

Montana Department of Natural Resources & Conservation  
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August 31, 2016

Re: Supporting Information for Objection to Permit Application No. 76N 30068837 (RC Resources, Inc.) by Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center

## **I. INTRODUCTION**

Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (collectively, the “Conservation Groups”) hereby object to the Department of Natural Resources and Conservation’s ( “DNRC”) Preliminary Determination to Grant Permit in response to an Application for Beneficial Water Use Permit No. 76N 30068837 by RC Resources, Inc. (June 22, 2016) (“Preliminary Determination”).

The Applicant is seeking authorization to develop the Rock Creek Mine, a copper-silver mining project proposed near Noxon, Montana. The Applicant proposes to access ore deposits beneath and adjacent to the Cabinet Mountains Wilderness, which is administered by the Kootenai National Forest, and to construct mill and other facilities on National Forest lands outside the wilderness boundary. USDA Forest Service Northern Region, Kootenai Nat’l Forest, Draft Supp. Envntl. Impact Statement for the Rock Creek Project S-2 (Feb. 2016) (“Rock Creek Mine DSEIS”). The U.S. Forest Service is the federal agency with primary authority for permitting the mine.

The Conservation Groups object to DNRC’s Preliminary Determination to grant a water right for the Rock Creek Mine on the grounds that the application does not meet three of the statutory criteria for issuance of a water right permit. First, the application is premature because the Applicant does not have the requisite written special use authorization from the United States Forest Service for the proposed diversion and associated mining activities. See MCA § 85-2-311(1)(e); id. § 85-20-1401, Art. IV.B.1. Second, the Applicant cannot establish that the quantity of water it proposes to appropriate is legally available because the proposed appropriation will cause dewatering of streams designated as outstanding resource waters that is prohibited by Montana’s nondegradation policy. See id. § 85-2-311(1)(a)(ii). Third, because the proposed appropriation will result in prohibited dewatering of outstanding resource waters, the Applicant cannot establish that its proposed use will be substantially in accordance with the classification of the affected waters under the Water Quality Act. See id. § 85-2-311(1)(g). For each of these reasons, DNRC may not lawfully grant the water right application at issue.

## **II. INTERESTS OF OBJECTORS**

### **A. Clark Fork Coalition**

The Clark Fork Coalition (CFC), founded in 1985, is a non-profit river conservation organization dedicated to protecting and restoring clean water throughout the Clark Fork River

watershed. CFC works to improve and protect water quality and to restore stream flow and function in the waterways of the Clark Fork River basin. This work involves the protection of the natural ecosystems of the Clark Fork River and its tributaries, including the area impacted by the Rock Creek Mine project, particularly due to the significant reduction in flows in waters draining the Clark Fork River caused by the project's groundwater dewatering. CFC represents 2,700 members who are united in the belief that clean water is integral to the health of our rivers and our communities.

The environmental, health, aesthetic, and recreational interests of CFC's members will be adversely affected by DNRC's Proposed Determination to grant a new groundwater right permit to RC Resources for use in operations at its proposed Rock Creek Mine in the Cabinet Mountains. CFC members use the affected waterways, including the East Fork Bull River, East Fork Rock Creek and the Cabinet Mountains Wilderness lakes and streams for recreational, aesthetic, and scientific purposes. CFC members use and enjoy the waters and lands associated with the proposed project area. CFC members intend to use those lands and waters for these purposes in the future. In addition, as part of their mission to protect water quality and to restore water quantity, CFC and its members have an interest in ensuring compliance with the laws and regulations of Montana and the United States, and to insure that proper procedures are followed in issuing water right permits. CFC has a 28-year history of working to prevent damaging and irreversible impacts from mines proposed for the lower Clark Fork, and has invested heavily in stopping degradation from the proposed Rock Creek Mine. CFC's objection is made on CFC's own behalf and on behalf of its members.

## **B. Rock Creek Alliance**

The Rock Creek Alliance's ("the Alliance") mission is to protect the Clark Fork-Pend Oreille Watershed from the impacts of the Rock Creek Mine. The Alliance also works to protect and conserve aquatic and terrestrial habitat in western Montana, including the Cabinet-Yaak Ecosystem, and the Clark Fork-Pend Oreille watershed to ensure the continued viability of the threatened species of grizzly bear, bull trout, and lynx, and sensitive species of wildlife including wolverine, harlequin duck, and west-slope cutthroat trout that live there. In addition, the organization is striving to ensure protection of the 93,000-acre Cabinet Mountains Wilderness Area, one of the first ten wilderness areas designated by Congress. The Alliance has participated in nearly every stage of the environmental analysis process for the proposed mine by submitting comments, acquiring technical studies, organizing and assisting the public in attending hearings and submitting comments, and consistently communicating with the permitting state and federal agencies regarding the proposed mine. The Alliance has been a plaintiff in every case challenging federal and state authorizations and permits for the Mine.

## **C. Earthworks**

Earthworks is a non-profit conservation organization, founded in 1988, dedicated to protecting communities and the environment against the adverse effects of mineral and energy development, while promoting sustainable solutions. Earthworks has approximately 75,000 members nation-wide and its northwest office is located in Missoula, Montana.

Earthworks has a long history of working to protect the Cabinet Mountains Wilderness, wilderness rivers and streams, and associated aquatic life from the adverse effects of the proposed Rock Creek Mine. In response to litigation filed by Earthworks and its conservation partners, the federal district court in Montana vacated the record of decision for the proposed mine in May 2010 because it failed to minimize impacts to water quality and fisheries. In October 2012, Earthworks and its conservation partners won a lawsuit before the Montana Supreme Court, which found that the Montana Department of Environmental Quality's issuance of a general discharge permit for the proposed Rock Creek Mine would not sufficiently protect Rock Creek's threatened bull trout population, a resource of "unique ecological significance" under state law. In March 2015, Earthworks petitioned the U.S. Fish and Wildlife Service to use its authority under the Endangered Species Act to take a new look at the cumulative effects to threatened bull trout in light of new data on the combined effects of the proposed Rock Creek and Montanore mines on wilderness waters that provide critical bull trout habitat. In April 2016, Earthworks submitted extensive comments on the Supplemental Environmental Impact Statement for the mine's revised plan.

The Preliminary Determination to grant a new groundwater right permit to RC Resources for use in operations at its proposed Rock Creek Mine in the Cabinet Mountains will adversely affect the environmental, aesthetic and recreational interest of Earthworks and its members. Earthworks members use wilderness rivers and streams (including the East Fork Bull River, St. Paul Lake Drainage, East Fork Rock Creek, and others) for recreational and aesthetic purposes. Earthworks members intend to use those lands and waters for these purposes in the future. Earthworks objects to DNRC's decision on its own behalf and on behalf of its members.

#### **D. Montana Environmental Information Center**

The Montana Environmental Information Center ("MEIC") is a Montana non-profit, public benefit corporation dedicated, inter alia, to protecting Montana's water quality and insuring compliance with the laws and Constitution of Montana. MEIC has litigated numerous water protection cases related to metal mining. MEIC has members who live near, recreate, work, and otherwise derive benefit from the waters in the Cabinet Mountains Wilderness.

### **III. THE APPLICANT LACKS THE REQUISITE FEDERAL AUTHORIZATION FOR ITS PROPOSED DIVERSION AND USE OF WATER (OBJECTION CRITERION (A)(6))**

At the outset, DNRC may not grant the Applicant's water right application because the Applicant does not possess the requisite authorization to use national forest lands for its proposed diversion and use of water. Where, as here, "the proposed use has a point of diversion, conveyance, or place of use on national forest system lands," a water right applicant must prove that it possesses "any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water." MCA § 85-2-311(1)(e); see *id.* § 85-20-1401, Art. IV.B.1. The Water Rights Compact between the State of Montana and the Forest Service requires that the "permitting process for water appropriations under state law and the permitting for the access and use of National Forest System lands in relation to water

appropriations will be sequenced to avoid further conflict between state and federal permitting.” Id. § 85-20-1401, Art. IV.B.1(a). Further, before DNRC may find an application for a water use permit correct and complete, the applicant must prove that it has the requisite federal authorization. Id. § 85-20-1401, Art. IV.B.1(b). Because the Applicant has not obtained the necessary authorization from the Forest Service, DNRC may not issue the water right permit.

The Applicant has proposed to impound, divert, and store water at the proposed active mining areas, which are located on National Forest land. Preliminary Determination 4, ¶ 1 and Fig. 1. The water would then be transported into a closed loop water distribution system for use at the proposed mill site, concentrate dewatering facility, paste plant, tailings impoundment area and wastewater treatment plant. Id. at 5, ¶ 2. The mill site, paste plant, and wastewater treatment plant would be located on national forest lands and the tailings impoundment would be partially located on national forest lands. Id. Fig. 1. The location of the proposed concentrate dewatering facility is not depicted. See id. The water would also have to be transported across national forest lands between these locations. Id. Accordingly, “the proposed use has a point of diversion, conveyance, [and] place of use on national forest system lands,” which obligates the Applicant to obtain any authorization required by federal law to occupy, use, or traverse the affected national forest lands before it may secure a water right permit. MCA § 85-2-311(1)(e).

As the Forest Service itself stated in the Rock Creek Mine Draft Supplemental Environmental Impact Statement (DSEIS), “[f]or the Rock Creek Project, the federal authorization for occupancy and use of [national forest] lands in relation to RCR’s water appropriations would be the Forest Service’s approved Plan of Operations for the project. Any new state permit(s) for water appropriations by RCR would be subject to the terms, conditions, and limitations in the Plan of Operations relating to the use of water.” Rock Creek Mine DSEIS 3-112. However, at this time the Forest Service is still engaged in environmental review of the mine pursuant to the National Environmental Policy Act (NEPA) and has not issued a plan of operations approval. Indeed, pursuant to NEPA and Forest Service regulations, the Forest Service still must review and respond to comments on the DSEIS it released earlier this year, prepare and publish a final EIS and draft Record of Decision, address any objections filed in response to the draft Record of Decision, and issue a final Record of Decision prior to approving any final Plan of Operations. See Rock Creek Mine DSEIS S-10, 1-18. Accordingly, the Forest Service’s authorization to use national forest lands for the purpose of the Applicant’s proposed project has not been granted.

In these circumstances, the requested permit must be denied. In discussions regarding the Montanore Mine, which is planned for development on the east side of the Cabinet Mountains Wilderness and would access the same ore body as the Rock Creek Mine, DNRC has itself acknowledged that Forest Service approval of the mine’s plan of operations must precede issuance of a water right permit. See Documentation of Conference Call Meeting with DNRC, USACE KNF, DEQ, ERO Resources, Inc. – Montanore Water Rights and the Montana Reserved Water Rights Compact (June 5, 2014) (Attached as Exhibit C) (DNRC official Mark Pittman describing the sequence for granting a water right for the Montanore Mine). In their Joint Final EIS for the Montanore Mine, the Forest Service and DEQ took the same position. See USDA Forest Serv. Northern Region, Kootenai Nat’l Forest and Mont. Dept. of Evtl. Quality, Joint

Final Env'tl. Impact Statement on the Montanore Project, 689-690 (Dec. 2015) ("Montanore Mine JFEIS"). There is no legitimate basis for DNRC to adopt a different position in addressing the Rock Creek Mine project.

In sum, the U.S. Forest Service has not yet issued authorization for use of national forest lands that is essential for the Applicant's project. For this reason alone, the water right application must be denied.

**IV. DNRC CANNOT LAWFULLY ISSUE THE REQUESTED PERMIT BECAUSE THE PROPOSED APPROPRIATION WILL CAUSE PROHIBITED DEWATERING OF OUTSTANDING RESOURCE WATERS (OBJECTION CRITERIA (A)(2) AND (A)(7)(C))**

Even if the Applicant possessed the requisite Forest Service authorization for the proposed diversion and use of water, which it does not, DNRC still must deny the water right application because the proposed appropriation will have the illegal effect of degrading streams that are designated "outstanding resource waters" under Montana law. As a result, the Applicant cannot satisfy two of the statutory criteria for obtaining a water right permit. First, the Applicant cannot show that the quantity of water it proposes to appropriate is legally available under MCA § 85-2-311(1)(a)(ii). Second, the Applicant cannot show that its proposed use will be substantially in accordance with the designation of the affected streams under the Water Quality Act, as required by MCA § 85-2-311(1)(g). The Applicant is required to show it has met each of the criteria listed under MCA § 85-2-311(1) before DNRC can issue a water right, so its failure to comply with either of these prerequisites precludes DNRC from issuing a water right permit. MCA § 85-2-311.

**A. The Proposed Appropriation Will Result in Illegal Dewatering of Outstanding Resource Waters**

The three-dimensional groundwater modeling supporting the Applicant's water right application shows that the proposed appropriation will diminish flows in outstanding resource waters beyond the legally permissible threshold. Under Montana law "[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." ARM § 17.30.617(1). In the area surrounding the proposed Rock Creek Mine, segments of Rock Creek, Copper Gulch, East Fork Bull River, Chicago Creek, Moran Basin Creek, Unnamed East Fork Tributary, St. Paul Lake Drainage, and South Basin Creek are surface waters located within the boundaries of the Cabinet Mountains Wilderness Area.<sup>1</sup> See Kootenai Nat'l Forest, Land Mgmt. Plan Final Record of

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<sup>1</sup> DNRC's preliminary decision does not analyze the availability of water in or the dewatering impact on Chicago Creek, South Basin Creek, Moran Basin Creek, Unnamed East Fork Tributary, or St. Paul Lake Drainage, all of which will be unlawfully degraded by the proposed appropriation. See Exhibit D.

Decision (ROD) map (Jan. 2015)<sup>2</sup>; Rock Creek Mine SDEIS Fig. 3-15. As such, these streams are outstanding resources waters under Montana law. ARM § 17.30.617(1).

Because of their “environmental, ecological, or economic value,” these waters “must be afforded the greatest protection feasible under state law” and the state must “prohibit, to the greatest extent practicable, changes to the existing water quality of those waters.” MCA § 75-5-315(1). Accordingly, for outstanding resource waters “no degradation is allowed.” ARM § 17.30.705(2)(c).

Under the Water Quality Act, “degradation” includes “activities that would increase or decrease the mean monthly flow of a surface water by [more than or equal to] 15 percent or the seven-day ten-year low flow by [more than or equal to] 10 percent.” ARM § 17.30.715(1)(a). Degradation can result from “cumulative impacts or synergistic effects.” Id. § (2)(a).

Here, the available data uniformly demonstrate that the appropriation proposed by the Applicant will cause prohibited degradation of outstanding resource waters. The water right application at issue, and DNRC’s Preliminary Determination, rely on Hydrometrics 2014—a report of 3D modeling data that predict the Rock Creek Mine’s impact on project-area stream flows—to demonstrate compliance with Water Use Act requirements. See Preliminary Determination 2-3, 13, 16. These data show that the proposed appropriation, which consists of groundwater that will drain into the mine adit, will cause flow reductions in outstanding resource waters that amount to prohibited degradation. See Hydrometrics, Inc., Groundwater Modeling Assessment for the Rock Creek Project, Sanders County, MT, Appx. B (rev’d Oct. 2014); Exhibit D (summary of Hydrometrics modeling results). Specifically, under all six modeled scenarios included in the report, wilderness reaches of “Unnamed East Fork Tributary,” South Basin Creek, Chicago Creek, and St. Paul Lake Drainage will experience illegal dewatering; in two scenarios Chicago Creek will lose 100% or more of its groundwater discharge. See Exhibit D. Additionally, three modeled scenarios demonstrate illegal dewatering of Copper Gulch and Moran Basin and one modeled scenario demonstrates illegal dewatering of East Fork Bull River. Id. Dewatering amounting to illegal degradation of outstanding resource waters will occur as early as year two of the mine’s exploration phase. Id.

Additionally, the 3D groundwater modeling results relied upon by the Forest Service and the Montana Department of Environmental Quality (“DEQ”) to approve the nearby Montanore Mine demonstrate that the cumulative effects of the proposed appropriation for the Rock Creek Mine combined with the effects of the Montanore Mine will inflict even more extensive degradation of outstanding resource waters. See Montanore Mine JFEIS Table 101.

In sum, every scenario evaluated by the Applicant and relevant regulatory agencies demonstrates that the proposed appropriation will illegally degrade outstanding resource waters.

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<sup>2</sup> Available at [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprd3826677.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3826677.pdf) (last visited Aug. 31, 2016).

## **B. DNRC Cannot Issue the Permit Because the Water Is Not Legally Available**

Given the unlawful dewatering impacts demonstrated by the available data, DNRC cannot lawfully issue the proposed water right for the Rock Creek Mine because the Applicant has not established that water is legally available in the amount the Applicant seeks to appropriate. MCA § 85-2-311(1)(a)(ii).

Regulations implementing the Water Use Act state that DNRC's consideration of proposed groundwater appropriations must "include identification of existing legal demands for any surface water source that could be depleted as a result of the groundwater appropriation." ARM § 36.12.1704(2)(a). The regulations further require DNRC, when considering groundwater applications, to "compare the physical water supply for any surface water source in which water flow could be reduced by any amount as a result of the groundwater appropriation and the legal demands within the area of potential impact." *Id.* § 36.12.1705.

Here, 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. As described above, the proposed use will have the illegal effect of decreasing the mean monthly flow of several outstanding resource waters by more than or equal to 15% or the seven-day ten-year low flow by more than or equal to 10%. *See id.* § 17.30.715(1)(a). This is degradation in violation of Montana law. MCA § 75-5-315(1) (stating that outstanding resource waters are to be "afforded the greatest protection feasible under state law" and "prohibit[ing], to the greatest extent practicable, changes to the existing water quality of those waters"); ARM § 17.30.705(2)(c) ("no degradation [of outstanding resource waters] is allowed").

In short, the requested water cannot be considered legally available because issuance of the permit would violate existing legal demands on the affected outstanding resource waters. For this reason too, the application must be denied.

## **C. DNRC Cannot Issue the Water Right Because the Proposed Use Will Conflict With the Classification of Water Set for the Source of Supply**

DNRC cannot lawfully issue the proposed water right for an additional reason: the proposed use will degrade outstanding resource waters and therefore is not in accordance with the designation of the water supply under the Water Quality Act. MCA § 85-2-311(1)(g). As a result, DNRC cannot issue the water right.

1. The proposed used is not substantially in accordance with the classification of water set for the source of supply

The Applicant cannot meet the statutory criteria for a water right permit because the proposed use will degrade outstanding resource waters in violation of their classification under the Water Quality Act. Montana law prohibits DNRC from issuing a water right unless the applicant can show that "the proposed use will be substantially in accordance with the classification of water set for the sources of supply pursuant to 75-5-301(1)," the Water Quality Act. MCA § 85-2-311(1)(g). The Water Quality Act directs DEQ to "establish the classification

of all state waters,” *id.* § 75-5-301(1), and, in accordance with that mandate, DEQ adopted ARM § 17.30.617, classifying “[a]ll state surface waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995” as outstanding resource waters. ARM § 17.30.617(1). The Water Quality Act and its implementing regulations prohibit degradation of these outstanding resource waters. MCA § 75-5-315(1); ARM § 17.30.705(2)(c). Any degradation of outstanding resource waters, therefore, is not in accordance with the classification of such waters under the Water Quality Act. For this additional reason, the permit must be denied.

2. The Conservation Groups have standing to raise this objection pursuant to the Montana Constitution

Regarding objections raised under MCA § 85-2-311(1)(g), another statutory provision, MCA § 85-2-311(2), provides that “only the [DEQ] or a local water quality district ... may file a valid objection.” However, this statutory limitation on standing to raise objections offends the Montana Constitution because it effectively denies the public the opportunity to vindicate its fundamental right to a clean and healthful environment and its ownership interest in the waters of the state. Mont. Const. art. II § 3; art. IX §§ 1, 3. Accordingly, DNRC must consider the above objection under MCA § 85-2-311(1)(g).

Applying MCA § 85-2-311(2) to dismiss the Conservation Groups’ objection would impermissibly relieve the Applicant of its statutory obligation to demonstrate that its proposed appropriation is consistent with the classification of the source waters and would deny the public the opportunity to assert its constitutionally recognized interest in conserving the affected waters. There is no local water quality district with jurisdiction over the water right application at issue. Further, the Conservation Groups met with DEQ concerning this issue and it appears that DEQ may not exercise its statutory right to object under MCA § 85-2-311(1)(g).

Under these circumstances, dismissing the Conservation Groups’ objection would be irreconcilable with the Montana Constitution and Supreme Court precedent. First, giving the Applicant an exemption from compliance with the Water Quality Act’s nondegradation policy would violate constitutional protections for the public’s fundamental right to a clean and healthful environment. *See* Mont. Const. art. II, § 3 and art. IX, § 1; *Mont. Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality*, 1999 MT 248, ¶¶ 80-81, 296 Mont. 207, 988 P.2d 1236 (holding unconstitutional statute that exempted certain industrial activities from nondegradation requirements).

Moreover, for DNRC to deny standing to the Conservation Groups here would deprive the public of any representative who can defend its interest in the affected waters. Such a result would be irreconcilable with the Montana Constitution’s recognition that all “waters within the boundaries of the state are the property of the state for the use of its people,” Mont. Const. art. IX, § 3, which the Supreme Court has interpreted as requiring broad public participation in water disputes, *see Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 34, 361 Mont. 77, 255 P.3d 179. Accordingly, DNRC must consider the Conservation Groups’ objection pursuant to MCA § 85-2-311(1)(g).

## V. CONCLUSION

For the foregoing reasons, the Applicant has not satisfied the statutory requirements for issuance of a water right permit and its application should be denied.

Sincerely,

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