

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30068837 BY RC RESOURCES INC.)))	FINAL ORDER GRANTING MOTION TO DISMISS AND GRANTING APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30068837 WITH CONDITIONS
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Pursuant to the provisions of §§ 85-2-309 through 311, MCA (the Water Use Act); § 2-4-601, *et. seq.*, MCA (the contested case provisions of the Montana Administrative Procedure Act); and Admin. R. Mont. 36.12.201, *et. seq.*, this matter comes on as a contested case before the Department of Natural Resources and Conservation (Department). The purpose of the contested case is to resolve objections to Application for Beneficial Water Use Permit No. 76N 30068837 by RC Resources, Inc., for which the Department issued a Preliminary Determination to Grant pursuant to § 85-2-307, MCA, on June 22, 2016. This Final Order must be read in conjunction with the Preliminary Determination to Grant (PD) which is hereby incorporated by reference.

BACKGROUND

The Preliminary Determination to Grant Application No. 76N-30068837 (PD) was issued by the Department on June 22, 2016, and published notice of that determination on July 5, 2016, in The Western News and in the Sanders County Ledger on July 7, 2016. The Department also provided notice to interested individuals on July 5, 2016. The deadline for objections to be filed was September 2, 2016. The Application received five valid objections. The USDA Forest Service objected on the criteria of possessory interest (§ 85-2-311(1)(e), MCA. The Clark Fork Coalition, Earthworks Inc., Rock Creek Alliance, and Montana Environmental Information Center all filed identical objections on the criteria of legal availability and possessory interest (§ 85-2-311(1)(a)(ii) and (e)). All four of the later objectors are represented by Earthjustice in this matter and will collectively be referred to in the Order as “Earthjustice.”

Through a series of telephonic pre-hearing conference calls, the parties agreed to continue this matter and that they would attempt settlement of the possessory interest issue

through stipulation and that the issue of legal availability should first be addressed through a 'motion to dismiss' or 'summary judgment' and briefs in support or opposition. (Audio PHC's 11/10/16, 12/22/16, 02/02/17, 04/18/17, and 06/06/17)

At the June 6, 2017 pre-hearing conference call it was agreed that the parties shall file by June 30, 2017, their proposed stipulations regarding possessory interest and a proposed briefing schedule regarding the criteria of legal availability or a status report.

On June 17, 2017, USDA Forest Service, through counsel Jody Miller, filed a "Stipulation and Agreement" between the Forest Service and RC Resources in which the Forest Service agrees to a conditional withdrawal of their objection if certain language in the stipulation is incorporated into any grant of the Application.

On June 29, 2017, Earthjustice, through counsel Katherine K. O'Brien and Timothy J. Preso, filed a "Status Report" in which they anticipate a final stipulation regarding their clients' possessory interest objection, and a jointly proposed briefing schedule regarding the legal availability objection(s).

On July 11, 2017, this Hearing Examiner issued an Order in which states:

The conditional objection withdrawal states that if the Hearing Examiner incorporates the terms of Agreement No. 5 of the Stipulation and Agreement into any state water permit issued for Application No. 76N-30068837, the USDA objection in this matter will be deemed withdrawn. The Hearing Examiner has accepted the condition as stated in the Stipulation and Agreement and the USDA is no longer required to participate in this proceeding, and their objection to Application No. 76N-30068837 will be dismissed upon entry of a Final Order in this matter.

That Order also gave Earthjustice until July 28, 2017 to file a final stipulation regarding possessory interest or a status report by the same date.

The July 11, 2017 Order also accepted the jointly proposed briefing schedule as follows:

August 18, 2017: RC Resources' Motion to Dismiss

September 22, 2017: Conservation Organizations' (Earthjustice) Response in Opposition to Motion to Dismiss

October 13, 2017: RC Resources' Reply in Support of Motion to Dismiss

On July 28, 2017, Earthjustice filed a "Stipulation and Agreement" in which the Conservation Organizations agree to a conditional withdrawal of their possessory interest

objection(s) if certain language in the stipulation, which is substantially the same language as the Forest Service stipulation, is incorporated into any grant of the Application.

On August 18, 2017, RC Resources filed a “Motion to Dismiss Objections, or Alternatively Motion for Partial Summary Judgment.” On September 22, 2017, Earthjustice filed a “Response in Opposition to Motion to Dismiss Objections or for Partial Summary Judgment.” On October 13, 2017, RC Resources filed a “Reply Brief Concerning Motion to Dismiss Objections or for Partial Summary Judgment.”

In addition, on October 27, 2017, Earthjustice filed a “Motion for Leave to File Surreply” and “Surreply in Opposition to Motion to Dismiss or for Partial Summary Judgment” and on November 6, 2017, RC Resources filed a “Brief in Opposing Objectors’ Motion for Leave to File Surreply. This Hearing Examiner did not rely on the Surreply in this matter and filing of a Surreply was not anticipated by this Hearing Examiner, therefore “Motion for Leave to File Surreply” is deemed denied.

APPEARANCES

Holly Jo Franz and Ryan McLane appeared as counsel for Applicant RC Resources Inc.

Katherine K. O’Brien and Timothy J. Preso from Earthjustice appeared as counsel for Objectors Clark Fork Coalition, Earthworks Inc., Rock Creek Alliance, and Montana Environmental Center.

Jody Miller, USDA Office of General Counsel, appear as counsel for U.S. Department of Agriculture, Forest Service.

ISSUES

Only two issues were initially presented by the Objectors in this matter – the issue of possessory interest and the issue of legal availability.

Possessory Interest

FINDINGS OF FACT

1. The PD relies on the Applicants signature of the affidavit on the application form affirming that the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (PD, ARM 36.12.1802)

2. USDA Forest Service objected to the possessory interest criteria based upon the Applicant having not yet “. . . obtain[ed] Forest Service authorization for mining operations within a National Forest.” The Forest Service also objected on the grounds that the Applicant does not have Plan of Operations approved by the Forest Service because the Environmental Impact Statement for this proposed mine is not yet final and no Record of Decision has been signed. (FS Objection)

3. Earthjustice objected to the possessory interest criteria for the same reason to wit: “The Applicant Lacks the Requisite Federal Authorization for its Proposed Diversion and Use of Water” (Earthjustice Objection Exhibit B, III)

4. Both the Forest Service and Earthjustice filed separate but essentially identical “Stipulation[s] and Agreement[s]” in which they agree to withdraw their respective possessory interest objections if the DNRC:

a. Includes in its Final Order for Application No. 76N-30068837 the following statement:

THIS WATER USE PERMIT IS SUBJECT TO TWO PRIVATE “STIPULATIONS AND AGREEMENTS” ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE AND JULY, 2017, AND WHICH ARE ATTACHED AS EXHIBITS A AND B OF THIS FINAL ORDER.

b. Attaches [these] Stipulation[s] and Agreement[s] to its Final Order for Application No. 76N-30068837.

c. Includes on the abstract of water use permit for any permit issued for Application No. 76N-30068837 the following statement:

THIS PERMIT IS SUBJECT TO TWO PRIVATE “STIPULATION[S] AND AGREEMENT[S]” ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE AND JULY, 2017, WHICH ARE ATTACHED AS EXHIBITS A AND B OF THE FINAL ORDER FOR APPLICATION NO. 76N-30068837.

(Stipulations and Agreements)

CONCLUSIONS OF LAW

5. Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default. (2-4-603, MCA)

6. The terms of a stipulation entered between parties as a private contractual agreement are not binding on the Department. At the Department's discretion, the terms of a stipulation may be included as a condition to a permit upon determination that the terms of the stipulation are consistent with and necessary to satisfy the applicable statutory criteria. (§ 85-2-310(4), MCA; ARM 36.12.207)

7. Mont. Code Ann. 85-2-311(1)(e) provides that the applicant must prove by a preponderance of the evidence that:

the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use or traverse national forest system land for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution under the permit. (emphasis provided)

8. This Hearing Examiner finds and concludes that the Applicant and Objectors have agreed to a private agreement including stipulation that are enforceable between the parties. Those stipulations are attached. The permit will include an issue remark indicating that the parties entered into a stipulated agreement as described above. Because the PD found possessory interest, and objections to possessory interest have been withdrawn pursuant to stipulation, the PD's findings and conclusions regarding possessory interest are adopted. (FOF 1-4)

Legal Availability

ARGUMENTS OF THE PARTIES

9. Conclusion of Law 8, above, resolves the Forest Service objection in its entirety and leaves only Earthjustice's objection related to legal availability as the sole issue to be resolved through this contested case.

10. RC Resources and Earthjustice agree that the remaining legal availability issue may be resolved through a summary judgment type proceeding. At the November 10, 2016, pre-hearing conference, Earthjustice suggested that "resolution [of the legal availability issue] through summary judgement proceedings" may be a possibility. At subsequent pre-hearing conferences the possibility of summary judgment or a Mont. R. Civil Proc. 12(b)(6) type of

resolution. Ultimately, as stated above, a briefing schedule was proposed and accepted and briefs on the issue were submitted. (PHC audio 11/10/16; 12/22/16/ 2/2/17; 6/6/17)

11. Earthjustice's original objection filing included arguments that the Application cannot be granted because the criteria of §§ 85-2-311(1)(a)(ii) and 85-2-311(1)(g), MCA, could not be met. Those two sections refer respectively to the legal availability of water and to "the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1) [MCA]." The original objection filing received a deficiency letter from the Department on September 26, 2016, that determined, *inter alia*, that "[a]s provided in 85-2-311(2), MCA, only the Department of Environmental Quality or a local water quality district . . . may file a valid objection for the criteria set forth in 85-2-311(1)(g), MCA. Therefore, Earthjustice's 85-2-311(1)(g) objection was deemed invalid. (Objection, Deficiency Letter)

12. ARM 17.30.617(1) provides "[a]ll state surface waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995, are outstanding resource waters (ORWs). []." See § 75-5-103(25). ARM 17.30.705(2)(c) provides "[f]or outstanding resource waters, no degradation is allowed and no permanent change in the quality of outstanding resource waters resulting from a new or increased point source discharge is allowed." ARM 17.30.715(1)(a) provides that insignificant changes in water quality include "activities that would increase or decrease the mean monthly flow of a surface water by less than 15 percent or the seven-day ten-year low flow by less than 10 percent."

13. Earthjustice's legal availability argument is premised on the reasoning that "the reduction of water flow associated with the Applicant's appropriation would violate the legal demands governing surface waters within the impact area by dewatering outstanding resource waters." Earthjustice asserts that Applicant's own modeling shows that certain waters in the Cabinet Mountains Wilderness would experience reductions in stream flow greater than the "insignificant levels" found in ARM 17.30.715(1)(a). Therefore, water is not legally available for appropriation. In essence Earthjustice's argument is that ARM 17.30.715(1)(a) creates a "legal demand" on the source of supply. (Objection, Objectors brief)

14. While the question of whether the Applicant's modeling shows there will be a reduction in streamflow that exceeds the ARM 17.30.715(1)(a) threshold is a question of fact, the parties agree that a purely legal question arises as to whether ARM 17.30.715(1)(a) creates a "legal demand" under § 85-2-311(1)(a)(ii). "The Hearing Examiner may decide the purely legal

question presented concerning the scope of legal availability inquiry under § 85-1-311(1)(a)(ii) based solely on [Earthjustice's] objection and attached exhibits" (Earthjustice Brief @ p.6). "The Hearing Office is posed with the simple legal question: May an objector simply reframe a Section 311(1)(g) water quality objection as a Section 311((1)(a)(ii) legal availability objection . . ." (RC Resources Reply Brief @ p.3).

15. RC Resources' brief on legal availability is titled "Motion to Dismiss *Objections*, or Alternatively Motion for Partial Summary Judgment." Its brief concludes that "RC Resources is entitled, as a matter of law, to dismissal of the objections of [Earthjustice]." Whether stylized as a "summary judgement" proceeding or a "M.R.C.P. 12(b)(6)" proceedings, the both RC Resources and Earthjustice have agreed that this issue can be resolved as a matter of law. (RC Resources Brief; Earthjustice Brief)

16. RC Resources argues that Earthjustice is now ". . . attempting to convert their invalid water quality objection into an, ostensibly, valid 'legal availability' objection brought under Section 311(1)(a)(ii)." RC Resources points to Earthjustice's September 1, 2016 objection and compares the language of their (ultimately denied) water quality objection with the language of their legal availability objection concluding that their "invalid water quality objection brought under Section 311(1)(g) are exactly the same objections as the water quality arguments they now raise as a "legal availability" objection under Section 311(1)(a)(ii)." RC Resources assert that "[Earthjustice's] argument rests upon an interpretation of the statute which ignores the plain language of Section 311(1)(g) and Section 311(2)." RC Resources asserts that the plain language of Section 311(2) ("only the department of environmental quality or a local water quality district . . . may file a valid objection" [based upon Section 311(1)(g)]) means that "RC Resources is not required to address objections based on the water quality requirement of non-degradation, because there is no valid Section 311(1)(g) objection." (RC Resources Brief)

17. RC Resources also argues that "'legal demands' . . . means other water rights on the claimed source and is not a general statutory recognition of every other law or regulation which may affect the source water." RC Resources asserts that the Department has interpreted legal demands to be other water rights and the Department's own rules imply that legal demands means other water rights or reservations of water. See, ARM 36.12.1704(1) (legal demands . . . may be affected by a proposed water right application, including prior appropriations and water reservations. These existing legal demands [are senior and] must not be adversely affected).

See also, ARM 36.12.1704(1)(a) and § 85-2-363(3), MCA (referring to quantities of water). RC Resources asserts that past practices of the Department have consistently used existing water rights as the measure of legal demands. (RC Resources Brief)

18. Earthjustice argues that “legal demands” means something more than only “water rights” or “other appropriations of water on the source” and that “regulatory limits on dewatering . . . impose a legal demand on the source of supply. . .” Earthjustice focuses on the fact that the legislature uses “legal demands” and “water rights” separately in Section 311 and therefore “it is reasonable to presume that the Legislature meant something different in using the term “legal demands” rather than “water rights in § 85-2-311(1)(a)(ii).” Earthjustice asserts that if “legal demands” are only other water rights and “an applicant must demonstrate – in addition to establishing legal availability- [under § 85-2-311(1)(b)] that “the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation not be affected” renders the legal demands inquiry “entirely duplicative of its inquiry concerning impact on existing water rights, rendering the legal demands inquiry superfluous.” (Earthjustice Brief)

19. Earthjustice further argues that their objection is not a water quality objection but rather a water quantity objection rooted in the Water Quality Act. Earthjustice asserts that the relevant legal demands include the restrictions on dewatering Outstanding Resource Waters established through § 75-5-315, ARM 17.30.705(2)(c) and ARM 17.30.715(1)(a). Earthjustice interprets § 85-2-311(1)(g) as a water classification objection and characterizes their use of the restrictions imposed under the Water Quality Act as a legal demands objection. Earthjustice concludes by stating “RC Resources’ arguments seek to choke off any avenue for the public to object to its proposed appropriation based on evidence that the appropriation will cause unlawful dewatering of Outstanding Resource Waters.” (Earthjustice Brief)

CONCLUSIONS OF LAW

20. A Department Hearing Examiner is vested with the authority to rule on motions presented during a contested case proceeding. ARM 36.12.203 (consistent with law, the hearing examiner *shall* perform the following duties: (b) hear and rule on motions (emphasis provided)). Department rules contemplate that summary judgment type motions are included in those duties. ARM 36.12.213 (all written motion other than *motions for summary judgement*

shall contain a statement . . . (emphasis provided)). It is appropriate under the instant circumstances to treat the legal availability issue as a M.R.C.P. 12(b)(6) motion because extrinsic evidence outside the objection or briefs is not required. *See Meagher v. Butte-Silver Bow City-Cty.*, 2007 MT 129 ¶ 13, 337 Mont. 339, 342, 160 P.3d 552, 556.

21. By focusing only on the phrase “legal demands” in Section 311(1)(a), Earthjustice ignores the express legislative intent that water quality objections under Section 311(1)(g) can only be raised by the DEQ or a water quality district. Statutes must be “read and interpret[ed] . . . as a whole, without isolating specific terms from the context in which they are used by the Legislature.” *Worldwide Holdings, Inc. v. CH SP Acquisition LLC*, 2015 MT 225, ¶21, 380 Mont. 215, 219, 355 P.3d 724, 727. Even if one assumes, for argument’s sake, that “legal demands” should be based upon more than the sum of other water rights, Earthjustice’s interpretation still has to be rejected for purposes of water quality objections because such an interpretation renders § 85-2-311(2) superfluous. Earthjustice’s attempt to maintain a water quality objection through the Section 311(1)(a)(ii) [legal demand criteria] elevates a general statutory provision over a specific statutory provision and renders the limits of the water quality criteria set forth in Sections 311(1)(f-h) and (2) meaningless. *Oster v. Valley Cty.*, 206 MT 180, ¶17, 333 Mont. 76, 81, 140 P.3d 1079, 1082-83 (holding that more specific statutes prevail over general provisions of law); *Montana Trout Unlimited v. DNRC*, 2006 MT 72, 23, 331 Mont. 483, 133 P.3d 224 (statutory construction must avoid an interpretation that renders any section of the statute superfluous or fails to give effect to all of the words used).

22. Earthjustice argues that because Section (1)(a)(ii)(B) uses the term “legal demands” whereas Section (1)(b) uses the terms “water rights”, “legal demands” must be interpreted to include more than “water rights”. Otherwise, Earthjustice argues “DNRC’s inquiry into ‘legal demands’ *entirely* duplic[ates] its inquiry concerning [adverse effects].” (emphasis provided). While there may be some duplication in the determination of legal availability and adverse effect, Earthjustice’s characterization is not persuasive and fails to recognize important distinctions between the Department’s analyses of legal availability and adverse effect. Because physical availability is based upon a “mean of the median” flow in a source, there may be water “legally available” (physical availability exceeds legal demands) on a source at times, yet a new appropriation may still result in an adverse effect. For example, if during drought periods the “mean of the median” flow level is not met, there may be an adverse effect due to a new or

junior user. It is for that reason that the “adverse effect” criteria is “determined based on consideration of an applicant’s plan for the exercise of the permit that demonstrates that the applicant’s use of the water will be controlled so the water right of a prior appropriator will be satisfied.” § 85-2-311(1)(b), MCA.

23. Both Earthjustice and RC Resources appear to regard § 85-2-311(1)(g) as an objection to the *classification* of waters under the Water Quality Act. Both are wrong. § 85-2-311(1)(g) reads in its entirety “the proposed use will be *substantially in accordance* with the classification of water set forth for the source of supply pursuant to 75-5-301(1)” (emphasis provided). The Water Use Act cannot alter the classification of water under the Water Quality Act – it can only determine if a new appropriation of water is *substantially in accordance* with the Water Quality Act. Only the DEQ or a local water quality district may file a valid objection to determine if a new appropriation will or will not be “*substantially in accordance* with the classification of water set forth [in the Water Quality Act]. § 85-2-311(2).

24. It is a well-accepted rule of statutory construction that the long and continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement should be regarded with a great importance in arriving at the proper construction of a statute when interpretation of that statute has been called into doubt. *Montana Power Co. v. Montana Pub. Serv. Comm’n*, 2001 MT 102, ¶25, 305 Mont. 260, 265-66, 26 P.3d 91, 94 (quoting *Bartels v. Miles City*, 145 Mont. 116, 122, 399 P.2d 768, 771 (Mont. 1965)). An agency’s interpretation of a statute should be upheld where it is reasonable and best effectuates the statute’s purpose. *Baitis v. Department of Revenue*, 2004 MT 17, ¶¶ 22-24, 319 Mont. 292, 83 P.3d 1278, and; *Juro's United Drug v. DPHHS*, 2004 MT 17, ¶9, 321 Mont. 167, ¶9, 90 P.3d 388, ¶9.

25. Here, the Department’s long-standing practice of determining legal availability by comparing physical availability to the existing water rights on a source is well established: “The actual needs of valid water rights are what is needed for Applicant to determine existing legal demands.” *In the Matter of the Application for Beneficial Water Use Permit Number 76LJ-11583100 by Benjamin L. & Laura M. Weidling*, DNRC Proposal for Decision (2002), (adopted by DNRC Final Order (2003)). See also, *In the Matter of the Application for Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC*, DNRC Proposal for Decision (2006), (adopted by DNRC Final Order (2006)). Moreover, this interpretation is

consistent with primary purpose of the MWUA's permitting process, which is to protect *senior water right holders* from encroachment by junior appropriators. Montana Power Co. v. Carey, 211 Mont. 91, 97-98, 685 P.2d 336, 340 (1984).

26. Earthjustice's attempt to bootstrap the criteria of § 85-2-311(1)(g) onto the criteria of § 85-2-311(1)(a)(ii) fails because it is contrary to the Legislature's clear directive that only the DEQ or a local water quality district can file a valid objection regarding whether a new appropriation is in accordance with the classification of water under the Water Quality Act and is contrary to DNRC's long-standing practice of determining legal demands as other water rights on the source of supply.

ORDER

Objectors U.S. Department of Agriculture, Forest Service; Clark Fork Coalition, Earthworks Inc., Rock Creek Alliance, and Montana Environmental Center objections regarding possessory interest (§ 85-2-311(1)(e), MCA) are deemed **WITHDRAWN**.

Objectors Clark Fork Coalition, Earthworks Inc., Rock Creek Alliance, and Montana Environmental Center § 85-2-311(1)(a)(ii) objection regarding legal availability (§ 85-2-311(1)(a)(ii), MCA) is **DISMISSED**.

Application for Beneficial Water Use Permit No. 76N-30068837 by RC Resources Inc. is **GRANTED** as determined by the Preliminary Determination to Grant Permit No. 76N-30068837 subject to the conditions contained therein and the following conditions:

THIS WATER USE PERMIT IS SUBJECT TO TWO PRIVATE "STIPULATIONS AND AGREEMENTS" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTHS OF JUNE AND JULY, 2017, AND WHICH ARE ATTACHED AS EXHIBITS A AND B OF THIS FINAL ORDER.

The Stipulation[s] and Agreement[s] are attached as Exhibits A and B to this Final Order for Application No. 76N-30068837.

The Department shall include on the abstract of the water use permit issued for Application No. 76N-30068837 the following statement:

THIS PERMIT IS SUBJECT TO TWO PRIVATE "STIPULATION[S] AND AGREEMENT[S]" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE AND JULY, 2017, WHICH ARE ATTACHED AS EXHIBITS A AND B OF THE FINAL ORDER FOR APPLICATION NO. 76N-30068837.

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 29th day of January 2018.

/Original signed by David A. Vogler/
David A. Vogler, Hearing Examiner
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and Conservation
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 29th day of January 2018 by first class United States mail.

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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT
NO. 76N-30068837 BY RC RESOURCES, INC.

STIPULATION
AND
AGREEMENT

This Stipulation and Agreement is for the purpose of resolving the objection by the United States of America, Department of Agriculture, Forest Service ("Forest Service") to water use permit Application No. 76N-30068837 by RC Resources, Inc. ("RC Resources") for a water use permit for diversion and beneficial use of groundwater for mining purposes on National Forest System lands. This Stipulation and Agreement is entered into by the Forest Service (by and through Christopher S. Savage, Forest Supervisor of the Kootenai National Forest, and Associate Regional Attorney Jody M. Miller) and by RC Resources (by its attorney Holly Franz and its Luther J. Russell, President). This Stipulation and Agreement replaces in its entirety the Stipulation these same parties executed in this matter in February of 2017 and filed with the Montana Department of Natural Resources and Conservation on or about February 27, 2017.

RECITALS

1. RC Resources filed an application for diversion and beneficial use of groundwater for mining purposes on June 11, 2015. RC Resources would use the water at the proposed Rock Creek mine, located in part on land within the boundary of the Kootenai National Forest, in Sanders County, Montana. The permit would be for a maximum volume of

857.00 acre feet of water per year for use on lands located in Sections 10, 21, 27, and 28, Township 26 North, Range 32 West, Sanders County. The Montana Department of Natural Resources and Conservation (DNRC) assigned number 76N-30068837 to the application.

2. The Forest Service filed an objection to Application No. 76N-30068837, asserting that RC Resources has not met the statutory criteria of showing a possessory interest in the property where the water is to be put to beneficial use, that the new appropriation permit may be inconsistent with the terms, conditions, and limitations of any future Forest Service authorization that is required prior to the initiation of mining, and that issuing the permit at this time violates the sequencing principle of the Forest Service/Montana Compact, causing unnecessary confusion as to what happens when the appropriation permit and Forest Service authorization sanction different terms of water use.
3. The DNRC deemed the Forest Service's objection valid and the matter was set on a hearings docket before DNRC Hearings Examiner David A. Vogler.
4. The parties wish to settle the Forest Service's objection without resorting to a hearing before the DNRC, or other forum or court.

AGREEMENTS

In consideration of the mutual covenants and conditions listed below, the parties agree and stipulate as follows:

1. When the Forest Service issues a written determination stating that the Rock Creek mining operation has ended and all mitigation and reclamation measures have been met and are complete, RC Resources will withdraw any water use permit that the DNRC issues for Application No. 76N-30068837 and ask the DNRC to terminate the permit.
2. RC Resources' water use for the Rock Creek Mine under any water use permit that DNRC issues for Application No. 76N-30068837 is subject to any terms, conditions and limitations related to the use of water contained in the Forest Service's Record of Decision and Plan of Operations for the Rock Creek Mine, including any future modifications to those Forest Service authorizations.
3. RC Resources will not change the elements of any water use permit the DNRC issues for Application No. 76N-30068837 or move the points of diversion and places of use unless the changes are in compliance with the terms, conditions and limitations of the Forest Service Plan of Operation for the Rock Creek Mine.
4. RC Resources will not sell or market any water use permit the DNRC issues for Application No. 76N-330068837 for use other than at the Rock Creek Mine located in Sanders County, Montana.

5. The Forest Service's objection to water use permit Application No. 76N-30068837 shall be deemed withdrawn if the DNRC:

- a. Includes in its Final Order for Application No. 76N-30068837 the following statement:

THIS WATER USE PERMIT IS SUBJECT TO A PRIVATE "STIPULATION AND AGREEMENT" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE, 2017, AND WHICH IS ATTACHED AS EXHIBIT A OF THIS FINAL ORDER.

and

- b. Attaches this Stipulation and Agreement to its Final Order for Application No. 76N-30068837.

and

- c. Includes on the abstract of water use permit for any permit issued for Application No. 76N-30068837 the following statement:

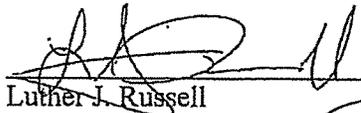
THIS PERMIT IS SUBJECT TO A PRIVATE "STIPULATION AND AGREEMENT" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE, 2017, WHICH IS ATTACHED AS EXHIBIT A OF THE FINAL ORDER FOR APPLICATION NO. 76N-30068837.

6. The terms of this Stipulation and Agreement and any water use permit that DNRC issues for RC Resources' Application No. 76N-30068837 set no precedent for other applications for new appropriations of water or changes of appropriation involving water diversion, impoundment, storage, transportation, withdrawal, use or distribution on National Forest System lands.
7. This Stipulation and Agreement is entered into by way of compromise and settlement of the Forest Service objection and shall not be construed as a concurrence by these parties beyond the resolution of that objection.
8. This Stipulation and Agreement is the compromise of a disputed water use application and is not to be construed as an admission against the interests of either party.
9. The terms of this Stipulation and Agreement are binding on the parties, their successors, and assigns.
10. Either party may seek enforcement of the terms of this Stipulation and Agreement in a court of competent jurisdiction or, if appropriate, before the DNRC.

11. Each party agrees to bear its own costs and attorney fees arising from the negotiation and execution of this Stipulation and Agreement in proceedings before the DNRC in this matter.
12. Each undersigned party entered into and executed this Stipulation and Agreement voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.
13. This Stipulation and Agreement may be executed by the parties in counterparts, each of which when executed and filed with the DNRC shall be an original, but all of which together shall constitute one instrument.

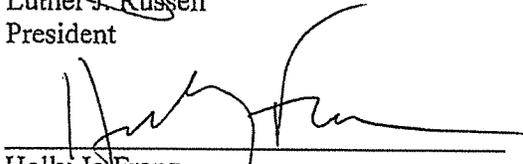
RC RESOURCES, INC.

Applicant



Luther J. Russell
President

6-9-17
Date



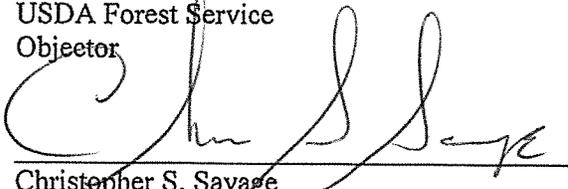
Holly Jo Franz
Attorney for RC Resources, Inc.

6-13-17
Date

UNITED STATES OF AMERICA

USDA Forest Service

Objector



Christopher S. Savage
Forest Supervisor
Kootenai National Forest

6/14/2017
Date



Jody M. Miller
Attorney for Objector

6-14-17
Date

Received by DNRC Hearings Unit
Postmark <u>7/28/17</u>
Fax/E-Mail _____
Hearing Examiner <u>OV</u>

Katherine K. O'Brien
 Timothy J. Preso
 Earthjustice
 313 East Main Street
 Bozeman, Montana 59715
 Phone: (406) 586-9699
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 kobrien@earthjustice.org
 tpreso@earthjustice.org

*Counsel for Objectors Clark Fork Coalition,
 Rock Creek Alliance, Earthworks, and
 Montana Environmental Information Center*

**BEFORE THE DEPARTMENT OF
 NATURAL RESOURCES AND CONSERVATION
 OF THE STATE OF MONTANA**

<p>IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 76N-30068837 BY RC RESOURCES, INC.</p>	<p align="center">STIPULATION AND AGREEMENT</p>
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This Stipulation and Agreement is for the purpose of resolving that portion of the objection by Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (collectively, the "Conservation Organizations") to water use permit application no. 76N-30068837 asserting that applicant RC Resources, Inc., lacks the requisite possessory interest in the proposed place of use (the "possessory interest objection"). This Stipulation and Agreement is entered into by Clark Fork Coalition, Rock Creek Alliance, Earthworks, Montana Environmental Information Center, and RC Resources.

RECITALS

1. RC Resources filed an application for diversion and beneficial use of groundwater for mining purposes on June 11, 2015. RC Resources would use the water at the proposed Rock Creek mine, located in part on land within the boundary of the Kootenai National Forest, in Sanders County, Montana. The permit would be for a maximum volume of 857.00 acre feet of water per year for use on lands located in Sections 10, 21, 27, and 28, Township 26 North, Range 32 West, Sanders County. The Montana Department of

Natural Resources and Conservation (DNRC) assigned number 76N-30068837 to the application.

2. The Conservation Organizations filed objections to application no. 76N-30068837 asserting, inter alia, that (1) RC Resources has not met the statutory criteria of showing a possessory interest in the property where the water is to be put to beneficial use because RC Resources does not possess the requisite federal authorization to use national forest lands for its proposed diversion and use of water, and (2) RC Resources has not met the statutory criteria of showing that the quantity of water it proposes to appropriate is legally available.
3. The DNRC deemed the Conservation Organizations' possessory interest and legal availability objections valid and the matter was set on a hearings docket before DNRC Hearings Examiner David A. Vogler.
4. The parties wish to settle the Conservation Organizations' possessory interest objection without resorting to a hearing before the DNRC, or other forum or court. This Stipulation does not address or affect the Conservation Organizations' pending legal availability objection.

AGREEMENTS

In consideration of the mutual covenants and conditions listed below, the parties agree and stipulate as follows:

1. When the Forest Service issues a written determination stating that the Rock Creek mining operation has ended and all mitigation and reclamation measures have been met and are complete, RC Resources will withdraw any water use permit that the DNRC issues for Application No. 76N-30068837 and ask the DNRC to terminate the permit.
2. RC Resources' water use for the Rock Creek Mine under any water use permit that DNRC issues for Application No. 76N-30068837 is subject to any terms, conditions and limitations related to the use of water contained in the Forest Service's Record of Decision and Plan of Operations for the Rock Creek Mine, including any future modifications to those Forest Service authorizations.
3. RC Resources will not change the elements of any water use permit the DNRC issues for Application No. 76N-30068837 or move the points of diversion and places of use unless the changes are in compliance with the terms, conditions and limitations of the Forest Service Plan of Operations for the Rock Creek Mine.
4. RC Resources will not sell or market any water use permit the DNRC issues for Application No. 76N-30068837 for use other than at the Rock Creek Mine located in Sanders County, Montana.

5. The Conservation Organizations' possessory interest objection to water use permit Application No. 76N-30068837 shall be deemed withdrawn if the DNRC:

- a. Includes in its Final Order for Application No. 76N-30068837 the following statement:

THIS WATER USE PERMIT IS SUBJECT TO TWO PRIVATE "STIPULATIONS AND AGREEMENTS" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE AND JULY, 2017, AND WHICH ARE ATTACHED AS EXHIBITS A AND B OF THIS FINAL ORDER.

and

- b. Attaches this Stipulation and Agreement to its Final Order for Application No. 76N-30068837.

and

- c. Includes on the abstract of water use permit for any permit issued for Application No. 76N-30068837 the following statement:

THIS PERMIT IS SUBJECT TO TWO PRIVATE "STIPULATIONS AND AGREEMENTS" ENTERED INTO BY THE PARTIES AND FILED WITH THE DEPARTMENT IN THE MONTH OF JUNE AND JULY, 2017, WHICH ARE ATTACHED AS EXHIBITS A AND B OF THE FINAL ORDER FOR APPLICATION NO. 76N-30068837.

6. The terms of this Stipulation and Agreement and any water use permit that DNRC issues for RC Resources' Application No. 76N-30068837 set no precedent for other applications for new appropriations of water or changes of appropriation involving water diversion, impoundment, storage, transportation, withdrawal, use or distribution on National Forest System lands.
7. This Stipulation and Agreement is entered into by way of compromise and settlement of the Conservation Organizations' possessory interest objection to water use permit application no. 76N-30068837 and shall not be construed as a concurrence by these parties beyond the resolution of that objection.
8. This Stipulation and Agreement is the compromise of a disputed water use application and is not to be construed as an admission against the interests of either party, including but not limited to any admission regarding the Conservation Organizations' objection asserting RC Resources has not met the statutory criteria of showing that the quantity of water it proposes to appropriate is legally available.

**STIPULATION and AGREEMENT – RC Resources, Inc. and Conservation Organizations
Water Use Application No. 76N-30068837**

July 2017 -- Page 3 of 5

9. The terms of this Stipulation and Agreement are binding on the parties, their successors, and assigns.
10. Either party may seek enforcement of the terms of this Stipulation and Agreement in a court of competent jurisdiction or, if appropriate, before the DNRC.
11. Each party agrees to bear its own costs and attorney fees arising from the negotiation and execution of this Stipulation and Agreement in proceedings before the DNRC concerning the Conservation Organizations' possessory interest objection to permit application no. 76N-30068837.
12. Each undersigned party entered into and executed this Stipulation and Agreement voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.
13. This Stipulation and Agreement may be executed by the parties in counterparts, each of which when executed and filed with the DNRC shall be an original, but all of which together shall constitute one instrument.

RC RESOURCES, INC.

Applicant



Luther J. Russell
President

7-24-17
Date



Holly Jo Franz
Attorney for RC Resources, Inc.

7-26-17
Date

CLARK FORK COALITION

Objector

Karen Knudsen, Executive Director

Date

ROCK CREEK ALLIANCE

Objector

Mary Crowe Costello, Executive Director

Date

EARTHWORKS

Objector

Bonnie Gestring, Northwest Circuit Rider

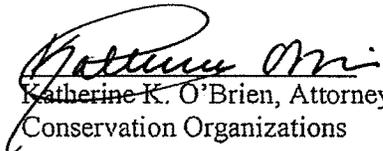
Date

MONTANA ENVIRONMENTAL INFORMATION CENTER

Objector

Jim Jensen, Executive Director

Date


Katherine K. O'Brien, Attorney for
Conservation Organizations

7/28/2017
Date

9. The terms of this Stipulation and Agreement are binding on the parties, their successors, and assigns.
10. Either party may seek enforcement of the terms of this Stipulation and Agreement in a court of competent jurisdiction or, if appropriate, before the DNRC.
11. Each party agrees to bear its own costs and attorney fees arising from the negotiation and execution of this Stipulation and Agreement in proceedings before the DNRC concerning the Conservation Organizations' possessory interest objection to permit application no. 76N-30068837.
12. Each undersigned party entered into and executed this Stipulation and Agreement voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence, whatsoever.
13. This Stipulation and Agreement may be executed by the parties in counterparts, each of which when executed and filed with the DNRC shall be an original, but all of which together shall constitute one instrument.

RC RESOURCES, INC.

Applicant

Luther J. Russell
President

Date

Holly Jo Franz
Attorney for RC Resources, Inc.

Date

CLARK FORK COALITION



July 25, 2017

Karen Knudsen, Executive Director

Date

ROCK CREEK ALLIANCE

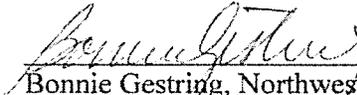
Objector

Mary Crowe Costello, Executive Director

Date

EARTHWORKS

Objector



Bonnie Gestring, Northwest Circuit Rider

7/27/2017

Date

MONTANA ENVIRONMENTAL INFORMATION CENTER

Objector

Jim Jensen, Executive Director

Date

Katherine K. O'Brien, Attorney for
Conservation Organizations

Date

ROCK CREEK ALLIANCE

Objector

Mary Crowe Costello
Mary Crowe Costello, Executive Director

7/25/17
Date

EARTHWORKS

Objector

Bonnie Gestring, Northwest Circuit Rider

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Jim Jensen, Executive Director

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Jim Jensen, Executive Director

7-24-17
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Katherine K. O'Brien, Attorney for
Conservation Organizations

Date