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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR REVIEW OF DETERMINATION MADE BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY ON THE APPLICATION FOR EXPLORATION LICENSE #00860	CASE NO. BER 2022-03 HR **TRIBES' AND CONSERVATION GROUPS' MOTION TO INTERVENE**

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 of right under Montana Rule of Administrative Procedure 24(a). Alternatively, the Tribes and Conservation Groups should be granted permissive intervention because they have questions of law and fact in common with DEQ's defense in this matter.

The Tribes and Conservation Groups contacted the existing parties regarding this motion. Respondent DEQ does not object. Petitioner Luke Ployhar opposes the motion.

BACKGROUND

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

The subject litigation is Luke Ployhar's proposal to explore for gold 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* Hernandez 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. This cyanide and acid mine drainage contaminated surface and ground waters hydrologically connected to the mines. *Id.* ¶¶ 8, 10–12. 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. *Id.* ¶¶ 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. *Id.* ¶¶ 9–14. 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. *Id.* ¶ 14; 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. Hernandez 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 organizations' efforts, spanning multiple decades, to mitigate impacts from the mines, have been unable to curb the pollution from the mines, which continues to spread deeper 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-landsky-goldmines-continue-mount-montana-bad-actor-superfund-acid/12925060002/*.

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.

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-landsky-gold-mines-continue-mount-montana-bad-actor-superfund-acid/1292506002/.

A. Ployhar's Proposed Exploration Project

In the midst of this unremediated toxic legacy from past mining activity, Luke Ployhar proposes new mineral exploration. Ployhar's proposed project would introduce new mining activity at the former Zortman mine area. Ployhar seeks to extract up to a 125-ton bulk sample from the former Zortman mine site for metallurgical testing. Final Environmental Assessment 6 (Feb. 2, 2022) (attached as Exhibit 1). The proposed exploration would excavate mineralized rock from a previously mined portion of the Zortman mine site. *Id.* The proposed project area was subject to previous mining and has been previously reclaimed. *Id.*

The proposal threatens to contribute additional contaminants, including acid mine drainage, to the existing water pollution problems at Zortman. Stiffarm Decl.

¶ 13; Gestring Decl. ¶ 7. The proposal is also inconsistent with other impacted entities' 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 of the Fort Belknap Indian Community, as well as conservation organizations and others familiar with the history of the Zortman mine, have opposed Ployhar's plan 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 project because Ployhar's exploration is inconsistent with the reclamation efforts that the tribal government, tribal members, the federal government, and other impacted parties seek to prioritize. Stiffarm Decl. ¶ 13; Gestring Decl. ¶ 7; Johnson Decl. ¶ 5; Brooks Decl. ¶¶ 4, 6–7.

B. DEQ's Decision to Require an EIS

On February 2, 2022, DEQ issued a final EA related to Ployhar's exploration application determining that, upon review of the relevant material, an EIS, not an EA, was the appropriate level of environmental review required for the project. Ex. 1 at 31. DEQ based that 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 (THPO). *Id.* at 19–20. Those comments stated or indicated that there may be significant impacts on cultural resources from the proposed action. *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 that more information is necessary in the form of an EIS to evaluate the impacts of Ployhar's proposed project to social structures and mores. *Id.* at 25. Specifically, in its Final EA, DEQ noted:

> The possible impacts to the "human environment," historical, archeological, social, cultural resources, and cumulative impacts require further analysis. As described above (in Section 7 and the "cumulative impacts" section), comments on the Draft EA presented DEQ with conflicting evidence from credible and potentially expert sources. This evidence raises substantial questions regarding whether significant impacts would occur to historical, archeological, social, and cultural resources as a result of this proposed action.

Id. at 31. The Tribes and Conservation Groups successfully advocated for DEQ's preparation of an EIS and would be harmed if DEQ were pressured to reverse that decision. Stiffarm Decl. ¶ 14; Gestring Decl. ¶¶ 7-8.

C. Ployhar's Effort to Circumvent DEQ's Deliberations

With his petition, Ployhar seeks to circumvent DEQ's reasoned decision to further evaluate the impacts of the proposed exploration license on the human environment before permitting the project to move forward. In particular, Ployhar seeks a recommendation that DEQ withdraw its requirement for an EIS. Notice of Appeal and Request for Hr'g at 10–11.

II. PROPOSED INTERVENORS

Proposed Intervenors 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 Intervenors include the sovereign Fort Belknap Indian Community, comprising the Gros Ventre

and Assiniboine Tribes of the Fort Belknap Indian Reservation, 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-Landuksy 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 who reside 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 deeper 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; Hernandez 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 Ployhar's mining proposal, which threatens to undo decades of advocacy and reclamation work. *Id.* ¶ 7. Completion of an EIS in relation to Ployar's proposal 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 Ployhar's proposal does not reverse extensive reclamation efforts. *Id.* ¶ 5.

Accordingly, MEIC and its members have a weighty interest in assuring that Ployhar's proposal is subject to rigorous environmental review. *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 assuring that Ployhar's proposal is closely reviewed through an EIS to prevent any improvident mining that could jeopardize reclamation at the Zortman-Landusky mines and worsen the existing acid mine drainage. *Id.* ¶ 7.

LEGAL STANDARD

Intervention is governed by 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*, 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).

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);

Citizens Awareness Network v. Montana Bd. of Env't Rev., 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583 (Montana Rules of Civil Procedure "serve as guidance for the agency and the parties" in administrative proceedings at Board of Environmental Review).

ARGUMENT

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

A. The Tribes' and Conservation Groups' Motion Is Timely.

"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. The scheduling order in this case was issued on September 2, 2022. Stipulated Scheduling Order at 3 (Sept. 2, 2022). The order sets September 16, as the deadline for intervention, making this motion timely. Further, the instant proceeding was filed only four months ago and is in its infancy, with no deadlines having passed and no disclosure or discovery having taken place. *See* Notice of Appeal and Request for Hr'g (May 27, 2022). The existing parties agreed to the scheduling order, demonstrating that no delay or prejudice will result from this timely intervention. Stipulated Scheduling Order at 3. *See, e.g.*, *U.S. ex rel. Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 412 n.9 (W.D. Pa. 2006) (intervention timely when compliant with scheduling order).

By contrast, the Tribes' and Conservation Groups' interests in preventing 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, Ployhar seeks to avoid additional environmental review necessitated by the potential for significant impacts to the human environment, including, specifically, the historical, archeological, social, and cultural resources of the Fort Belknap Tribes. Notice of Appeal and Request for Hr'g at 1, 10–11. If permitted to do so, Ployhar would effectively circumvent lawful review under the Montana Environmental Policy Act

of the impacts that will be generated by his proposed project. 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.

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); *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 proposed exploration project. *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 (9th 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, the Tribes and Conservation Groups have direct and substantial interests in this proceeding that are sufficient to justify intervention of right.

C. Ployhar's Action Threatens to Harm the Tribes' and Conservation Groups' Interests.

Having demonstrated significant interests affected by Ployhar's action, it follows that Ployhar's action threatens to impair 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 (9th 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 (9th Cir. 2006))).

Here, Ployhar seeks to move forward with his exploration project without the required review under the Montana Environmental Policy Act. Notice of Appeal and Request for Hr'g at 10–11. 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 Ployhar now seeks to take actions that

threaten to undo this reclamation and worsen pollution from the site, *see supra* Background Parts I.C; *id.* Background Part II. As such, Ployhar's action threatens to harm the Tribes' and Conservation Groups' interests. *See, e.g.*, *Citizens for Balanced Use*, 647 F.3d at 898.

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

No party in this action adequately represents the Tribes and Conservation Groups' 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). 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 obliged to represent the broader public interest and not only the different and specific interests of the Tribes and Conservation Groups and their members whose interests are directly threatened by Ployhar's exploration project. *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 new mining at the Zortman site, and is not solely accountable to those, such as the Tribes and Conservation Groups, who oppose the project 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, Ployhar, who seeks to move forward with exploration without the benefit of adequate and lawful environmental analysis, 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) and are entitled to intervene as of right.

II. ALTERNATIVELY, THE TRIBES AND CONSERVATION GROUPS SHOULD BE GRANTED PERMISSIVE INTERVENTION.

While the Tribes and Conservation Groups meet the requirements of Rule 24(a) for intervention as of right, they equally satisfy all requirements to intervene permissively pursuant to Rule 24(b). 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. The Tribes and Conservation Groups' Defenses Have Questions of Law and Fact in Common with DEQ's Defense.

The Tribes and Conservation Groups meet the "common question" requirement for permissive intervention. They intend to assert defenses responsive to Ployhar's 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 the Tribes' and Conservation Groups' defenses present common questions of law and fact with Ployhar's action. *See* Mont. R. Civ. P. 24(b)(1)(B).

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

Finally, as noted above, granting permissive intervention here will not prejudice the rights of existing parties or cause undue delay. *See* Mont. R. Civ. P. 24(b)(3). The Tribes and Conservation Groups are moving to intervene pursuant to the deadline set by the Hearing Examiner and agreed upon by all parties. *See* Stipulated Scheduling Order at 3. The Tribes and Conservation Groups further intend to comply with the deadlines in the scheduling order. As such, their intervention will cause neither prejudice nor delay.

In sum, the Tribes and Conservation Groups satisfy the requirements for permissive intervention under Rule 24(b). Accordingly, they should be granted intervention.

CONCLUSION

The Tribes and Conservation Groups should be granted intervention of right under Rule 24(a). Alternatively, they should be granted permissive intervention under Rule 24(b).

Respectfully submitted this 16th day of September, 2022.

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Dated the 16th of September, 2022.

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