IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 22-0068

MONTANA ENVIRONMENTAL INFORMATION CENTER, AND SIERRA CLUB.

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent / Appellant,

and

WESTMORELAND ROSEBUD MINING, LLC f/k/a WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors / Appellants.

MOTION FOR LEAVE TO FILE BRIEF OF TALEN MONTANA, LLC AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' RULE 22 MOTION

On Appeal from the Sixteenth Judicial District Court, Rosebud County,
Montana Cause No. DV 19-34
The Honorable Katherine Bidegaray

Talen Montana, LLC ("Talen Montana"), by counsel, moves for leave to file an *amicus curiae* brief in support of the Rule 22 motion for stay in the above referenced appeal, which was filed February 8, 2022.[1] Counsel for Talen Montana has contacted counsel for Appellants and Appellees regarding consent for the motion for leave. Appellants do not oppose. Appellees oppose.

Under Rule 12 of the Montana Rules of Appellate Procedure, an *amicus curiae* brief may be filed "only upon invitation or leave of the supreme court granted on motion" showing "the interest of the applicant" and "the reasons why a brief of an amicus curiae is desirable." Mont. R. App. P. 12(7). Here, Talen Montana has a substantial interest in the outcome of the pending motions. Talen Montana is the co-owner and operator of the coal-fired Colstrip Steam Electric Station ("CSES") Units 3&4, which generate and supply electric power to customers in Montana and across the Northwest, including homeowners, commercial businesses and industrial facilities. Attachment 1, Declaration of Shannon Brown, ¶¶ 6-7, 10 (Dec. 20, 2021)

[1] Talen Montana is filing separate, but substantively identical, motions for leave to support the Rule 22 motions in three appeals: Appellant DEQ's Motion for Stay (DA 22-0067), Appellants Westmoreland Rosebud Mining, et al.'s Motion for Stay (DA 22-0064), and Appellants Westmoreland Rosebud Mining, et al.'s Motion for Stay (DA 22-0068). Because Talen Montana's support for each of the three Rule 22 motions is substantively identical and the appeals may be consolidated, in the interest of conserving judicial resources Talen Montana's proposed *amicus curiae* brief will be identical for each of the three appeals.

("Brown Second Declaration").[2] The District Court's orders, which are based on significant errors of fact and law, direct vacatur (effective April 1, 2022) of a vital coal mining permit issued to Westmoreland Rosebud Mining LLC ("WRM"). This improper vacatur order will shut down mining activities in a critical area of WRM's Rosebud Mine known as AM4; the mine is Talen Montana's sole source of fuel for CSES Units 3&4. *Id.* at ¶ 11. If left in place, the District Court's improper orders substantially increase the risk of direct and irreparable harm to Talen Montana's economic interests, including its ability to operate Units 3&4 and satisfy contractual obligations of Talen Montana's corporate affiliates, and may further disrupt Talen Montana's ability (and the ability of other CSES co-owners) to supply electricity to the power grid, increasing the potential for severe downstream effects to the people of Montana (and elsewhere), including energy price fluctuations, brownouts, or blackouts. *Id.* at ¶¶ 13-37.

Additionally, *amicus* briefing is desirable because Talen Montana is uniquely positioned to explain the impacts that vacatur of the AM4 permit on CSES Units 3&4 operations and, more critically, the reliability and cost of power supply in Montana. For this same reason, Talen Montana timely filed a motion to intervene in the remedy briefing stage of the proceedings below to oppose vacatur and provide

[2] The Brown Second Declaration was originally filed with the District Court as an attachment to Talen Montana's Reply Brief in Support of Motion to Intervene (Dec. 20, 2021) ("Talen Montana Reply Brief"), attached hereto as Attachment 2.

crucial information on the downstream consequences of vacatur. The District Court improperly denied Talen Montana's motion. In doing so, the District Court apparently failed to read Talen Montana's reply briefing and supporting evidence,[3] which established that Appellees' vacatur remedy was premised on factual errors and speculation about the operational capabilities of CSES Units 3&4.

For example, while the District Court adopted whole cloth the Appellees' argument that deferring vacatur until April 2022 somehow would negate potentially catastrophic impacts to the power grid or Talen Montana (based solely on the speculation of Appellee's declaration, a Seattle resident with no direct knowledge of the operations at the Mine or CSES), Talen Montana's Reply Brief and the Second Brown Declaration refuted those arguments. The Reply and Second Brown

[3] Talen Montana filed its initial motion to intervene on November 12, 2021, and then timely filed a reply brief in support of its motion to intervene on December 20, 2021, which was docketed by the District Court as docket entry 104. *See* Attachment 3, (District Court Docket Sheet dated 1/28/2022). Nevertheless, the District Court's January 28, 2022 order denying Talen Montana's motion to intervene erroneously stated that "Talen did not file a reply brief in support of intervention." *See* Attachment 4, (District Court Intervention Decision). The District Court thus failed to analyze critical issues relevant to the issue of both intervention and vacatur. Notably, the Appellees, not the District Court, wrote the fifteen-page order signed by Judge Bidegaray denying Talen Montana's motion to intervene. *See* Attachment 5 (email exchange between Judge Bidegaray's office and counsel for Appellees requesting and conveying the proposed order denying the motion to intervene); *compare* Attachment 6 (Proposed Intervention Decision from Appellees) *with* Attachment 4 (District Court Intervention Decision). Accordingly, there is no evidence that the District Court read or considered Talen Montana's briefing, or had full grasp of the consequences of the vacatur order.

Declaration explained, in detail, that the Rosebud Mine is the sole and exclusive supplier of coal used by CSES Units 3&4 through at least 2025, Attachment 1 at ¶¶ 11-12, CSES Units 3&4 relies on coal from AM4 area of the Rosebud Mine (due to the quality of the coal in that area), *id.* at ¶¶ 19-20, and it could take years for Talen Montana to secure alternate sources of coal of sufficient quality and quantity (due to logistics and environmental compliance obligations), *id.* at ¶¶ 15-18. Thus, vacatur of the AM4 permit could result in Talen Montana quickly running out of fuel for CSES Units 3&4, *id.* at ¶¶ 13-14, and the power grid could be disrupted as a result, *id.* at ¶¶ 13, 21-29, 32-37. The District Court failed to consider any of this when it found that deferral to April 2022 would resolve any harms related to vacatur and denied the motions for a stay.

Since the District Court improperly denied Talen Montana's request to become a party, Talen Montana may not itself file a Rule 22 motion to stay the effect of the District Court's orders vacating the permit. *See* Mont. R. App. P. 22(1) (allowing only "parties" to seek relief under Rule 22). Talen Montana therefore has an interest in supporting the pending Rule 22 motions to stay the effect of the District Court's orders pending appeal so that Talen Montana has a meaningful opportunity to be heard *before* the District Court's vacatur order constrains Talen Montana's fuel supply for CSES Units 3&4. Further, Talen Montana is the primary source of crucial information about the downstream impacts from vacating the WRM mining permit

effective April 1, 2022. Talen Montana tried to present this information to the District Court, but Talen Montana's efforts were ignored. Talen Montana desires to provide this Court with this critical information before a ruling on the Rule 22 motions.

For the foregoing reasons, Talen Montana seeks leave to support the above referenced Rule 22 motion and specifically supports the request that this Court stay the effect of the District Court's orders pending appeal. If the motion for leave is granted, Talen Montana's brief can be filed immediately.

Dated this 17th day of February, 2022.

/s/___Robert L. Sterup _____

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ATTACHMENT LIST

Attachment 1	Declaration of Shannon Brown, dated Dec. 20, 2021
Attachment 2	Talen Montana Reply Brief, dated Dec. 20, 2021
Attachment 3	District Court Docket Sheet, dated Jan. 28, 2022
Attachment 4	District Court Order re Intervention, dated Jan. 28, 2022
Attachment 5	Email exchange between Judge Bidegaray's office and counsel for Appellees Re: proposed order denying the motion to intervene, dated Jan. 28, 2022
Attachment 6	Proposed Intervention Decision, dated Jan. 28, 2022

CERTIFICATE OF SERVICE

I, Robert L. Sterup, hereby certify that I have served true and accurate copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF OF TALEN MONTANA, LLC AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' RULE 22 MOTION to the following on February 17, 2022:

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MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA, LLC, Proposed Respondent-Intervenor.	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **DECLARATION OF SHANNON BROWN**

I, Shannon Brown, declare under penalty of perjury as follows:

1. I am over 18 years of age.

2. I reside in Montgomery County, Texas.

3. I make this Declaration in support of Talen Montana, LLC's ("Talen Montana") Reply Brief in Support of Motion to Intervene as Respondent.

4. I make this Declaration based upon personal knowledge. The basis of my personal knowledge is as follows: Since May 2018, I have served as senior director of asset management at Talen Energy Supply, LLC ("Talen"), an indirect corporate parent of Talen Montana. In that capacity, I have represented Talen Montana on various committees relating to Units 3 and 4 of the Colstrip Steam Electric Station ("Units 3&4"), including committees providing oversight for the supply of coal to Units 3&4 and the operation of Units 3&4. My responsibilities related to coal supply include profit and loss of the power generation, coal supply contract negotiations, managing commercial and contractual issues arising under Talen Montana's coal supply agreement, approving invoices, and otherwise administering the coal supply agreement between Talen Montana and Westmoreland Rosebud Mining, LLC ("Westmoreland"). Through my role, I have gained extensive knowledge and experience regarding Unit 3&4's coal needs and the supply of coal from Rosebud Mine to Units 3&4.

5. I have reviewed the November 18, 2021 declaration of Mr. David Alan Schlissel and identified numerous errors in it with respect to Units 3&4. Select errors are discussed herein. Mr. Schlissel has never been employed at Units 3&4 or conducted any work at the Colstrip Steam Electric Station ("CSES").

Units 3&4 Background

6. CSES is a coal-fired power plant in Colstrip, Montana that depends on coal to generate power. CSES Units 1&2 were retired in early 2020. Units 3&4 are the remaining active coal-fired units, and they each have a net generating capacity of approximately 740 MW. Units 3&4's current capacity is therefore approximately 1,480 MW.

7. Talen Montana is the operator and a co-owner of Units 3&4. Talen Montana's ownership interest is 30% of Unit 3.

8. As operator of Units 3&4, Talen Montana is responsible for day-to-day operations and power generation activities, long-term scheduling and planning, compliance with permits, management of environmental liabilities, and otherwise acting on behalf of the Units 3&4 co-owners.

9. NorthWestern Corporation (d/b/a NorthWestern Energy) is another co-owner of Units 3&4.

10. A significant amount of Talen Montana's and NorthWestern Energy's power generated by Units 3&4 is supplied to Montana customers, including homeowners, commercial and industrial facilities, municipalities, and other customers. As noted above, Units 3&4 collectively can produce 1480 MW, of which approximately 375 to 450 MW are supplied to Montana customers. This is based on my belief that most, if not all, of NorthWestern Energy's share of the energy generated by Units 3&4 is supplied to Montana customers, in addition to the distribution of energy within Montana by Talen Montana's affiliates.

Current Coal Supply and Usage by Units 3&4

11. Rosebud Mine has been and is currently the exclusive supplier of coal to Units 3&4. Units 3&4 typically burn 500,000 to 600,000 tons of coal per month, and during most years is forecasted to burn around 7 million tons of coal per year (Units 3&4 will typically burn less during years with planned outages for maintenance).

12. With respect to Talen Montana's ownership interest in Units 3&4 specifically, Talen Montana and Westmoreland currently have a contract in place through 2025 requiring Westmoreland to supply coal from Rosebud Mine to Units 3&4. The contract is a full requirements contract obligating Westmoreland to supply all coal required by Talen Montana for its interest in Units 3&4. Talen Montana is obligated to purchase from Westmoreland all coal for its interest in Units 3&4, with a limited exception for test burns of coal from other mines.

Impacts of Vacatur of AM4 Permit on Ability to Fuel Units 3&4

13. Without sufficient coal supply of adequate quality from Rosebud Mine to CSES, Units 3&4 will be unable to run at full capacity (or potentially at all). If the coal supply from Rosebud Mine is completely halted, Units 3&4 has only about 25-30 days of coal stored on-site, meaning that Unit 3&4 operations could cease in a month or less.

14. Contrary to Mr. Schlissel's speculation, Talen Montana does not have the ability to materially expand Units 3&4 on-site storage of coal beyond the current supply of 25-30 days. The coal is in a "dead pile" that is covered in a concrete-like crust to prevent release of dust from the coal. The dead pile, which has not been significantly used since 2008, is used for emergency situations only. The amount of coal Units 3&4 can store on the dead pile is physically constrained

based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022.

15. Talen Montana's ability to obtain replacement coal for Units 3&4 is extremely limited, and it is very unlikely Talen Montana would be able to obtain any replacement coal even by the end of 2022. Accordingly, merely delaying vacatur of the AM4 permit by four months provides Talen Montana with no additional options to replace its coal supply.

16. First, Talen Montana does not have rail unloading facilities that would enable transport of coal to CSES by rail, and any construction of such facilities would take significant time and would be extremely expensive. Building new rail unloading facilities would take substantially longer than four months; it could take years to get such facilities permitted and constructed. For instance, construction of new facilities and burning of new coal would likely require an amendment to the air permit for Units 3&4, which could also take significant time (again, longer than four months) to obtain. Further, Talen Montana would likely need to do test burns for any new alternative coal source to assess its viability for combustion at Units 3&4.

17. Second, trucking coal to CSES presents other logistical challenges related to transporting large volumes of coal over long distances. In 2019 when Talen Montana was exploring alternative coal sources, Talen Montana calculated that approximately 724 truck trips per day would be required to supply Units 3&4 with coal entirely by truck (i.e., one truck every two minutes). Additionally, as with transporting new coal by rail, transporting new coal by truck would likely require test burns and an amendment to the air permit.

18. Third, contracts for coal and rail deliveries are typically negotiated at least a year or more in advance. Based on my current knowledge of the coal market and railroad capacities

currently, I do not believe there are material volumes for additional coal that Talen Montana could contract to buy and deliver prior to the end of 2022.

19. With respect to coal from other areas of Rosebud Mine, the coal within Rosebud Mine is not interchangeable. Even if Westmoreland is able to relocate its mining operations to other areas of Rosebud Mine (which is questionable for the reasons outlined in the December 6, 2021 Declaration of Russell Batie), it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from AM4 cannot be mined and blended with coal from other areas, the resulting coal blend may not be of sufficient quality for Units 3&4.

20. For instance, Westmoreland's Environmental and Engineering Manager Russell Batie has stated that "AM4 is important to the Mine's production because it is a high-quality coal that can be blended with other coal." Batie December 6 Declaration ¶ 11. Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality. *See* Batie December 6 Declaration ¶ 9.2. According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply because Westmoreland already planned to mine those areas in the near future in addition to the AM4 area and potentially because mining activities in some of the other areas are also subject to ongoing legal challenges. *See* Batie December 6 Declaration ¶¶ 9.3, 9.4, 10. Thus, without AM4 it is unclear if Westmoreland will be able to supply coal that Units 3&4 can use to operate.

Impacts on Energy Supply if Units 3&4 Cannot Run at Full Capacity

21. As discussed in my prior declaration, there are significant potential impacts to the supply of energy to Montana and the region if Units 3&4 cannot run at full capacity due to a lack of fuel supply. These impacts remain a threat even if the supply of coal from AM4 is not cut off until April 2022.

22. Planned maintenance outages at Units 3&4 do not occur annually and do not occur every spring. Planned maintenance outages are carefully scheduled based on current energy market supply and the need to conduct certain maintenance and construction activities while units are offline. Additionally, Units 3&4 are almost never scheduled for outage at the same time (i.e., their outages are staggered so that one unit remains online at all times). No outage for either unit is currently planned for Spring or Fall 2022. The next planned outage is Unit 4 scheduled for 2024.

23. A "forced" unplanned outage in Spring 2022 due to lack of fuel supply would impact both energy supply and prices in potentially unpredictable ways. Even taking one unit offline in the spring could cause issues due to the 2021 drought that continues to affect the supply of hydropower. Once offline, the Colstrip unit may take at least a full day to come back online. If both units are offline, it may take several days to get both units online.

24. Likewise, although energy demand is typically reduced in the spring as compared to the winter, energy demand surges again in the summer months – as shown by Mr. Schlissel's own Chart 1. It is crucial for both Units 3&4 to be online during the summer months to meet that demand surge.

25. Units 3&4 are important dispatchable energy sources for this energy usage in Montana specifically and the northwest region more generally for all seasons. A dispatchable energy source is one that can be dispatched up and down to meet energy demand.

26. Non-dispatchable energy sources are those like wind and solar, which cannot be turned on and off to meet demand. Their power generation is dependent on external environmental factors. Hydropower is likewise partially dependent on external environmental factors; for instance, droughts will limit the supply of available hydropower.

27. Mr. Schlissel's graph showing the availability of hydropower, notably, shows 2020 rather than 2021. A significant drought in 2021 limited the availability of hydropower in the west and is expected to have impacts on the available supply of hydropower for at least the next year.

28. Solar power currently only supplies a very limited amount of energy within Montana (approximately 17 MW), and is unlikely to be a suitable replacement in the short-term for the approximately 375-450 MW supplied by Units 3&4 within the state of Montana. Transmitting solar power from California, as Mr. Schlissel suggests, may be theoretically possible, but it would be extremely costly and inefficient to move that power.

29. Accordingly, even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022. This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation.

30. Mr. Schlissel's hypothetical "worst case" scenario – that Talen Montana could operate just one unit for four months and then rely on coal from a new area of the Rosebud Mine

– is therefore not the worst-case scenario. The worst-case scenario is that Units 3&4 don't run all, especially if Westmoreland is not able to supply Units 3&4 with coal of sufficient quantity for significantly longer than four months because it cannot use or blend AM4 coal, and Talen Montana is not able to obtain replacement fuel for Units 3&4 until sometime in 2023 or even later.

31. Further, Mr. Schlissel understates the energy supply impacts of his own "worst case" scenario. Operating just one unit into the summer months – when energy demand increases – may very well be insufficient to meet energy demand in Montana.

Impacts on Price if Units 3&4 Cannot Run at Full Capacity

32. Mr. Schlissel's statement that "Colstrip is the most expensive resource in the portfolio . . . Northwestern Energy" is misleading and incomplete at best.

33. Talen Montana participates in wholesale energy markets where it sells power based on its variable cost to produce power. The variable cost to produce power is based on the current operational cost.

34. The dispatch of power to consumers in the region through the wholesale energy markets is based on the variable costs that power producers bid, with the daily market price determined by supply-demand fundamentals.

35. The variable cost to produce power at Units 3&4 is extremely low – around $20 per megawatt hour (MWh). For comparison, a typical natural gas peaking generation unit with a typical natural gas cost has the variable cost to produce around $45 per MWh. Natural gas generation is a dispatchable resource with more than double the cost of Units 3&4.

36. As a result, Units 3&4 are among the first to get dispatched to meet energy demand, generally running around the clock, and are among the cheapest sources of energy to consumers sold through the wholesale markets.

37. Current 2022 average on-peak power prices in the northwest are almost $60/MWh. Per MWh power prices in the region have already doubled in the past 12 months and are among the highest prices seen in the region in the past 10 years. If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers.

Executed this 20th day of December, 2021.

Shannon Brown

ATTACHMENT 2

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ATTORNEYS FOR PROPOSED RESPONDENT-INTERVENOR

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA LLC, Proposed Respondent-Intervenor,	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **REPLY IN SUPPORT OF MOTION TO INTERVENE AS RESPONDENT** (Mont. R. Civ. P. 24)

INTRODUCTION

The parties in this case have now squarely placed Talen Montana, LLC ("Talen Montana") at the center of their present remedy dispute. All parties—including the Petitioners who oppose Talen Montana's intervention—have now speculated about whether and how the Colstrip Steam Electric Station ("CSES") Units 3&4, and by extension the power grid in Montana, would be affected by vacatur of the AM4 permit. Further, the Petitioners have now raised a new remedy (specifically, deferred vacatur of the AM4 permit until April 2022) which has never before been the subject of briefing before this Court—and have speculated about the impact of deferred vacatur specifically on Talen Montana's operation of CSES Units 3&4.

Accordingly, it is perfectly clear that Talen Montana has significant legal interests related to the subject matter currently being litigated in this action: potential vacatur of the AM4 permit. Talen Montana seeks intervention to address the appropriateness of the remedy proposals in this case and to present the Court with an accurate record on the real-world impact that Petitioners' preferred approach would have on CSES Units 3&4 and the power grid. Specifically, Talen Montana intends to explain why a four-month deferral will not solve the identified problems and would still result in the same harms to CSES Units 3&4 (and the power grid) that Petitioners concede the Court should avoid. Moreover, Talen Montana may raise independent legal arguments related to remedy; for instance, since there was never any development of facts or briefing on remedy before the Board of Environmental Review ("BER") or this Court, Talen Montana may argue that it is inappropriate to address remedy issues at all while this Court sits in an appellate

posture without an evidentiary hearing on remedy impacts and/or remand to the BER as the fact-finder in the first instance.[1]

Talen Montana's intervention is crucial, and all of the parties appear to agree—based on their briefing—that the issues Talen Montana will speak to are essential. Before these issues of great importance to Talen Montana and Montana residents are decided, the Court should have the benefit of briefing from Talen Montana. Petitioners' attempts to prevent this Court from even *hearing* from Talen Montana on this issue should be rejected. Under Rule 24 of the Montana Rules of Civil Procedure, Talen Montana's motion should be granted because (1) it has a right to intervene, and (2) the common questions of law and fact in the present remedy dispute are focused almost exclusively on Talen Montana—as evidenced by Petitioners' own briefing to the Court.

ARGUMENT

I. The recent briefing on remedy underscores that intervention is needed here.

The remedy briefing already before the Court conclusively demonstrates why Talen Montana must be given an opportunity to be heard to protect its interests and ensure this Court's

[1] Petitioners agree that this Court sits in an appellate posture. *See* Resp. on Intervention (Dkt. No. 93) at 5, 11 ("petition for judicial review to the district court is analogous to an appeal") (citing *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996)). Because this Court sits in an appellate posture and the Petitioners never before raised remedy in briefing—which would have elicited facts and other equitable arguments related to remedy—it may be more appropriate for the Court to remand the issue of remedy to the BER, or alternatively, at least hold an evidentiary hearing to assess the facts related to remedy which so far have been presented to the Court exclusively through competing declarations. *See Gould Ranch Cattle Co. v. Irish Black Cattle Ass'n*, 2018 MT 80N, ¶ 7, 392 Mont. 551, 414 P.3d 1248 (agreeing that appellate courts "should not, in the first instance, determine the merits of the preliminary injunction" and remanding the issue for the trier of fact to make "findings of fact and conclusions of law" addressing the application for an injunction); *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 43, 341 Mont. 368, 382, 178 P.3d 696, 706 ("'It is for the trier of fact, and not this Court, to assess the credibility of witnesses and weigh the evidence; we will not second-guess a district court's determinations regarding the strength and weight of conflicting testimony.'") (quoting *Point Serv. Corp. v. Myers*, 2005 MT 322, ¶ 28, 329 Mont. 502, 125 P.3d 1107).

remedy decision is based on an accurate record and a full review of the legal issues regarding whether the Court should even make new factual findings that were not made before the BER. All of the parties' recent filings on remedy have addressed impacts to Talen Montana's CSES Units 3&4 in the context of opining on the suitability of different remedies. In the case of Petitioners' most recent brief on remedy, Resp. on Remedy (Dkt. No. 89) at 1-4, 12-13, Petitioners speculate in significant but unsupported detail about the capability of Talen Montana to overhaul its established CSES Units 3&4 practices for the sourcing, transportation, and storage of coal, and further speculate as to the impact of Petitioners' newly proposed four-month stay of vacatur on Units 3&4 operations and compliance obligations. But Talen Montana, which co-owns and operates Units 3&4, is the only proposed participant in this case actually responsible for their operations and compliance, and is therefore the only party that could adequately brief the Court on the operational capabilities of Units 3&4. *See generally* Second Declaration of Shannon Brown ("Second Brown Decl.") (attached as Exhibit A). Accordingly, Talen Montana must be allowed to respond to the Petitioners' assertions, which are at odds with Talen Montana's experience. Examples of factual errors Petitioners made are discussed below.

a. Both DEQ and Westmoreland made assertions about impact of remedy on Talen Montana, prompting the motion to intervene.

On November 5, 2021, DEQ filed a motion for clarification and brief in support that questioned whether this Court's Order required shutting down operations at the AM4 permit area. In doing so, DEQ pointed out that "the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station," which is "used to generate electricity for Montanans and people in other northwestern states. DEQ Br. (Dkt. No. 81) at 2 (emphasis added). DEQ cited the declaration of Martin Van Oort, a Hydrologist for the DEQ Coal Section, who swore to these facts under oath. *See* Van Oort Decl. (Dkt. No. 82) at ¶10 ("the coal from the Rosebud Mine is used at

the Colstrip Steam Electric Station, where it is used to generate electricity for Montanans and people in other northwestern states. Currently the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station.") (emphasis added).

On November 8, 2021, Intervenor-Respondents (including Westmoreland and collectively referred to as "Westmoreland" herein) filed a similar brief that devoted an entire section to "The Mine and the Colstrip Power Station," Westmoreland Br. on Remedy (Dkt. No. 84) at 3-4. Intervenor-Respondents argued that vacatur would result in Westmoreland being "unable to provide the Colstrip Power Station with enough coal to meet the Colstrip Power Station's fuel demands" and would "jeopardize the generation of reliable electricity." *Id.* at 4 (emphasis added); *see also id.* at 10 ("Westmoreland's inventory is large enough to last only approximately one month, after which Westmoreland will likely be unable to provide sufficient quantities of coal to meet its contractual obligations to the Colstrip Power Station.") (emphasis added); 11 ("cessation of operations in the AM4 Area would also impair Westmoreland's ability to supply the Colstrip Power Station with coal of sufficient quality to meet contractual specifications, which are, in turn, designed to satisfy air quality standards imposed on the Colstrip Power Station" and "the disruption of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet its customers' demands") (emphasis added); *id.* at 12 ("The people of the Mountain West and Montana depend on electrical generation from the Colstrip Power Station, which in turn depends on the Mine.") (emphasis added); *id.* at 17 ("because the Colstrip Power Station depends exclusively on the Mine as its source of coal, a cessation of AM4 Area operations could jeopardize the Power Station's ability to satisfy its fuel demands, thereby potentially causing widespread impacts to consumers of electricity") (emphasis added). Westmoreland cited the declaration of Russel Batie, the

Environmental and Engineering Manager at the Rosebud Mine, who also swore to these facts under oath. *See, e.g.*, First Batie Decl. (Dkt. No. 84, Ex. A) at ¶ 5 ("A cessation of operations in the AM4 Area would greatly jeopardize Westmoreland's ability to provide the Colstrip Power Station with coal of sufficient quantity and quality to meet the Power Station's fuel demands.") (emphasis added); *id.* at ¶ 8 ("[I]mpairment of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet the demands of its customers. This risk is particularly grave given the coming winter months, when electricity is typically in high demand in order to generate heat.") (emphasis added).

Following these two filings, which specifically referenced how the outcome of those motions could potentially harm operations at CSES Units 3&4 and highlighted potential downstream consequences on power supply in Montana, Talen Montana sought intervention to address these issues for the Court. Petitioners opposed intervention despite the significant recent briefing about impacts of remedy in this case on Talen Montana and CSES Units 3&4. Talen Montana filed the motion to intervene on November 12, 2021—days after DEQ and Westmoreland's initial motions.

b. Petitioners' subsequent assertions and errors about CSES Unit 3&4 operations confirm the need for Talen Montana to intervene.

Petitioners' substantive response to DEQ's and Westmoreland's motions leave no doubt that intervention is necessary. At a minimum, intervention is now necessary to correct the record on Petitioners' arguments about the impacts of their preferred remedy on Talen Montana, which are riddled with speculation and factual errors. On November 22, 2021, ten days after Talen Montana swiftly filed its motion to intervene, Petitioners filed their response to DEQ and Westmoreland's motions. Despite opposing Talen Montana's effort to respond to the representations made by DEQ and Westmoreland, the Petitioners made their own assertions about

the operations of—and impacts of this litigation to—CSES Units 3&4. Petitioners proposed a new hybrid remedy, that the Court should "defer" vacatur until April 2022, never previously briefed before the Court. Then, Petitioners argued that CSES Units 3&4 operations would not be harmed by deferred vacatur in any way. Talen Montana must be allowed to intervene to respond to these bold assertions.

In support of this newly proposed remedy, Petitioners dismissed "hypothetical threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant" raised by DEQ and Westmoreland, Resp. on Remedy (Dkt. No. 89) at 1, and made (among others) the following assertions about CSES Units 3&4:

- Energy from CSES Units 3&4 "is unneeded" "in the spring," *id.* at 1-2;
- "[I]t is possible to shut down own [sic] of the two [Colstrip] units during this 'shoulder' season without negatively affecting energy supplies or energy costs," *id.* at 3-4, in part because "Colstrip Unit 3 and Unit 4 have each been shut down for two-and-one half month outages in the spring and fall 'shoulder seasons' in 2020 and 2021," Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 7;
- The "concerns about coal and electricity supply are highly speculative" because CSES Units 3&4 could utilize coal from other "active mine areas" besides the AM4 Area, Resp. on Remedy (Dkt. No. 89) at 12;
- "[C]oal stockpiles at the mine and [Colstrip] power plant…are sufficient to keep at least one of the two Colstrip units operating for four months…which is sufficient to meet reduced spring electricity demands," *id.* at 12; Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 8 ("there is enough stockpiled coal at the mine and power plant to operate both units for approximately two months or one unit for approximately four months if coal supply from the Rosebud Mine is 'completely halted'")), ¶ 19 ("the power plant would still have sufficient coal stockpiles to keep at least one unit operating for all four months");[2]
- "If any stoppage of mining in AM4 is deferred until April 2022, it is highly likely that coal stockpiles at the mine and power plant will be sufficient to keep both or at

[2] He even made suggestions about what Talen Montana "should" do in the interim, though he did not opine on the technical feasibility or cost associated with his suggestions. *Id.* at ¶ 16 ("Talen should increase their inventories of coal before any shutdown of mining in the AM4 area.") (emphasis added).

least one power plant operating during the entire time, which would prevent any harm to state or regional power supplies," Resp. on Remedy (Dkt. No. 89) at 10;

- Talen Montana can "increase [its'] inventories of coal before any shutdown of mining in the AM4 area" and that "would protect against the negative effects hypothesized by WRM and Talen," Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 16; and

- "As it is, for Montana ratepayers, Colstrip is the most expensive resource in the portfolio of the Montana utility owner of Colstrip, Northwestern Energy," *id*. at ¶ 17.

Petitioners' support for all this is largely the declaration of David Schlissel—a Seattle resident with no experience working at CSES—who declared that it was his opinion that it was "extremely unlikely" that vacatur would "threaten the energy supply or cost of energy in Montana or the Pacific Northwest" because CSES had two outages in 2020 and 2021. Schlissel Decl. (Dkt. No. 89, Ex. 2) at ¶ 7; *see also id.* at ¶ 19 ("In [the] worst case scenario, it is still extremely unlikely that energy supplies or energy costs in the Montana or the Pacific Northwest would be negatively affected."). He also based his allegations about CSES Units 3&4 operations based on excerpts of declarations from Westmoreland and DEQ (rather than the most direct source of the information, which is Talen Montana itself). In a couple of instances, both Petitioners and Schlissel actually relied on or responded to statements made by Talen Montana without citing to Talen Montana's brief or declaration.[3]

In making these assertions, Petitioners have proved why intervention is needed. In addition to—or perhaps because of—being based on the speculative opinion of someone with no experience

[3] Resp. on Remedy (Dkt. No. 89) at 12 ("coal stockpiles at the mine and power plant, identified by WRM and Talen, are sufficient") (emphasis added); Schlissel Decl. (Dkt No. 89, Ex. 2) at ¶ 16 ("…Talen should increase their inventories of coal before any shutdown of mining in the AM4 Area. This would protect against the negative effects hypothesized by WRM and Talen.") (emphasis added).

of working at CSES Units 3&4, Petitioners' allegations are riddled with errors. As just a few examples:

- Energy from Units 3&4 is "needed" year-round, and energy demand surges again in the summer months—a fact Petitioners appear to ignore, but Mr. Schlissel's own graph demonstrates. Second Brown Decl. at ¶¶ 24-32.

- Outages do not occur every year and are extremely complicated to plan—CSES cannot simply shut off one unit and run the other indefinitely, or shut off both and turn one or both back on quickly when demand arises. Second Brown Decl. at ¶¶ 22-23. No outage is currently planned for Spring 2022. *Id.*

- Talen Montana cannot stockpile more than one month of coal due to physical constraints. Second Brown Decl. at ¶ 14 ("The amount of coal Units 3&4 can store on the dead pile is physically constrained based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022").

- Talen Montana cannot simply swap AM4 coal for coal from other Rosebud Mine areas sources. Second Brown Decl. at ¶ 19 ("it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from other mine areas cannot be mined and blended with coal from AM4, the resulting coal blend may not be of sufficient quality for Units 3&4"), ¶ 20 ("Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality" . . . "According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply"). Petitioners initially acknowledge (but then ignore) that coal quality issues would prevent using alternative coal sources. *See, e.g.*, Resp. on Intervention (Dkt. No. 93) at 2 ("Much, but not all, of the coal in the other mine areas is of lower quality, containing higher levels of ash, sodium, and mercury, which could, in turn, cause violations of air pollution standards at the power plant.").

- Talen Montana's ability to obtain replacement coal from non-Rosebud Mine sources is extremely limited by a host of logistical and permit compliance issues and cannot be accomplished in four months if at all. Second Brown Decl. at ¶¶ 15-18. For instance, it could take years to build and permit rail unloading facilities (which Talen Montana does not currently have), *id.* at ¶ 16, and trucking all coal to CSES would require 724 deliveries per day (one truck every two minutes), *id.* at ¶ 17. Further, bringing in coal from other sources also would likely require test burns and an amendment to the air permit. *Id.* at ¶¶ 16-17. In any event, it is unlikely there are material volumes of additional coal that Talen Montana could contract to

buy and deliver "prior to the end of 2022," much less in four months. *Id.* at ¶ 18 (emphasis added).

- Petitioners' assertion that CSES "is the most expensive resource in the portfolio" of Northwestern Energy is a "misleading and incomplete" statement at best, and removing Unit 3 and/or Unit 4 from the energy supply market would most likely result in further increase in energy prices beyond the significant increase that already occurred in 2021. Second Brown Decl. at ¶¶ 32-37. "If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers." *Id.* at ¶ 37 (emphasis added).

Thus, Petitioners' unequivocal statement that there was "no probability" of harm related to "coal and energy supplies" if vacatur is deferred to April 2022 is fundamentally flawed. Resp. on Remedy (Dkt. No. 89) at 22. To the contrary: "even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022." Second Brown Decl. at ¶ 29 (emphasis in original). "This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation." *Id*. Moreover, Petitioner's "worst case" scenario—that CSES Units 3&4 would be able to operate one unit for four months before finding replacement coal—is not based in reality; it could take Talen Montana *years* to obtain replacement fuel for Units 3&4. *Id.* at ¶ 30 ("2023 or even later). Given Petitioners' implicit concession that there is some risk of harm to Talen Montana and the supply of energy justifying deferral, it is critical that the Court (or the BER, as appropriate) have the benefit of an accurate and full record on this issue before ruling on remedy.

In sum, Petitioners are asking this Court to bless a "compromise" approach—one which relies on speculation and factual errors about the operational capabilities at CSES Units 3&4—

without hearing from Talen Montana on whether this approach is based in reality. Given that all parties here agree that the impact to Colstrip is highly material to the outcome of these motions, there is simply no good reason why this Court should not hear directly from Talen Montana on this issue. It is understandable that Petitioners would not want substantive briefing pointing out errors in their preferred remedy proposal, but in the end Petitioners' attempt to keep this Court in the dark speaks more to the weakness of their arguments than to the propriety of Talen Montana's intervention. At bottom, the Court should be allowed to hear briefing from those who actually know about CSES Units 3&4 before ruling on the present motions.

II. Talen Montana satisfies the test for intervention of right.

As discussed in Talen Montana's initial brief, Talen Montana satisfies the four-part test for intervention of right. Petitioner's arguments to the contrary ignore the fundamental principle that intervention is construed broadly in favor of the applicant. *See, e.g.*, *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct., Sheridan Cty.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 193, 40 P.3d 400, 402 ("Montana's rule is essentially identical to the federal rule which is interpreted liberally.") (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)); *Scotts Valley Band of Pomo Indians Of The Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir. 1990) (reversing denial of a motion for intervention and holding "Rule 24(a) is construed broadly, in favor of the applicants for intervention") (citing *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988) and *Wash. Bldg. & Const. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982)). When considered in the context of the present motions before the Court, Talen Montana's intervention request to participate in newly raised remedy issues is appropriate and should be granted.

a. Talen Montana has protectable interests that would be harmed by Petitioners' proposed remedy.

Talen Montana has several "direct, substantial, legally protectable interest[s]" related to the proceedings. *Sportsmen for I-143*, ¶ 9 (quotation omitted). *See* Mem. In Support of Mot. to Intervene (Dkt. No. 86) at 12-16 (listing several).[4] It is black-letter law that the intervening party's interest must be "related" to that subject-matter, not identical to it. *See* 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") (emphasis added).

Petitioners only have one response to all of Talen Montana's "significant economical and contractual" interests: these interests would not be harmed if the Court deferred vacatur by four months. Resp. on Intervention (Dkt. No. 93) at 14-16. In effect, Petitioners have conceded that Talen Montana has an interest that is related to this litigation—it is just the view of Petitioners that Talen Montana's interests would only be harmed by immediate vacatur of the AM4 permit. As discussed above, Petitioners conclusions on this are based entirely on their own speculation and factual errors.

Critically, Talen Montana's interests in continued operation of CSES Units 3&4 are implicated whether Petitioners seek "immediate" vacatur, or a four-month deferral. As discussed in the attached declaration of Mr. Brown and above in Section I.b, four months is nowhere near

[4] These interests, which were identified in Talen Montana's opening brief, include Talen Montana's "economic interest in the continued operation of CSES Units 3&4," its contractual obligations to "provide electricity to its affiliates and ultimately to the market," its economic interest in avoiding "prohibitively expensive" construction of a rail unloading facilities or other last-minute options for the transportation of alternative coal, its permit obligations and the potential need to conduct "test burns to determine whether the replacement coal could even be reliably burned and/or if it would require blending," and the severe corresponding impacts to Talen Montana's 250 employees and the people of Montana, including "downstream issues, such as fluctuations in energy prices or more severe issues like grid reliability and blackouts" if CSES Units 3&4 "are forced to significantly curtail or shut down operations due to a lack of available fuel." Br. at 14-16.

enough time for Talen Montana to obtain coal from a source other than Rosebud Mine, and it is not certain that suitable alternative coal could ever be obtained. *See supra at* pp. 7-9; Second Brown Decl. at ¶¶ 15-20, 29-30. Meanwhile, Westmoreland has indicated that four months is likely not enough time for it to overhaul its operations and continue to provide Talen Montana with coal of sufficient quality. Second Batie Decl (Dkt. No. 94, Ex. A) at ¶ 10 ("the only available long-term replacement for the approximately 180,000-200,000 tons of coal mined from AM4 each month are in the portion of Area B that has significant engineering challenges and could be available (if at all) no earlier than 6-8 months, and in undeveloped parts of Area F that would also require substantial preparatory work and would not produce coal for electrical generation for at least 8-10 months") (emphasis added); First Batie Decl. (Dkt. No. 84, Ex. A) at ¶ 7 ("A cessation of mining in the AM4 Area would force Westmoreland to use a higher ration of lower quality coal from other Mine areas, which would disrupt the blending process and impair Westmoreland's ability to meet specifications designed to satisfy air quality standards at the Colstrip Power Station."). Accordingly, if the Court orders vacatur of the permit – now or in four months - CSES's sole source of coal will be cutoff, and Talen Montana's operations will be significantly harmed or impaired.

b. Talen Montana's interests are not adequately represented by anyone else.

As noted previously, Rule 24 requires only that the intervenor's interests "may be" inadequately represented, "and the burden of making this showing is minimal." *Sportsmen for I-143*, 2002 MT 18, ¶ 14 (citing *Sagebrush Rebellion*, 713 F.2d at 527). Among the factors in assessing whether representation "may be" inadequate is whether an existing party is "capable of and willing to make" all of the intervenor's arguments, and "whether the intervenors offers a necessary element to the proceedings that would be neglected." *Sagebrush Rebellion*, 713 F.2d at

528. Additionally, the adequacy of representation is determined "primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action." *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (citing *Planned Parenthood of Minn. v. Citizens for Community Action*, 558 F.2d 861, 870 (8th Cir. 1977)). Here, it is already apparent that the other parties are not positioned to protect Talen Montana's interests or provide all relevant factual support for why vacatur (immediate or deferred) would impair those interests. And many, if not all, of Talen Montana's interests related to the subject matter of this litigation—*e.g.*, its contractual obligations with corporate affiliates and customers and compliance with its operating permit—are not shared by any of the parties here.

For instance, Petitioners have made several factual allegations specific to the operations at CSES Units 3&4, Talen Montana's ability to shut down Units 3&4 without affecting energy prices or availability, or Talen Montana's its ability to utilize alternative sources of lower quality coal and maintain its operations consistent with its permit obligations and customer demands. *See* Resp. on Intervention (Dkt. No. 93) at 2-3, 15-17. No current participant to the litigation (including the Petitioners or the current Respondents) has any basis to opine these issues—only Talen Montana can speak to how and whether its units can be shutdown, or the impact that Petitioners' preferred remedy would have on its operations, permit and contract obligations, customers, and corporate affiliates. As discussed in Section I.b, *supra*, Petitioners made numerous errors in its assertions about CSES Unit 3&4 operations. And Westmoreland, who filed its reply on remedy on December 6, 2021, did not—indeed *could* not—explain why those assertions about Units 3&4 were incorrect. Rather, its focus was (properly) on why Petitioners' proposed remedy was unworkable from the standpoint of the Mine. *See* Reply on Remedy (Dkt. No. 94) at 10-12 (explaining why a four-month deferral would still result in the Rosebud mine not being able to

meet its contractual and permit obligations). It is therefore undeniable that Westmoreland cannot make Talen Montana's arguments, so intervention is appropriate. *Sagebrush Rebellion*, 713 F.2d at 528; *see also Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999) ("proposed intervenors have articulated specific relevant defenses that the University may not present and, as a consequence, have established the possibility of inadequate representation") (emphasis added).

Further, the fact that Westmoreland might share a broad opposition to Petitioners' remedy is insufficient reason to deny intervention. That argument "operates at too high a level of generality," because an intervenor "must intervene on one side of the 'v.'" and will always have "the same general goal as the party on that side." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020). In *Driftless*, the Seventh Circuit reversed the district court's denial of a request by public utilities companies to intervene in a challenge to a permit authorizing the construction of transmission lines after the permitting agency had already filed a motion to dismiss. The district court denied the motion because the utilities companies had the same "goal" as the permitting agency—dismissal of the suit—and therefore the same interest. The Circuit disagreed, explaining how their interests were independent and different in "several important respects," including that the utilities "own, finance, and will operate the transmission line in question," "have obligations to their investors in connection with its construction and operation," had "substantial sunk and anticipated future investments in the power line," and "[a]s public utilities, they have a legal obligation to maintain the power grid and provide adequate and reliable electricity services to the public." *Id.* at 748. Because all of those interests were "materially different" than the agency's, and because they established that the agency's representation "may be" inadequate, they had a right to intervene. *Id.* at 749. It was irrelevant that the agency would

still "mount a vigorous defense" because they had "different defenses" and "very real differences in the interests at stake." *Id.*

The same is true here between Westmoreland and Talen Montana. While Talen Montana does not doubt Westmoreland has mounted a "vigorous defense" of its own interests, and the companies both generally oppose vacatur, the truth is that there are very real differences in the interests at stake, which include contractual obligations to Talen Montana's customers and corporate affiliates, economic interests in the units that Talen Montana owns and operates, as well as Talen Montana's contribution of electricity for the power grid—none of which are shared by Westmoreland. Indeed, in arguing that intervention would prejudice them, Petitioners concede that Talen Montana offers "a whole new suite of arguments about the power grid," that Westmoreland does not share. Resp. on Intervention (Dkt. No. 93) at 18.[5] The parties all agree that these facts are a necessary element to the remedy proceedings.[6] The development of those essential facts would be neglected if Talen Montana cannot intervene, so intervention should be granted. *Sagebrush Rebellion*, 713 F.2d at 528. Similarly, because Talen Montana will present specific defenses that that the existing parties may not, have not, and cannot present themselves, Talen Montana's interests are not adequately represented.

c. The motion is timely.

Talen Montana's motion is timely for the reasons set out in its original brief. Mem. In Support of Mot. to Intervene (Dkt. No. 86) at 9-12. Petitioners ignore the majority of Talen

[5] Petitioners consider this prejudicial, but that is nonsensical because Petitioners preferred remedy arguments are premised on their own argument that their remedy would avoid harm to the power grid. It is therefore apparent that Petitioners are able and willing to make arguments about impacts to the power grid.

[6] As noted above, if Talen Montana's motion to intervene is granted, Talen Montana may argue remedy proceedings below before the BER as the original finder of fact rather than this Court, which sits in an appellate posture.

Montana's arguments on timeliness, and do not address the Montana Supreme Court's four-factor test on timeliness at all.[7] Rather, they focus exclusively on the fact that Talen Montana did not intervene *before the BER*. Resp. on Intervention (Dkt. No. 93) at 10-11 (emphasizing the "six-year delay"). But Petitioners effectively ignore that the remedy issue has never been briefed before this Court, and, as a result of the parties *very recent* briefing, this case is essentially entering a new remedy phase. Because Talen Montana's motion to intervene came *days* after that briefing—indeed, before Petitioners even filed their substantive response to DEQ and Westmoreland's motions on remedy—the motion to intervene is timely and should be granted.

Petitioners' sole argument on timeliness is that Talen Montana's motion came after this Court's Order, and Talen Montana should have intervened earlier. Resp. on Intervention (Dkt. No. 93) at 9-13. First, this is more than a bit disingenuous, as Petitioners suggest that had Talen Montana tried to intervene at the outset of this case in this Court in 2019, they would have opposed it then too. *Id.* at 10-11 (noting the BER's intervention deadline and the limits for intervention "on appeal"). But even Petitioners' own cited cases demonstrate that post-judgment intervention is appropriate when—as here—the intervenor's interests are not represented. *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 1, 21, 33-35, 356 Mont. 41, 230 P.3d 808; *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co*., 407 F.3d 1091, 1103 (10th Cir. 2005) ("Because, at this stage in the litigation, neither party has an interest in contesting subject matter jurisdiction, [third party's]

[7] As discussed in Talen Montana's opening brief, courts must consider "(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*, 558 F.2d 257, 264-66 (5th Cir. 1977)). No single factor is dispositive. *Id.*

interest may be harmed if [third party] is not permitted to intervene on appeal.") (citing Fed. R. Civ. P. 24(a)) (cited in *Pub. Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017)).

As set forth in Section II.b, *supra*, Talen Montana's interests are not adequately represented by the other parties in this case. Further, courts have long allowed intervention at the start of a new phase of a case.[8] This is effectively now the "remedy" phase of the case, which began when DEQ filed their motion for clarification of the Court's Order on November 5, 2021, or, at earliest, when the Court issued its Order on October 28, 2021.

Petitioners question how Talen Montana's interests could have been implicated by the recent filings, since 1) Petitioners requested vacatur before the BER in 2016, and 2) Westmoreland's motions opposed (not sought) vacatur.[9] Petitioners never sought a preliminary injunction on mining operations at AM4 once during the last six years, and the parties have never

[8] *See, e.g.*, *United States v. State of Or.*, 745 F.2d 550, 552 (9th Cir. 1984) (reversing the denial of intervention where a new "phase" of litigation and negotiations began, which justified the State of Idaho's intervention over a decade after the case had commenced, and holding "[m]ere lapse of time alone is not determinative") (citing 7A C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972)) (emphasis added); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 129 (D.C. Cir. 1972) (reversing the denial of a request to intervene where applicants sought to participate in the remedial and appellate phases and holding "[t]imeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved") (emphasis added) (citations omitted); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 293 (3d Cir. 1982) (reversing the denial of intervention to "'participate in an upcoming ... phase of the litigation'") (quoting *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977)).

[9] Petitioners note that no one seeks "immediate" vacatur. Talen Montana agrees that an equitable remedy is needed here, but Petitioners' four-month deferral is insufficient. Rather, the Court (and/or the BER) should remand without vacatur, consistent with similar cases concerning risks to the power grid. *See Cal. Cmties. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) (declining to vacate because of the "severe consequences" that would result to a "much needed power plant," including the risk of blackouts—"if saving a snail warrants judicial restraint, so does saving the power supply") (internal citation omitted); *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 101 (D.D.C. 2019) (vacatur was not warranted, notwithstanding the serious defects by the agency, who failed to conduct an environmental impact study, because the plant was a "crucial source of electricity in the area," and shutdown would result in unreliable energy supply, potential blackouts, and significant waste).

briefed the Court on vacatur. Indeed, operations have continued uninterrupted since Petitioners filed their BER action. Further, BER rejected Petitioners' contested case, and Petitioners then *appealed* that decision to the District Court, where the Court serves in an appellate role pursuant to the Montana Administrative Procedure Act ("MAPA").[10] In light of Petitioners' own failure to brief injunctive relief at any time, and the appellate posture in this Court—where adjudicating injunctive relief in the first instance may be inappropriate anyway for the reasons discussed above—Talen Montana did not believe it had a compelling reason to intervene.[11] But now, after Petitioners have devoted so much of their remedy briefing to the proposition that their proposed remedy will not harm CSES Units 3&4 or the power grid, Talen Montana must be allowed to respond. And, though it opposed vacatur, Westmoreland did so by making explicit reference to Talen Montana and CSES's operational capabilities at Units 3&4, and Petitioners did the same. It was *those* collective filings, and their overt reliance on third-party statements about what would and would not cause harm to Talen Montana and CSES Units 3&4, that triggered Talen Montana's intervention interests. *That* is why intervention is appropriate here.

Second, by failing to address them, Petitioners effectively concede that the other three factors favor finding Talen Montana's motion timely. Petitioners offer no argument that the

[10] As noted in footnote 1, *supra*, Petitioners agree that this Court sits in an appellate posture. This may explain why they never sought to shutdown mining operations in this Court, and never briefed the Court on vacating the permits. But after the instant motions raised the issue of remedy, they quickly changed tack and are now advocating that this Court find, in the first instance, that the mine should be shut down by April 2022.

[11] Petitioners' rank speculation that Talen Montana decided not to intervene in 2016 due to financial problems is baseless and nonsensical, given the economic interests Talen Montana has outlined here. Resp. on Intervention (Dkt. No. 93) at 12, n.5. Oddly, Petitioners cite an article with a quote from Talen Montana's CEO, arguing that it is "an admission of a party opponent," *id.* at 4, n.3, despite opposing Talen Montana's efforts to become a party.

original parties would suffer prejudice resulting from any delay in intervention.[12] Indeed, they cannot because 1) Petitioners are the only ones to oppose, 2) *all* the original parties here put the impacts to Talen Montana at center stage in the first place, and 3) Talen Montana filed its motion almost immediately thereafter.

Petitioners also offer no argument against the common sense position that Talen Montana would be prejudiced if it is denied the ability to participate, aside from the unserious claim that Westmoreland's status as supplier of coal to CSES means it adequately represents Talen Montana's interests in maintaining CSES Units 3&4 operations in compliance with Talen Montana's separate contractual obligations and permits. As noted in Section II.a, *supra*, Talen Montana's interests in CSES Units 3&4 and the power supply is a distinct and essential issue, as the recent filings all make clear. Further, Talen Montana has another unique interest here: correcting Petitioners' speculative arguments about Talen Montana and CSES Units 3&4 before the Court.

Finally, Petitioners ignore the unusual circumstances here—where the parties requested clarification on a remedy that had not been briefed, and that the Court did not order, and after which Petitioners offered a new hybrid remedy and justified it by making specific assertions about how its newly proposed remedy would not harm Talen Montana (all while opposing Talen Montana's attempts to be heard). Petitioners' position that Talen Montana should not be allowed to respond borders on the absurd; Talen Montana's motion to intervene, which was filed days after

[12] While they do argue that the Petitioners would be prejudiced by having to respond to power grid arguments, they did so under their permissive joinder section. Critically, they make no attempt to link that supposed prejudice to the supposed delay in seeking intervention, which is the correct standard for the purposes of intervention of right.

the parties recent filings kicked off a new remedy phase, was timely, and all of the relevant factors point to allowing Talen Montana's intervention here.

III. Talen Montana satisfies the test for permissive intervention.

The Court should alternatively grant permissive intervention here because it is undeniable that Talen Montana has claims or defenses to Petitioners' preferred remedy that "shares with the main action a common question of law or fact." Mont. R. Civ. P. 24(b)(1)(B). As noted above, every participating party in this case has referenced the importance of determining whether (and how much) CSES Units 3&4 would be impacted by the remedy here. Indeed, Petitioners' preferred remedy concedes the importance of avoiding harms to CSES and the power grid—one of the few issues on which Talen Montana and Petitioners agree. However, Petitioners are wrong that their preferred remedy would accomplish that goal. Though Petitioners do not want Talen Montana to explain to the Court exactly why that is, the Court can and should grant intervention here so that it may consider a full and accurate record before deciding on this common question of law and fact.

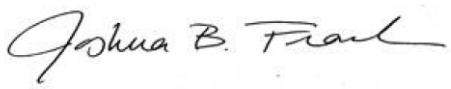
IV. The conditions Petitioners would put on Talen's intervention are nonsensical.

Finally, Petitioners suggest that, to avoid any prejudice to Petitioners (or perhaps to the Court), Talen Montana should be required to file joint briefs with Westmoreland. Resp. on Intervention (Dkt. No. 93) at 19. This makes no sense given the stage of the proceedings. DEQ, Westmoreland, and Petitioners have completed their briefing on the remedy motions. There was no opportunity to consolidate briefing because Petitioners opposed Talen Montana's intervention (and expedited consideration of the motion). There is only one substantive brief missing from pending motions: Talen Montana's. Petitioners presumably will have the opportunity to respond to that brief, should the Court grant intervention here, as is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Talen Montana's Motion to Intervene. Talen Montana qualifies both for intervention as of right under Rule 24(a) and for permissive intervention under Rule 24(b).

Respectfully submitted, this 20th day of December, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, a true and accurate copy of the foregoing document for DV 2019-34 was mailed by electronic mail, addressed as follows:

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Exhibit A

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ATTORNEYS FOR PROPOSED RESPONDENT-INTERVENOR

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA, LLC, Proposed Respondent-Intervenor.	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **DECLARATION OF SHANNON BROWN**

I, Shannon Brown, declare under penalty of perjury as follows:

1. I am over 18 years of age.

2. I reside in Montgomery County, Texas.

3. I make this Declaration in support of Talen Montana, LLC's ("Talen Montana") Reply Brief in Support of Motion to Intervene as Respondent.

4. I make this Declaration based upon personal knowledge. The basis of my personal knowledge is as follows: Since May 2018, I have served as senior director of asset management at Talen Energy Supply, LLC ("Talen"), an indirect corporate parent of Talen Montana. In that capacity, I have represented Talen Montana on various committees relating to Units 3 and 4 of the Colstrip Steam Electric Station ("Units 3&4"), including committees providing oversight for the supply of coal to Units 3&4 and the operation of Units 3&4. My responsibilities related to coal supply include profit and loss of the power generation, coal supply contract negotiations, managing commercial and contractual issues arising under Talen Montana's coal supply agreement, approving invoices, and otherwise administering the coal supply agreement between Talen Montana and Westmoreland Rosebud Mining, LLC ("Westmoreland"). Through my role, I have gained extensive knowledge and experience regarding Unit 3&4's coal needs and the supply of coal from Rosebud Mine to Units 3&4.

5. I have reviewed the November 18, 2021 declaration of Mr. David Alan Schlissel and identified numerous errors in it with respect to Units 3&4. Select errors are discussed herein. Mr. Schlissel has never been employed at Units 3&4 or conducted any work at the Colstrip Steam Electric Station ("CSES").

Units 3&4 Background

6. CSES is a coal-fired power plant in Colstrip, Montana that depends on coal to generate power. CSES Units 1&2 were retired in early 2020. Units 3&4 are the remaining active coal-fired units, and they each have a net generating capacity of approximately 740 MW. Units 3&4's current capacity is therefore approximately 1,480 MW.

7. Talen Montana is the operator and a co-owner of Units 3&4. Talen Montana's ownership interest is 30% of Unit 3.

8. As operator of Units 3&4, Talen Montana is responsible for day-to-day operations and power generation activities, long-term scheduling and planning, compliance with permits, management of environmental liabilities, and otherwise acting on behalf of the Units 3&4 co-owners.

9. NorthWestern Corporation (d/b/a NorthWestern Energy) is another co-owner of Units 3&4.

10. A significant amount of Talen Montana's and NorthWestern Energy's power generated by Units 3&4 is supplied to Montana customers, including homeowners, commercial and industrial facilities, municipalities, and other customers. As noted above, Units 3&4 collectively can produce 1480 MW, of which approximately 375 to 450 MW are supplied to Montana customers. This is based on my belief that most, if not all, of NorthWestern Energy's share of the energy generated by Units 3&4 is supplied to Montana customers, in addition to the distribution of energy within Montana by Talen Montana's affiliates.

Current Coal Supply and Usage by Units 3&4

11. Rosebud Mine has been and is currently the exclusive supplier of coal to Units 3&4. Units 3&4 typically burn 500,000 to 600,000 tons of coal per month, and during most years is forecasted to burn around 7 million tons of coal per year (Units 3&4 will typically burn less during years with planned outages for maintenance).

12. With respect to Talen Montana's ownership interest in Units 3&4 specifically, Talen Montana and Westmoreland currently have a contract in place through 2025 requiring Westmoreland to supply coal from Rosebud Mine to Units 3&4. The contract is a full requirements contract obligating Westmoreland to supply all coal required by Talen Montana for its interest in Units 3&4. Talen Montana is obligated to purchase from Westmoreland all coal for its interest in Units 3&4, with a limited exception for test burns of coal from other mines.

Impacts of Vacatur of AM4 Permit on Ability to Fuel Units 3&4

13. Without sufficient coal supply of adequate quality from Rosebud Mine to CSES, Units 3&4 will be unable to run at full capacity (or potentially at all). If the coal supply from Rosebud Mine is completely halted, Units 3&4 has only about 25-30 days of coal stored on-site, meaning that Unit 3&4 operations could cease in a month or less.

14. Contrary to Mr. Schlissel's speculation, Talen Montana does not have the ability to materially expand Units 3&4 on-site storage of coal beyond the current supply of 25-30 days. The coal is in a "dead pile" that is covered in a concrete-like crust to prevent release of dust from the coal. The dead pile, which has not been significantly used since 2008, is used for emergency situations only. The amount of coal Units 3&4 can store on the dead pile is physically constrained

based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022.

15. Talen Montana's ability to obtain replacement coal for Units 3&4 is extremely limited, and it is very unlikely Talen Montana would be able to obtain any replacement coal even by the end of 2022. Accordingly, merely delaying vacatur of the AM4 permit by four months provides Talen Montana with no additional options to replace its coal supply.

16. First, Talen Montana does not have rail unloading facilities that would enable transport of coal to CSES by rail, and any construction of such facilities would take significant time and would be extremely expensive. Building new rail unloading facilities would take substantially longer than four months; it could take years to get such facilities permitted and constructed. For instance, construction of new facilities and burning of new coal would likely require an amendment to the air permit for Units 3&4, which could also take significant time (again, longer than four months) to obtain. Further, Talen Montana would likely need to do test burns for any new alternative coal source to assess its viability for combustion at Units 3&4.

17. Second, trucking coal to CSES presents other logistical challenges related to transporting large volumes of coal over long distances. In 2019 when Talen Montana was exploring alternative coal sources, Talen Montana calculated that approximately 724 truck trips per day would be required to supply Units 3&4 with coal entirely by truck (i.e., one truck every two minutes). Additionally, as with transporting new coal by rail, transporting new coal by truck would likely require test burns and an amendment to the air permit.

18. Third, contracts for coal and rail deliveries are typically negotiated at least a year or more in advance. Based on my current knowledge of the coal market and railroad capacities

currently, I do not believe there are material volumes for additional coal that Talen Montana could contract to buy and deliver prior to the end of 2022.

19. With respect to coal from other areas of Rosebud Mine, the coal within Rosebud Mine is not interchangeable. Even if Westmoreland is able to relocate its mining operations to other areas of Rosebud Mine (which is questionable for the reasons outlined in the December 6, 2021 Declaration of Russell Batie), it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from AM4 cannot be mined and blended with coal from other areas, the resulting coal blend may not be of sufficient quality for Units 3&4.

20. For instance, Westmoreland's Environmental and Engineering Manager Russell Batie has stated that "AM4 is important to the Mine's production because it is a high-quality coal that can be blended with other coal." Batie December 6 Declaration ¶ 11. Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality. *See* Batie December 6 Declaration ¶ 9.2. According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply because Westmoreland already planned to mine those areas in the near future in addition to the AM4 area and potentially because mining activities in some of the other areas are also subject to ongoing legal challenges. *See* Batie December 6 Declaration ¶¶ 9.3, 9.4, 10. Thus, without AM4 it is unclear if Westmoreland will be able to supply coal that Units 3&4 can use to operate.

Impacts on Energy Supply if Units 3&4 Cannot Run at Full Capacity

21. As discussed in my prior declaration, there are significant potential impacts to the supply of energy to Montana and the region if Units 3&4 cannot run at full capacity due to a lack of fuel supply. These impacts remain a threat even if the supply of coal from AM4 is not cut off until April 2022.

22. Planned maintenance outages at Units 3&4 do not occur annually and do not occur every spring. Planned maintenance outages are carefully scheduled based on current energy market supply and the need to conduct certain maintenance and construction activities while units are offline. Additionally, Units 3&4 are almost never scheduled for outage at the same time (i.e., their outages are staggered so that one unit remains online at all times). No outage for either unit is currently planned for Spring or Fall 2022. The next planned outage is Unit 4 scheduled for 2024.

23. A "forced" unplanned outage in Spring 2022 due to lack of fuel supply would impact both energy supply and prices in potentially unpredictable ways. Even taking one unit offline in the spring could cause issues due to the 2021 drought that continues to affect the supply of hydropower. Once offline, the Colstrip unit may take at least a full day to come back online. If both units are offline, it may take several days to get both units online.

24. Likewise, although energy demand is typically reduced in the spring as compared to the winter, energy demand surges again in the summer months – as shown by Mr. Schlissel's own Chart 1. It is crucial for both Units 3&4 to be online during the summer months to meet that demand surge.

25. Units 3&4 are important dispatchable energy sources for this energy usage in Montana specifically and the northwest region more generally for all seasons. A dispatchable energy source is one that can be dispatched up and down to meet energy demand.

26. Non-dispatchable energy sources are those like wind and solar, which cannot be turned on and off to meet demand. Their power generation is dependent on external environmental factors. Hydropower is likewise partially dependent on external environmental factors; for instance, droughts will limit the supply of available hydropower.

27. Mr. Schlissel's graph showing the availability of hydropower, notably, shows 2020 rather than 2021. A significant drought in 2021 limited the availability of hydropower in the west and is expected to have impacts on the available supply of hydropower for at least the next year.

28. Solar power currently only supplies a very limited amount of energy within Montana (approximately 17 MW), and is unlikely to be a suitable replacement in the short-term for the approximately 375-450 MW supplied by Units 3&4 within the state of Montana. Transmitting solar power from California, as Mr. Schlissel suggests, may be theoretically possible, but it would be extremely costly and inefficient to move that power.

29. Accordingly, even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022. This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation.

30. Mr. Schlissel's hypothetical "worst case" scenario – that Talen Montana could operate just one unit for four months and then rely on coal from a new area of the Rosebud Mine

– is therefore not the worst-case scenario. The worst-case scenario is that Units 3&4 don't run all, especially if Westmoreland is not able to supply Units 3&4 with coal of sufficient quantity for significantly longer than four months because it cannot use or blend AM4 coal, and Talen Montana is not able to obtain replacement fuel for Units 3&4 until sometime in 2023 or even later.

31. Further, Mr. Schlissel understates the energy supply impacts of his own "worst case" scenario. Operating just one unit into the summer months – when energy demand increases – may very well be insufficient to meet energy demand in Montana.

Impacts on Price if Units 3&4 Cannot Run at Full Capacity

32. Mr. Schlissel's statement that "Colstrip is the most expensive resource in the portfolio . . . Northwestern Energy" is misleading and incomplete at best.

33. Talen Montana participates in wholesale energy markets where it sells power based on its variable cost to produce power. The variable cost to produce power is based on the current operational cost.

34. The dispatch of power to consumers in the region through the wholesale energy markets is based on the variable costs that power producers bid, with the daily market price determined by supply-demand fundamentals.

35. The variable cost to produce power at Units 3&4 is extremely low – around $20 per megawatt hour (MWh). For comparison, a typical natural gas peaking generation unit with a typical natural gas cost has the variable cost to produce around $45 per MWh. Natural gas generation is a dispatchable resource with more than double the cost of Units 3&4.

36. As a result, Units 3&4 are among the first to get dispatched to meet energy demand, generally running around the clock, and are among the cheapest sources of energy to consumers sold through the wholesale markets.

37. Current 2022 average on-peak power prices in the northwest are almost $60/MWh. Per MWh power prices in the region have already doubled in the past 12 months and are among the highest prices seen in the region in the past 10 years. If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers.

Executed this 20th day of December, 2021.

Shannon Brown

ATTACHMENT 3

Rosebud County District Court
Case Register Report
DV-44-2019-0000034-JR

ımental Information Center, et al. vs. Montana Department Of Environme

Filed: 7/10/2019
Subtype: Judicial Review

Status History

Open	7/10/2019
Closed	1/28/2022

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Def. no. 6 Northern Cheyenne Coal Miners Association,

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Judge History

Date	Judge	Reason for Removal
9/27/2019	Bidegaray, Kathy	Current
8/21/2019	Gilbert, Brenda	Substituted
7/10/2019	Murnion, Nickolas C	Recused
9/9/2019	Rieger, Olivia	Substituted

Rosebud County District Court
Case Register Report
DV-44-2019-0000034-JR
ımental Information Center, et al. vs. Montana Department Of Environme

Register of Actions

Doc. Seq.	Entered	Filed	Text	Judge
1.000	07/10/2019	07/10/2019	Petition for Review of Final Agency Action/ Appeal of Case No. BER 2016-03 SM, Montana Board of Environmental Review	Murnion, Nickolas C
2.000	08/05/2019	08/05/2019	Proof Of Service - served on State of Montana Dept. of Environmental Quality on 7-23-19, Board Of Environmental Review - 7-23-19 & Western Energy - 7-24-19	Murnion, Nickolas C
3.000	08/08/2019	08/08/2019	Summons Returned and Filed on Western Energy, DEQ and Board of Enviromental Review	Murnion, Nickolas C
4.000	08/08/2019	08/08/2019	Notice of Transmittal of Adminstrative Record	Murnion, Nickolas C
5.000	08/14/2019	08/14/2019	Defendant Western Energy Company's Answer to Petition for Review of Final Agency Action	Murnion, Nickolas C
6.000	08/14/2019	08/14/2019	Defendant Western Energy Company's Corporate Disclosure Statement	Murnion, Nickolas C
7.000	08/19/2019	08/19/2019	Recusal and Order Calling in Judge (Judge Hayworth declined)	Murnion, Nickolas C
8.000	08/21/2019	08/21/2019	Recusal and Order Calling in Judge (Judge Gilbert)	Murnion, Nickolas C
9.000	08/26/2019	08/26/2019	Order Requiring Courtesy Copies	Gilbert, Brenda
10.000	08/26/2019	08/26/2019	Order Setting Case Scheduling Conference	Gilbert, Brenda
11.000	08/26/2019	08/26/2019	Answer	Gilbert, Brenda
12.000	08/27/2019	08/27/2019	Defendant's Motion to Dismiss for Failure to State a Claim (Montana Board of Enviromental Review)	Gilbert, Brenda
13.000	08/27/2019	08/27/2019	Defendant Montana Board of Enviromental Review's Brief in Support of Motion to Dismiss for Failure to State a Claim	Gilbert, Brenda
14.000	09/05/2019	09/05/2019	Defendant Westmorland Rosebud Mining, LLC's Motion to Substitute Judge	Gilbert, Brenda
15.000	09/05/2019	09/05/2019	Order Vacating Case Scheduling Conference	Gilbert, Brenda
16.000	09/09/2019	09/09/2019	Recusal and Order Calling in Judge	Gilbert, Brenda
17.000	09/11/2019	09/11/2019	Order Requiring Mirror Filings	Rieger, Olivia
18.000	09/11/2019	09/11/2019	Unopposed Motion for Extension of Time to File Reply Brief	Rieger, Olivia
19.000	09/11/2019	09/11/2019	Order Granting Petitioner's Motion for Extension of Time to File Reply Brief	Rieger, Olivia
20.000	09/18/2019	09/18/2019	Motion for Substitution (Hon. Olivia Reiger)	Rieger, Olivia
21.000	09/27/2019	09/27/2019	Petitioners' Response to Respondent Board of Environmental Review's Motion to Dismiss	Rieger, Olivia
22.000	09/27/2019	09/27/2019	Recusal And Order Calling In Judge (Katherine M. Bidegaray)	Rieger, Olivia
23.000	10/07/2019	10/07/2019	Entry of Appearance of Victoria A. Marquis	Bidegaray, Kathy
24.000	10/10/2019	10/10/2019	Defendant Montana Board of Enviromental Review's Reply Brief in Support of it's Motion to Dismiss	Bidegaray, Kathy
25.000	11/12/2019	11/12/2019	Order Setting Telephonic Status/ Scheduling Conference	Bidegaray, Kathy
26.000	11/14/2019	11/14/2019	Court Minutes	Bidegaray, Kathy

Rosebud County District Court
Case Register Report
DV-44-2019-0000034-JR
ımental Information Center, et al. vs. Montana Department Of Environme

Register of Actions

Doc. Seq.	Entered	Filed	Text	Judge
27.000	11/14/2019	11/14/2019	Order Continuing Telephonic Scheduling / Status Conference	Bidegaray, Kathy
28.000	11/26/2019	11/26/2019	Minute Entry	Bidegaray, Kathy
29.000	12/09/2019	12/09/2019	Scheduling Order	Bidegaray, Kathy
30.000	12/12/2019	12/12/2019	Motion to Correct the Caption	Bidegaray, Kathy
31.000	12/13/2019	12/13/2019	Motion To Amend The Administrative Record	Bidegaray, Kathy
32.000	12/16/2019	12/16/2019	Notice of Change of Address for Counsel of Record	Bidegaray, Kathy
33.000	01/06/2020	01/06/2020	Order Granting Motion to Amend the Administrative Record	Bidegaray, Kathy
34.000	01/07/2020	01/07/2020	Order Granting Motion to Correct the Caption	Bidegaray, Kathy
35.000	02/04/2020	02/04/2020	Unopposed Motion to Amend the Scheduling Order	Bidegaray, Kathy
36.000	02/04/2020	02/04/2020	Order Granting Petitioner's Motion to Amend the Scheduling Order	Bidegaray, Kathy
37.000	02/19/2020	02/19/2020	Notice of Transmittal of Amended Administrative Record	Bidegaray, Kathy
38.000	03/09/2020	03/09/2020	Plaintiffs' Unopposed Motion to Amend the Scheduling Order	Bidegaray, Kathy
39.000	03/09/2020	03/09/2020	Order Granting Petitioner's Motion to Amend the Scheduling Order	Bidegaray, Kathy
40.000	03/12/2020	03/12/2020	Order Denying Respondent Montana Board of Enviromental Review's Motion to Dismiss	Bidegaray, Kathy
41.000	03/24/2020	03/24/2020	Plaintiffs Unopposed Motion for Extension of Time to File Opening Brief	Bidegaray, Kathy
42.000	03/25/2020	03/25/2020	Order Granting Petitioner's Unopposed Motion for Extension of Time to File Opening Brief	Bidegaray, Kathy
43.000	04/10/2020	04/10/2020	Petitioner's Opening Brief	Bidegaray, Kathy
44.000	05/26/2020	05/26/2020	Notice of Filing	Bidegaray, Kathy
45.000	06/01/2020	06/01/2020	Respondent Montana Department of Enviromental Quality's Answer Brief/ Oral Argument Requested	Bidegaray, Kathy
46.000	07/15/2020	07/15/2020	Montana Department of Enviromental Quality Notice of Supplemental Authority	Bidegaray, Kathy
47.000	07/15/2020	07/15/2020	Intervenor-Respondents' Response Brief/ Oral Argument Requested	Bidegaray, Kathy
48.000	07/28/2020	07/28/2020	Unopposed Motion to Reset Briefing Deadlines	Bidegaray, Kathy
49.000	07/28/2020	07/28/2020	Order Granting Unopposed Motion to Reset Briefing Deadlines	Bidegaray, Kathy
50.000	08/07/2020	08/07/2020	Order Requiring Mirror Filings	Bidegaray, Kathy
51.000	08/07/2020	08/07/2020	Board of Enviromental Review's Answer Brief	Bidegaray, Kathy
52.000	08/28/2020	08/28/2020	Plaintiff's Unopposed Motion for Extension of Time to File Reply Brief	Bidegaray, Kathy
53.000	08/28/2020	08/28/2020	Order Granting Petitioner's Unopposed Motion to Extend Briefing Deadline	Bidegaray, Kathy
54.000	09/21/2020	09/21/2020	Petitioner's Reply to DEQ	Bidegaray, Kathy

Rosebud County District Court
Case Register Report
DV-44-2019-0000034-JR
ımental Information Center, et al. vs. Montana Department Of Environme

Register of Actions

Doc. Seq.	Entered	Filed	Text	Judge
55.000	09/21/2020	09/21/2020	Petitioner's Reply to WRM	Bidegaray, Kathy
56.000	09/21/2020	09/21/2020	Notice of Appearance of Roger Sullivan	Bidegaray, Kathy
57.000	10/08/2020	10/08/2020	Order Setting Judicial Review Hearing	Bidegaray, Kathy
58.000	10/21/2020	10/21/2020	Order to Appear Via Zoom	Bidegaray, Kathy
59.000	10/30/2020	10/29/2020	Joint Motion of Montana DEQ and Westmoreland to Strike Exhibits to Petitioners' Reply to DEQ	Bidegaray, Kathy
60.000	11/24/2020	11/16/2020	Petitioner's Response to DEQ's and WRM's Motion to Strike	Bidegaray, Kathy
61.000	11/24/2020	11/24/2020	Respondents' Unopposed Motion for Extension of Time to File Reply to Petitioners' Response to DEQ's and WRM's Motion to Strike	Bidegaray, Kathy
62.000	11/25/2020	11/25/2020	Order Granting Motion for Extension of Time to File Reply to petitioners' Response to DEQ's and WRM's Motion to Strike	Bidegaray, Kathy
63.000	12/03/2020	12/02/2020	Request for Oral Argument	Bidegaray, Kathy
64.000	12/07/2020	12/07/2020	Reply in Support of Motion to Strike/Oral Argument Requested	Bidegaray, Kathy
65.000	12/10/2020	12/10/2020	Order Setting Oral Argument Hearing on Respondents' Motion to Strike	Bidegaray, Kathy
66.000	12/14/2020	12/14/2020	Petitoners' Notice of Supplemental Authority	Bidegaray, Kathy
67.000	12/16/2020	12/16/2020	Court Minutes	Bidegaray, Kathy
68.000	12/21/2020	12/21/2020	Notice of Preparation of Transcript	Bidegaray, Kathy
69.000	12/24/2020	12/23/2020	DEQ Proposed Order on Petition for Judicial Review	Bidegaray, Kathy
70.000	12/24/2020	12/23/2020	Petitioner's Proposed Order	Bidegaray, Kathy
70.100	04/02/2021	12/23/2020	Intervenors' Proposed Order	Bidegaray, Kathy
71.000	03/29/2021	03/29/2021	Petitioner's Notice of Supplemental Authority	Bidegaray, Kathy
72.000	04/09/2021	04/09/2021	Response to Petitioners' Notice of Supplemental Authority	Bidegaray, Kathy
73.000	05/06/2021	05/06/2021	Notice of Withdrawal of Counsel	Bidegaray, Kathy
74.000	05/19/2021	05/19/2021	Notice of Supplemental Authority	Bidegaray, Kathy
75.000	09/20/2021	09/20/2021	Petitioner's Notice of Change of Address of Counsel (Shiloh Hernandez)	Bidegaray, Kathy
76.000	10/25/2021	10/25/2021	Notice of Withdrawal of Counsel	Bidegaray, Kathy
77.000	10/25/2021	10/25/2021	Notice of Appearance	Bidegaray, Kathy
78.000	10/28/2021	10/28/2021	Order on Motion to Strike	Bidegaray, Kathy
79.000	10/28/2021	10/28/2021	Order on Petition	Bidegaray, Kathy
80.000	11/05/2021	11/05/2021	DEQ Motion for Stay Pending Appeal and Request for Clarification	Bidegaray, Kathy
81.000	11/05/2021	11/05/2021	Brief in Support of DEQ's Motion for Stay Pending Appeal and Request for Clarification	Bidegaray, Kathy
82.000	11/05/2021	11/05/2021	Declaration of Martin Van Oort	Bidegaray, Kathy
83.000	11/08/2021	11/08/2021	Intervenors' Motion on Remedy and for Stay Pending Appeal Oral Argument requested	Bidegaray, Kathy
84.000	11/08/2021	11/08/2021	Brief in Support of Intervenors' Motion on Remedy	Bidegaray, Kathy

Rosebud County District Court
Case Register Report
DV-44-2019-0000034-JR
ımental Information Center, et al. vs. Montana Department Of Environme

Register of Actions

Doc. Seq.	Entered	Filed	Text	Judge
85.000	11/15/2021	11/14/2021	Talen Montana LLC's Motion to Intervene as Respondent for Expedited Consideration	Bidegaray, Kathy
86.000	11/15/2021	11/14/2021	Memorandum in Support of Motion to Intervene as Respondent	Bidegaray, Kathy
87.000	11/15/2021	11/14/2021	Declaration of Shannon Brown	Bidegaray, Kathy
88.000	11/15/2021	11/14/2021	Corporate Disclosure Statement by Proposed Respondent - Intervenor Talen Montana, LLC	Bidegaray, Kathy
89.000	11/22/2021	11/22/2021	Petitioners' Combined Response to DEQ and WRM's Motions for Stay and Motions on Remedy	Bidegaray, Kathy
90.000	11/23/2021	11/23/2021	Petitioner's Motion for Extenstion of Time	Bidegaray, Kathy
91.000	11/24/2021	11/24/2021	Petitioners' Proposed Order on Remedy and Stay	Bidegaray, Kathy
92.000	11/24/2021	11/24/2021	Order Granting Extension of Time	Bidegaray, Kathy
93.000	12/06/2021	12/06/2021	Petitioners' Response in Opposition to Talen's Motion to Intervene	Bidegaray, Kathy
94.000	12/06/2021	12/06/2021	Intervenors' Reply to Petitioners' Combined Response to DEQ and Intervenors' Motions for Stay and Motions on Remedy	Bidegaray, Kathy
95.000	12/10/2021	12/10/2021	DEQ's Reply Brief in Support of Motion for Stay Pending Appeal	Bidegaray, Kathy
96.000	12/13/2021	12/13/2021	Petitioners' Motion for Costs and Attorneys' Fees	Bidegaray, Kathy
97.000	12/13/2021	12/13/2021	Brief in Support of Petitioners' Motion for Costs and Attorneys' Fees	Bidegaray, Kathy
98.000	12/13/2021	12/13/2021	Declaration of Shiloh Hernandez	Bidegaray, Kathy
99.000	12/13/2021	12/13/2021	Declaration of Walton D. Morris, Jr.	Bidegaray, Kathy
100.000	12/13/2021	12/13/2021	Declaration of Roger Sullivan	Bidegaray, Kathy
101.000	12/13/2021	12/13/2021	Declaration of L. Randall Bishop	Bidegaray, Kathy
102.000	12/13/2021	12/13/2021	Declaration of Timothy Bechtold	Bidegaray, Kathy
103.000	12/13/2021	12/13/2021	Declaration of Derf Johnson	Bidegaray, Kathy
104.000	12/20/2021	12/20/2021	Reply in Support of Motion to Intervene as Respondent	Bidegaray, Kathy
105.000	01/20/2022	01/18/2022	Montana Department of Environmental Quality's Answer and Unopposed Motion to Stay Briefing Schedule Pending Settlement Negotiations	Bidegaray, Kathy
106.000	01/20/2022	01/20/2022	Order Granting Respondent Montana Department of Environmental Quality's Unopposed Motion for Stay	Bidegaray, Kathy
107.000	01/28/2022	01/28/2022	Order on Remedy and Stay	Bidegaray, Kathy

ATTACHMENT 4

Katherine M. Bidegaray
Seventh Judicial District
Court Department No. 2
300 12th Ave. NW, Suite #2
Sidney, Montana 59270

DATE Jan 28 2021
CLERK OF DISTRICT COURT
By:

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRACLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANABOARD OF ENVIRONMENTAL REVIEW,and WESTERN ENERGY CO., Respondents.	Cause No.: DV-19-34 **ORDER RE INTERVENTION**

I. INTRODUCTION

Pending before the Court is a motion to intervene in the instant action filed on November 12, 2021, by Talen Montana LLC ("Talen") the operator and minority-owner of the Colstrip Power Plant. Talen asserts that it is entitled to intervene as a matter of right pursuant to Rule 24(a), M.R.Civ.P. In the alternative, Talen contends it satisfies the requirements for permissive intervention under Rule 24(b), M.R.Civ.P. According to Talen, it moves to intervene to protect its "narrow interest" in avoiding "immediate vacatur" of the AM4 Permit at the Rosebud Strip Mine, a concern that it contends

Case No. DV 19-34
File No.

materialized for the first time in Respondents' pending motions filed November 5, 2021, and November 8, 2021, which consist of a motion from the Respondent Montana Department of Environmental Quality ("MDEQ") for a stay of this Court's October 28, 2021 Order and a request for clarification of the Order, and a motion from Intervenor-Respondent Westmoreland Rosebud Mining, LLC ("WRM") on remedy and for a stay pending appeal. The Petitioners Montana Environmental Information Center and Sierra Club (together "Conservation Groups") oppose Talen's Motion. The above filings are accompanied by declarations, referenced below.

II. FACTUAL BACKGROUND

A. The Rosebud Strip Mine and Colstrip Power Plant

Talen is the operator and owner of a 15% interest in the Colstrip Power Plant. Brown Decl. ¶ 6 (Nov. 12, 2021) (Talen owns 30% of one of the two remaining units (Unit 3) at the plant). The majority owners of the plant are seeking to close the coal plant by 2025. Resp. to Mots. on Remedy, Ex. 2, ¶¶ 17-18 (Nov. 22, 2021) (Declaration of David Schlissel). Electricity from the coal plant is one of the most expensive sources of energy for Montana ratepayers. Resp. to Mots. on Remedy, Ex. 1, ¶ 10 (Nov. 22, 2021) (Declaration of Anne Hedges).

The adjacent Rosebud Strip Mine is the sole source of coal for the Colstrip Power Plant. Brown Decl. ¶ 10. The strip-mine has four active coal mining areas, Schlissel Decl. ¶ 9, covering approximately 30,000 acres. BER:95, Ex. DEQ-1A at 3-2. The AM4 Area at issue covers only 300 acres[1] and contains only 10% of the strip-mine's coal reserves and approximately 30% of current coal production. Schlissel Decl.

[1] BER:95, Ex. DEQ-1 at 1. WRM has already strip-mined over 100 acres of AM4. Van Oort Decl. ¶ 13.

¶ 9; WRM Br. in Supp. of Mot. on Remedy, Ex. A, ¶ 4 (Nov. 8, 2021) (Declaration of Russell Batie). Consequently, all parties agree that any temporary cessation of mining in the AM4 Area will not stop mining in the other three active mine areas, which together constitute 70% of the mine's current production. Schlissel Decl. ¶ 9; Batie Decl. ¶ 4. Much, but not all, of the coal in the other mine areas is of lower quality, containing higher levels of ash, sodium, and mercury, which could, in turn, cause violations of air pollution standards at the power plant. Batie Decl. ¶¶ 4, 7.

WRM could move its dragline and other equipment in the AM4 Area to other permitted coal reserves in two to four months. Batie Decl. ¶ 6; BER:95. Ex. DEQ-1A at 3-2 (describing operations). During the interim period, mining would continue in the three other active mine areas. Schlissel Decl. ¶ 9. In addition, WRM and Talen each have a one-month supply of coal stockpiled. Brown Decl. ¶ 12; Batie Decl. ¶ 6. This stockpiled coal is enough on its own to supply one of the two units at the Colstrip Plant for four months. Schlissel ¶ 19.

The Colstrip Power Plant often shuts down one of the two units for multiple months in the spring or fall "shoulder" season when regional energy demand decreases. Schlissel Decl. ¶¶ 7, 11-14. During the spring, abundant regional hydroelectric and inexpensive solar photovoltaic ("PV") electricity are available. Schlissel Decl. ¶¶ 12-14. Accordingly, as happened in the spring and fall shoulder seasons in 2020 and 2021, one of the two units at the Colstrip Plant can shut down for months without affecting the availability or price of regional electricity supplies. Schlissel Decl. ¶¶ 7-10, 19.

B. Prior Proceedings

As Talen notes in its memorandum, this action is a challenge to DEQ's approval of the AM4 Permit for the Rosebud Strip Mine, which "has been the subject of litigation before the [BER] and this Court for years." Talen Memo. in Supp. of Mot. to Intervene at 2 (Nov. 12, 2021) [hereinafter, "Talen Memo"].

DEQ approved the AM4 permit in December 2015. BER:95, Ex. DEQ-1 at cover page. In January 2016 the Conservation Groups requested a contested case before BER to challenge the permit, asserting that DEQ's "approval of the AM4 Amendment was in error." BER:1 at 1.

BER assigned the case to a hearing examiner, who issued a scheduling order, which required "[a]ll motions for intervention ... be served by February 15, 2016." BER:13 at 1. Talen did not file a motion to intervene by February 15, 2016.

The hearing examiner's scheduling order set a schedule for discovery. BER:13 at 1. Following discovery, in June 2016, Conservation Groups moved for summary judgment, requesting BER to "enter summary judgment in favor of Petitioners, *vacate the Department's decision*, and remand the matter." BER:15 at 80 (emphasis added).

BER denied summary judgment, and the contested case went to a trial-type hearing in 2018. Following the four-day hearing, in July 2018, Conservation Groups filed proposed findings and conclusions. BER:123. The proposed findings asked BER to conclude that DEQ's "cumulative hydrologic impact assessment and approval of the AM4 Amendment of the Area B Permit were unlawful and therefore are *SET ASIDE*." BER:123 at 53 (emphasis added). In May 2019, after the hearing examiner issued proposed findings and conclusions, Conservation Groups filed objections again

requesting that BER "*vacate* DEQ's unlawful approval of the AM4 Amendment and remand the matter to DEQ." BER:141 at 55 (emphasis added).

In June 2019, BER issued its final order affirming the AM4 Permit. BER:152 at 85-86. In July 2019, the Conservation Groups filed their petition for judicial review, initiating this action. Pet. for Rev. (July 10, 2019). Judicial review of a contested case is equivalent to an appeal from a trial. *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996) ("[A] petition for judicial review to the district court is analogous to an appeal...."). This Court issued a scheduling order in December 2019. Scheduling Or. (Dec. 9, 2019). Talen did not seek to intervene. The Conservation Groups, DEQ, and WRM filed merits briefs. In December 2020, this Court heard oral argument and, on October 28, 2021, issued its Order on Petition, overturning BER's approval of the AM4 Permit and remanding the matter to DEQ.

Following this Court's ruling, on November 8, 2021, WRM filed a motion on remedy, arguing that this Court should not vacate the AM4 Permit. WRM Br. in Supp. of Mot. on Remedy at 5. On November 12, 2021, Talen moved to intervene, asserting a "specific and significant interest ... in opposing a blanket and immediate vacatur of the AM4 permit or an immediate cessation of AM4 mining operations." Talen Memo. at 3. Talen clarified that its "narrow interest" was limited to avoiding "immediate vacatur of the WRM AM4 permit." *Id.* at 9.

On November 22, 2021, the Conservation Groups filed their response to WRM's motion, explaining that to obviate WRM's asserted concerns about impacts to electricity supplies and in an abundance of caution, they did *not* request immediate vacatur. Pet'rs' Combined Resp. at 10-13, 24 (Nov. 22, 2021). Instead, the Conservation Groups

requested that this Court defer vacatur approximately four months until April 1, 2022, when, due to reduced electricity demands, one of the power plant units often shuts down. *Id.* at 10-13, 24.

Talen did not file a reply brief in support of intervention. On January 28, 2022, this Court issued its Order on Remedy and Stay. In the Order, the Court deferred vacatur until April 1, 2022. Order at 23.

III. LEGAL STANDARDS

A party may seek intervention of right in an action if the party "claims an interest relating to the property or transaction which is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." Mont. R. Civ. P. 24(a)(2). To meet this requirement, an applicant for intervention has the burden of satisfying four criteria:

> (1) the application must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that protection of his interest may be impaired by the disposition of the action; and (4) the applicant must show that his interest is not adequately represented by an existing party.

Enz v. Raelund, 2018 MT 134, ¶ 57, 391 Mont. 406, 419 P.3d 674.

Permissive intervention is available to a party with a "claim or defense that shares with the main action a common question of law or fact." Mont. R. Civ. P. 24(b)(1)(B). "Whether intervention is sought as a matter of right under Rule 24(a) or by permission under Rule 24(b), timeliness is a threshold issue." *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 22, 305 Mont. 22, 22 P.3d 646. Further, while the standard for intervention is generally construed liberally, *Sportsmen for I-143 v. Mont. Fifteenth Jud.*

Dist. Ct., 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400, the standard is much more stringent once a merits ruling has been issued: "absent extraordinary and unusual circumstances, intervention, by a party who did not participate in the litigation giving rise to the judgment ... should not be permitted." *N.L.R.B. v. Shurtenda Steaks, Inc.*, 424 F.2d 192, 194 (10th Cir. 1970); *In re Adoption of C.C.L.B.*, ¶¶ 24, 28 (noting "general rule disfavoring post judgment intervention").

The standard is even more demanding when an applicant seeks to intervene on appeal. 7C Wright & Miller, Federal Practice and Procedure § 1916 (3d ed. Apr. 2021 update) ("There is even more reason to deny an application to intervene made while appeal is pending or after the judgment has been affirmed on appeal."); *see also, e.g., Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017) ("Though we usually take a liberal view of Rule 24(a), when an applicant has not sought intervention in the district court, we permit it on appeal 'only in an exceptional case for imperative reasons.'" (quoting *Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005))).

IV. DISCUSSION

A. Intervention of Right

Motions to intervene after a judgment or on appeal are disfavored and only permitted in exceptional cases. *In re Adoption of C.C.L.B.*, ¶¶ 24, 28; *Pub. Serv. Co. of New Mexico*, 857 F.3d at 1113. In Montana, as elsewhere, motions to intervene following a merits ruling are typically denied. *In re Adoption of C.C.L.B.*, ¶¶ 28, 43; *Connell*, ¶ 23; *Goodover v. Lindey's, Inc.*, 232 Mont. 302, 313, 757 P.2d 1290, 1297 (1988); *In re Marriage of Glass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985); 7C Wright

& Miller, Federal Practice and Procedure § 1916 ("There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant. Motions for intervention after judgment ordinarily fail to meet this exacting standard and are denied."). As the Montana Supreme Court has explained, "The notion that one may waive a right by inaction is far from novel in this jurisdiction." *Archer*, 174 Mont. at 434, 571 P.2d at 382.

1. **Timeliness**

The Montana Supreme Court has repeatedly affirmed denial of intervention of parties that have slept on their rights:

> We have held a motion to intervene is untimely when filed 16 months after the initiation of a personal injury action; four and one half months after notice of the original complaint was given; two and one half years after becoming aware of a promissory note at issue; and three years after filing suit.

Connell v. State Dep't of Soc. & Rehab. Servs., 2003 MT 361, ¶ 22, 319 Mont. 69, 81 P.3d 1279 (internal citations omitted) (citing *Estate of Schwenke v. Becktold*, 252 Mont. 127, 132, 827 P.2d 808, 811 (1992); *Cont'l Ins. Co. v. Bottomly*, 233 Mont. 277, 280, 760 P.2d 73, 75 (1988); *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982); *Archer v. LaMarch Creek Ranch*, 174 Mont. 429, 433, 571 P.2d 379, 382 (1977)).

One critical consideration is whether the party seeking late intervention could have sought intervention at an earlier time. *In re Adoption of C.C.L.B.*, ¶ 28 (finding post-judgment intervention untimely where applicants "waited an additional six months before attempting to protect their interests"); *accord Connell*, ¶ 23 (applicant's representative admitted he "was aware" of district court decision "yet waited another three years to intervene"); *Estate of Schwenke*, 252 Mont. at 132, 827 P.2d at 811

(applicant "was aware of the litigation for more than one year" but "did nothing until one week before trial"); *Grenfell*, 198 Mont. at 95, 643 P.2d at 1187 (applicant had "actual notice" of case but waited "four and one-half months" to move to intervene).

Under any of the above-referenced yardsticks, Talen's motion to intervene is demonstrably untimely. As Talen itself acknowledges, this litigation has stretched on "for years." Talen Memo. at 2. Notably, Talen failed to seek intervention before BER within the time limits established by the hearing examiner. BER:13 at 1 (setting intervention deadline of "February 15, 2016"). In fact, Talen failed entirely to avail itself of the administrative process during the contested case. Mont. Code Ann. § 2-4-702(1)(a) (party must present issues at administrative level before raising them on judicial review). That Talen delayed further—until the appeal from BER and then *after* the merits ruling on judicial review before this Court—only further emphasizes Talen's failure to seek timely intervention. *Hilands Golf Club*, 277 Mont. at 331, 922 P.2d at 474 (judicial review of contested case analogous to appeal); *Pub. Serv. Co. of New Mexico*, 857 F.3d at 1113 (intervention on appeal limited to "exceptional" circumstances).

Objectively, Talen's nearly six-year delay is substantially longer than delays found by the Montana Supreme Court to be excessive. *See Connell*, ¶ 22. Subjectively, as the operator and minority owner of the Colstrip Plant, Brown Decl. ¶ 6, Talen cannot credibly contend that it did not have notice of this litigation, which, as the company itself explains, is related to the "*sole* source of coal" for the power plant. Talen Memo. at 3 (emphasis in original).[2] Under the maxims of jurisprudence, a party that knows of litigation but sleeps on its rights is not entitled to intervene. Mont. Code Ann. § 1-3-218;

[2] Talen avoids disclosing when it first knew of this litigation.

In re Adoption of C.C.L.B., ¶ 28; *Connell*, ¶ 23; *Estate of Schwenke*, 252 Mont. at 132, 827 P.2d at 811; *Grenfell*, 198 Mont. at 95, 643 P.2d at 1187; *Archer*, 174 Mont. at 434, 571 P.2d at 382.

Talen attempts to justify its substantial delay on the basis that (1) no prior briefing raised "immediate vacatur" as an issue; and (2) WRM's motion on remedies had "identif[ied] vacatur ... as a potential issue." Talen Memo. at 9-10. The record, however, indicates that Talen is mistaken on both counts. First, the Conservation Groups requested vacatur of the AM4 Permit in their briefing before BER on at least three occasions, including as early as June 2016. BER:15 at 80; BER:123 at 53; BER:141 at 55. Second, Talen's contention that it only became aware of vacatur as a "potential issue" after seeing WRM's remedies brief is a stretch. As a sophisticated corporate entity, Talen had notice that "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288 (collecting cases). The "potential" for vacatur of an unlawful permit should come as no surprise. Moreover, WRM's brief did not, in fact, seek vacatur, but *opposed* any vacatur. WRM Br. in Supp. of Mot. on Remedy at 5. It is unclear to the Court how a brief opposing vacatur suddenly caused Talen's "narrow interest" in avoiding "immediate vacatur" to "ripen[]." Talen Memo. at 9-10.

Finally, the Court does not find that the cases Talen cites support intervention here. The delay in *JAS, Inc. v. Eisele*, 2014 MT 77, ¶ 27, 374 Mont. 312, 321 P.3d 113—only "slightly more than five months after the complaint was filed"—is not comparable to the nearly six-year delay of Talen here. Of further note, in *JAS, Inc.*, the

plaintiff had obtained a default judgment, which is "not favored," and no substantive litigation had occurred beyond the filing of the complaint and the default judgment. *Id.*, ¶¶ 12-13, 19. In contrast, this case has been actively litigated at length, through discovery, motions, trial, a BER ruling, appeal to this Court for judicial review, and a ruling on the merits from this Court.

In *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 1, 21, 33-35, 356 Mont. 41, 230 P.3d 808, a district court allowed the developer of a challenged subdivision to intervene following a decision reversing the governing body's approval of a subdivision plat. In upholding this decision, the Montana Supreme Court noted that the developer's intervention was prompted by the governing body's decision not to pursue an appeal, which meant the developer's "interests [were] ... no longer adequately represented." *Id.*, ¶ 35. Here, by contrast, Talen's asserted "narrow interest" in avoiding "immediate vacatur" is represented by WRM, which has already filed a petition for supervisory control and has represented that it intends to file an appeal as soon as possible. Moreover, as discussed below, *no party* is seeking "immediate vacatur." And in its Order on Remedy and Stay the Court has deferred vacatur of the AM4 permit until April 1, 2022. Order at 23.

In sum, this Court determines that Talen's motion—filed nearly six years after the intervention deadline established by BER—is untimely, which warrants denial.

2. Talen's "narrow interest" in avoiding "immediate vacatur"

An applicant for intervention "must make a *prima facie* showing of a direct, substantial, legally-protectable interest in the proceedings." *In re Adoption of C.C.L.B.*,

¶ 16. Moreover, the applicant must further demonstrate that "protection of his interest may be impaired by the disposition of the action." *Enz*, ¶ 57.

Talen does not meet either requirement. Talen's identified "narrow interest" is in avoiding "immediate vacatur" of the AM4 Permit. Talen Memo. at 9; *see also id.* at 11, 14-15 (repeating interest in avoiding permit being "immediately vacated" and mining in the AM4 Area "ordered to cease immediately"). No party, however, seeks "immediate vacatur" of the AM4 Permit. WRM Br. in Supp. of Mot. on Remedy at 5 (WRM opposing immediate vacatur); Pet'rs' Combined Resp. at 10-13, 24 (Conservation Groups requesting Court to defer vacatur until April 1, 2022). And as noted, in its Order on Remedy and Stay the Court has deferred vacatur of the AM4 permit until April 1, 2022. Consequently, Talen's asserted direct, substantial, or legally protectable interest is not in danger of impairment in this action. *See, e.g., United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 598-99 (D. Colo. 2008) (denying intervention of right to intervene in case where no "pending motion or proceeding before th[e] court" threatened the asserted interest).

Talen waived any more generalized interest it has, as an initial matter, by its failure to intervene in the time BER allotted. *See Archer*, 174 Mont. at 434, 571 P.2d at 382; BER:13 at 1. Indeed, Talen's decision to wait nearly six years to seek intervention belies any assertion of a direct and substantial interest. Moreover, the Conservation Groups' request for deferred vacatur allays any more generalized concerns about WRM's supply of coal to the Colstrip Power Plant. The AM4 Area provides only a small amount (30%) of the strip-mine's coal, and most of the coal (70%) comes from three other permit areas that are not affected by this action. Schlissel Decl. ¶ 9; Batie Decl.

¶ 4. In addition, existing coal stockpiles at the mine and power plant are sufficient to supply both units of the power plant for two months or one unit for four months. Brown Decl. ¶ 12; Batie Decl. ¶ 6; Schlissel Decl. ¶ 19. WRM can move its strip-mining equipment to other permitted coal supplies in two to four months. Batie Decl. ¶ 6. It is, thus, highly unlikely that coal supplies to the power plant will be disrupted if vacatur is deferred for four months, until April 1, 2022. Schlissel Decl. ¶¶ 9-10, 19. Talen's statements about "keeping the lights on" (Talen Memo. at 16) appear exaggerated and, in any event, lose their force considering the request for, and Order granting, deferred vacatur—one of the units of the power plant is routinely shut down in spring, when cleaner, less expensive energy makes coal power from both units unnecessary. Schlissel Decl. ¶¶ 7-19.

In sum, Talen's late-asserted interest in intervening in this action seeking to intervene for the purpose of opposing "immediate vacatur"—which no party has requested—does not satisfy Rule 24(a)(2).

3. **Adequate representation by an existing party**

It is the burden of the applicant for intervention to demonstrate that its purported interest is not adequately represented by existing parties. *Enz*, ¶ 57; *State ex rel. Palmer v. Dist. Ct. of Ninth Jud. Dist.*, 190 Mont. 185, 189-90, 619 P.2d 1201, 1204 (1980); *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). Here, Talen's purported interest in avoiding "immediate vacatur" (discussed above) is identical to that of WRM. Notably, WRM has already argued that this Court should not immediately vacate the AM4 Permit, WRM Br. in Supp. of Mot. on

Remedy at 5, which is precisely the "narrow interest" proffered by Talen. Talen Memo. at 9, 14-15.

Talen's more generalized interest in assuring coal supply from the mine to the power plant appears indistinguishable from WRM's. Talen admits that WRM is required by contract to supply coal to the power plant. Talen Memo. at 7. As such, WRM has a legal duty to fulfill Talen's asserted interest, which WRM is vigorously defending. In this circumstance, WRM adequately represents Talen's interests. *See State ex rel. Palmer*, 190 Mont. at 189-90, 619 P.2d at 1204 (finding that representative of estate could adequately represent interest of heir because of legal duty); *City of Stilwell, Okla.*, 79 F.3d at 1042-43 (finding that electrical generation and distribution coop was adequately represented by member organization in takings challenge where coop and member organization had identical objectives—to prevent condemnation of transmission lines—albeit distinct motivations).

While Talen summarily states in one sentence, Talen Memo at 17, without support or elaboration, that "potential harms to WRM" are "distinct" from potential harm to Talen, that is not enough. *E.g.*, *City of Stilwell*, 79 F.3d at 1042-43. There is no question that WRM and Talen have the identical *interest* in assuring continued coal supply to the power plant. Batie Decl. ¶ 5; Talen Memo. at 7.

In short, Talen has failed to carry its burden, as the applicant for intervention, to demonstrate that its purported interest is not adequately represented by an existing party. *Enz*, ¶ 57.

B. Permissive Intervention

As noted, "timeliness is a threshold issue" for permissive intervention as well as for intervention of right. *In re Adoption of C.C.L.B.*, ¶ 22. As discussed above, Talen's late move to intervene follows nearly six years of litigation and merits rulings by BER and this Court, which render the motion untimely. As such, Talen motion for permissive intervention is likewise denied. *In re Adoption of C.C.L.B.*, ¶ 43. To rule otherwise would be contrary to both Rule 24 and Rule 1, which mandates that the civil rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Rule 1, Mont. R. Civ.

V. CONCLUSION

Talen has waited almost six years to seek intervention in this litigation until after BER's merits ruling and the Court's merits ruling on appeal. Under any standard, that is too long. Further, Talen's asserted "narrow interest" in avoiding "immediate vacatur" is neither present nor threatened in this action, where no party has sought immediate vacatur. As noted, in its Order on Remedy and Stay, the Court has deferred vacatur of the AM4 permit until April 1, 2022. To the degree Talen has a general interest in assuring continued coal supply to the power plant, WRM adequately represents that interest, as demonstrated by WRM's ability to defend its operation zealously.

Accordingly, for the above-stated reasons, it is hereby **Ordered** that Talen's motion to intervene of right or with permission is **denied.**

Dated this 28th day of January, 2022.

Katherine M. Bidegaray
District Court Judge

cc: Derf Johnson/Shiloh Hernandez/Walt Morris/Roger Sullivan
John C. Martin/Samuel R. Yemington/Victoria Marquis
Nicholas A. Whitaker/Jeremiah Langston
Amy D. Christensen
Robert Sterup/Joshua Frank

ATTACHMENT 5

From: Roger Sullivan <rsullivan@mcgarveylaw.com>
Sent: Friday, January 28, 2022 5:51 PM
To: Eakin, Dan; Shiloh Hernandez; kanderson@brownfirm.com; djohnson@meic.org; wmorris@fastmail.net; amy@cplawmt.com; vamarquis@hollandhart.com; jcmartin@hollandhart.com; sryemington@hollandhart.com; rsterup@brownfirm.com; Frank, Joshua; Whitaker, Nicholas
Cc: Kelli Torbeck; cpepino@earthjustice.org; Armstrong, Catherine; Roger Sullivan
Subject: RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor
Attachments: 1-28-22 Petitioners' Proposed Order re Intervention - Rosebud B DV 19-34 -3.docx

[EXTERNAL EMAIL]

Dan,

Attached please find Petitioner's Proposed Order re: Intervention in "Word" format.

Thank you,
Roger

McGarveyLaw

Roger Sullivan
Senior Partner
(406) 752-5566 (406) 752-7124
www.mcgarveylaw.com
345 First Avenue East, Kalispell, MT 59901

From: Eakin, Dan <Dan.Eakin@mt.gov>
Sent: Thursday, January 27, 2022 4:11 PM
To: Shiloh Hernandez <shernandez@earthjustice.org>; kanderson@brownfirm.com; djohnson@meic.org; wmorris@fastmail.net; amy@cplawmt.com; rsullivan@mcgarveylaw.com; vamarquis@hollandhart.com; jcmartin@hollandhart.com; sryemington@hollandhart.com; rsterup@brownfirm.com; joshua.frank@bakerbotts.com; Whitaker, Nicholas <Nicholas.Whitaker@mt.gov>
Cc: ktorbeck@mcgarveylaw.com; cpepino@earthjustice.org; Armstrong, Catherine <Catherine.Armstrong2@mt.gov>
Subject: RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Yes, that would be fine.

Thank you,

Dan Eakin

Law Clerk for Hon. Katherine M. Bidegaray
Seventh Judicial District Court, Dept. 2
300 12th Avenue NW, Suite 2
Sidney, MT 59270
406-433-4023

From: Shiloh Hernandez <shernandez@earthjustice.org>
Sent: Thursday, January 27, 2022 4:07 PM
To: Eakin, Dan <Dan.Eakin@mt.gov>; kanderson@brownfirm.com; djohnson@meic.org; wmorris@fastmail.net; amy@cplawmt.com; rsullivan@mcgarveylaw.com; vamarquis@hollandhart.com; jcmartin@hollandhart.com; sryemington@hollandhart.com; rsterup@brownfirm.com; joshua.frank@bakerbotts.com; Whitaker, Nicholas <Nicholas.Whitaker@mt.gov>
Cc: ktorbeck@mcgarveylaw.com; cpepino@earthjustice.org; Armstrong, Catherine <Catherine.Armstrong2@mt.gov>
Subject: [EXTERNAL] RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Dan,

Petitioners will be able to submit a proposed order by the end of the day tomorrow. Will that work?

Respectfully,
Shiloh

From: Eakin, Dan <dan.eakin@mt.gov>
Sent: Thursday, January 27, 2022 2:52 PM
To: kanderson@brownfirm.com; Shiloh Hernandez <shernandez@earthjustice.org>; djohnson <djohnson@meic.org>; wmorris@fastmail.net; amy@cplawmt.com; rsullivan@mcgarveylaw.com; vamarquis@hollandhart.com; jcmartin@hollandhart.com; sryemington@hollandhart.com; rsterup@brownfirm.com; joshua.frank@bakerbotts.com; nicholas.whitaker@mt.gov
Cc: ktorbeck@mcgarveylaw.com; Chrissy Pepino <cpepino@earthjustice.org>; catherine.armstrong2@mt.gov
Subject: RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Hello all,

The Court is ready to address Talen Montana LLC's Motion to Intervene as proposed Respondent. We have a proposed Order from Talen, but the Court would also like one from the Petitioners.

Would the Petitioners please be able to submit a proposed Order in Word format as soon as possible? We would greatly appreciate it.

Thank you,

Dan Eakin
Law Clerk for Hon. Katherine M. Bidegaray
Seventh Judicial District Court, Dept. 2
300 12th Avenue NW, Suite 2
Sidney, MT 59270
406-433-4023

From: Kelly Anderson <KAnderson@brownfirm.com>
Sent: Monday, November 15, 2021 9:33 AM
To: Eakin, Dan <Dan.Eakin@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>
Subject: [EXTERNAL] RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Good morning, per you request, attached are the Word versions of proposed Orders. Thank you.

Kelly Anderson
Paralegal
Brown Law Firm, P.C.
315 North 24th Street
P.O. Drawer 849
Billings, MT 59103-0849
Phone (406) 248-2611
Fax (406) 248-3128
email kanderson@brownfirm.com

From: Eakin, Dan <Dan.Eakin@mt.gov>
Sent: Friday, November 12, 2021 4:27 PM
To: Kelly Anderson <KAnderson@brownfirm.com>
Subject: RE: Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Thank you for the email, Kelly. Would it be possible to please email Judge Bidegaray and I the two proposed orders in Word format?

Have a good weekend,

Dan Eakin
Law Clerk for Hon. Katherine M. Bidegaray
Seventh Judicial District Court, Dept. 2
300 12th Avenue NW, Suite 2
Sidney, MT 59270
406-433-4023

From: Kelly Anderson <KAnderson@brownfirm.com>
Sent: Friday, November 12, 2021 4:04 PM
To: Eakin, Dan <Dan.Eakin@mt.gov>; Ball, Elizabeth <lball@mt.gov>; Bidegaray, Katherine <kbidegaray@mt.gov>; shernandez@earthjustice.org; djohnson@meic.org; wmorris@fastmail.net; amy@cplawmt.com; rsullivan@mcgarveylaw.com; vamarquis@hollandhart.com; jcmartin@hollandhart.com; sryemington@hollandhart.com; Whitaker, Nicholas <Nicholas.Whitaker@mt.gov>
Cc: Robert Sterup <RSterup@brownfirm.com>; joshua.frank@bakerbotts.com

Subject: [EXTERNAL] Montana Environmental Information Center and Sierra Club v. MT Dept of DEQ, et al. and Talen Montana, LLC proposed Respondent-Intervenor

Good afternoon, attached are the following being filed in Rosebud County in the referenced matter:

Talen Montana LLC's Motion to Intervene as Respondent and for Expedited Consideration;
Memorandum in Support of Motion to Intervene as Respondent;
Declaration of Shannon Brown;
Corporate Disclosure Statement by Proposed Respondent-Intervenor Talen Montana, LLC;
Proposed Order Setting Briefing Schedule Regarding Motion to Intervene;
Proposed Order Granting Talen Montana, LLC's Motion to Intervene.

Thank you.

Kelly Anderson
Paralegal
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315 North 24th Street
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Billings, MT 59103-0849
Phone (406) 248-2611
Fax (406) 248-3128
email kanderson@brownfirm.com

ATTACHMENT 6

Katherine M. Bidegaray
Seventh Judicial District
Court Department No. 2
300 12th Ave. NW, Suite #2
Sidney, Montana 59270
(406) 433-5939

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT,
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRACLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANABOARD OF ENVIRONMENTAL REVIEW,and WESTERN ENERGY CO., Respondents.	Cause No.: DV-19-34 **[Petitioners' Proposed]** **ORDER RE INTERVENTION**

I. INTRODUCTION

Pending before the Court is a motion to intervene in the instant action filed on November 12, 2021, by Talen Montana LLC ("Talen") the operator and minority-owner of the Colstrip Power Plant. Talen asserts that it is entitled to intervene as a matter of right pursuant to Rule 24(a), M.R.Civ.P. In the alternative, Talen contends it satisfies the requirements for permissive intervention under Rule 24(b), M.R.Civ.P. According to Talen, it moves to intervene to protect its "narrow interest" in avoiding "immediate vacatur" of the AM4 Permit at the Rosebud Strip Mine, a concern that it contends materialized for the first time in Respondents' pending motions filed November 5, 2021, and November 8, 2021, which consist of a motion from the Respondent Montana Department of Environmental Quality ("MDEQ") for a stay of this Court's October 28, 2021 Order and a request for clarification of the Order, and a motion from Intervenor-Respondent Westmoreland Rosebud Mining, LLC ("WRM") on remedy and for a stay pending appeal. Talen's motion is opposed by Petitioners, the Montana Environmental Information Center and Sierra Club (together "Conservation Groups"). The above filings are accompanied by declarations, referenced below.

II. FACTUAL BACKGROUND

A. The Rosebud Strip Mine and Colstrip Power Plant

Talen is the operator and owner of a 15% interest in the Colstrip Power Plant. Brown Decl. ¶ 6 (Nov. 12, 2021) (Talen owns 30% of one of the two remaining units (Unit 3) at the plant). The majority owners of the plant are seeking to close the coal plant by 2025. Resp. to Mots. on Remedy, Ex. 2, ¶¶ 17-18 (Nov. 22, 2021) (Declaration of David Schlissel). Electricity from the coal plant is one of the most expensive sources of energy for Montana ratepayers. Resp. to Mots. on Remedy, Ex. 1, ¶ 10 (Nov. 22, 2021) (Declaration of Anne Hedges).

The adjacent Rosebud Strip Mine is the sole source of coal for the Colstrip Power Plant. Brown Decl. ¶ 10. The strip-mine has four active coal mining areas, Schlissel Decl. ¶ 9, covering approximately 30,000 acres. BER:95, Ex. DEQ-1A at 3-2. The AM4 Area at issue covers only 300 acres[1] and contains only 10% of the strip-mine's coal reserves and approximately 30% of current coal production. Schlissel Decl. ¶ 9; WRM Br. in Supp. of Mot. on Remedy, Ex. A, ¶ 4 (Nov. 8, 2021) (Declaration of Russell Batie). Consequently, all parties agree that any temporary cessation of mining in the AM4 Area will not stop mining in the other three active mine areas, which together constitute 70% of the mine's current

[1] BER:95, Ex. DEQ-1 at 1. WRM has already strip-mined over 100 acres of AM4. Van Oort Decl. ¶ 13.

production. Schlissel Decl. ¶ 9; Batie Decl. ¶ 4. Much, but not all, of the coal in the other mine areas is of lower quality, containing higher levels of ash, sodium, and mercury, which could, in turn, cause violations of air pollution standards at the power plant. Batie Decl. ¶¶ 4, 7.

WRM could move its dragline and other equipment in the AM4 Area to other permitted coal reserves in two to four months. Batie Decl. ¶ 6; BER:95. Ex. DEQ-1A at 3-2 (describing operations). During the interim period, mining would continue in the three other active mine areas. Schlissel Decl. ¶ 9. In addition, WRM and Talen each have a one-month supply of coal stockpiled. Brown Decl. ¶ 12; Batie Decl. ¶ 6. This stockpiled coal is enough on its own to supply one of the two units at the Colstrip Plant for four months. Schlissel ¶ 19.

The Colstrip Power Plant often shuts down one of the two units for multiple months in the spring or fall "shoulder" season when regional energy demand decreases. Schlissel Decl. ¶¶ 7, 11-14. During the spring, abundant regional hydroelectric and inexpensive solar photovoltaic ("PV") electricity are available. Schlissel Decl. ¶¶ 12-14. Accordingly, as happened in the spring and fall shoulder seasons in 2020 and 2021, one of the two units at the Colstrip Plant can shut down for months without affecting the availability or price of regional electricity supplies. Schlissel Decl. ¶¶ 7-10, 19.

B. Prior Proceedings

As Talen notes in its memorandum, this action is a challenge to DEQ's approval of the AM4 Permit for the Rosebud Strip Mine, which "has been the subject of litigation before the [BER] and this Court for years." Talen Memo. in Supp. of Mot. to Intervene at 2 (Nov. 12, 2021) [hereinafter, "Talen Memo"].

DEQ approved the AM4 permit in December 2015. BER:95, Ex. DEQ-1 at cover page. In January 2016 the Conservation Groups requested a contested case before BER to challenge the permit, asserting that DEQ's "approval of the AM4 Amendment was in error." BER:1 at 1.

BER assigned the case to a hearing examiner, who issued a scheduling order, which required "[a]ll motions for intervention … be served by February 15, 2016." BER:13 at 1. Talen did not file a motion to intervene by February 15, 2016.

The hearing examiner's scheduling order set a schedule for discovery. BER:13 at 1. Following discovery, in June 2016, Conservation Groups moved for summary judgment, requesting BER to "enter summary judgment in favor of Petitioners, *vacate the Department's decision*, and remand the matter." BER:15 at 80 (emphasis added).

BER denied summary judgment, and the contested case went to a trial-type hearing in 2018. Following the four-day hearing, in July 2018, Conservation Groups filed proposed findings and conclusions. BER:123. The proposed findings

asked BER to conclude that DEQ's "cumulative hydrologic impact assessment and approval of the AM4 Amendment of the Area B Permit were unlawful and therefore are *SET ASIDE*." BER:123 at 53 (emphasis added). In May 2019, after the hearing examiner issued proposed findings and conclusions, Conservation Groups filed objections again requesting that BER "*vacate* DEQ's unlawful approval of the AM4 Amendment and remand the matter to DEQ." BER:141 at 55 (emphasis added).

In June 2019 BER issued its final order affirming the AM4 Permit. BER:152 at 85-86. In July 2019 the Conservation Groups filed their petition for judicial review, initiating this action. Pet. for Rev. (July 10, 2019). Judicial review of a contested case is equivalent to an appeal from a trial. *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996) ("[A] petition for judicial review to the district court is analogous to an appeal…."). This Court issued a scheduling order in December 2019. Scheduling Or. (Dec. 9, 2019). Talen did not seek to intervene. The Conservation Groups, DEQ, and WRM filed merits briefs. In December 2020 this Court heard oral argument and on October 28, 2021, issued its Order on Petition, overturning BER's approval of the AM4 Permit and remanding the matter to DEQ.

Following this Court's ruling, on November 8, 2021, WRM filed a motion on remedy, arguing that this Court should not vacate the AM4 Permit. WRM Br. in

Supp. of Mot. on Remedy at 5. On November 12, 2021, Talen moved to intervene, asserting a "specific and significant interest … in opposing a blanket and immediate vacatur of the AM4 permit or an immediate cessation of AM4 mining operations." Talen Memo. at 3. Talen clarified that its "narrow interest" was limited to avoiding "immediate vacatur of the WRM AM4 permit." *Id.* at 9.

On November 22, 2021, the Conservation Groups filed their response to WRM's motion, explaining that to obviate WRM's asserted concerns about impacts to electricity supplies and in an abundance of caution, they did *not* request immediate vacatur. Pet'rs' Combined Resp. at 10-13, 24 (Nov. 22, 2021). Instead, the Conservation Groups requested that this Court defer vacatur approximately four months until April 1, 2022, when, due to reduced electricity demands, one of the power plant units often shuts down. *Id.* at 10-13, 24.

Talen did not file a reply brief in support of intervention. On January 28, 2022 this Court issued its Order on Remedy and Stay.

III. LEGAL STANDARDS

A party may seek intervention of right in an action if the party "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties

adequately represent that interest." Mont. R. Civ. P. 24(a)(2). To meet this requirement, an applicant for intervention has the burden of satisfying four critera:

> (1) the application must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) the applicant must show that protection of his interest may be impaired by the disposition of the action; and (4) the applicant must show that his interest is not adequately represented by an existing party.

Enz v. Raelund, 2018 MT 134, ¶ 57, 391 Mont. 406, 419 P.3d 674.

Permissive intervention is available to a party with a "claim or defense that shares with the main action a common question of law or fact." Mont. R. Civ. P. 24(b)(1)(B).

"Whether intervention is sought as a matter of right under Rule 24(a) or by permission under Rule 24(b), timeliness is a threshold issue." *In re Adoption of C.C.L.B.*, 2001 MT 66, ¶ 22, 305 Mont. 22, 22 P.3d 646. Further, while the standard for intervention is generally construed liberally, *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶ 7, 308 Mont. 189, 40 P.3d 400, the standard is much more stringent once a merits ruling has been issued: "absent extraordinary and unusual circumstances, intervention, by a party who did not participate in the litigation giving rise to the judgment … should not be permitted." *N.L.R.B. v. Shurtenda Steaks, Inc.*, 424 F.2d 192, 194 (10th Cir. 1970); *In re Adoption of C.C.L.B.*, ¶¶ 24, 28 (noting "general rule disfavoring postjudgment interevention").

The standard is even more demanding when an applicant seeks to intervene on appeal. 7C Wright & Miller, Federal Practice and Procedure § 1916 (3d ed. Apr. 2021 update) ("There is even more reason to deny an application to intervene made while appeal is pending or after the judgment has been affirmed on appeal."); *see also, e.g.*, *Pub. Serv. Co. of New Mexico v. Barboan*, 857 F.3d 1101, 1113 (10th Cir. 2017) ("Though we usually take a liberal view of Rule 24(a), when an applicant has not sought intervention in the district court, we permit it on appeal 'only in an exceptional case for imperative reasons.'" (quoting *Elliot Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005))).

IV. DISCUSSION

A. Intervention of Right

Motions to intervene after a judgment or on appeal are disfavored and only permitted in exceptional cases. *In re Adoption of C.C.L.B.*, ¶¶ 24, 28; *Pub. Serv. Co. of New Mexico*, 857 F.3d at 1113. In Montana, as elsewhere, motions to intervene following a merits ruling are typically denied. *In re Adoption of C.C.L.B.*, ¶¶ 28, 43; *Connell*, ¶ 23; *Goodover v. Lindey's, Inc.*, 232 Mont. 302, 313, 757 P.2d 1290, 1297 (1988); *In re Marriage of Glass*, 215 Mont. 248, 253, 697 P.2d 96, 99 (1985); 7C Wright & Miller, Federal Practice and Procedure § 1916 ("There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the

applicant. Motions for intervention after judgment ordinarily fail to meet this exacting standard and are denied."). As the Montana Supreme Court has explained, "The notion that one may waive a right by inaction is far from novel in this jurisdiction." *Archer*, 174 Mont. at 434, 571 P.2d at 382.

1. **Timeliness**

The Montana Supreme Court has repeatedly affirmed denial of intervention of parties that have slept on their rights:

> We have held a motion to intervene is untimely when filed 16 months after the initiation of a personal injury action; four and one half months after notice of the original complaint was given; two and one half years after becoming aware of a promissory note at issue; and three years after filing suit.

Connell v. State Dep't of Soc. & Rehab. Servs., 2003 MT 361, ¶ 22, 319 Mont. 69, 81 P.3d 1279 (internal citations omitted) (citing *Estate of Schwenke v. Becktold*, 252 Mont. 127, 132, 827 P.2d 808, 811 (1992); *Cont'l Ins. Co. v. Bottomly*, 233 Mont. 277, 280, 760 P.2d 73, 75 (1988); *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982); *Archer v. LaMarch Creek Ranch*, 174 Mont. 429, 433, 571 P.2d 379, 382 (1977)).

One critical consideration is whether the party seeking late intervention could have sought intervention at an earlier time. *In re Adoption of C.C.L.B.*, ¶ 28 (finding post-judgment intervention untimely where applicants "waited an additional six months before attempting to protect their interests"); *accord Connell*,

¶ 23 (applicant's representative admitted he "was aware" of district court decision "yet waited another three years to intervene"); *Estate of Schwenke*, 252 Mont. at 132, 827 P.2d at 811 (applicant "was aware of the litigation for more than one year" but "did nothing until one week before trial"); *Grenfell*, 198 Mont. at 95, 643 P.2d at 1187 (applicant had "actual notice" of case but waited "four and one-half months" to move to intervene).

Under any of the above-referenced yardsticks, Talen's motion to intervene is demonstrably untimely. As Talen itself acknowledges, this litigation has stretched on "for years." Talen Memo. at 2. Notably, Talen failed to seek intervention before BER within the time limits established by the hearing examiner. BER:13 at 1 (setting intervention deadline of "February 15, 2016"). In fact, Talen failed entirely to avail itself of the administrative process during the contested case. Mont. Code Ann. § 2-4-702(1)(a) (party must present issues at administrative level before raising them on judicial review). That Talen delayed further—until the appeal from BER and then *after* the merits ruling on judicial review before this Court—only further emphasizes Talen's failure to seek timely intervention. *Hilands Golf Club*, 277 Mont. at 331, 922 P.2d at 474 (judicial review of contested case analogous to appeal); *Pub. Serv. Co. of New Mexico*, 857 F.3d at 1113 (intervention on appeal limited to "exceptional" circumstances).

Objectively, Talen's nearly six-year delay is substantially longer than delays found by the Montana Supreme Court to be excessive. *See Connell*, ¶ 22. Subjectively, as the operator and minority owner of the Colstrip Plant, Brown Decl. ¶ 6, Talen cannot credibly contend that it did not have notice of this litigation, which, as the company itself explains, is related to the "*sole* source of coal" for the power plant. Talen Memo. at 3 (emphasis in original).[2] Under the maxims of jurisprudence, a party that knows of litigation but sleeps on its rights is not entitled to intervene. Mont. Code Ann. § 1-3-218; *In re Adoption of C.C.L.B.*, ¶ 28; *Connell*, ¶ 23; *Estate of Schwenke*, 252 Mont. at 132, 827 P.2d at 811; *Grenfell*, 198 Mont. at 95, 643 P.2d at 1187; *Archer*, 174 Mont. at 434, 571 P.2d at 382.

Talen attempts to justify its substantial delay on the basis that (1) no prior briefing raised "immediate vacatur" as an issue; and (2) WRM's motion on remedies had "identif[ied] vacatur … as a potential issue." Talen Memo. at 9-10. The record, however, indicates that Talen is mistaken on both counts. First, the Conservation Groups requested vacatur of the AM4 Permit in their briefing before BER on at least three occasions, including as early as June 2016. BER:15 at 80; BER:123 at 53; BER:141 at 55. Second, Talen's contention that it only became

[2] Talen avoids disclosing when it first knew of this litigation.

aware of vacatur as a "potential issue" after seeing WRM's remedies brief is a stretch. As a sophisticated corporate entity, Talen had notice that "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288 (collecting cases). The "potential" for vacatur of an unlawful permit should come as no surprise. Moreover, WRM's brief did not, in fact, seek vacatur, but *opposed* any vacatur. WRM Br. in Supp. of Mot. on Remedy at 5. It is unclear to the Court how a brief opposing vacatur suddenly caused Talen's "narrow interest" in avoiding "immediate vacatur" to "ripen[]." Talen Memo. at 9-10.

Finally, the Court does not find that the cases cited by Talen support intervention here. The delay in *JAS, Inc. v. Eisele*, 2014 MT 77, ¶ 27, 374 Mont. 312, 321 P.3d 113—only "slightly more than five months after the complaint was filed"—is not comparable to the nearly six-year delay of Talen here. Of further note, in *JAS, Inc.*, the plaintiff had obtained a default judgment, which is "not favored," and no substantive litigation had occurred beyond the filing of the complaint and the default judgment. *Id.*, ¶¶ 12-13, 19. In contrast, this case has been actively litigated at length, through discovery, motions, trial, a BER ruling, appeal to this Court for judicial review, and a ruling on the merits from this Court.

In *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 1, 21, 33-35, 356 Mont. 41, 230 P.3d 808, a district court allowed the developer of a challenged subdivision to intervene following a decision reversing the governing body's approval of a subdivision plat. In upholding this decision, the Montana Supreme Court noted that the developer's intervention was prompted by the governing body's decision not to pursue an appeal, which meant the developer's "interests [were] … no longer adequately represented." *Id.*, ¶ 35. Here, by contrast, Talen's asserted "narrow interest" in avoiding "immediate vacatur" is represented by WRM, which has already filed a petition for supervisory control and has represented that intends to file an appeal as soon as possible. Moreover, as discussed below, *no party* is seeking "immediate vacatur." And in its Order on Remedy and Stay the Court has deferred vacatur of the AM4 permit until April 1, 2022. Order at 23.

In sum, this Court determines that Talen's motion—filed nearly six years after the intervention deadline established by BER—is untimely, which warrants denial.

2. Talen's "narrow interest" in avoiding "immediate vacatur"

An applicant for intervention "must make a prima facie showing of a direct, substantial, legally-protectable interest in the proceedings." *In re Adoption of*

C.C.L.B., ¶ 16. Moreover, the applicant must further demonstrate that "protection of his interest may be impaired by the disposition of the action." *Enz*, ¶ 57.

Talen does not meet either requirement. Talen's identified "narrow interest" is in avoiding "immediate vacatur" of the AM4 Permit. Talen Memo. at 9; *see also id.* at 11, 14-15 (repeating interest in avoiding permit being "immediately vacated" and mining in the AM4 Area "ordered to cease immediately"). No party, however, seeks "immediate vacatur" of the AM4 Permit. WRM Br. in Supp. of Mot. on Remedy at 5 (WRM opposing immediate vacatur); Pet'rs' Combined Resp. at 10-13, 24 (Conservation Groups requesting Court to defer vacatur until April 1, 2022). And as noted, in its Order on Remedy and Stay the Court has deferred vacatur of the AM4 permit until April 1, 2022. Consequently, Talen's asserted direct, substantial, or legally-protectable interest is not in danger of impairment in this action. *See, e.g., United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 598-99 (D. Colo. 2008) (denying intervention of right to intervene in case where no "pending motion or proceeding before th[e] court" threatened the asserted interest).

Any more generalized interest of Talen has, as an initial matter, been waived by the company's failure to intervene in the time allotted by BER. *See Archer*, 174 Mont. at 434, 571 P.2d at 382; BER:13 at 1. Indeed, Talen's decision to wait nearly six years to seek intervention belies any assertion of a direct and substantial

interest. Moreover, the Conservation Groups' request for deferred vacatur allays any more generalized concerns about WRM's supply of coal to the Colstrip Power Plant. The AM4 Area provides only a small amount (30%) of the strip-mine's coal, and the majority of the coal (70%) comes from three other permit areas that are not affected by this action. Schlissel Decl. ¶ 9; Batie Decl. ¶ 4. In addition, existing coal stockpiles at the mine and power plant are sufficient to supply both units of the power plant for two months or one unit for four months. Brown Decl. ¶ 12; Batie Decl. ¶ 6; Schlissel Decl. ¶ 19. WRM can move its strip-mining equipment to other permitted coal supplies in two to four months. Batie Decl. ¶ 6. It is, thus, highly unlikely that coal supplies to the power plant will be disrupted if vacatur is deferred for four months, until April 1, 2022. Schlissel Decl. ¶¶ 9-10, 19. Talen's statements about "keeping the lights on" (Talen Memo. at 16) appear exaggerated and, in any event, lose their force in light of the request for and Order granting deferred vacatur—one of the units of the power plant is routinely shut down in spring, when cleaner, less expensive energy makes coal power from both units unnecessary. Schlissel Decl. ¶¶ 7-19.

In sum, Talen's late-asserted interest in intervening in this action seeking to intervene for the purpose of opposing "immediate vacatur"—which no party has requested—does not satisfy Rule 24(a)(2).

3. **Adequate representation by an existing party**

It is the burden of the applicant for intervention to demonstrate that its purported interest is not adequately represented by existing parties. *Enz*, ¶ 57; *State ex rel. Palmer v. Dist. Ct. of Ninth Jud. Dist.*, 190 Mont. 185, 189-90, 619 P.2d 1201, 1204 (1980); *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). Here, Talen's purported interest in avoiding "immediate vacatur" (discussed above) is identical to that of WRM. Notably, WRM has already argued that this Court should not immediately vacate the AM4 Permit, WRM Br. in Supp. of Mot. on Remedy at 5, which is precisely the "narrow interest" proffered by Talen. Talen Memo. at 9, 14-15.

Any more generalized interest of Talen in assuring coal supply from the mine to the power plant appears indistinguishable from that of WRM. Talen admits that WRM is required by contract to supply coal to the power plant. Talen Memo. at 7. As such, WRM has a legal duty to fulfill Talen's asserted interest, which WRM is vigorously defending. In this circumstance, WRM adequately represents the interests of Talen. *See State ex rel. Palmer*, 190 Mont. at 189-90, 619 P.2d at 1204 (finding that representative of estate could adequately represent interest of heir because of legal duty); *City of Stilwell, Okla.*, 79 F.3d at 1042-43 (finding that electrical generation and distribution coop was adequately represented by member organization in takings challenge where coop and member organization had

identical objectives—to prevent condemnation of transmission lines—albeit distinct motivations).

While Talen summarily states in one sentence, Talen Memo at 17, without support or elaboration, that "potential harms to WRM" are "distinct" from potential harm to Talen, that is not enough. *E.g.*, *City of Stilwell*, 79 F.3d at 1042-43. There is no question that WRM and Talen have the identical *interest* in assuring continued coal supply to the power plant. Batie Decl. ¶ 5; Talen Memo. at 7.

In short, Talen has failed to carry its burden, as the applicant for intervention, to demonstrate that its purported interest is not adequately represented by an existing party. *Enz*, ¶ 57.

B. Permissive Intervention

As noted, "timeliness is a threshold issue" for permissive intervention as well as for intervention of right. *In re Adoption of C.C.L.B.*, ¶ 22. As discussed above, Talen's late move to intervene follows nearly six years of litigation and merits rulings by BER and this Court, which render the motion untimely. As such, Talen motion for permissive intervention is likewise denied. *In re Adoption of C.C.L.B.*, ¶ 43. To rule otherwise would be contrary to both Rule 24 and Rule 1, which mandates that the civil rules be "construed and administered to secure the

just, speedy, and inexpensive determination of every action and proceeding." Rule 1, Mont. R. Civ.

V. CONCLUSION

Talen has waited almost six years to seek intervention in this litigation, and following a merits ruling by BER and a merits ruling on appeal by this Court. Under any standard, that is too long. Further, Talen's asserted "narrow interest" in avoiding "immediate vacatur" is neither present nor threatened in this action, where no party has sought immediate vacatur. As noted, in its Order on Remedy and Stay, the Court has deferred vacatur of the AM4 permit until April 1, 2022. To the degree Talen has a general interest in assuring continued coal supply to the power plant, that interest is adequately represented by WRM, which has demonstrated its ability to zealously defend its operation.

Accordingly, for the above-stated reasons, it is hereby **Ordered:**

Talen's motion to intervene of right or with permission is denied.

Dated this ____ day of January 2022.

_____

Hon. Katherine M. Bidegaray
District Court Judge

cc: Derf Johnson/Shiloh Hernandez/Walt Morris/Roger Sullivan
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Nicholas A. Whitaker/Jeremiah Langston
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CERTIFICATE OF SERVICE

I, Robert L. Sterup, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 02-17-2022:

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