

COMPLAINT

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FILED LISA KALLIO

MONTANA FIRST JUDICIAL DISTRICT COURT LEWIS AND CLARK COUNTY

TONGUE RIVER WATER
USERS' ASSOCIATION

Plaintiff,

vs.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY
and REDSTONE GAS PARTNERS,
LLC.,

Defendants.

CAUSE NO. CDV-2001-258

COMPLAINT

I. INTRODUCTION

1. By this Complaint, the Tongue River Water Users' Association (TRWU), an association of irrigators with water rights to the use of the waters of the Tongue River for irrigation, and who also have water rights to use of the ground water, challenges the Montana Department of Environmental Quality (DEQ) decision to issue Montana Pollution Discharge Elimination System (MPDES) Permit # MT-0030457 (Permit), to Redstone Gas Partners, LLC (Redstone).

2. The permit allows Redstone to discharge polluted groundwater that is a by-product of its coal bed methane operations into the Tongue River. The groundwater contains contaminants that are harmful to soils, native

plants, cultivated crops, and aquatic life. The pollution permitted by DEQ is significant and should have undergone the rigorous environmental and economic review required by Montana's non-degradation laws. Additionally, the permit and associated discharges constitute a breach of TRWU's contract with the State of Montana for use of the Tongue River Waters for irrigation purposes, violate Montana's water wasting statutes, and violate TRWU's fundamental constitutional right to a clean and healthful environment found at Article II, Section 3 of the Montana Constitution, and violate Article IX, Sections 1 and 3 of the Montana Constitution. Further, this Complaint challenges the DEQ's failure to provide adequate public notice and comment prior to permitting Redstone to discharge the coalbed methane wastewater into the Tongue River. Finally, by this Complaint, TRWU alleges that DEQ violated the Montana Environmental Policy Act (MEPA) by its actions in issuing the Environmental Analysis for Redstone's permits.

II. FACTUAL BACKGROUND

3. The preceding paragraphs are realleged as if set forth in full hereunder.
4. By this Complaint, TRWU challenges DEQ's nonsignificance determination and decision not to perform nondegradation review of Redstone's dumping of approximately 2.3 million gallons of highly saline waste water per day directly into the Tongue River.
5. TRWU has a long-term contract with the State of Montana for the lease of water for irrigation, and has entered into a long-term commitment to pay an additional \$3.97 per acre foot of water to help fund the new Tongue River Dam.

6. On February 7, 2000, as a follow-up to a January 25, 2000 meeting with DEQ, TRWU sent written comments to the DEQ expressing concern over the groundwater discharges into the Tongue River from Redstone's coalbed methane wells. TRWU's primary complaint focused on the adverse effects on agricultural lands from discharging groundwater with an extremely high sodic and saline content into the Tongue River. In that letter, TRWU suggested that a more environmentally sound solution for disposal of the groundwater was via deep well injection back into the aquifer. DEQ, in its Checklist Environmental Assessment section providing for a "Description and analysis of reasonable alternatives whenever alternatives are reasonably available and prudent to consider:" responded "[n]one." It is widely known that reinjection of CBM wastewater back into aquifers has been occurring in other parts of the United States for years.

7. Despite the concerns of TRWU and many other parties, on June 16, 2000, DEQ issued MPDES permit # MT-0030457 to Redstone to discharge pollutants into the Tongue River in southeastern Montana. A modified final permit was issued on July 3, 2000 providing for four additional outfall points. No additional notice or time for public comment was provided, even though the permit was modified. The MPDES permit authorizes Redstone to discharge groundwater produced from its coalbed methane (CBM) wells directly into the Tongue River at 11 points.

II. STANDING, JURISDICTION, AND VENUE

8. Plaintiff Tongue River Water Users Association is a Montana non-profit corporation incorporated in accordance with the laws of Montana for the purpose of appropriating, purchasing, marketing, selling, pumping, diverting,

developing, furnishing, distributing, leasing and disposing of the waters of the Tongue River in Montana. TRWU is further incorporated for the purpose of constructing, reconstructing, maintaining, repairing, altering, using, controlling and operating, "dams, reservoirs, irrigation works and systems, drainage works and systems, diversion canals" and other water works systems and appurtenances for storage and distribution of the Tongue River waters. TRWU has at all times pertinent hereto maintained its principal office in Custer County, Montana. This Complaint is brought on the organization's own behalf and on behalf of its members individually.

9. TRWU is a water users' association comprised of ranchers, farmers, and the Northern Cheyenne Tribe, all of whom rely on and pay for the use of the waters of the Tongue River. TRWU pays, based on different contracts with the State and Federal Government, from \$1.30 to \$2.50 per acre foot to lease the waters of the Tongue River, \$1.00 per acre foot for operation and maintenance, of water storage facilities, plus an additional \$3.97 per acre foot for a newly constructed dam on the Tongue River located below the Redstone discharge points.

10. TRWU's members reside in Custer, Rosebud, and Big Horn counties, and are dependent on high quality surface and groundwaters for their livelihoods as ranchers and farmers. TRWU members rely on the high quality water not only for irrigation, but also for livestock watering. Members also hunt, fish, and recreate in, and appreciate, Powder River, Rosebud, Big Horn, and Custer Counties for their aesthetic qualities and lifestyle opportunities and have an interest in preserving them. Plaintiff's members are directly and adversely affected by the discharge of pollutants into the waters of

the Tongue River. The environmental, economic, health, aesthetic, and recreational interests of TRWU's members have been, and continue to be adversely affected by Respondant DEQ permitting Redstone's illegal discharges.

11. The Northern Cheyenne Tribe (Tribe) is a member of TRWU. The Tribe has water rights to the use of the waters of the Tongue River pursuant to the Northern Cheyenne-Montana Compact (Compact), a compact between the Northern Cheyenne Tribe, the State of Montana, and the United States of America. The Compact is codified at § 85-20-301, MCA. The Montana legislature ratified and adopted the Compact known as the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (P.L. 102-374, 102 Stat. 1186). See § 85-20-302. MCA. The Redstone discharges into the Tongue River have been, are being, and will continue to substantially and adversely interfere with the Tribes legal right and ability to use the Waters of the Tongue River for irrigation and to market the water as set forth in the Compact. Tribal members also rely on the water to feed livestock and wildlife for their subsistence.

12. Members of TRWU, including the Tribe, use and enjoy the waters and lands in, around, and affected by the discharges from Redstone's wells, including waters in the vicinity of, and downstream from, Redstone's discharges into waters of the United States. Plaintiff has a contract with the State of Montana pursuant to which the State is obligated to Plaintiff to provide water that is suitable for irrigation and agricultural use and is obligated to provide water that is not degraded. The Tribe is also legally entitled to domestic use of the waters that are being degraded. The State is obligated to ensure that the short and long-term quality of the water is maintained.

13. Plaintiff's members, including the Northern Cheyenne Tribe, specifically use, recreate in, and enjoy these areas in the following ways:

TRWU's members live within the watershed impacted by discharges from Redstone's wells;

TRWU's members conduct ranching and farming operations, and irrigate with water impacted by discharges from Redstone's wells;

TRWU's members use the waters impacted by Redstone's discharges for domestic use;

TRWU's members fish, hunt, raft, hike, walk and boat in and around the waters impacted by discharges from Redstone's wells;

TRWU's members observe and enjoy wildlife in the Tongue River watershed around, and downstream from, Redstone's wells;

TRWU's members have economic, aesthetic, and health interests in keeping the waters in the vicinity of, and downstream from, Redstone's wells free from pollutants.

TRWU's members rely on the ground water that is being depleted to recharge rivers and streams and seeps and springs on their land for livestock and wildlife watering.

14. Plaintiff TRWU has standing in this Complaint to protect its own interests and those of its individual members in a representative capacity. TRWU's associational purposes are adversely affected by the Redstone discharges that degrade waters, adjacent lands, and irrigable lands upon which the water is discharged. TRWU is further harmed by the Redstone's discharges in that they impair the habitability, economic value, recreational value, and aesthetic benefits of the watershed.

15. Plaintiff TRWU is an interested party whose substantial interests are adversely affected by the Respondants' actions as required by § 75-5-103(13). Therefore, TRWU may properly Complaint DEQ's final determination of nonsignificance and decision to forego nondegradation review.

III. FACTS

16. The preceding paragraphs are realleged as though set forth in full hereunder.

17. On December 15, 1999, the Montana Department of Natural Resources and Conservation (DNRC) issued a Final Order designating the Powder River Basin Groundwater Area (Groundwater Area) in anticipation of expected groundwater withdrawals associated with coal bed methane (CBM) development in the basin. The DNRC Final Order includes findings of fact that CBM extraction technology requires continuous groundwater removal to lower groundwater levels and to reduce water pressures in coal beds, and this groundwater removal will lower water levels in the aquifer. Other aquifers in a CBM development area may or may not be affected by CBM groundwater withdrawals, depending on the connections between aquifers. Further, the DNRC findings of fact state that "coal aquifers are often the only practical source of fresh water for domestic, stock, and agricultural uses by the people in the area." The DNRC findings of fact also state that assessment of localized effects of CBM developments on water availability would require compiling baseline data from existing wells before CBM development occurs. The findings of fact also state that there is "considerable data available showing significant effects on water levels in coal aquifers from extensive and continuous pumping of water from coal mines in the Decker area."

18. In its findings of fact, the DNRC Final Order also states that the water withdrawn from the coal aquifers is not a desired product of the operation, and must be discharged in some way. To discharge the withdrawn waste water, CBM permit holders must obtain the proper water discharge permits in the Groundwater Area, including a MPDES permit from (DEQ) for discharge to surface water, and/or an Underground Injection Control (UIC) permit from the Board of Oil and Gas Conservation/and or the Environmental Protection Agency (EPA) for re-injecteing discharges to groundwater.

19. In its conclusions of law, the DNRC Final Order states that “[e]xcessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the area proposed for controlled ground water designation. By ‘excessive,’ the Department means that water levels in targeted aquifers could be reduced near project areas for long periods of time in a water-scarce area.”

20. Information from a set of data on aquifer groundwater samples collected in the Groundwater Area by CBM developers and analyzed by Inter-Mountain Labs in Sheridan, Wyoming, and information from another set of data collected and analyzed by the DEQ showed that water withdrawn from CBM discharge wells has eighteen times as much sodium as water flowing in the Tongue River, and a Sodium Adsorption Ratio (SAR) forty times greater than the Tongue River water. The SAR is a calculated index of the amount of sodium relative to other elements, primarily calcium and magnesium. High SAR values slow the infiltration and permeability of soils, causing water and nutrients not to effectively penetrate the soils, and increases overland flow and erosion. Obviously, when water is not penetrating the soils, there is less

available for plant and root uptake. Further, high SAR values when combined with high salinity causes salts to build up on soils rather than penetrate and flow through the soils. The combined negative effects are disastrous to soil productivity. The result to Plaintiff will be reduced crop production, meaning adverse economic impacts to Plaintiff and its members. The average SAR for CBM discharge from the Inter-Mountain Lab data set is 51.9. The average SAR from the DEQ data set is 34.8. The waters of the Tongue River have a SAR of 0.79. Most native plants in the Tongue River basin can survive when the SAR is below 3.0. No native plant species can survive when the SAR is 12 or above.

21. As shown in Table 2 of the Statement of Basis in the permit, the median concentration SAR for the CBM discharges is 47. Under any circumstances and soil conditions, and especially in the Tongue River drainage, if the Redstone discharges continue, TRWU members will have to implement special soil management techniques, if such techniques are even technologically or economically available and/or feasible, at great cost to avoid reduced soil productivity. Over time, the discharges will adversely impact Plaintiff and its members, both economically, socially and culturally.

22. Further, the cumulative impacts of discharges occurring upstream in Wyoming combined with Redstone's discharges in Montana were not adequately analyzed prior to allowing Redstone's discharges. New information has become available regarding the cumulative impacts. DEQ's Director, Mark Simonich, sent Wyoming DEQ/WQD a letter and attachment on October 17, 2000 requesting additional analyses before Wyoming permits any further discharges, stating that the study used in permitting the discharges is "inadequate," and suggesting that Montana and Wyoming may want to

"collaborate on a waste load allocation that could be used as a basis for future permit actions in both states." In the attachment to Simonich's letter, DEQ questions Wyoming's data upon which permits are premised, voices concerns about (total maximum daily loads (TMDL's), and states that **"MDEQ believes that, unless the CBM water is treated or re-injected, it will cause greater impacts to salinity and SAR than those predicted by this study because the study did not consider these factors."**

23. Water withdrawn from coal bed aquifers in the Groundwater Area is not suitable for irrigation, lawn watering, or land spreading. The withdrawn water is unacceptable for irrigation based on its sodium levels. Sodium-rich water will cause all but the coarsest sands that are extremely well-drained to disperse. Sodium and its compounds are electrically charged and will adhere to opposite charged sites on soil particles. When charged sites are occupied, individual particles are separated from other particles, allowing them to be suspended. Suspended soil particles can then be washed away causing the increase of erosion. This dispersion eventually leads to deteriorated soil structure, reduced infiltration, and poor drainage.

24. The Inter-Mountain Labs and DEQ analyses also show that:

- a) CBM discharge water has four times the conductivity of Tongue River water. Conductivity is a measure of dissolved solids and salts;
- b) CBM discharge water has four times the total dissolved solids of Tongue River water;
- c) CBM discharge water is five times as alkaline as Tongue River water;

d) CBM discharge water has five times the bicarbonate as Tongue River water;

e) CBM water has one-and-a-half times as much sulfate as Tongue River water;

f) CBM water has from two to twelve times as much fluoride as Tongue River water;

g) CBM water has four times as much ammonia as Tongue River water;

h) CBM water has increased levels of aluminum, iron, magnesium and other metals compared to Tongue River water.

25. Section 301 of the federal Clean Water Act (CWA), 33 U.S.C. § 1311(a) prohibits the discharge of any pollutant from a point source into waters of the United States unless such discharge is permitted in a National Pollution Discharge Elimination System (NPDES) permit. Because the United States Environmental Protection Agency (EPA) has certified the state of Montana to issue such permits under the Montana Pollution Discharge Elimination System (MPDES), a MPDES permit issued by DEQ may also permit discharge of a pollutant into the waters of the United States in Montana.

26. Redstone, as part of its CX Field, has drilled and pumped in excess of 120 wells that each discharge between 15-30 gallons per minute of water that is polluted as alleged herein. The CX Field and the permitted discharges are located in Big Horn County, Montana. From the time Redstone began pumping groundwater from its CBM wells and discharging this groundwater into the surface waters of the United States until June 16, 2000, Redstone did not have a NPDES or MPDES permit for discharging groundwater produced

from its CBM wells into the surface waters of the Tongue River or its tributaries.

IV. ALLEGATIONS

COUNT 1 -- DEQ FAILED TO PERFORM NONDEGRADATION REVIEW

27. The preceding paragraphs are realleged as though set out in full hereunder.

28. DEQ conducted sampling of the waters of the United States in the region for which the MPDES permit final determination was approved by DEQ. The permit, however, states that DEQ based its determinations on past discharge data for the permit on sampling conducted by Redstone. DEQ did not include sampling information that the department itself collected in Table 2, the effluent quality data chart in the permit. Later samples collected by DEQ should have been analyzed and included in determining parameters in the decision to issue Redstone a MPDES permit, especially under a determination of nonsignificant effect on water quality.

29. DEQ failed to perform a soils analysis in the Tongue River drainage to determine the effects of the discharges on the specific soils, and failed to analyze the long-term cumulative effects of the dumping of saline CBM water on the soils would be.

30. Under A.R.M. 17.30.602, "harmful parameters" means parameters listed as harmful in DEQ circular WQB-7. SAR and sodium are not listed in WQB-7, yet the Redstone MPDES permit sets out a level for both allowed to be discharged by Redstone. Not only does WQB-7 not set out degradation parameters for sodium and SAR, no officially recognized narrative water quality standards exist for SAR.

31. According to footnote 16 of Table 3 of the Redstone permit, DEQ has relied on A.R.M. 17.30.715(1)(g) in setting SAR and sodium levels for the permit. A.R.M. 17.30.715(1)(g) states that changes in water quality are nonsignificant, and do not need to undergo nondegradation review under MCA § 75-5-303 when “changes in the quality of water for any parameter for which there are only narrative water quality standards if the changes will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.”

32. Even though WQB-7 does not set out the harmful parameter of SAR, and the calculated index of 6 as the nondegradation criterion is based on no explicit narrative standard for SAR, the SAR nondegradation standard set out in Redstone's MPDES permit is considered toxic. DEQ cannot set the nondegradation standard for SAR at a level known to be toxic. DEQ's anticipated SAR in the Tongue River downstream from the points of discharge would be over twice as high as the previous maximum recorded SAR in the Tongue River. Furthermore, the DEQ is well aware that non-degradation review is required in circumstances such as this.

33. DEQ has not considered the cumulative impacts or synergistic effects of increased sodium and SAR in Tongue River water as required by A.R.M. 17.30.715(2)(a). Plaintiff's members use the surface waters of the Tongue River for irrigation. Further, DEQ failed to factor in the cumulative impacts of CBM development and associated discharges of pollutants upstream in Wyoming where CBM development has been occurring for some time. Montana DEQ was well aware of the massive-scale CBM development upriver in Wyoming prior to issuing Redstone's permit. CBM development in Wyoming

upstream from the permitted discharge sites has proceeded at a pace and scale much greater than CBM development in the CX Field. Taken together, the impacts from all upstream Wyoming discharges and the Redstone CBM discharges create significant adverse impacts to TRWU and its members. Moreover, the long-term impacts, especially in years of low flow, will be especially detrimental to the interests of TRWU and its members.

34. The Tongue River is classified as B-2 waters at Redstone's point of discharge of pollutants. See 17.30.611, A.R.M. Waters classified as B-2 are high-quality waters pursuant to § 75-5-102, MCA. Section 75-5-303, MCA, requires that the quality of high-quality waters must be maintained. Further, under § 75-5-303(3), MCA, DEQ may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of the evidence that:

(a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters; (c) existing and anticipated uses of state waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

35. Nonsignificant activities granted a statutory exception to § 75-5-303, MCA, are set out in §§ 75-5-317 and 301(5)(c), MCA. Regulatory exceptions are also found at A.R.M. 17.30.716. None of the exceptions set forth in § 75-5-317, MCA, or A.R.M. 17.30.716 are applicable here. Sections 75-5-317(2)(j)-(k), MCA, expressly do not exempt discharges to surface water.

Section 75-5-301(5)(c), MCA, states that the DEQ must "establish criteria for determining whether a proposed activity or class of activities, in addition to those activities identified in 75-5-317, will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

- (i) equates significance with the potential for harm to human health, a beneficial use, or the environment;
- (ii) considers both the quantity and the strength of the pollutant;
- (iii) considers the length of time the degradation will occur;
- (iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent.

See § 75-5-301(5)(c), MCA.

36. Even though DEQ has determined that the discharges are nonsignificant and nondegradation review is unnecessary, A.R.M. 17.30.715(1) requires DEQ to determine whether certain activities will result in nonsignificant changes in water quality "due to their low potential to affect human health or the environment." MCA § 75-5-301(5)(c)(i), however, requires DEQ to equate significance "with the potential for harm to human health, a beneficial use, or the environment." A.R.M. 17.30.715(1) is thus inconsistent with MCA § 75-5-301(5)(c)(i), because DEQ does not consider the impact on beneficial uses in a determination of nonsignificance under A.R.M. 17.30.715(1). Regulations must not conflict with governing statutes, and when the two are in conflict, as they are here, the statute must govern agency behavior. See *Epperson v. Willis Corroon Admin. Svcs. Corp.*, 281 Mont. 373, 934 P.2d 1034 (1997) (citing *Bick v. Department of Justice*, 224 Mont. 455, 730

P.2d 418 (1986). Pursuant to § 75-5-301(5)(c), DEQ must consider the potential for harm to beneficial users, particularly irrigators, when assessing significance, pursuant to § 75-5-303(1), MCA, which provides that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." Because TRWU has a preexisting right to appropriate, store, and use the waters of the Tongue River for irrigation, the State has an obligation to protect TRWU's right to use, and the quality of, the waters of the Tongue River.

37. An increased SAR will have a cumulative and synergistic effect on irrigators, including TRWU members, who withdraw irrigation water from the Tongue River for land application. Irrigation is a beneficial use of Tongue River water. Tongue River water downstream from the permitted discharge of pollutants will have a higher SAR than typical in the Tongue River. Irrigators will thus spread increased levels of sodium on their fields while irrigating. Salting of fields has a well-known harmful effect on the productivity of land in Montana, particularly in the Tongue River drainage.

38. DEQ has also not shown the effects of the release of pollutants on the reservoir downstream from the permitted discharge site. For example, the Redstone permit allows heightened levels of dissolved solids, yet DEQ has made no attempt to analyze what will happen to these solids when and if they reach the reservoir, the impact of these solids on the reservoir aquatic life, and the impact on irrigators who withdraw water from the reservoir for surface irrigation.

39. In Table 3 of the Redstone permit, DEQ has set the nondegradation criterion for aluminum, according to footnote 12, based on the 75th percentile

of the baseline water quality when the secondary maximum contaminate level of the background water (here the Tongue River) exceeds 0.05 milligrams per liter. This method of assessment does not appear in the Administrative Rules of Montana, and DEQ should set the nondegradation criterion according to the dictates of A.R.M. 17.30.715(1)(c), as DEQ did for many of the metals assessed.

40. Further, DEQ has not revealed the formulaic basis for arriving at a figure of 1600 gallons per minute of total effluent discharge as the basis for the permit. The Redstone MPDES permit, therefore, does not fall within the regulatory and statutory nondegradation exceptions, and DEQ must conduct nondegradation review in accordance with MCA § 75-5-303.

41. The Redstone MPDES permit does not comply with § 75-5-303, MCA, because it has not been demonstrated by a preponderance of evidence that "there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation." On the contrary, on site disposal of the produced groundwater, rather than discharge to the waters of the United States, is economically, environmentally, and technologically feasible. Further, DEQ has not shown that Redstone's wells will result in important economic or social development that exceeds the costs of allowing degradation of high-quality waters. Redstone, in fact, employs primarily Wyoming residents in the CX field, as stated in the EA.

42. DEQ has not shown that the existing beneficial uses, including irrigation, will be "fully protected" as required by MCA § 75-5-303(3)(c), or that the water quality necessary to protect existing and anticipated uses will be maintained and protected, as required by A.R.M. 17.30.705. Allowing an increased SAR for irrigation water does not fully protect irrigation use, nor does

it maintain the water quality necessary to protect the irrigated land. Any increase in SAR will have an adverse effect on irrigation as a beneficial use, and a permitted increase of SAR to toxic levels will have a deleterious effect on the land and water both immediately and cumulatively.

43. Finally, the Montana Supreme Court has determined that the state must show a compelling interest that has been narrowly tailored to effectuate such compelling state interest prior to authorizing degradation of state waters. *See Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248. Therefore, DEQ must conduct an adequate and meaningful nondegradation review based on all of the information that is currently available, including information on the cumulative impacts of both Montana and Wyoming discharges and available treatment and reinjection technologies.

COUNT 2 - PERMIT CONDITIONS, MIXING ZONES AND MONITORING ARE ARBITRARY AND INSUFFICIENT

44. The preceding paragraphs are realleged as though set out in full hereunder.

45. No mixing zone for any of the eleven permitted discharge points is defined in the permit. Rather the mixing zones are described as "nearly instantaneous." This appellation is overly broad and vague and not in compliance with § 75-5-301, MCA. Allowing Redstone to suggest mixing zones at the time of permit renewal, in approximately two years, is also not in compliance with § 75-5-301, MCA. Moreover, the permit itself states at Section F. on page 6 that "[l]acking field data on mixing efficiency in Tongue River, the permittee will be required to collect field information to develop a site specific

mixing zone at the time the permit is renewed." Such language clearly illustrates that DEQ had no knowledge on which to base its "nearly instantaneous" mixing zone determination.

46. The monitoring requirements set out in the Redstone permit are insufficient to capture the information necessary to assess the efficacy of the permit and the effects of pollutant discharges on the Tongue River and the Tongue River ecosystem. The permit requires Redstone to measure the flow rate of effluent, for example, once per week. Given that wells produce groundwater at varying rates, and not all wells are producing at any given time, a continuous flow meter at the point of discharge to measure the total rate of flow is more appropriate than weekly measurements. Further, given the potential harm associated with sodium, SAR, solids in solution, and various metals, a weekly grab sample is more appropriate, particularly given the long period of before the parameters of the permit are reviewed by DEQ.

COUNT 3 - FAILURE TO PROVIDE FOR ADEQUATE PUBLIC INVOLVEMENT AND ACTUAL NOTICE TO THE TONGUE RIVER WATER USERS' ASSOCIATION PRIOR TO ISSUING PERMIT

47. The preceding paragraphs are realleged as if set forth in full hereunder.

48. State and federal laws governing the issuance of MPDES permits impose an obligation upon DEQ to provide reasonable notice and comment opportunities on draft MDPES permits, including the permit at issue here.

49. Further, the Montana Constitution's Declaration of Rights, Article II, Section 8, provides an inalienable right of participation in the operation of agencies prior to agencies making final decisions, and Article II, Section 9 provides an inalienable right to know and observe deliberations of state

agencies except where individual privacy may be invaded. DEQ failed to provide Plaintiffs the opportunity to participate and the right to know, and therefore violated Plaintiff's fundamental constitutional rights.

50. DEQ failed to provide TRWU and its members with actual notice of its nonsignificance determination and determination to forego nondegradation review. Pursuant to A.R.M. 17.30.1372(5)(c) & (d), DEQ should have provided legal notice under state law and using any method "reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases, or any other forum or medium to elicit public comment." There is no question that Plaintiff and its members are persons potentially affected by DEQ's action. In this case, Plaintiffs had the right to expect to be provided actual notification of actions that could significantly threaten the waters they use for irrigation, livestock watering and domestic use. However, Plaintiffs were provided no such notification.

51. DEQ acknowledged that the only public notice they provided was via a general mailing. Pers. telephone conversation with DEQ's Tom Reid, Nov. 9, 2000. No public notice was provided through publication in a newspaper, because DEQ determined that the action was not a major permit or a general MPDES permit. *Id.* DEQ based its determination on A.R.M. 17.30.1372(5)(b) which provides that only where major and general MPDES permits are being issued is publication in a daily or weekly newspaper necessary. DEQ did not publish any press releases, or take any other steps to provide Plaintiffs with actual notice as required by A.R.M. 17.30.1372(5)(c) & (d). *Id.* The EA at p. 6 also states that the only public notice that was provided "was sent to the department's mailing list for those individuals who have expressed an interest

in discharge permits in the Yellowstone drainage or statewide. Had Plaintiffs been provided notice, they unquestionably would have commented, and in fact did provide the DEQ with both oral and written comments as soon as they discovered that the DEQ intended to issue the Redstone MPDES permit. This is evidenced by the letters and comments Plaintiffs sent to DEQ.

52. Further, DEQ did not provide public notice and comment on the modified permit issued July 3, 2000, and wholly failed to follow procedures set forth in A.R.M. 17.30.1365-5 & A.R.M. 17.30.1370-1379. Therefore, the permit is void.

53. DEQ failed to provide the general public, affected landowners and water users of the Tongue River with an adequate opportunity to comment on the draft MPDES permit for Redstone's discharges. Even after Plaintiff wrote DEQ on June 7, 2000 after learning about the draft permit and requesting that the comment period be re-opened, DEQ declined to do so. DEQ's failure to provide adequate notice and comment and to reopen the comment period when requested was arbitrary, capricious, unreasonable, and in violation of applicable law and regulations.

COUNT 4 - AMENDED PERMIT VOID

54. The preceding paragraphs are realleged as though set forth in full hereunder.

55. The amended or revised permit issued by DEQ to Redstone on or about July 3, 2000 providing for additional outfalls is void because of DEQ's failure to follow procedures set forth in ARM 17.30 1364-5 and 17.30.1370-79.

COUNT 5—BREACH OF CONTRACT

56. The preceding paragraphs are realleged as though set forth in full hereunder.

57. Plaintiffs have, since 1937, had "water marketing contracts" with the State of Montana for use of the Tongue River Water pursuant to which they are authorized to use up to 40,000 acre feet of water per year between May 1 and September 30.

58. Pursuant to the original water marketing contract and amendments thereto, the latest of which was entered into in 1997, the water is for irrigation, an existing beneficial use. As such, the quality of the Tongue River must be maintained so as to protect it for irrigation purposes.

59. The pollution of the Tongue River Waters that Plaintiffs are contractually entitled to use pursuant to the water marketing contract constitutes a breach of contract, because the dumping of the CBM wastewater into the Tongue River, and the ultimate mixing and storage of the highly saline and sodic waters in the Tongue River Reservoir, is rendering the Tongue River water and the water stored in the Tongue River Reservoir unfit for irrigation purposes.

COUNT 6--VIOLATION OF MONTANA THE WATER WASTING STATUTE

60. The preceding paragraphs are realleged as though set forth in full hereunder.

61. Section 85-2-505, MCA, prevents the waste of groundwater, and requires that all wells producing waters that contaminate other waters to be plugged or capped, and to equip wells to stop the flow of water when produced water is not being put to beneficial use.

62. Section 85-2-505, MCA, provides certain exceptions when produced groundwater does not have to be put to beneficial use, including draining land to preserve its utility, removing water from a mine to permit mining operations, removing water used in connection with producing, reducing, smelting, and milling metallic ores and industrial minerals or that displaced from an aquifer by the storage of other mineral resources.

63. Redstone's CBM operations remove groundwater and put the groundwater thus produced to no beneficial use in violation of § 85-2-505, MCA.

64. Redstone's CBM operations do not qualify for any of the enumerated exceptions to § 85-2-505, MCA.

65. Redstone's CBM operations remove ground water from an arid region of the state for no beneficial use, where Plaintiff and its members have existing rights to beneficial use of the ground water. Redstone is removing potential future uses of such water for the foreseeable future, in contravention of the laws and policies of Montana. Such removal may have adverse hydrological impacts to existing beneficial uses as well, as recognized in the Environmental Analysis at page 2, wherein it states that "some wells may dry up in the project area," and that "[c]oal extraction has already depleted aquifers in the project area."

66. The MPDES permit that authorizes Redstone to discharge groundwater violates the above-cited provisions of Montana law and implementing regulations, and should be revoked accordingly.

COUNT 7—MONTANA ENVIRONMENTAL POLICY ACT VIOLATIONS

67. The preceding paragraphs are realleged as though set forth in full hereunder.

68. On June 2, 2000, the DEQ issued an Environmental Assessment (EA) that it had prepared for Redstone's MPDFES permit No. MT-0030457. The EA was required by the Montana Environmental Policy Act (MEPA), § 75-1-101, MCA, et seq. at its implementing regulations.

69. The DEQ violated MEPA in preparing and issuing the EA in that it failed to adequately analyze all of the impacts associated with Redstone's CBM development and authorized by the MPDES permit. The impacts associated with Redstone's CBM development include, but are not limited to: CBM wells, roads to the wells, trenches and pipelines, holding ponds for CBM water, electrical lines, compressor stations, and the accompanying impacts to air and water quality, noise and visual pollution, impacts to soils and agricultural crops and native plants, ground disturbance, increased noxious weed invasions, impacts to terrestrial and aquatic ecosystems, impacts to wildlife, hydro-geological impacts such as depletion of aquifers and drying up of wells, seeps and springs, possible ground subsidence, underground coalbed fires, socio-economic impacts, and the cumulative effects of other CBM development.

70. DEQ's issuance of Redstone's MPDES permit also violated MEPA by failing to consider reasonable alternatives, and by failing to disclose the irretrievable commitment of resources associated with the CBM development. DEQ further violated MEPA by failing to prepare a supplemental EA when additional significant information became available and the DEQ had

knowledge that the circumstances had changed after the initial EA was prepared.

71. Because the impacts associated with CBM development are significant, DEQ should have prepared an Environmental Impact Statement (EIS). DEQ's failure to prepare and EIS violates MEPA.

COUNT 8—THE ENVIRONMENTAL DEGRADATION IN THIS CASE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT AND THE DUTY TO MAINTAIN AND IMPROVE A CLEAN AND HEALTHFUL ENVIRONMENT

72. The preceding paragraphs are reallaged as though set forth in full hereunder.

73. The Montana Constitution, Article II, Section 3, defines Montanans' right to a clean and healthful environment as an inalienable right. Further, Article IX, Section 1 provides that the State and each person must maintain and improve the environment. Thus any action that would abridge these constitutional provisions must pass a strict scrutiny analysis. The state must show a compelling state interest to abridge this fundamental right, and show that the state's interest has been narrowly tailored to effectuate such compelling state interest. Further, the Supreme Court of the State of Montana has ruled that Montanans need not wait for dead fish to float on our rivers, for example, to show harm to our clean and healthful environment.

74. The pollution authorized by the permit as alleged herein is not clean and healthful and is deleterious to the human environment and beneficial use of the Tongue River in violation of the Montana Constitution. DEQ has failed to show any compelling state interest in granting a permit to allow Redstone to degrade the quality of water in Montana without conditioning

said permit to require substantial reduction or elimination of the pollution to protect beneficial uses. The application of any and all regulations or statutes upon which the DEQ based its issuance of the MPDES permit without conducting nondegradation review violate the constitutional right to a clean and healthful environment and the duty to maintain and improve the environment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the board grant Plaintiff the following relief:

- A. Issue a declaratory judgment declaring that DEQ violated the law for each and every violation of the law alleged herein, including that the MPDES permit as amended is void and of no effect;
- B. Amend ARM 17.30.715(1) to conform it to governing statutes;
- C. Determine and declare that the regulatory basis relied upon by DEQ to exempt the permit from non-degradation review as applied in the case at bar violates the Montana Constitution Article II, Section 3 and Article IX Section 1.
- D. Order DEQ to perform non-degradation review under § 75-5-303, MCA, before any new MPDES permits to Redstone, its successors or assigns or any other CBM developers are issued.
- E. Issue a permanent injunction preventing Defendant Redstone, its successors or assigns or any other CBM developers from discharging coal bed methane water into the Tongue River or any other water of the state of Montana until such time as lawfully issued MPDES permits are issued.

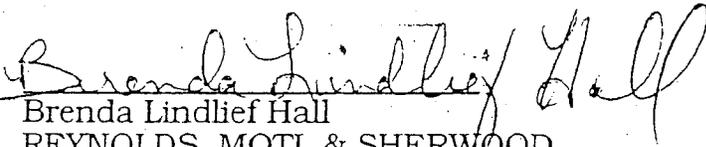
F. Declare that DEQ, and the State of Montana have breached/and continue to be in breach of, the water contracts with TRWU by allowing the degradation caused by the CBM discharges to the waters used by TRWU for irrigation.

G. Declare that pumping of the groundwater associated with Redstone's, its successors or assigns CBM development violates the water rights of TRWU and its members, and violates Article IX, Section 3 of the Montana Constitution.

H. Award Plaintiff's costs and attorney's fees and grant such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, this ^{23rd} day of April,

2001.


Brenda Lindlief Hall
REYNOLDS, MOTL & SHERWOOD
Attorney for the Plaintiff
Tongue River Water Users' Ass'n

ORDER

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MONTANA FIRST JUDICIAL DISTRICT COURT

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BY _____
DEPUTY

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

TONGUE RIVER WATER USER'S
ASSOCIATION; NORTHERN PLANS
RESOURCE COUNCIL; MONTANA
ENVIRONMENTAL INFORMATION
CETNER, INC.,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY; FIDELITY
EXPLORATION AND PRODUCTION
COMPANY; MDU RESOURCES GROUP,
INC.; MONTANA DEPARTMENT OF
NATURAL RESOURCES; and STATE OF
MONTANA,

Defendants.

Cause No. BDV-2001-258

ORDER

Upon request of Plaintiffs, and no objection being lodged by Defendants,
It is hereby ORDERED, ADJUDGED AND DECREED that this matter
is DISMISSED without prejudice.

DATED this 8 day of JUNE, 2006


JEFFREY M. SHERLOCK
District Court Judge

1 pcs: Brenda Lindlief Hall
Jack Tuholske
2 Michael Reisner
John North/Claudia Massman
3 Jon Metropoulos

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T/JMS/tongue river v deq ord dismiss wo prejudice.wpd

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