion timely where filed "less than three months after the complaint was filed"); cf. Connell v. Mont. Dep't of Soc. & Rehab. Servs., 2003 MT 361, ¶ 23, 319 Mont. 69, 81 P.3d 1279 (district court did not err in holding untimely an intervention motion filed three years after entry of final judgment); Estate of Schwenke v. Bechtold, 252 Mont. 127, 132-33, 827 P.2d 808, 811 (1992) (district court did not err in holding untimely an intervention motion filed one week prior to trial). Indeed, Proposed Intervenors file this motion before the Defendants even have answered the complaint. Intervention at this earliest stage of the litigation would not delay this lawsuit or prejudice any party. See Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, ¶ 35, 356 Mont. 41, 230 P.3d 808 (district court properly granted motion to intervene where intervention did not cause delay or prejudice). This motion is therefore timely.

B. Proposed Intervenors Have Substantial Interests in This Lawsuit

Proposed Intervenors have substantial interests in this action that justify their intervention as of right. 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); 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); “no specific legal or equitable interest need be established,” id. (quotation and alteration omitted).

Proposed Intervenors readily satisfy this standard. As summarized above and documented in the attached affidavits, Proposed Intervenors’ members, supporters, board members, and staff live, own property near, and recreate in the areas of the Cabinet Mountains that are threatened with water pollution, stream dewatering, and other harmful effects from the proposed Rock Creek and Montanore mines that are affected by DEQ’s challenged determinations. See Costello Aff., ¶¶ 2, 5-10; Gerth Aff., ¶¶ 3-7; Gestring Aff., ¶¶ 2, 6-10; Jensen Aff., ¶¶ 4-5; Knudsen Aff., ¶¶ 3, 7-8; Randall Aff., ¶¶ 5-7. These “environmental, conservation and wildlife interests” are sufficient to justify intervention as of right. Sagebrush Rebellion, 713 F.2d at 526-28. Further, Proposed Intervenors’ members live and own property near and recreate in areas impacted by pollution from the abandoned Pegasus mines, and Proposed Intervenors have dedicated years of effort to remediating pollution from those mines. See Gestring Aff., ¶ 11; Jensen Aff., ¶¶ 6-9; Knudsen Aff., ¶¶ 3, 5-6; Flynn Aff., ¶¶ 1-2, 4-7. These direct and substantial interests motivated Proposed Intervenors to submit the October 2017 enforcement request that prompted the DEQ investigation resulting in the challenged violation letters and are sufficient to justify their intervention as of right in this case. See, e.g., Citizens for Balanced Use, 647 F.3d at 897-98 (affirming that group’s interest in preserving wilderness study area for members’ use and enjoyment constitutes sufficient interest to support intervention as of right); W. Energy All. v. Zinke, 877 F.3d 1157, 1165 (10th Cir. 2017) (conservation groups entitled to intervene to protect their “interests in reducing the instances and effects of oil and gas drilling on public lands”).

Moreover, Proposed Intervenors are entitled to intervene to defend the result for which they advocated before DEQ and that Plaintiffs now seek to overturn. As the Montana Supreme Court has held, “[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.” Sportsmen for I-143, ¶ 12 (quoting Idaho Farm Bureau Fed’n v. Babbitt, 58 F.3d 1392, 1397 (9th Cir. 1995)); see also Cal. Dump Truck Owners Ass’n v. Nichols, 275 F.R.D. 303, 306-07 (E.D. Cal. 2011) (conservation organization was entitled to intervene to defend vehicle emissions regulation for which it had advocated). Here, Proposed Intervenors submitted the enforcement request that advocated for and prompted DEQ’s challenged action. Proposed Intervenors now seek to intervene to defend the result obtained through their administrative advocacy.

For each of these reasons, Proposed Intervenors have direct and substantial interests in this lawsuit that are sufficient to justify intervention as of right.

C. This Lawsuit Threatens to Harm Proposed Intervenors’ Interests

Having documented a significant interest affected by Plaintiffs’ lawsuit, it follows that Plaintiffs’ lawsuit threatens to impair Proposed Intervenors’ interest. 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). Plaintiffs seek to overturn DEQ’s determination that Mr. Baker and Hecla may not pursue their proposed mines in the Cabinet Mountains unless and until they take specific actions to return to compliance with the MMRA. As stated, Proposed Intervenors advocated for this decision before DEQ and DEQ’s action protects Proposed Intervenors’ interests in the lands, waters, and wildlife of the Cabinet Mountains that would be impacted by the Rock Creek and Montanore mine projects that Mr. Baker and Hecla seek to develop. See Costello Aff., ¶¶ 2, 5-10; Gerth Aff., ¶¶ 3-7; Gestring

Aff., ¶¶ 2, 6-10; Jensen Aff., ¶¶ 4-5; Knudsen Aff., ¶¶ 3, 7-8; Randall Aff., ¶¶ 5-7; see also Citizens for Balanced Use, 647 F.3d at 898 (applicants' interests in conserving and enjoying wilderness study area may be impaired by plaintiffs' successful lawsuit to lift motorized-use restrictions); Sagebrush Rebellion, 713 F.2d at 528 (impairment element satisfied where "[a]n adverse decision in th[e] suit would impair the [applicant's] interest in the preservation of birds and their habitats").

In short, this lawsuit threatens harm to Proposed Intervenors' interests. They are entitled to intervene to prevent that harm.

D. The Existing Parties Do Not Adequately Represent Proposed Intervenors' Interests

No party in this action adequately represents Proposed Intervenors' interests. Existing parties do not adequately represent a proposed 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). Proposed Intervenors 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, Plaintiffs cannot adequately represent Proposed Intervenors' interests because they are attempting to halt the MMRA enforcement action that Proposed Intervenors sought through their October 2017 enforcement request to DEQ, and which they seek to defend through their participation in this case. Plaintiffs' interests are in direct opposition to those of Proposed Intervenors.

DEQ also cannot adequately represent Proposed Intervenor's interests. As an administrative agency ultimately accountable to all Montanans, DEQ is obliged to represent the broader public interest and not the specific interests of conservation groups and their members whose interests are directly affected by the threatened impacts of the Rock Creek and Montanore Mines and pollution from the abandoned Pegasus mines. 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 Hecla's projects, and is not solely accountable to those, such as Proposed Intervenor, who oppose the projects and seek to protect the undeveloped lands and wildlife of the Cabinet Mountains. In these circumstances, DEQ cannot adequately represent Proposed Intervenor's 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"). Indeed, while DEQ has taken appropriate action under the MMRA's bad actor provisions to halt development of the Rock Creek and Montanore Mines in the challenged determinations, DEQ has issued multiple authorizations for these projects under other statutory authority. Several Proposed Intervenor are challenging one of those authorizations as inconsistent with state and federal law. See Mont. Env'tl. Info. Ctr., et al. v. Mont. Dep't of Env'tl. Quality, et al., No. BDV 2017-641 (Mont. First Judicial Dist. Ct., filed Aug. 15, 2017) (challenging DEQ's issuance of water pollution discharge permit for Montanore Mine). Given this record of adversity on related issues, DEQ cannot adequately represent Proposed Intervenor's interests.

For these reasons, no other party adequately represents Proposed Intervenors' interests in this matter. Proposed Intervenors therefore meet all the requirements of Rule 24(a) and are entitled to intervene as of right.

II. IN THE ALTERNATIVE, PROPOSED INTERVENORS SHOULD BE GRANTED PERMISSIVE INTERVENTION

While Proposed Intervenors meet the requirements of Rule 24(a) for intervention as of right, Proposed Intervenors equally satisfy all requirements to intervene permissively pursuant to Rule 24(b) of the Montana Rules of Civil Procedure. Under Rule 24(b), a court may allow an applicant to intervene if the intervention application is timely; the applicant's claim or defense has a question of law or fact in common with the main action; and intervention will not result in prejudice or undue delay to the existing parties. See Mont. R. Civ. P. 24(b)(1), (3). As set forth above, this intervention application is timely. The remaining requirements are also satisfied.

A. Proposed Intervenors' Defenses Have Questions of Law and Fact in Common with Plaintiffs' Action

Proposed Intervenors satisfy the "common question" requirement for permissive intervention. Proposed Intervenors intend to assert defenses responsive to Plaintiffs' claims. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (intervention proper where groups "asserted defenses ... directly responsive to the claims for injunction asserted by plaintiffs"), abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011). Nothing more is required to demonstrate that Proposed Intervenors' defenses present common questions of law and fact with Plaintiffs' complaint. See Mont. R. Civ. P. 24(b)(1)(B).

B. Intervention Will Not Result in Prejudice or Undue Delay to the Original Parties

Finally, granting permissive intervention here will not prejudice the rights of the existing parties or cause undue delay. See Mont. R. Civ. P. 24(b)(3). Proposed Intervenors have filed their motion before the deadline for Defendants' response to Plaintiffs' motion for preliminary injunction, Order, Montanore Minerals Corp., et al. v. Mont. Dept. Env'tl. Quality, et al., DV 18-52 (Mar. 26, 2018), and before Defendants have answered the complaint. Proposed Intervenors intend to comply with the Court's scheduling order on the preliminary injunction motion and any other scheduling orders the Court issues. Because intervention is proposed at such an early stage, it will not result in any prejudice or undue delay.

In sum, Proposed Intervenors equally satisfy the requirements for permissive intervention. See Mont. R. Civ. P. 24(b). For this independent reason, the Court should grant Proposed Intervenors' intervention motion.

CONCLUSION

For the foregoing reasons, this Court should grant Proposed Intervenors' motion to intervene as of right under Rule 24(a). Alternatively, the Court should permit Proposed Intervenors to intervene under Rule 24(b).

Respectfully submitted on this 3rd day of April, 2018,


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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 40(4)(a), I hereby certify that the foregoing brief contains 4,992 words, as determined by the word count function of Microsoft Word.


Katherine K. O'Brien

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2018, I served the foregoing Memorandum in Support of Motion to Intervene by email and first class mail to the following:

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