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Number DV-22-9
Filed 24th
Day of August, 2022
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**IN THE MONTANA FOURTEENTH JUDICIAL DISTRICT COURT
MEAGHER COUNTY**

MONTANA TROUT UNLIMITED,
TROUT UNLIMITED, MONTANA
ENVIRONMENTAL INFORMATION
CENTER, EARTHWORKS, and
AMERICAN RIVERS,

Petitioners,

v.

MONTANA DEPARTMENT OF
NATURAL RESOURCES AND
CONSERVATION and TINTINA
MONTANA, INC.,

Respondents.

Case No. DV-22-9

**PETITION FOR REVIEW
OF FINAL AGENCY ACTION**

#1

INTRODUCTION

1. This case presents an important question of law: whether Montana's Department of Natural Resources and Conservation may allow substantial volumes of groundwater to be pumped from an aquifer in a closed basin without a permit—or any mandatory mitigation measures—when the diversion is necessary to facilitate a mining operation and will be used to partially offset stream dewatering. Under the language of Montana's Water Use Act and the constitutional provisions it implements, the clear answer is “no.” Because the Department acted arbitrarily and unlawfully in reaching the opposite conclusion, its decision—and the water-use permit it granted to Tintina Montana for the Black Butte Copper Mine—must be vacated by this Court.

2. Tintina plans to build its mine in the Sheep Creek drainage—upstream from the Missouri River and its iconic tributary, the Smith. During the project, the company will withdraw more than 250,000,000 gallons of water from the mine's underground workings each year. This withdrawal is subject to the general permitting provisions of the Water Use Act, as well as the heightened mitigation requirements that apply in the highly appropriated Upper Missouri River Basin. The Department's permitting analysis, however, addressed less than half of Tintina's planned diversion. DNRC's asserted basis for exempting the rest of the company's withdrawal from Montana's permitting and mitigation requirements was that the water would not be used for industrial purposes, and instead will be treated, stored, and eventually discharged without any beneficial use.

3. The Department's position was wrong as a matter of law. The Water Use Act recognizes only two categories of use: beneficial uses, which are subject to the statute's permitting and mitigation requirements, and waste, which is prohibited. The statute does not recognize a third category of water diversion and impoundment for purposes that are neither beneficial uses nor waste. Moreover, all of Tintina's diversion will be for beneficial uses—namely, dewatering mine workings as necessary to facilitate mining, and mitigating streamflow depletions.

4. The Department's decision also flouted the Water Use Act's fundamental purpose of protecting senior water rights, including instream flow rights. Tintina's entire appropriation of groundwater—not just the fraction used in mining operations—will change the timing, location, and volume of groundwater accretions to surface water. Particularly in closed groundwater basins, DNRC must regulate such significant groundwater withdrawals to satisfy its constitutional and statutory mandates. The agency's unlawful failure to protect Montana's waters must not be allowed to stand.

JURISDICTION AND VENUE

5. Under the Montana Administrative Procedure Act, MCA § 2-4-702(1), (2)(e), this Court has jurisdiction to review DNRC's final decision granting Tintina's permit application and denying petitioners' beneficial-use objection. *See* Final Order, In the Matter of Applications for Beneficial Water Use Permit Nos. 41J-30116562 and 41J-30116563 by Tintina Montana, Inc. (DNRC Office of Admin. Hearings) (July 26, 2022) ("Final Order") (attached as Exhibit 1); Order on Cross-

Motions for Partial Summary Judgment, In the Matter of Applications for Beneficial Water Use Permit Nos. 41J-30116562 and 41J-30116563 by Tintina Montana, Inc. (DNRC Office of Admin. Hearings) (Feb. 23, 2022) (“Summary-Judgment Order”) (attached as Exhibit 2).

6. As described more fully below, petitioners participated in the objections process before DNRC and have exhausted all administrative remedies available within the agency. *See* MCA § 2-4-702(1)(a).

7. DNRC issued the challenged final decision on July 26, 2022. As required by MCA § 2-4-702(2)(a), petitioners have filed this petition within 30 days of DNRC’s decision.

8. Venue is proper in this district because the challenged appropriation right is located in Meagher County. *See* MCA § 2-4-702(2)(e)(ii), (iii).

PARTIES

9. Petitioner Montana Trout Unlimited is a statewide grassroots nonprofit organization located in Missoula, Montana, and dedicated to conserving and restoring cold-water fisheries throughout the state. Members of the organization live and recreate in the Smith River watershed where Tintina’s copper mine is proposed. Montana Trout Unlimited has helped fund fishery research and restorations in the Smith River, participated as a stakeholder in Smith River management decisions by state agencies, and served as lead plaintiff in a case that established the Smith River watershed as a closed basin under the Montana Water Use Act.

10. Petitioner Trout Unlimited is a Michigan nonprofit corporation headquartered in Arlington, Virginia, with 387 affiliated chapters across the United States, including 12 chapters in Montana. The organization's mission is to conserve, protect, and restore North America's cold-water fisheries and their watersheds. Trout Unlimited's grassroots volunteers and national staff have engaged in extensive public education and advocacy to protect the Smith River watershed and associated aquatic life from the adverse effects of Tintina's proposed Black Butte Mine.

11. Petitioner Montana Environmental Information Center ("MEIC") is a member-supported Montana nonprofit organization based in Helena, Montana. Founded in 1973, MEIC represents approximately 5,000 members from across Montana and the United States. MEIC is dedicated to, among other things, protecting Montana's water quality and ensuring compliance with the laws and Constitution of Montana. MEIC has litigated numerous water-protection cases related to metal mining in Montana. MEIC members live near, recreate in, and otherwise derive benefit from the public lands and waters in the Smith River watershed.

12. Petitioner Earthworks is a nonprofit organization dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks is headquartered in Washington, D.C., and has offices around the country, including in Missoula, Montana. The organization has employed its extensive research and

advocacy experience to protect the Smith River watershed and educate the public about the environmental impacts of hardrock mining in Montana.

13. Petitioner American Rivers is a nonprofit conservation organization committed to protecting clean water in rivers across the nation to ensure ample supplies for fish, wildlife, agriculture, and communities. Headquartered in Washington, D.C., American Rivers has field offices across the country, including in Bozeman, Montana. The organization and its members value and derive benefit from the Smith River and its tributaries for their wild, free-flowing character, clean water, abundant fish and wildlife, and world-class recreational opportunities.

14. All of the petitioners have longstanding interests in protecting water within the Smith River watershed because they and their members place a high value on the continued healthy functioning of the ecosystems that support thriving trout populations and depend on the clean, cold water of the Smith River and its tributaries. Petitioners have been actively seeking to protect the Smith River watershed through a wide array of actions, including public outreach and education, scientific analysis, and advocacy intended to promote healthy ecosystem functioning in the region. Each of the organizations has participated in the various public reviews of Tintina's mine proposal pursuant to the Metal Mine Reclamation Act, Montana Environmental Policy Act, and the Montana Water Use Act. Petitioners also filed an objection to DNRC's preliminary determination regarding Tintina Montana's application for the challenged beneficial-use permit.

15. Members of the petitioner organizations depend on the Smith River and its tributaries for traditional, recreational, and employment activities, including outfitting, guiding, angling, floating, swimming, wildlife viewing, and aesthetic enjoyment. In doing so, petitioners' members rely upon the water of the Smith River watershed to sustain the ecosystems that enable these pursuits. Petitioners' members derive economic, aesthetic, recreational, scientific, inspirational, and other benefits from these activities.

16. Tintina's proposed Black Butte Copper Mine threatens to damage water quality and reduce surface-water quantities within the Smith River watershed, thereby harming petitioners' members' opportunities to fish the Smith River's world-class trout fishery; to enjoy the popular and spectacular 59-mile float of the river; to study the wildlife supported by the Smith River watershed; and to carry out businesses dependent upon the health of the watershed and associated recreation and tourism. The legal violations alleged in this petition therefore cause direct injury to the economic, aesthetic, conservation, recreational, scientific, educational, spiritual, and wildlife-preservation interests of petitioners and their members.

17. Respondent DNRC is an agency of the State of Montana and is responsible for issuing water-use permits consistent with the requirements of the Water Use Act and Montana's Constitution. DNRC is headquartered in Helena, Montana.

18. Respondent Tintina Montana, Inc. holds the water-use permit at issue in this proceeding. On information and belief, Tintina Montana, Inc. also does business as Tintina Resources, Inc. and is a subsidiary of the Canadian corporation Sandfire Resources America, Inc.

LEGAL BACKGROUND

19. The Montana Constitution permits groundwater to be appropriated only for beneficial use; any other appropriation constitutes impermissible waste. In the words of the Constitution, “[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” Mont. Const. art. IX, § 3(3).

20. The Water Use Act was adopted to implement this constitutional protection of the state’s water resources for the benefit of the people. With the statute, the legislature declared that “[t]he general welfare of the people of Montana ... requires that water resources of the state be put to optimum beneficial use and not wasted.” MCA § 85-1-101(1).

21. In furtherance of this policy, the Water Use Act requires water users to obtain permits to appropriate water for beneficial uses, and expressly prohibits the waste or contamination of groundwater. MCA §§ 85-2-301, 302, 505. Waste is defined to include “the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.” *Id.* § 85-2-102(27).

22. The Water Use Act broadly defines “beneficial use” to include any “use of water for the benefit of the appropriator, other persons, or the public,” including but not limited to enumerated uses such as mining and aquifer recharge or mitigation. MCA § 85-2-102(5)(a), (e). The corollary to the legal requirement that water be put to beneficial use is a prohibition against wasting water. *See id.* § 85-2-505(1).

23. Under the Water Use Act, “a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works” without a valid permit issued by DNRC, subject to limited exceptions not relevant here. MCA § 85-2-302(1). To obtain a permit for a new surface or groundwater appropriation, an applicant must affirmatively prove that the criteria enumerated in Section 311 of the Water Use Act—the “311 criteria”—are satisfied. *Id.* § 85-2-311. This includes a requirement to prove that “the proposed use of water is a beneficial use[.]” *Id.* § 85-2-311(1)(d). Indeed, it is well established under the Water Use Act and the fundamental principles of prior appropriation that beneficial use is “the *basis*, the *measure* and the *limit* of all rights to the use of water.” *McDonald v. State*, 220 Mont. 519, 530, 772 P.2d 598, 605 (1986) (emphases in original).

24. In addition to proving that its application satisfies the 311 criteria, an applicant, like Tintina, that seeks to appropriate groundwater in a closed basin bears the burden of proving that it will offset any adverse effects on prior appropriators from its new appropriation through an aquifer-recharge or mitigation

plan that satisfies specified statutory requirements. MCA §§ 85-2-360, 362; ARM 36.12.120. As DNRC's own proposed decision in this case acknowledged, the burdens the Water Use Act imposes on applicants for new appropriations in a closed basin are "daunting" and "exacting," and applicants "must withstand strict scrutiny of each of the legislatively required factors" to qualify for one of the limited statutory exemptions that allow such appropriations. Mont. DNRC, Prelim. Determination to Grant Permit App. for Beneficial Water Use Permit No. 41J 30116562 by Tintina Mont., Inc., (Mar. 13, 2020) ("Prelim. Determination"), at 7-8 (quoting *Sitz Ranch v. DNRC*, No. DV-10-13390, Order Affirming DNRC Decision (Mont. Fifth Jud. Dist. 2011)).

25. Ultimately, the Water Use Act and its beneficial-use permitting scheme implement the Montana Constitution's mandate that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Mont. Const. art. IX, § 3(3). Consistent with the prior-appropriation doctrine on which it is predicated, the Water Use Act's primary purpose is "to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." *Mont. Power Co. v. Carey*, 211 Mont. 91, 97-98, 685 P.2d 336, 339-40 (1984).

26. To fulfill its constitutional duties, the legislature further declared in the Water Use Act that the state "shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and

protection of its water resources[;]” that state water resources “must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life[;]” and that maximizing economic benefits to Montanans requires “the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state.” MCA § 85-1-101(3), (5), (8).

FACTUAL BACKGROUND

27. Tintina’s application for a new groundwater appropriation was “part of a bundle of eight water right applications related to the Black Butte Copper Project in Meagher County. The project is a proposed underground copper mine ... located about 15 miles north of White Sulphur Springs in the Sheep Creek drainage[.]” Prelim. Determination at 3.

28. The site of Tintina’s proposed mine is within the Upper Missouri River Basin, which is closed to new appropriations by statute. *See* MCA § 85-2-343. Within this highly appropriated watershed, Tintina plans to pump up to 807 acre-feet of groundwater annually—more than 250,000,000 gallons—to dewater its underground mine workings. “Tintina is proposing to pump water from the mine at the same rate it anticipates to naturally infiltrate” the mine workings. S. Irvin, Mont. DNRC, Staff Expert Review of Pre-Filed Expert Testimony Related to Change Application Nos. 41J 30116553 (Bar Z Ranch Inc. and John and Terri Hanson); 41J 30116554 (Bar Z Ranch Inc.); 41J 30116556, 41J 30116557, 41J 30116558, and 41J 30116559 (Thorson Ranch LLC); and Permit Application Nos.

41J 30116562 and 41J 30116563 (Tintina Montana Inc.) (Apr. 20, 2021) (“Staff Report”), at 6. Tintina plans to collect the full volume of groundwater that drains into the underground mine workings “in sumps within the workings, and then pump[] [it] to a main sump near the mine’s access ramp. From that point, a high-pressure multistage pump will divert up to 2.23 [cubic feet per second] from the mine[.]” Prelim. Determination at 37.

29. The dewatering of the company’s mine workings is essential “to facilitate underground operations[.]” Staff Report at 3.

30. While Tintina will remove approximately 807 acre-feet of groundwater each year, DNRC determined that “the proposed beneficial use for industrial purposes associated with the copper mine is a maximum flow rate of 1.11 [cubic feet per second] and volume up to 350 [acre-feet] per year.” DNRC Technical Report at 1. This water “will be stored in either the [process water pond] or treated in the [water treatment plant] and put to beneficial use” at the project site for ore processing, dust suppression, and other purposes. Prelim. Determination at 37.

31. The remainder of the groundwater that Tintina diverts from the mine—up to 457 acre-feet, or nearly 150,000,000 gallons, per year—will be “conveyed to the [water treatment plant], treated, and discharged through the [underground infiltration gallery] into the drainage (it may also be routed to the treated water storage pond before discharge).” Prelim. Determination at 37. DNRC determined that none of this water is subject to beneficial-use permitting requirements under the Water Use Act. Tintina’s groundwater modeling, however,

showed net depletions year-round to Sheep Creek, Coon Creek, and Black Butte Creek due to this groundwater pumping.

32. Based on its flawed interpretation of the Water Use Act, DNRC required mitigation for only 340.3 acre-feet of Tintina's planned withdrawals per year—the quantity of water that the Department determined would be consumed by industrial uses at the mine site. DNRC's preliminary determination did not discuss or propose mitigation associated with the approximately 457 acre-feet of additional groundwater that Tintina intends to pump from its mine each year.

33. While Tintina plans to discharge the 457 acre-feet of groundwater that is not used in mine operations each year to an infiltration gallery, the water will be stored in a treatment pond and not discharged from July through September to avoid violations of the seasonal surface-water-quality nutrient criterion for total nitrogen. Because these months are critical for irrigation, this will further exacerbate the mine's potential impacts on senior appropriators.

34. Most of the water discharged to Tintina's underground infiltration gallery will be returned to Sheep Creek and the lower portion of Coon Creek. This "would partially compensate for the loss of base flow in Sheep Creek caused by mine dewatering." Mont. Dep't of Env'tl. Quality, Black Butte Copper Project Final Env'tl. Impact Statement, at 3.4-47 (Feb. 2020). None of the groundwater pumped from the mine workings but purportedly not put to beneficial use, however, will be returned to Black Butte Creek or Coon Creek above the infiltration gallery. And some of that

water will evaporate from Tintina's treatment pond and not be discharged to the infiltration gallery at all.

35. Petitioners filed an objection to Tintina's proposed groundwater appropriation on June 12, 2020. In it, the organizations argued that the company had failed to "satisfy its burden of proving[.]" under Section 311 of the Water Use Act, "that water [wa]s physically available [for the appropriation], that water [wa]s legally available, that the beneficial use of water c[ould] be limited to only a fraction of the groundwater pumped, and that issuing the permit w[ould] not trigger adverse effects to public water rights in Sheep Creek, its tributaries, and the Smith River." Montana Trout Unlimited, *et al.*, Objection Addendum, Application for Beneficial Water Use Permit 41J 30116562 (Groundwater) (June 12, 2020), at 1; MCA § 85-2-311(1).

36. On September 3, 2021, petitioners filed a motion for partial summary judgment challenging DNRC's determination that most of Tintina's planned diversion would not be put to a beneficial use and was accordingly exempt from the requirements of the Water Use Act. In a February 23, 2022 order, a hearing examiner within the agency's Office of Administrative Hearings affirmed the Department's decision. According to the examiner:

The distinction drawn by DNRC in regard to ... [Tintina's] Application—that there are certain uses of water that neither rise to the level of beneficial use nor constitute waste but rather fall into a category that is wholly beyond the scope of the Water Use Act's regulatory scheme—[wa]s not a new one. Rather, it is one DNRC has drawn consistently for decades.

Summary-Judgment Order at 3. “Given the duration and consistency of DNRC’s interpretation that dewatering efforts are neither beneficial uses nor waste but rather water disposal measures that exist apart from the water rights permitting system created by the Water Use Act, and the fact that the Legislature has never acted to countermand or modify this interpretation,” the examiner declared that he was “inclined to presume that DNRC ha[d] interpreted the law correctly.” *Id.* at 5.

37. On July 26, 2022, after petitioners and Tintina settled the remainder of the organizations’ objections, the Department’s hearing examiner issued a final order rejecting petitioners’ beneficial-use objection.

FIRST CLAIM FOR RELIEF
(Violation of the Water Use Act, MCA §§ 85-2-101 *et seq.*)

38. Each of the preceding paragraphs is incorporated here by reference.

39. Under Montana’s Water Use Act, it is generally unlawful to “appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works unless ... [a] person [has] applie[d] for and receive[d] a permit or an authorization for a change in appropriation right from the department.” MCA § 85-2-302(1). In order to secure a permit, an applicant must “prove[] by a preponderance of evidence that[,]” among other things, “the proposed use of water is a beneficial use[.]” *Id.* § 85-2-311(1)(d).

40. Montana’s “beneficial use” requirement—and the corresponding prohibition on waste—are fundamental to the protections of the state’s water laws. With the Water Use Act, the legislature declared that “[t]he general welfare of the people of Montana ... requires that water resources of the state be put to optimum

beneficial use and not wasted.” MCA § 85-1-101(1). As a result, the statute makes clear that “[a] person may appropriate water only for a beneficial use[.]” and that “[n]o ground water may be wasted” through its “application ... to anything but a beneficial use.” *Id.* §§ 85-2-102(27); 85-2-301(1); 85-2-505(1).

41. The requirements of the Water Use Act are even more demanding in highly appropriated basins like the Upper Missouri, where Tintina hopes to build its proposed mine. “An application for a ground water appropriation right in a [closed] basin ... must be accompanied by a hydrogeologic report ... , an aquifer recharge or mitigation plan if required, and an application for a change in appropriation right or rights if necessary.” MCA § 85-2-360(1). When an applicant’s hydrogeologic report “predicts that there will be a net depletion of surface water[.]” the applicant is required to “submit an aquifer recharge or mitigation plan” that explains, among other things, “where and how the water in the plan will be put to beneficial use; ... the amount of water that is required for aquifer recharge or mitigation; ... [and] evidence of how the aquifer recharge or mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator[.]” *Id.* § 85-2-362(1). As the Department itself has affirmed, these requirements are “daunting” and “exacting,” and an applicant “must withstand strict scrutiny of each of the legislatively required factors” before appropriating groundwater in a closed basin. Prelim. Determination at 7-8 (quoting *Sitz Ranch v. DNRC*, No. DV-10-13390, Order Affirming DNRC Decision (Mont. Fifth Jud. Dist. 2011)).

42. In electing to exempt most of Tintina's planned appropriation from the Water Use Act's permitting and mitigation requirements, DNRC defied the language and purpose of the statute. While the Department insisted that "dewatering efforts are neither beneficial uses nor waste but rather water disposal measures that exist apart from the water rights permitting system created by the Water Use Act," Summary-Judgment Order at 5, the legislature left no room for this third category of unregulated appropriations. Instead, the statute divides water uses into two classes: beneficial uses, for which a permit may be obtained, and waste, the unlawful "application of water to anything but a beneficial use." MCA §§ 85-2-102(27); 85-2-301, 302; 85-2-505.

43. All of the groundwater that Tintina plans to pump from its proposed mine—not just the fraction the company will utilize for specific tasks during mining operations—will be appropriated for a beneficial use. As previously noted, the Water Use Act broadly defines "beneficial use" as any "use of water for the benefit of the appropriator, other persons, or the public, including but not limited to ... industrial [and] mining ... uses[.]" as well as "aquifer recharge or mitigation[.]" MCA § 85-2-102(5)(a), (e). Tintina's dewatering efforts, which are essential to the development and operation of its planned copper mine, fall well within this definition. *See id.*; *id.* § 85-2-505(1), (1)(c) (providing that the "disposal of ground water without further beneficial use that must be ... removed from a mine to permit mining operations or to preserve the mine in good condition" may not "be construed as waste"). Given that the company also plans to use most of the groundwater it

pumps for “aquifer recharge or mitigation”—by discharging it into the mine’s underground infiltration gallery—the water will further serve a second beneficial purpose. *Id.* § 85-2-102(5)(e). DNRC’s contrary conclusion was arbitrary and unlawful.

44. In addition to defying the language and purpose of the Water Use Act, DNRC’s interpretation of the statute cannot be squared with Montana’s Constitution. Under the Constitution, “[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.” Mont. Const. art. IX, § 3(3). The Constitution further requires the legislature to “provide for the administration, control, and regulation of water rights”—a mandate the legislature fulfilled by adopting the Water Use Act. *Id.* art. IX, § 3(4). And the Constitution also commands, finally, that the legislature “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.” *Id.* art. IX, § 1(3).

45. Read together, these provisions dictate an interpretation of the Water Use Act that facilitates comprehensive regulation and reasonable conservation of Montana’s valuable and often scarce water resources. DNRC’s position that Tintina may divert more than 450 acre-feet of groundwater a year in a closed basin without satisfying statutory permitting requirements, however, turns these constitutional mandates on their head. Contrary to the Constitution’s mandate for a comprehensive regulatory scheme that will prevent unreasonable depletion of water

resources, the Department's position creates a regulatory loophole for mining companies whenever the companies elect not to apply their diverted mine drainage to a further beneficial use. The agency's interpretation of the Water Use Act should accordingly be rejected.

46. Because the Department had no statutory basis for exempting most of Tintina's planned appropriation from the permitting and mitigation requirements of the Water Use Act, its decision to grant the challenged permit should be set aside by this Court. *See* MCA § 2-4-704(2).

**SECOND CLAIM FOR RELIEF
(Violation of the Montana Constitution,
Mont. Const. art. IX, § 1(3), art. IX, §§ 3(3), 3(4))**

47. Each of the preceding paragraphs is incorporated here by reference.

48. As explained above, DNRC defied the language and purpose of the Water Use Act in electing to exempt most of Tintina's appropriation from the permitting and mitigation requirements of the statute. Should this Court conclude otherwise, however, it should also hold that the Water Use Act's failure to regulate groundwater pumping and disposal at underground mines in Montana violates the state's Constitution.

49. Under the Constitution, again, "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Mont. Const. art. IX, § 3(3). The legislature is accordingly obligated to "provide for the administration, control, and regulation of water

rights[.]” and to establish “adequate remedies to prevent unreasonable depletion and degradation of natural resources.” *Id.* art. IX, §§ 1(3), 3(4). If the Water Use Act allows mining companies to pump unlimited amounts of groundwater in the course of mining operations without a permit or mitigation measures, it falls short of these requirements and should accordingly be rejected as unconstitutional by this Court. *See* MCA § 2-4-704(2).

REQUEST FOR RELIEF

Petitioners respectfully request that this Court:

1. Reverse and vacate DNRC’s July 26, 2022 final order dismissing petitioners’ beneficial-use objection and granting Tintina’s application for water-use permit No. 41J-30116562;
2. Declare that groundwater pumping for purposes of mine dewatering is a beneficial use subject to the permitting and mitigation requirements of the Water Use Act, and that DNRC’s effort to exempt mine dewatering from the requirements of the statute was accordingly unlawful;
3. Declare, in the alternative, that the Water Use Act’s failure to regulate mine dewatering violates Montana’s Constitution;
4. Remand this matter to DNRC for further consideration consistent with this Court’s decision;
5. Require DNRC to pay petitioners their reasonable costs, fees, and expenses, including attorneys’ fees, associated with this litigation; and

6. Grant petitioners such additional relief as the Court may deem just and proper.

Respectfully submitted this 24th day of August, 2022.



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CERTIFICATE OF SERVICE

I hereby certify that an electronic transmission of the foregoing petition and the accompanying exhibits was sent to the Clerk of Court on this date. I also caused true and accurate copies of the foregoing petition and the accompanying exhibits to be mailed to:

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A true and accurate copy of the foregoing petition and the accompanying exhibits was also sent by certified mail to:

Attorney General Austin Knudsen
Montana Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
contactdoj@mt.gov

Date: August 24, 2022.



Exhibit 1:

Final Order, In the Matter of Applications for Beneficial Water Use Permit
Nos. 41J-30116562 and 41J-30116563 by Tintina Montana, Inc.
(DNRC Office of Admin. Hearings) (July 26, 2022)

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
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-1510

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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Exhibit 2:

Order on Cross-Motions for Partial Summary Judgment, In the Matter of Applications for Beneficial Water Use Permit Nos. 41J-30116562 and 41J-30116563 by Tintina Montana, Inc. (DNRC Office of Admin. Hearings) (Feb. 23, 2022)

Office of Administrative Hearings
Department of Natural Resources and Conservation
1539 Eleventh Avenue
P.O. Box 201601
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)	ORDER
BENEFICIAL WATER USE PERMIT NO.)	ON CROSS-MOTIONS FOR PARTIAL
41J-30116562 TINTINA MONTANA INC.;)	SUMMARY JUDGMENT
41J-30116563 TINTINA MONTANA INC.)	

Applicant Tintina Montana, Inc. (Applicant) and Objectors Montana Trout Unlimited, Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers (Conservation Objectors) have each filed and fully briefed a motion for partial summary judgment (MPSJ) related to Application for Beneficial Water Use Permit No. 41J-30116562 (Application). For the reasons set forth below, I hereby GRANT Applicant's MPSJ and DENY Conservation Objectors' MPSJ.

Background

The Application is 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). Department of Natural Resources and Conservation (DNRC) Preliminary Determination to Grant (PDG) at 4. In the Application, Applicant proposes to appropriate groundwater from an aquifer in the Newland Formation of the Belt Supergroup at a rate of 1.11cfs up to a volume of 350 acre-feet per year (AFY) for Industrial purposes at the mine works. *Id.* Applicant also intends to withdraw additional water from the aquifer to dewater its mine works, potentially as much as 457 AFY in addition to the 350 AFY requested in the Application. Because Applicant does not intend to use this additional volume in connection with its mining operation, but rather plans to reinject it into an infiltration gallery whence it will eventually flow into a surface source, DNRC considers this additional volume to be outside the scope of the Application and to

fall instead under the regulatory jurisdiction of the Montana Department of Environmental Quality. *Id.* at n. 1. It is the regulatory treatment of this additional volume of water that has given rise to the instant motions.

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 PDG, DNRC concluded that Applicant satisfied these requirements, and conditioned the PDG on Applicant's compliance with its proposed mitigation plan. PDG at 24; 44-45.

Discussion

In their MPSJ, Conservation Objectors assert that it was legal error for DNRC's analysis that culminated in the PDG to exclude the other 457 AFY Applicant may need to evacuate from its contemplated mine works. Specifically, Conservation Objectors argue that under Montana law, a use of water must fall into one of two categories: beneficial use or waste. Brief in Support of Motion for Partial Summary Judgment (Conservation Objectors' Brief) at 11-12. Since § 85-2-505(1)(c), MCA, provides that mine dewatering categorically does not constitute waste, they contend that the 457 AFY must be treated as a proposed beneficial use that requires evaluation as part of the Application. Conservation Objectors' Brief at 13-14. Thus, under their theory, DNRC erred in the PDG by treating the 457 AFY as falling within neither category but rather as a mere manipulation of water wholly outside the ambit of the Water Use Act, and I need to set aside the PDG and return the Application to DNRC to analyze whether the Application should be granted at the full 805 AFY volume.

Applicant's MPSJ, by contrast, asserts that there is no genuine issue of material fact that it has satisfied its burden under § 85-2-311(d), MCA, to prove that the 350 AFY appropriation contemplated in the Application, as analyzed by DNRC in the PDG, is a beneficial use of water. Applicant endorses the distinction drawn by DNRC between the 350 AFY at issue in the Application and the additional volume of water that it needs to evacuate from the proposed mine

works but does not intend to put to beneficial use in connection with its operation of the Project. Applicant contends that the former is indisputably a beneficial use (something Conservation Objectors do not contest), while the latter is not implicated by the Water Use Act and its permitting scheme. Applicant's Combined Brief in Support of Cross-Motion for Summary Judgment and in Opposition to Objectors' Motion for Partial Summary Judgment (Applicant's Brief) at 8-9.

The distinction drawn by DNRC in regard to the Application – that there are certain uses of water that neither rise to the level of beneficial use nor constitute waste but rather fall into a category that is wholly beyond the scope of the Water Use Act's regulatory scheme – is not a new one. Rather, it is one DNRC has drawn consistently for decades. In 1981, DNRC considered a permit application for a gravel operation that sought a right to 12 cfs up to 6,650 AFY for pit dewatering and 700 gallons per minute up to 237 AFY for gravel washing. *In re Application for Beneficial Water Use Permit No. 24591g41H by Kenyon-Noble Ready Mix Co. (Kenyon-Noble) Proposal for Decision at 6 (June 3, 1981)*. DNRC ultimately issued the permit for the gravel washing water, *Kenyon-Noble Final Order at 1 (July 17, 1981)* but held that the evacuation of water from the gravel pit was neither a beneficial use nor a waste of water and thus was not eligible for a water right permit. *Kenyon-Noble Proposal for Decision at 20-23*. In reaching that conclusion, DNRC specifically considered and rejected an argument similar to one Conservation Objectors bring here, namely that the specific exclusion of mine dewatering operations from the statute prohibiting the waste of groundwater¹ perforce means that such drainage must be considered a beneficial use requiring a permit. In reaching that conclusion, DNRC reasoned:

[T]he exclusion of the disposal of groundwater incidental to mining operations from the meaning of "waste" merely bespeaks a legislative judgment that such practices should not inevitably and necessarily be curtailed in order to protect water users diverting from some sort of critical groundwater area. Indeed, the mere fact that the legislature expressly excepted such activities indicates that they are not normally to be regarded as having any inherent protections by virtue of the law of water rights.

Nor does the presence of the verbiage [in § 85-2-505(1)(c), MCA] "without further beneficial use"...work a transformation of such practices into appropriations. Rather than referring to or modifying any disposals of groundwater, that language merely serves to highlight a legislative intention that waters withdrawn and subsequently used for beneficial purposes should be treated as traditional

1. "The disposal of ground water without further beneficial use that must be withdrawn for the sole purpose of improving or preserving the utility of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition" may not be construed as waste. Section 85-2-505(1)(c), MCA.

appropriations in terms of ascertaining waste in light of the scope and character of subsequent beneficial use. Subsequent use of waters withdrawn are thus not inevitably protected against waste characterizations.

Kenyon-Noble Reasons of the Hearing Examiner at 2-3 (July 17, 1981). The following year, DNRC, citing the decision in *Kenyon-Noble*, reiterated its position that “[n]ot all dealing with water resources amount to appropriative interest. . . . Drainage practices, although they may indeed impact on water uses, are characterized by a desire not to use the water resource, but rather to rid oneself of the nuisance. See generally, *In re Kenyon Noble*, Dept. Order 7/81.” *In re Application for Beneficial Water Use Permit No. 11493-s41G by Jefferson River Acres and In re Application for Beneficial Water Use Permit No. 15211-s41G by Gordon F. Lane, Proposal for Decision at 30* (June 11, 1982).²

In 1999, DNRC was presented with another opportunity to consider the interplay between drainage practices and appropriations for beneficial use in a situation not dissimilar to the instant case. There, a mining company that had filed permit applications shifted gears and requested DNRC to find that its proposed mine dewatering efforts were not in fact a beneficial use of water and thus that no permit was either possible or necessary for that aspect of its operation. *In re Applications for Beneficial Water Use Permits 41T-104524, 41T-104526, 41T-104527 by CR Kendall Corp. (CR Kendall) Opinion on Threshold Issue of Beneficial Use at 4* (February 3, 1999). Several parties who had objected to the permit applications argued that mine dewatering was indeed a beneficial use, but that DNRC should deny the application on other grounds and prevent the mine from performing its contemplated water disposal activities. *Id.* DNRC sided with the applicant and terminated further consideration of the applications. *Id.* at 11. In doing so, it surveyed a series of administrative and judicial decisions, including *Kenyon-Noble*; *West Side Ditch Co. v. Bennett et al.*, 106 Mont 422 (1938); *State Department of Highways v. Feenan*, 231 Mont. 255 (1988); and *In re City of Deer Lodge*, B-No. 97514-76G (Final Order June 4, 1996); which it found to collectively illustrate the principle that manipulations of water that provide benefits but that do not rise to the level of beneficial uses of water are not capable of sustaining water rights. *CR Kendall Opinion on Threshold Issue of Beneficial Use at 6-7, 9-10.* Put succinctly, DNRC concluded that “water disposal is not water usage” for water rights purposes. *Id.* at 10.

2. The Proposal for Decision was incorporated by reference into the Department’s Final Order in the case. Final Order, April 24, 1984, at 1.

Conservation Objectors have identified no cases in which DNRC has taken a contrary position to the one advanced in *Kenyon-Noble* and *CR Kendall*, and I am not aware of any. Given the duration and consistency of DNRC's interpretation that dewatering efforts are neither beneficial uses nor waste but rather water disposal measures that exist apart from the water rights permitting system created by the Water Use Act, and the fact that the Legislature has never acted to countermand or modify this interpretation, I am inclined to presume that DNRC has interpreted the law correctly. *Baltis v. Department of Revenue of State*, 2004 MT 17, ¶ 24, 319 Mont. 292, 83 P.3d 1278 ("Where the Legislature acquiesces in long-standing agency interpretation of a statute and takes no action to inform that interpretation, the court will presume that the Department has properly interpreted the law."). If the presence of water is the problem and not the solution, then we are not in the realm of water rights.

In an effort to avoid this conclusion, Conservation Objectors rely heavily on the Montana Second Judicial District's decision in *Diamond Cross Properties v. State*, 2008 WL 3243320 (July 14, 2008), which they read to reject the distinction drawn by DNRC in favor of their preferred beneficial-use/waste binary construction. In that case, the district court was asked to resolve competing motions for summary judgment whose core issues the court framed as:

- 1) Whether Article IX, Section 3(3) of the Montana Constitution and the policy provisions of the 1973 Water Use Act, as amended, require that [coalbed methane] produced ground water be put to a beneficial use.
- 2) Whether § 85-2-505(1)(e), MCA, in conjunction with § 82-11-175 (2)(c) and (2)(d) provide for the beneficial disposition of [coalbed methane] produced ground water.

Diamond Cross Prop. at 3. The latter question is not directly relevant to this case, focused narrowly as it is on an interpretation of the Montana statutory scheme regulating the production of coalbed methane (CBM). But the first question is similar to one posed by Conservation Objectors here, which they assert must be answered in the affirmative when it comes to Applicant's disposal of the 457 AFY not evaluated by DNRC in the PDG. The *Diamond Cross* court said yes to its first question as well, but its reasons for doing so do not aid Conservation Objectors.

Art. IX, §3(3) provides:

"All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

The *Diamond Cross* court interpreted this provision, in conjunction with the Water Use Act policy statement codified at § 85-1-101, MCA, to mean “that the production, use, or disposal of large quantities of CBM ground water must serve a statutorily defined beneficial use” because “Article IX, § 3(3) and the [Water Use Act] focus on the protection and utilization of Montana's water resources for beneficial purposes.” *Diamond Cross Props.* at 6.

Immediately following this statement, however, the court addressed an argument propounded by DNRC, a codefendant in that case, that its regulatory jurisdiction under the Water Use Act does not extend to every manipulation of water but only to those uses of water that fall within the legal definition of beneficial use. *Id.* In support of this position, DNRC pointed to, *inter alia*, its decisions in *Kenyon-Noble* and *CR Kendall*. (DNRC MSJ Brief at 10-11, *Diamond Cross*, 5/24/2006). Far from rejecting DNRC's argument, the *Diamond Cross* court in fact *accepted* it as to the examples provided by DNRC, but proceeded to distinguish CBM-produced groundwater on other grounds:

The Court does not dispute the DNRC's position in the context of the referenced examples. Indeed, the rulings made by the DNRC in the instances recited are in concert with the exceptions noted by the Legislature that do not constitute waste of water under the *WUA*. See § 85-2-505 (a),(b),(c), and (d). However, the disposition of CBM produced ground water is distinguishable because the quantity of water that is produced in CBM extraction dwarfs the amounts of water disposed of in the examples cited by the DNRC. Additionally, the examples preferred by DNRC were outside a controlled ground water area. These distinctions and the anticipated impacts, real or imagined, of substantial dewatering of aquifers require appropriate State regulatory review to give effect to the mandates of Article IX, § 3(3) and the Legislative policy reflected in the *WUA*.

Diamond Cross Props. at 6. Here, however, the volume of groundwater related to Applicant's mine dewatering but excluded from DNRC's consideration of the Application is nearly 15 times *less* than the volume of water at issue in *Kenyon-Noble* (457 AFY as compared to 6,650 AFY), and thus not one that “dwarfs” what the *Diamond Cross Props.* court was willing to countenance as being correctly excluded from the Water Use Act's permitting regimen. Too, Applicant's Project is not located in a controlled groundwater area. While, as noted above, it is located in a basin provisionally closed to new appropriations pursuant to § 85-2-343, MCA, that is an entirely different designation than a controlled groundwater area promulgated pursuant to § 85-2-506, MCA. This case, therefore, lies well within the heartland of the scenarios identified by DNRC and approved by the *Diamond Cross Props.* court that do *not* require water rights permits for drainage

practices rather than being akin to the CBM extraction found in that case to require closer scrutiny by DNRC under its permitting authority.

Conclusion

For over 40 years, DNRC has consistently taken the position that mine dewatering standing alone is neither a beneficial use of water nor, pursuant to § 85-2-505(1)(c), MCA, waste. Rather it is a manipulation of water wholly outside the scope of the Water Use Act's permitting scheme. The Legislature has not seen fit in that time to modify or disavow this interpretation. And the only court case any of the parties have identified that examines the correctness of DNRC's interpretation found it to be so on facts analogous to those presented here. Conservation Objectors' motion for partial summary judgment therefore fails.

Applicant is entitled to partial summary judgment limited to its having met its burden of proof as to the beneficial use criterion set forth in § 85-2-311(1)(d), MCA, in regard to the 350 AFY that are properly the subject of the Application. Applicant retains the burden to prove that it can satisfy the remaining applicable criteria of § 85-2-311, MCA, in regard to the Application, and this Order does not address Conservation Objectors' other valid grounds for objection to that Application. Nor, of course, does it determine anything in relation Applicant's other permit and change applications connected with the Project nor Conservation Objectors' objections to those applications.

I will set a status conference by separate order to discuss with the parties a schedule for proceeding with the efficient resolution of the above-captioned applications as well as the six pending change applications associated with Applicant's effort to develop the Project.

IT IS SO ORDERED.

Dated this 23rd day of February 2022.

/Original signed by Jay D. Weiner/
Jay D. Weiner, Hearing Examiner
Department of Natural Resources
and Conservation
Office of Administrative Hearings
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-1510

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT was served upon all parties listed below on this 23rd day of February 2022 by first class United States mail and/or by electronic mail (e-mail).

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