

Office of Administrative Hearings
Department of Natural Resources and Conservation
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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 NOS.)
41J-30116562 AND 41J-30116563 BY) **FINAL ORDER**
TINTINA MONTANA INC.)

On February 23, 2022, I granted a motion for partial summary judgment filed by Applicant Tintina Montana, Inc. (Applicant) and denied a competing motion for partial summary judgment filed by Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers (Conservation Objectors). In doing so, I held that Applicant had satisfied its burden under § 85-2-311, MCA, regarding the criterion of beneficial use for Application for Beneficial Water Use Permit No. 41J-30116562. On May 3, 2022, Applicant and Conservation Objectors (collectively the Settling Parties) filed a Joint Notice of Stipulation and Motion for Entry of Final Judgment (Stipulation) for both Application 41J-30116562 and Application for Beneficial Water Use Permit No. 41J-30116563 (Applications). For the reasons set forth below, I now GRANT that motion and enter this Final Order, which must be read in conjunction with the Preliminary Determinations to Grant (PDGs) issued by the Department of Natural Resources and Conservation (DNRC) for the Applications. Those PDGs are incorporated herein by reference.¹

1. On April 1, 2020, a day prior to the issuance of public notice, DNRC issued a Notice of Errata to correct an error in the PDG for Application 41J-30116563 regarding the places of use for the mitigation water sought in that application. That Notice of Errata is also incorporated herein by reference.

BACKGROUND AND PROCEDURAL HISTORY

The Applications are part of a suite of permit and change applications filed by Applicant in conjunction with its effort to develop an underground copper mine known as the Black Butte Project (Project). Application 41J-30116562 PDG at 3-4. In Application 41J-30116562, Applicant proposes to appropriate groundwater from an aquifer in the Newland Formation of the Belt Supergroup at a rate of 1.11 cubic feet per second (CFS) up to a volume of 350 acre-feet per year (AFY) for Industrial purposes at the mine works. *Id.* at 4. In Application 41J-30116563, Applicant proposes to capture high spring flows from Sheep Creek at a flow rate of 7.5 CFS to store up to 291.9 AFY in an off-stream reservoir and to use the water for mitigation and wetland maintenance purposes. Application 41J-30116563 PDG at 3.

The Project is located in the Sheep Creek drainage of Basin 41J (Smith River), which is a subbasin of the Upper Missouri River, a river basin provisionally closed to new appropriations under Montana law. Section 85-2-343, MCA. Pursuant to that statute, DNRC may issue a permit for a new groundwater use in such a subbasin if, *inter alia*, it finds that the applicant has prepared a hydrogeologic report assessing the effects of the proposed groundwater appropriation on hydrologically connected surface sources and, if that report shows there will be a net depletion of surface water, a mitigation plan capable of offsetting the effects of net depletion of the new appropriation on existing surface water users. Sections 85-2-360, -362, MCA. In issuing the PDGs, DNRC concluded that Applicant satisfied these requirements, and conditioned the PDGs on Applicant's compliance with its proposed mitigation plan. Application 41J-30116562 PDG at 24, 44-45; Application 41J-30116563 PDG at 25, 37-38.

On March 13, 2020, DNRC issued PDGs for the Applications, which were then put out for public notice. Conservation Objectors timely filed valid objections raising the issues of legal availability and adverse effect as to both Applications, the issue of beneficial use in regard to Application 41J-30116562, and the issues of physical availability and adequacy of the proposed means of diversion or diversion works in regard to Application 41J-30116563. Pursuant to a pre-hearing motions schedule I set, the Settling Parties timely filed and briefed competing motions for partial summary judgment on the issue of beneficial use for Application 41J-30116562. On February 23, 2022, I granted Applicant's motion and denied Conservation Objectors' motion for the reasons set forth in my Order of that date. On March 14, 2022, a day before a status conference I had set to discuss the orderly resolution of this case, the Settling Parties filed a status report advising me that Conservation Objectors wished to appeal my ruling on the partial

summary judgment motions and that the Settling Parties desired to engage in negotiations to resolve Conservation Objectors' remaining issues to allow that appeal to proceed expeditiously. After discussion at the status conference of March 15, 2022, I set a series of deadlines intended to allow the Settling Parties an opportunity to conduct their discussions while keeping the hearing process on track. On May 3, 2022, the Settling Parties filed the Stipulation.²

LEGAL STANDARD

Under Montana law, an applicant for a new beneficial water use permit always retains the burden of proof to show by a preponderance of the evidence that the applicable criteria of § 85-2-311(1), MCA, are satisfied before DNRC may issue the applicant a new beneficial use permit. *Bostwick Properties v. DNRC*, 2013 MT 48, ¶ 18, 369 Mont. 150, 296 P.3d 1154.³ Consequently, in connection with the Applications, Applicant must show that:

- 1) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;
- 2) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested;
- 3) the water rights of a prior appropriator will not be adversely affected by the proposed new use;
- 4) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- 5) the proposed use of water is a beneficial use; and
- 6) 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.

Section 85-2-311(1)(a)-(e), MCA. Pursuant to § 85-2-307(2)(a)(ii), MCA, DNRC's PDGs reflects DNRC's preliminary determination that Applicant has proven those criteria for each of the

2. The Conservation Objectors are the only parties who filed valid objections to the Applications. There are two other parties who filed valid objections to one or more of the change applications that are part of the package of applications associated with the Project. In their motion, the Settling Parties represent that these other objectors do not oppose the entry of this Final Order as requested in the motion.

3. A permit applicant need only demonstrate that the criteria of § 85-2-311(1)(f)-(h), MCA, are satisfied if a valid objection raising those grounds is filed. Section 85-2-311(2), MCA. Those criteria are not at issue in this case.

Applications by the requisite standard. The issuance of DNRC's PDGs proposing to grant the Applications, however, does not relieve Applicant of its obligation to prove that the applicable criteria are satisfied.

DISCUSSION

In their filing of May 3, 2022, the Settling Parties recognize that my Order of February 23, 2022, resolved the question of Applicant's satisfaction of the beneficial use criterion for Application 41J-30116562. In the Stipulation, which is attached as Exhibit A to this Final Order, the Settling Parties recite that the remainder of Conservation Objectors' objections will be resolved and deemed withdrawn if I include a negotiated condition as part of a grant of Application 41J-30116563. This condition is based on Applicant's agreement in the Stipulation to take several steps regarding the measurement and use of water in connection with the Applications. Specifically, the Settling Parties represent that Applicant agrees to install or cause to be installed, prior to the initiation of surface water diversions or groundwater pumping pursuant to the Applications, real-time stream gages at the following locations:

- 1) on Sheep Creek at the location of the former USGS gaging station;
- 2) on Sheep Creek at the bridge on Strawberry Butte Road;
- 3) on Sheep Creek downstream of the confluence of Moose Creek and Sheep Creek, or on both Sheep Creek and Moose Creek above their confluence at a precise location to be determined depending on who ultimately assumes responsibility for the installation. Stipulation at 3-4. Applicant further agrees to be responsible for ensuring the public availability of the real-time data recorded by these gaging stations. *Id.* at 4. Applicant also agrees to "track the daily diverted volumes for water diverted into and out of the [reservoir associated with Application 41J-30116563,]" to make that data "available to the public through Sandfire Resource America's Black Butte Copper Project website[,]" and to update that data "on a monthly basis." *Id.* Applicant finally agrees to "provide year-round mitigation of the total modeled net depletion of Black Butte Creek, which is calculated to be 45 gpm." *Id.*

In light of these commitments, the Settling Parties agree that Conservation Objectors' remaining objections will be resolved if I include the following language as a condition on the grant to Application 41J-30116563:

THE APPROPRIATOR SHALL NOT COMMENCE DIVERSIONS OF WATER
UNLESS THE CUMULATIVE FLOW IN SHEEP CREEK AND MOOSE CREEK

ARE 88.4 CFS OR GREATER. DIVERSIONS OF WATER MUST CEASE IF THE CUMULATIVE FLOW IN SHEEP CREEK DOWNSTREAM OF MOOSE CREEK FALL BELOW 84.9 CFS. THE APPROPRIATOR SHALL EITHER ESTABLISH A SINGLE STREAM GAGE IN SHEEP CREEK BELOW THE CONFLUENCE WITH MOOSE CREEK LOCATED IN THE NWNWSE SECTION 18, T12N, R7E; OR STREAM GAGES IN EACH CREEK ABOVE THE CONFLUENCE. IF STREAM GAGES ARE TO BE ESTABLISHED IN BOTH SHEEP CREEK AND MOOSE CREEK ABOVE THE CONFLUENCE, THE STREAM GAGE IN SHEEP CREEK SHALL BE LOCATED IN THE NWSWSW SECTION 18, T12N, R7E; AND THE STREAM GAGE IN MOOSE CREEK SHALL BE LOCATED IN THE S2SWNE SECTION 13, T12N, R6E. STREAM FLOWS AT THE REFERENCED GAGES MUST BE CHECKED DAILY TO ENSURE CONDITIONS ARE APPROPRIATE FOR DIVERSIONS.

Pursuant to ARM 36.12.207, the terms of a settlement agreement or stipulation are not binding on DNRC. ARM 36.12.207(1). I may, however, include the terms of a stipulation or settlement agreement if I conclude that any such conditions are “consistent with and necessary to satisfy the statutory criteria.” ARM 36.12.207(2). Because of the good faith dispute between the Settling Parties over the question of adverse effect, and because the measurement of water and the provision of mitigation are directly related to Applicant’s effort to prove that criterion, I find that the Settling Parties’ proposed condition comports with the requirements of ARM 36.12.207(2). Consequently, I hereby add that condition to the grant of Application 41J-30116563. And, pursuant to the terms of the Settlement Agreement, I hereby deem Conservation Objectors’ objections to the Applications withdrawn.⁴ DNRC is directed to include a copy of Exhibit A in its file for Application 41J-30116563.

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4. To be clear, this determination is not intended to render moot an appeal of my summary judgment ruling. Rather, it is to make clear that if Conservation Objectors are not successful in that appeal, there is no need for further administrative proceedings on the Applications and this Order will stand as final DNRC action granting the Applications.

CONCLUSION

With the condition discussed above added to the terms and conditions included in the PDG for Application 41J-30116563, Applicant has met its burden of proof to show by a preponderance of the evidence that it has satisfied all applicable criteria necessary to warrant a grant of the Applications.

FINAL ORDER

Application for Beneficial Water Use Permit No. 41J-30116562 is GRANTED as proposed in DNRC's PDG of March 13, 2020.

Application for Beneficial Water Use Permit No. 41J-30116563 is GRANTED as proposed in DNRC's PDG of March 13, 2020, as modified by the correction identified in DNRC's Notice of Errata of April 1, 2020, and with the addition of the following condition:

THE APPROPRIATOR SHALL NOT COMMENCE DIVERSIONS OF WATER UNLESS THE CUMULATIVE FLOW IN SHEEP CREEK AND MOOSE CREEK ARE 88.4 CFS OR GREATER. DIVERSIONS OF WATER MUST CEASE IF THE CUMULATIVE FLOW IN SHEEP CREEK DOWNSTREAM OF MOOSE CREEK FALL BELOW 84.9 CFS. THE APPROPRIATOR SHALL EITHER ESTABLISH A SINGLE STREAM GAGE IN SHEEP CREEK BELOW THE CONFLUENCE WITH MOOSE CREEK LOCATED IN THE NWNWSE SECTION 18, T12N, R7E; OR STREAM GAGES IN EACH CREEK ABOVE THE CONFLUENCE. IF STREAM GAGES ARE TO BE ESTABLISHED IN BOTH SHEEP CREEK AND MOOSE CREEK ABOVE THE CONFLUENCE, THE STREAM GAGE IN SHEEP CREEK SHALL BE LOCATED IN THE NWSWSW SECTION 18, T12N, R7E; AND THE STREAM GAGE IN MOOSE CREEK SHALL BE LOCATED IN THE S2SWNE SECTION 13, T12N, R6E. STREAM FLOWS AT THE REFERENCED GAGES MUST BE CHECKED DAILY TO ENSURE CONDITIONS ARE APPROPRIATE FOR DIVERSIONS.

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, MCA) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 26th day of July 2022.

/Original signed by Jay D. Weiner/
Jay D. Weiner, Hearing Examiner
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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 26th day of July 2022 by first class United States mail and/or by electronic mail (e-mail).

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