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MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

<p>CLARK FORK COALITION, EARTHWORKS, TROUT UNLIMITED, and ROCK CREEK ALLIANCE</p> <p>v.</p> <p>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, REVETT MINERALS, INC. and RC RESOURCES, INC.</p>	<p>CAUSE NO. _____</p> <p>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</p>
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I. INTRODUCTION

This action arises from certain construction activities that Defendants Revett Minerals, Inc. and RC Resources, Inc. (collectively “Revett”) plan to undertake, with the approval of Defendant Montana Department of Environmental Quality (“DEQ”), in connection with the proposed Rock Creek Project, a large copper and silver mine beneath the Cabinet Mountains Wilderness. Plaintiffs seek a declaration that the proposed construction activities are not eligible for coverage under MPDES General Permit No. MTR 100000, and that Revett may not

commence construction without obtaining a permit under the Montana Pollutant Discharge Elimination System (“MPDES”). Plaintiffs also seek an injunction preventing Revett from commencing construction unless and until it obtains such a permit, and complies with Montana’s public participation laws and statutory nondegradation policy.

II. PARTIES, VENUE AND STANDING

1. Plaintiff Clark Fork Coalition is a Montana non-profit organization dedicated to the protection of water quality in the Clark Fork River Basin.

2. Plaintiff Rock Creek Alliance is a non-profit organization dedicated to the protection and preservation of the Rock Creek watershed and the adjacent Clark Fork Pend Oreille watershed.

3. Plaintiff Trout Unlimited is a non-profit, 501(c)(3) organization incorporated under the laws of Michigan and headquartered in Arlington, Virginia, which is dedicated to the conservation, protection, and restoration of coldwater fisheries in North America. Trout Unlimited has numerous councils and chapters throughout the country, including the Idaho and Montana Councils and the Panhandle Chapter.

4. Plaintiff Earthworks is a national nonprofit conservation organization dedicated to protecting communities and the environment from the adverse impacts of mining. Earthworks is headquartered in Washington D.C. and has field offices across the country, including Missoula, Montana, Bozeman, Montana, Durango, Colorado and Tucson, Arizona.

5. Defendant DEQ is the agency within the executive branch of the state of Montana that is statutorily charged with administering and enforcing the Montana Water Quality Act.

6. Defendant RC Resources is a wholly-owned subsidiary of Defendant Revett Minerals, Inc. which is a corporation organized under the laws of Canada, with its principal place

of business in Spokane, Washington. Revett is the holder of certain mineral rights and state and federal permits for the Rock Creek Project, and therefore is named herein pursuant to § 27-8-301, MCA.

7. Venue is proper in this Court because Defendant DEQ is a state agency located in Helena, Montana.

8. Members of each of Plaintiff organizations live in the state of Montana and use Rock Creek, the Clark Fork River, and environs, including the areas affected by Revett's proposed operations, and have an interest in preserving them. Members of Plaintiff organizations use Rock Creek and the Clark Fork River for recreation and nature appreciation, and those interests will be adversely affected by the actions of the Defendant.

9. The environmental, health, aesthetic, and recreational interests of each Plaintiff's members will be adversely affected by DEQ's actions of permitting the proposed Rock Creek Mine, and by Revett's construction of the mine. Members of the Plaintiff organizations use and enjoy the waters and lands associated with the proposed project area, including waters in the vicinity of, and downstream from, the construction activities that Revett intends to undertake, and that DEQ intends to authorize under the General Permit. Plaintiffs' members intend to use said lands and waters for these purposes in the future. Plaintiffs' members specifically use, recreate in and enjoy these areas in the following ways:

- (a) Plaintiffs' members live in the watershed impacted by discharges from the proposed mine;
- (b) Plaintiffs' members recreate in and around the waters and surface areas that will be affected by discharges from the proposed mine;
- (c) Plaintiffs' members observe study and enjoy wildlife and aquatic life in the watershed and surface areas around the proposed mine;

(d) Plaintiffs' members have aesthetic and health interests in keeping the waters in the vicinity of the proposed mine free from pollutants.

10. Each Plaintiff has as part of its mission the goal of protecting water quality and insuring compliance with the laws and regulations of Montana and the United States. Plaintiffs and their members participated in the scoping process, attended meetings and hearings, and submitted comments on the proposed project. This action is brought on the organizations' own behalf and on behalf of their members.

11. A ruling on the merits of Plaintiffs' claims in their favor would redress the injuries alleged in this Complaint by ensuring compliance with the statutes, rules, and constitutional provisions enacted to protect the environmental and participatory interests alleged herein.

III. GENERAL ALLEGATIONS

12. In June 2003, DEQ and the Kootenai National Forest (KNF) issued a joint Record of Decision allowing the mine project to go forward in two distinct phases; the first comprised of an evaluation adit, which will provide data required for the permitting of the second phase, which consists of the construction and operation of the entire mine with up to four adits, mill, water treatment facility, roads, and tailings paste storage facility.

13. As described in the ROD and accompanying environmental impact statement ("EIS"), the mine is designed to process approximately 10,000 tons of ore per day for thirty years. Construction and operation of the mine will result in nearly 600 acres of surface disturbance consisting of evaluation, service and ventilation adits, the mine and associated mill facility, utility and transportation corridors, tailing paste storage, facility, waste water treatment facility and support facilities.

14. Most of the above facilities, including the adits, mill, tailings and waste rock facilities, and related roads, will be located in the Rock Creek drainage.

15. Rock Creek originates in the Cabinet Mountains and flows into the Clark Fork River near the site of the proposed mine. Rock Creek provides crucial habitat for bull trout, cutthroat trout, harlequin duck and other aquatic species.

16. Rock Creek is classified under Montana law as a “B-1 water,” which is protected for uses such as drinking water, recreation, growth and propagation of salmonid fishes and associated aquatic life.

17. DEQ has formally identified Rock Creek pursuant to section 303(d) of the Clean Water Act as a water body that is impaired by unnaturally high levels of sediment. More specifically, DEQ has found that excessive sediment levels prevent Rock Creek from fully supporting the beneficial use of a coldwater fishery.

18. Rock Creek and its tributaries support populations of bull trout (*Salvelinus confluentus*) and other salmonids. The bull trout is Montana’s largest native freshwater fish. Prized by sportsmen and naturalists, bull trout can exceed thirty pounds. Bull trout exhibit both a resident and migratory life form. Migratory bull trout migrate to Rock Creek to spawn. Young migratory bull trout spend their initial life stages in small tributary creeks and migrate to large rivers and lakes for their adult lives. Resident bull trout spend their life histories entirely within smaller creeks such as Rock Creek.

19. Bull trout are listed under the Federal Endangered Species Act, 16 U.S.C. 1531 *et seq.* as a threatened species. Bull trout have experienced precipitous population declines and are considered threatened with extinction. Bull trout inhabit the Clark Fork River in the vicinity of the proposed mine as well as Rock Creek and its tributaries.

20. The Montana Bull Trout Restoration Team appointed by Governor Racicot in 1993 identified Rock Creek as a core area for bull trout, and maintenance of its water quality and habitat is critical to the long-term survival and recovery of the species in Montana.

21. The U.S. Fish and Wildlife Service (“USFWS”) has designated numerous segments of Rock Creek as critical habitat that is essential to the recovery of bull trout. Most of these segments are downstream of the proposed mine construction activities.

22. Bull trout are sensitive to changes in water quality, particularly increases in sediment. The deposition of fine sediments in salmonid spawning and rearing habitat increases mortality of bull trout embryos, alevins, and fry. For a substrate oriented salmonid like juvenile

bull trout, deposition of fine sediments filling spaces between rubble can have a very negative effect on survival, especially over-winter survival.

23. On October 11, 2006, the U.S. Fish and Wildlife Service (“USFWS”) issued a biological opinion containing a detailed scientific evaluation of the likely impacts the construction of the mine would have on the Rock Creek populations of bull trout.

24. The USFWS found that Rock Creek has already been severely impacted by sediment pollution from past human activities: “In general, habitat conditions in the Rock Creek watershed are degraded with relatively high levels of sediments present in the spawning gravels and periods of stream flow intermittence occurring in many years. [] The past occurrences such as climate change, riparian logging, road building, geologic events, and the 1910 fire have likely degraded habitat and contributed to Rock Creek’s limited habitat conditions for bull trout.”

25. The USFWS further found that several key components necessary for bull trout viability in Rock Creek are functioning at unacceptable risk due to excess levels of sediment. These include availability of spawning gravels, growth and survival of young fish, pool frequency and quality, and the condition of riparian conservation areas.

26. The USFWS further found that “any significant increase in fine sediment levels in bull trout spawning areas [in Rock Creek] will most likely have negative effects on productivity of bull trout.”

27. Construction of the Rock Creek Project is expected to discharge large amounts of sediment into Rock Creek. Much of this sediment will be generated by the reconstruction and widening of the road to the adit site, and the associated vehicle traffic.

28. Estimates by the Forest Service and Revett of the amount of increased sediment resulting from construction have ranged from 400 tons per year to over 1,400 tons per year.

29. Elevated levels of sediment in Rock Creek resulting from the construction are expected to persist for at least five to seven years.

30. Revett has stated on several occasions that it intends to go forward with construction activities in the spring of 2008. Revett has stated to DEQ that in order to comply with the Montana Water Quality Act (“WQA”) it intends to proceed under the authority of

MPDES General Permit MTR 100000, which provides MPDES program authorization for all construction activities carried out in compliance with its terms. A copy of General Permit MTR 100000 is attached to this Complaint as Exhibit 1.

31. On March 19, 2008, DEQ sent Revett a letter purporting to authorize a short-term water quality standard for turbidity related to construction of the proposed exploration adit and support facilities. A true and accurate copy of the letter is attached as Exhibit 2.

32. The construction slated to occur on the Rock Creek project under the authority of General Permit MTR 100000 is likely to adversely affect and be harmful to the bull trout, worsening the already tenuous state of their population in Rock Creek.

33. Plaintiffs and the general public were not provided with adequate notice and opportunity to be heard on the issuance of permission to operate under General Permit 100000 for the Rock Creek project, which is a matter of significant interest to the public.

34. Plaintiffs have had to hire attorneys to pursue these claims.

IV. FIRST CAUSE OF ACTION –INAPPLICABILITY OF GENERAL PERMIT

35. Plaintiffs re-allege all previous paragraphs as if set forth in full.

36. By its own terms, General Permit MTR 100000 provides no coverage for activities that are unable to meet water quality standards established pursuant to 75-5-301, MCA, and ARM Title 17, Chapter 30, Subchapters 5, 6, 7, and 10.

37. The applicable water quality standards for Rock Creek, codified at ARM § 17.30.623(f), state that: “No increases are allowed above naturally occurring concentrations of sediment or suspended sediment . . . which will or are likely to . . . render the waters harmful, detrimental, or injurious to . . . wild animals, birds, fish, or other wildlife.

38. By its own terms, General Permit MTR 100000 provides no coverage for activities where: “The point source is or will be located in an area of unique ecological or

recreational significance. Such determination must be based upon considerations of Montana stream classifications adopted under 755-301, MCA, impacts on fishery resources, [and] local conditions at proposed discharge sites.”

39. The area downstream of the proposed mine construction activities is an area of unique ecological significance because of, *inter alia*, the presence of a threatened, genetically unique population of bull trout, which are an endangered species, and the presence of designated critical habitat for this species.

40. The increases in sediment caused by construction of the Rock Creek Project are likely to be harmful to bull trout and other native salmonids as set forth above.

41. The proposed construction activities do not fall within the coverage provided by General Permit MTR 100000, and therefore is subject to all MPDES permitting requirements as set forth in MCA § 75-5-605.

V. SECOND CAUSE OF ACTION – VIOLATION OF MCA § 75-5-318

42. Plaintiffs re-allege all previous paragraphs as if set forth in full.

43. MCA 75-5-318 authorizes DEQ or the Department of Fish, Wildlife and Parks to issue short-term water quality standards for turbidity and total suspended sediment (TSS) produced by “stream-related construction activities or stream enhancement projects.”

44. On March 19, 2008, DEQ sent Revett a letter purporting to authorize a short-term water quality standard for turbidity related to construction of the proposed exploration adit and support facilities. (Exhibit 1.) The letter states this standard will be in effect for a full year, from March 17, 2008 to March 18, 2009.

45. The construction of the proposed evaluation adit and support facilities is not “stream-related construction activity” within the meaning of § 75-5-318, because, *inter alia*, the

pollution-generating aspects of the project is not within or adjacent to the bed and banks of a stream.

46. The construction of the proposed evaluation adit and support facilities is not a “stream enhancement project” within the meaning of § 75-5-318, because, *inter alia*, the project is not within or adjacent to the bed and banks of a stream, its purpose is to facilitate construction of a mine, and it will harm, not enhance, the stream.

47. A water quality standard lasting one year is not a “short term” standard within the meaning of §75-5-318.

48. DEQ’s letter of March 19, 2008 does not set forth any numeric or narrative standards for turbidity or suspended sediment.

49. DEQ’s letter of March 19, 2008 does not constitute a valid short-term authorization under §75-5-318.

VI. THIRD CAUSE OF ACTION – VIOLATION OF MCA § 75-5-303 (NON-DEGRADATION)

50. Plaintiffs re-allege all previous paragraphs as if set forth in full.

51. Rock Creek and its tributaries are classified as “high quality” waters pursuant to Montana’s non-degradation law, MCA § 75-5-303.

52. The activities proposed by Revett would lower the quality of the waters of Rock Creek and its tributaries by discharging high levels of sediment into them. This degradation of water quality is expected to last for at least five to seven years.

53. Defendant DEQ may not authorize any party to undertake an activity that will degrade high-quality waters without first complying with the process set forth in MCA § 75-5-303 and the administrative rules promulgated thereunder.

54. Revett has not sought, and DEQ has not granted, an authorization to degrade high quality waters in connection with Revett's proposed sediment-generating activities in the Rock Creek watershed.

55. The proposed construction activities, and DEQ's authorization of those activities pursuant to the general permit violate MCA 75-5-303.

VII. FOURTH CAUSE OF ACTION – VIOLATION OF PUBLIC PARTICIPATION LAWS

56. Plaintiffs re-allege all previous paragraphs as if set forth in full.

57. Article II, § 8 of the Montana Constitution states that “The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.”

58. MCA § 2-3-111 requires DEQ to give interested persons “a reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public.”

59. The proposed Rock Creek project has engendered enormous controversy in Montana and throughout the nation over the past two decades. The decision to allow Revett to proceed with sediment-discharging activities in the Rock Creek drainage under General Permit MTR 100000, and the decision that the specific terms of Revett's stormwater prevention plan comply with that general permit and the WQA, are decisions of significant interest to the public.

60. The decision to issue Revett “short-term” water quality standards pursuant to MCA 75-5-318 is a decision of significant interest to the public.

61. DEQ has not provided Plaintiffs, interested persons or the public a reasonable opportunity to submit data, views, or arguments prior to making these decisions, in violation of Article II, § 8 of the Montana Constitution and Title 2, Chapter 3 MCA.

VIII. FIFTH CAUSE OF ACTION – VIOLATION OF CONSTITUTIONAL ENVIRONMENTAL DUTY

62. Plaintiffs re-allege all previous paragraphs as if set forth in full.

63. Article IX, Section 1 of the Montana Constitution requires the state and all persons to maintain and improve a clean and healthful environment.

64. Article IX, Section 1 of the Montana Constitution requires the state to enact adequate remedies to protect the environmental life support system from degradation, and to prevent unreasonable depletion and degradation of natural resources.

65. The Montana Water Quality Act, including the non-degradation and MPDES permit provisions, implements the duties set forth in Article IX, Section 1.

66. As applied by DEQ in this case, General Permit MTR 100000 violates Article IX, Section 1 by failing to protect Rock Creek and its native bull trout from degradation and unreasonable depletion.

IX. REQUEST FOR RELIEF

Based on the foregoing, Plaintiffs request that the Court grant the following relief:

A. A declaratory judgment declaring that the proposed construction activities for the Rock Creek Project are not eligible for coverage under General Permit MTR 100000.

B. An order declaring DEQ's § 318 authorization dated March 19, 2008 to be void and invalid.

C. Alternatively, an order declaring General Permit MTR 100000, MCA § 75-5-318, and the statutes and rules relied upon by DEQ to be unconstitutional as applied by DEQ.

D. An order permanently enjoining Revett from undertaking any ground-disturbing activities associated with the mine until such time as it has complied with all applicable provisions of the Montana Water Quality Act, including the MPDES program and Montana's non-degradation policy.

E. Plaintiffs' costs and reasonable attorney fees.

F. All other appropriate relief as the Court deems just and proper.

DATED this ____ day of June, 2008.

BY: _____
David K. W. Wilson, Jr.
REYNOLDS, MOTL AND SHERWOOD

BY: _____
Mathew Clifford

Attorneys for Petitioners/Plaintiffs