



Item: Proposed Water Rights Settlement with Montana Department of Fish, Wildlife and Parks OF1510

From: Greg Doyon, City Manager
Sara Sexe, City Attorney

Initiated By: Greg Doyon, City Manager
Sara Sexe, City Attorney

Presented By: Greg Doyon, City Manager
Sara Sexe, City Attorney

Action Requested: Approve Water Rights Settlement with Montana Department of Fish, Wildlife and Parks.

Suggested Motion:

1. Commissioner moves:

“I move that the City Commission (approve/disapprove) the Water Rights Settlement regarding Water Right Claim No. 41Q 124863-00 with Montana Department of Fish, Wildlife and Parks and authorize counsel to execute the Settlement Stipulation for presentation to the Montana Water Court.”

2. Mayor requests a second to the motion, Commission discussion, public comment, and calls for the vote.

Summary:

The Montana Department of Fish, Wildlife and Parks (FWP) and the United States objected to the City of Great Falls Water Right Claim No. 41Q 124863-00, claiming that the claim had been abandoned by the Anaconda Copper Mining Company (ACM) and/or ARCO Environmental Remediation LLC (AERL), from whom the City obtained a Quit Claim deed for the right. After arguments to the Water Court, the parties have agreed to reach a compromise on the issue and entered into a settlement agreement, pending Commission and Water Court approval.

A detailed background has been prepared by the City’s outside counsel, Stephen Brown, providing a detailed analysis of the issues and proposed resolution. Reference is directed to that report for a detailed background, but a summary of that report is provided below.

In 2011, The Montana Water Court initiated a proceeding to adjudicate water rights associated with the former Anaconda Smelter in Black Eagle. At that time, AERL, the successor to the ACM, owned three water rights. The three water rights were for different purposes, one for irrigation use, one for fire suppression, and the largest water right claim for industrial use.

After the Water Court process started, AERL indicated it no longer wanted to keep these water rights. Based on evidence that some of the water rights may have been associated with property that AERL had conveyed to Great Falls, the Water Court provided an opportunity for Great Falls to determine whether it desired to pursue ownership of some or all of the three water right claims. Great Falls did so in a 2012 filing.

Following the 2012 filing, the United States and the FWP submitted objections to the three water rights in the Water Court process. In 2012 the objections were resolved as to the irrigation right and the fire suppression water right and those rights have been owned by Great Falls since then with all objections resolved.

As to the industrial right, there have been a number of proceedings before the Water Court to determine whether AERL abandoned the right prior to when the Water Court proceedings were initiated. The Water Court has ruled that Great Falls can pursue ownership of the industrial right, but also has ruled that fact issues exist as to whether the right has been abandoned. During this process, AERL signed a quitclaim deed formally transferring title to the right to Great Falls.

After the Water Court's most recent ruling, Great Falls has engaged in negotiations with FWP. FWP is the main party pursuing the abandonment argument. After several meetings and exchanges of proposals, the parties reached a tentative agreement under which Great Falls would reduce certain elements of the water right claim and, in exchange FWP has agreed to drop its objections to the industrial water right. The agreement is conditioned upon its approval by the City Commission. The United States has agreed to these terms.

The benefits of entering into the Settlement Stipulation include:

1. The securing for the City of Great Falls a water right with an established flow rate of 6.0 cfs (reduced from the claimed rate of 8.75 cfs). Even at the reduced rate, this still would be a significant addition to the collection of water rights that the City holds;
2. The overall volume limit of the right would not change. There would be no limits on when the water right can be exercised to stay within a certain volume limit. However, FWP has asked that limits be placed on the rate water consumed. This means that a certain amount of the water that is diverted would have to be returned to the Missouri above Rainbow Dam. Generally, this already occurs with other municipal use;
3. The settlement does not limit where the City may use the water. Currently the place of use is limited to the historic smelter site and surrounding property. The settlement terms do not prohibit the City from using water at other locations, although this would require approval from the Department of Natural Resources

and Conservation in a change application, to which FWP will not object. If the water is used at another location, the settlement terms require that the consumptive rate not exceed 30 percent. Generally this is within consumptive use guidelines that allow for domestic use as an option; and

4. Other than these changes, the settlement terms do not change the water right as it was claimed.

Alternatives:

The Commission could reject the settlement agreement, and allow the issue to proceed to the Water Court for determination. In such case, the determination would be whether the right is valid. In such case, there are potential options for determination:

1. If the right is determined abandoned, the City would lose the right completely;
2. If the right is determined valid, it could be granted without restriction to the City;
and
3. If the right is determined valid, the Water Court could determine that it was partially abandoned, reducing the size or extent of the right.

Attachments/Exhibits:

Stephen R. Brown Settlement Memorandum, including proposed Settlement Stipulation

Date: February 25, 2016
To: Greg Doyon and Sara Sexe
From: Stephen R. Brown
Subject: Proposed Water Rights Settlement with Montana Department of Fish Wildlife and Parks

BACKGROUND

A. Introduction

In 2011, the Montana Water Court initiated a proceeding to adjudicate the water rights associated with the former Anaconda Smelter in Black Eagle. At that time, ARCO Environmental Remediation, LLC (“AERL”), the successor to the Anaconda Copper Mining Company, owned three water rights. The three water rights were for different purposes, one for irrigation use, one for fire suppression, and the largest water right claim for industrial use.

After the Water Court process started, AERL indicated it no longer wanted to keep these water rights. Based on evidence that some of the water rights may have been associated with property that AERL had conveyed to Great Falls, the Water Court provided an opportunity for Great Falls to determine whether it desired to pursue ownership of some or all of the three water right claims. Great Falls did so in a 2012 filing.

Following the 2012 filing, the United States and the Montana Department of Fish, Wildlife and Parks (“FWP”) submitted objections to the three water rights in the Water Court process. In 2012 the objections were resolved as to the irrigation right and the fire suppression water right and those rights have been owned by Great Falls since then with all objections resolved.

As to the industrial right, there have been a number of proceedings before the Water Court to determine whether AERL abandoned the right prior to when the Water Court proceedings were initiated. The Water Court has ruled that Great Falls can pursue ownership of the industrial right, but also has ruled that fact issues exist as to whether the right has been abandoned. During this process, AERL signed a quitclaim deed formally transferring title to the right to Great Falls.

After the Water Court’s most recent ruling, Great Falls has engaged in negotiations with FWP. FWP is the main party pursuing the abandonment argument. After several meetings and exchanges of proposals, the parties reached a tentative agreement under which Great Falls would reduce certain elements of the water right claim and, in exchange FWP has agreed to drop its objections to the industrial water right. The agreement is conditioned upon its approval by the City Commission. The United States has agreed to these terms.

The following table shows the elements of the industrial water right as claimed, and as proposed under the agreement:

	Current claim	Settlement proposal
Priority date	June 11, 1906	No change
Purpose	Industrial	No change
Flow rate	8.75 cfs	6.0 cfs
Volume	6,335 acre feet	<ul style="list-style-type: none"> • No change to total • 50% consumptive within historic place of use • 30% consumptive outside historic place of use
Source	Missouri River	No change
Point of diversion	Sec. 6, Twp. 20N, Rge. 4E	No change
Place of use	Various	No change

B. General Background of City Water Rights

Great Falls owns a number of water rights that it uses to operate its municipal supply system. The following sections provide a summary of the existing water rights to put the settlement proposal issues in this case in context.

1. Main Water Rights

Great Falls holds three main municipal water rights, which were confirmed in the Water Court’s order in case 41QJ-30 dated June 14, 2013.

Claim No.	Priority Date	Flow Rate		Volume (AF/yr)
		GPM	CFS ¹	
41QJ 123408-00	6/23/1971	26,928	60	20,104
41QJ 123410-00	8/30/1889	33,244	74	20,104
41QJ 123411-00	1/19/1966	8,976	20	20,104
Total		69,564	155	20,104

¹ According to the standards of conversion, one cubic foot per second (“cfs”) is equivalent to 11.22 gallons per minute (“gpm”). When water rights are less than one cfs, they typically are expressed in gallons per minute. See Rule 4(a) Mont. Water Right Claim Examination Rules (Converting Measurements).

2. Minor Water Rights

In addition to the main water rights, Great Falls also owns several water rights that are used to irrigate parks and golf courses. These rights and their limits include:

Claim No.	Use	Priority Date	Flow Rate		Volume (AF/yr)
			GPM	CFS	
41Q 105494-00	Irrigation (Gibson Park)	1/1/1900		2.23	196.46
41Q 110040-00	Irrigation (Anaconda GC)	9/14/1908		6.68	2466.08
41Q 105493-00	Irrigation (Odd Fellows)	6/30/1960	150		29.17
41Q 123409-00	Irrigation (Municipal GC)	9/30/1961		4.46	1644.05
41Q 039801	Irrigation (West Bank Pk)	11/30/1981	415		43.50
Total					4379.26

3. Water Reservation

The city's water rights also include a "water reservation" approved by the Board of Natural Resources and Conservation on July 1, 1992 following a lengthy application and review process. This water right is designated as Water Reservation No. 41K 071890. The water reservation authorizes Great Falls to use up to 11.5 cfs and up to 6,022 AF per year for municipal and industrial use, and 8.9 cfs and 467 af per year for park irrigation.

C. Settlement Issues.

In the Water Court case involving the industrial right, FWP argued that the water right was abandoned as a result of a prolonged period of nonuse. As noted previously, the Water Court has issued several rulings about the water right, but the case is not concluded. If the case is not settled, an evidentiary hearing will be necessary before the Water Court. At the hearing, the City will bear the burden of proof to show that the lack of use of the water right was excused as a result of the environmental issues.

The resolution of the case likely will be an "all or nothing" matter. In other words, the Water Court will make a final determination as to whether the water right is valid. If the right is determined abandoned, it will be lost completely. The Water Court also could determine that the water right is partially abandoned, or even never used to its full extent. If that occurs, the size of the water right would be reduced.

The settlement terms that FWP has agreed to, and that the United States also agrees to, include the following elements:

- The flow rate will be reduced from the claimed rate of 8.75 cfs to 6.0 cfs. Even at the reduced rate, this still would be a significant addition to the collection of water rights that Great Falls holds.
- The overall volume limit would not change. This means there would not be limits on when the water right can be exercised to stay within a certain volume limit. However, FWP has asked that limits be placed on the rate water is consumed. This means that a

certain amount of the water that is diverted would have to be returned to the Missouri above Rainbow Dam. Generally, this already occurs with other municipal use.

- The settlement does not limit where Great Falls may use the water. Currently the place of use is limited to the historic smelter side and surrounding property. The settlement terms do not prohibit the City from using water at other locations, although this would require approval from the Department of Natural Resources and Conservation in a change application. If the water is used at another location, the settlement terms require that the consumptive rate not exceed 30 percent. Generally this is within consumptive use guidelines that allow for domestic use as an option.
- Other than these changes, the settlement terms do not change the water right as it was claimed.

A copy of the settlement agreement is attached. If it is approved and signed, the agreement would be submitted to the Water Court for its final approval. Generally, the Water Court encourages settlements and usually will approve an agreement like this.