

1                                   **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**  
2                                   **OF THE STATE OF MONTANA**

3 **IN THE MATTER OF:**  
4 **VIOLATIONS OF THE OPENCUT**  
5 **MINING ACT BY BIG ROCK, LLC AT**  
6 **WHEELER GRAVEL PIT, MISSOULA**  
7 **COUNTY, MONTANA (OPENCUT NO.**  
8 **719; FID 2471)**

**CASE NO. BER 2016-06 OC**

Electronically Filed with the Montana Board of  
Environmental Review

This 7 day of February, 2017

at 1:47 o'clock p.m.

**ORDER**

By: 

9           The undersigned has issued Findings of Fact, Conclusions of Law and a  
10 Proposed Order (Proposed order). The Proposed Order has been served on the  
11 parties. Mont. Code Ann. § 2-4-621 affords “each party adversely affected to file  
12 exceptions and present briefs and oral argument to the officials who are to render  
13 the decision.” See Mont. Admin R. 1.3.223(1).

14           Mont. Code Ann. § 2-4-621(3) provides:

15           The agency may adopt the proposal for decision as the agency's final  
16 order. The agency in its final order may reject or modify the  
17 conclusions of law and interpretation of administrative rules in the  
18 proposal for decision but may not reject or modify the findings of  
19 fact unless the agency first determines from a review of the complete  
20 record and states with particularity in the order that the findings of  
fact were not based upon competent substantial evidence or that the  
proceedings on which the findings were based did not comply with  
essential requirements of law. The agency may accept or reduce the  
recommended penalty in a proposal for decision but may not increase  
it without a review of the complete record.

21           It is ORDERED:

22           1.       The Scheduling Order is **Vacated**.  
23           2.       Any party adversely affected by the Proposed Order will have until  
24 **February 28, 2017**, to file exceptions to the proposed order. If no party files  
25 exceptions this matter will be deemed submitted.

26           3.       The parties will have until **March 20, 2017**, to file response briefs. If  
27 no party files a response brief, this matter will be submitted.

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4. The parties will have until **April 3, 2017**, to file reply briefs.

5. Once this matter is submitted, it will be placed on the next-available Agenda of the Board of Environmental Review for final agency action. The Parties may request an alternative meeting date by stipulation.

DATED this 7th day of February, 2017.

/s/ Andres Haladay  
\_\_\_\_\_  
ANDRES HALADAY  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Order to be mailed and electronically mailed to:

Ms. Hillary Houle  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
[Hhoule@mt.gov](mailto:Hhoule@mt.gov) email

Ms. Rebecca Convery  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Rconvery@mt.gov](mailto:Rconvery@mt.gov) email

Mr. Ed Coleman, Bureau Chief  
Coal and Opencut Mining Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Ecoleman@mt.gov](mailto:Ecoleman@mt.gov) email

Mr. Dan G. Cederberg  
Cederberg Law Office, P.C.  
269 West Front Street  
P.O. Box 8234  
Missoula, MT 59807-8234  
Via mail

DATED: February 7, 2017 /s/ Andres Haladay

## Houle, Hillary

---

**From:** O'Brien, Lori  
**Sent:** Tuesday, February 07, 2017 1:47 PM  
**To:** Houle, Hillary; Convery, Rebecca; Coleman, Edward  
**Subject:** 2016-06 OC - Big Rock LLC  
**Attachments:** ORDER on exceptions.pdf; Findings of Fact Conclusions of Law and Proposed Order.pdf  
**Categories:** Green Category

Attached please find Findings of Fact and Conclusions of Law and an Order regarding exceptions in the above referenced matter.

*Lori L. O'Brien  
Civil Investigator/Paralegal  
Montana Department of Justice  
Agency Legal Services Bureau  
1712 9<sup>th</sup> Avenue  
Helena, Montana 59620  
(406) 444-1496  
[lobrien@mt.gov](mailto:lobrien@mt.gov)*

*This email contains information from the Montana Department of Justice - Agency Legal Services Bureau which is confidential and/or privileged.*

Environmental Review

This 7 day of February, 2017

at 1:47 o'clock p.m.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

By: [Signature]

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**IN THE MATTER OF:  
VIOLATIONS OF THE OPENCUT  
MINING ACT BY BIG ROCK, LLC AT  
WHEELER GRAVEL PIT, MISSOULA  
COUNTY, MONTANA (OPENCUT NO.  
719; FID 2471)**

**CASE NO. BER 2016-06 OC**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER**

**INTRODUCTION**

Appellant Big Rock, LLC (Big Rock) requested a hearing regarding the Montana Department of Environmental Quality's (DEQ) cited violations of the Opencut Mining Act. A scheduling order was entered, and Big Rock has not complied. DEQ moved to dismiss this matter and Big Rock did not respond. A Show Cause Order was entered and Big Rock did not respond.

**FINDINGS OF FACT**

1. On May 11, 2016, DEQ issued a Notice of Violation and Administrative Compliance and Penalty Order against Big Rock.
2. On June 16, 2016, Big Rock filed a Notice of Request for Hearing in the Matter of Violations of the Opencut Mining Act by Big Rock, LLC at Wheeler Gravel Pit, Missoula County, Montana.
3. Big Rock did not provide a basis for its Request for Hearing.
4. The Board of Environmental Review assigned this matter to a Hearing Examiner.
5. On September 13, 2016, a Scheduling Order was entered.
6. The Scheduling Order required Big Rock to file a more definite statement setting forth with particularity the basis for this appeal, by September 30, 2016.



1 **A. DEQ’s Motion to Dismiss Is Deemed Well Taken.**

2 5. Montana Uniform District Court Rule 2(b), “Failure to File Briefs,”  
3 provides:

4 Failure to file briefs may subject the motion to summary ruling. The  
5 moving party’s failure to file a brief shall be deemed an admission  
6 that the motion is without merit. *Failure to file an answer brief by  
the opposing party within the time allowed shall be deemed an  
admission that the motion is well taken.*

7 (emphasis added.)

8 6. When a motion is deemed “well-taken” pursuant to Uniform District  
9 Court Rule 2(b), the Montana Supreme Court “will not hold a district court in error  
10 for failing to address an issue that the parties did not raise.” *McDunn v. Arnold*,  
11 2013 MT 138, ¶ 14, 370 Mont. 270, 303 P.3d 1279.

12 7. Pursuant to Uniform District Court Rule 2(b), Big Rock’s failure to  
13 Respond to DEQ’s Motion to Dismiss constitutes an admission DEQ’s Motion is  
14 well-taken.

15 8. Big Rock has not raised any arguments in response to DEQ and the  
16 Board of Environmental Review cannot be held in error for failure to address issues  
17 Big Rock did not raise.

18 9. DEQ’s Motion to Dismiss is deemed well taken, except to the extent  
19 DEQ requests attorney fees. *See Infra*, ¶¶ 21-23.

20 10. This matter is dismissed, with prejudice.

21 **B. This Matter is Dismissed for Failure to Comply with the Scheduling**  
22 **Order.**

23 11. A hearing examiner may set motion and briefing schedules, provide  
24 for the taking of discovery, and generally “regulate the course of hearings.” Mont.  
25 Code Ann. § 2-4-611; Mont. Admin R. 1.3.218.

26 12. “The purpose of a scheduling order is to instruct the parties to  
27 complete certain pretrial activities such as discovery and filing pretrial motions by a

1 specific date. This scheduling order allows the district court to better control trial  
2 proceedings by resolving many issues during the pretrial phase of the case.”

3 *Stevenson v. Felco Indus.*, 2009 MT 299, ¶ 32, 352 Mont. 303, 216 P.3d 763.

4 13. M.R.Civ.P. 16 provides guidance that a hearing examiner may impose  
5 “just orders” if a party or attorney fails to obey a scheduling order or other pretrial  
6 order. M.R.Civ.P. 16(f)(1)(C); *see also Kingsbury Ditch Co. v. Dep’t of Nat. Res. &*  
7 *Conservation*, 223 Mont. 379, 381, 725 P.2d 1209, 1210 (1986) (considering,  
8 without deciding, hearing officer’s decision to not employ sanctions for discovery  
9 abuse). A “just order” may include the sanction of dismissal of an action in whole  
10 or in part. *McKenzie v. Scheeler*, 285 Mont. 500, 511, 949 P.2d 1168, 1174 (1997).

11 14. “Rule 16(f), M.R.Civ.P., which provides that a district court may  
12 impose sanctions for failure to obey a scheduling order, does not require that a party  
13 be given notice of failure to comply or that sanctions could be imposed.” *Id.*

14 15. Big Rock appealed this matter pursuant to Mont. Code Ann. § 82-4-  
15 441(5)(b), which required Big Rock to submit a “written request for hearing stating  
16 the reason for the request.”

17 16. Due to Big Rock’s failure to include any “reason for the request,” the  
18 Scheduling Order instructed Big Rock to provide a more definite statement setting  
19 forth with particularity the basis for this appeal, by September 30, 2016.

20 17. Big Rock’s non-compliance with the Scheduling Order has interfered  
21 with the undersigned’s ability to regulate the course of these proceedings.

22 18. Big Rock’s non-compliance with the Scheduling Order has resulted in  
23 an inability to complete pre-trial activities in a timely and economical fashion.

24 19. Big Rock’s non-compliance with the Scheduling Order has resulted in  
25 an inability to resolve issues during the pretrial phase of the case.

26 20. Although not required, Big Rock had notice of the Scheduling Order,  
27 notice of non-compliance with the scheduling order and notice that further non-



1 compliance might result in dismissal. Big Rock had multiple opportunities to be  
2 heard but did not respond.

3 21. Big Rock’s non-compliance merits dismissal with prejudice.

4 22. M.R.Civ.P. 16(f)(2) provides that in the event of non-compliance with  
5 Rule 16, the hearing examiner “must order the party, its attorney, or both to pay the  
6 reasonable expenses – including attorney fees – incurred because of any  
7 noncompliance with this rule, unless the noncompliance was substantially justified  
8 or other circumstances make an award of expenses unjust.”

9 23. Rule 16 is not expressly adopted by MAPA and the undersigned does  
10 not find the expenses provision of the rule to provide guidance under these  
11 circumstances.

12 24. Moreover, even if Rule 16 applied, the procedural disposition of this  
13 case renders an award of expenses unjust. Based on Big Rock’s non-compliance,  
14 this matter is in its procedural infancy. DEQ has filed a motion to dismiss,  
15 analogous to M.R.Civ.P. 12(b)(6). This is not a situation where DEQ has repeatedly  
16 moved to compel Big Rock’s compliance with the scheduling order or discovery  
17 rules, expending valuable time and energy on repetitive procedural battles. Rather,  
18 DEQ has requested, and received, outright dismissal of this matter, with prejudice.  
19 Big Rock will have a final order entered against it, including monetary penalties.  
20 The undersigned concludes it would be unjustified, under these circumstances, to  
21 impose further monetary obligations on Big Rock.

22 **C. This Matter is Dismissed Based on Big Rock’s Failure to Comply with**  
23 **Orders.**

24 25. Montana R.Civ.P. 41(b) provides, “[i]f the plaintiff fails to prosecute  
25 or to comply with these rules or a court order, a defendant may move to dismiss the  
26 action or any claim against it.”

27

1           26.     Montana’s Rule 41(b) was amended in 2010 to “conform to the recent  
2 changes in the Federal Rules.” M.R.Civ.P. 41, Committee Notes.

3           27.     Rule 41(b) has “long been interpreted to permit courts to dismiss  
4 actions sua sponte for a plaintiff’s failure to prosecute or comply with the rules of  
5 civil procedure or court’s orders.” *Hells Canyon Pres. Council v. United States*  
6 *Forest Serv.*, 403 F.3d 683, 689 (9th Cir. 2005) (quoting *Olsen v. Mapes*, 333 F.3d  
7 1199, 1204 n.3 (10th Cir. 2003)).

8           28.     Montana analyzes four factors to determine whether a tribunal, in its  
9 discretion, may dismiss pursuant to 41(b):

- 10           (1) the plaintiff’s diligence in prosecuting his claims;  
11           (2) the prejudice to the defense caused by the plaintiff’s delay;  
12           (3) the availability of alternate sanctions; and  
12           (4) the existence of a warning to plaintiff that his case is in danger of  
dismissal.

13 *Watson v. West*, 2009 MT 342, ¶ 25, 353 Mont. 120, 218 P.3d 1227.

14           29.     The Board of Environmental Review is in the best position to  
15 “consider the circumstances of each case and decide questions of good faith in  
16 situations that may warrant sanctions.” *Id.* ¶ 31.

17           30.     Big Rock has not exercised diligence in this case. Big Rock requested  
18 a hearing before the Board of Environmental Review but did not comply with the  
19 statutory requirement it provide the basis for the appeal. Big Rock did not comply  
20 with the Scheduling Order, requiring a more specific statement of its basis for  
21 appeal. Big Rock did not respond to DEQ’s motion to dismiss. Big Rock did not  
22 respond to the Show Cause Order. In short, Big Rock’s objective conduct  
23 establishes it has not been diligent.

24           31.     Big Rock’s lack of diligence has resulted in prejudice to DEQ. Waste  
25 of time and delay constitute sufficient prejudice when they arise from another  
26 party’s lack of diligence and disregard for a tribunal’s orders. *Watson*, ¶ 28.

27 Moreover under the Scheduling Order, discovery closed without Big Rock ever

1 disclosing the specific reasons for its appeal, leaving DEQ without knowledge of the  
2 legal or factual basis for Big Rock's appeal.

3 32. The undersigned has considered whether to impose something other  
4 than involuntary dismissal. *See* M.R.Civ.P. 37(b)(2)(A)(i)-(iv). Given that Big  
5 Rock has been unresponsive to multiple orders, missed discovery deadlines, has not  
6 responded to DEQ's motion and has not demonstrated objective inclination to  
7 participate in these proceedings, anything less than dismissal would unnecessarily  
8 prolong these proceedings to the prejudice of DEQ, frustrate judicial economy and  
9 be a waste of time.

10 33. Big Rock received two warnings that its case was in danger of  
11 dismissal. First, Big Rock received DEQ's Motion to Dismiss. Big Rock did not  
12 respond. Second, Big Rock was ordered to Show Cause why this matter should not  
13 be dismissed pursuant to Rule 41(b). Big Rock did not respond.

14 34. Based on the foregoing, Big Rock's appeal is dismissed with  
15 prejudice.

16 **D. Default Is Entered Against Big Rock.**

17 35. The Attorney General's Model Rule 10(1) (Mont. Admin. R.  
18 1.3.214(1)) states:

19 If a party does not appear to contest an intended agency action, the agency  
20 may enter a default order. If a default is entered, the order must contain  
findings of fact and conclusions of law.

21 36. As set forth in the Findings of Fact, Big Rock was afforded  
22 opportunity for hearing in this case. Big Rock had notice of the Scheduling Order,  
23 the applicable deadlines, and its responsibilities. Big Rock had notice of the  
24 pending Motion to Dismiss. Big Rock had notice of the Show Cause Order. Big  
25 Rock did not comply with the scheduling order, did not participate in briefing in this  
26 matter and did not respond to the Show Cause Order. Big Rock has not appeared to  
27 contest the intended agency action by DEQ. Therefore, Big Rock will be defaulted.



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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Findings of Fact, Conclusions of Law and Proposed Order to be mailed to:

Ms. Hillary Houle  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
Via email: [Hhoule@mt.gov](mailto:Hhoule@mt.gov)

Ms. Rebecca Convery  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Rconvery@mt.gov](mailto:Rconvery@mt.gov)

Mr. Ed Coleman, Bureau Chief  
Coal and Opencut Mining Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Ecoleman@mt.gov](mailto:Ecoleman@mt.gov)

Mr. Dan G. Cederberg  
Cederberg Law Office, P.C.  
269 West Front Street  
P.O. Box 8234  
Missoula, MT 59807-8234

DATED: February 7, 2017 /s/ Andres Haladay

## Houle, Hillary

---

**From:** O'Brien, Lori  
**Sent:** Tuesday, February 07, 2017 1:47 PM  
**To:** Houle, Hillary; Convery, Rebecca; Coleman, Edward  
**Subject:** 2016-06 OC - Big Rock LLC  
**Attachments:** ORDER on exceptions.pdf; Findings of Fact Conclusions of Law and Proposed Order.pdf  
**Categories:** Green Category

Attached please find Findings of Fact and Conclusions of Law and an Order regarding exceptions in the above referenced matter.

*Lori L. O'Brien  
Civil Investigator/Paralegal  
Montana Department of Justice  
Agency Legal Services Bureau  
1712 9<sup>th</sup> Avenue  
Helena, Montana 59620  
(406) 444-1496  
[lobrien@mt.gov](mailto:lobrien@mt.gov)*

*This email contains information from the Montana Department of Justice - Agency Legal Services Bureau which is confidential and/or privileged.*

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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

**IN THE MATTER OF:  
VIOLATIONS OF THE OPENCUT  
MINING ACT BY BIG ROCK, LLC AT  
WHEELER GRAVEL PIT, MISSOULA  
COUNTY, MONTANA (OPENCUT NO.  
719; FID 2471)**

**CASE NO. BER 2016-06 OC**

Electronically Filed with the Montana Board of  
Environmental Review

This 3 day of March, 2017  
at 10:27 o'clock a.m.

**NOTICE OF SUBMITTAL**

By: 

The Order on Exceptions gave all parties the opportunity to file exceptions by February 28, 2017. No exceptions having been filed, this matter is submitted and will be placed as an action item at the March 31, 2017, Board of Environmental Review Meeting.

DATED this 3rd day of March, 2017.

/s/ Andres Haladay  
ANDRES HALADAY  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Notice of Submittal to be mailed and electronically mailed to:

Ms. Hillary Houle  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
[Hhoule@mt.gov](mailto:Hhoule@mt.gov) email

Ms. Rebecca Convery  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Rconvery@mt.gov](mailto:Rconvery@mt.gov) email

Mr. Ed Coleman, Bureau Chief  
Coal and Opencut Mining Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901  
[Ecoleman@mt.gov](mailto:Ecoleman@mt.gov) email

Mr. Dan G. Cederberg  
Cederberg Law Office, P.C.  
269 West Front Street  
P.O. Box 8234  
Missoula, MT 59807-8234  
Via mail

DATED: March 3, 2017 /s/ Andres Haladay



**From:** [O'Brien, Lori](#)  
**To:** [Convery, Rebecca](#); [Coleman, Edward](#); [Houle, Hillary](#)  
**Subject:** 2016-06 OC  
**Date:** Friday, March 03, 2017 10:26:32 AM  
**Attachments:** [Notice of Submittal 3-1-2017.pdf](#)

---

Attached Please find a Notice of Submittal in the Big Rock matter.

*Lori L. O'Brien  
Civil Investigator/Paralegal  
Montana Department of Justice  
Agency Legal Services Bureau  
1712 9<sup>th</sup> Avenue  
Helena, Montana 59620  
(406) 444-1496  
[lobrien@mt.gov](mailto:lobrien@mt.gov)*

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*This email contains information from the Montana Department of Justice – Agency Legal Services Bureau which is confidential and/or privileged.*

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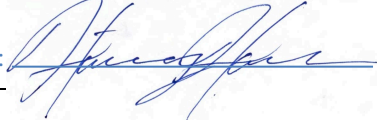
**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

**IN THE MATTER OF:  
COLUMBIA FALLS ALUMINUM  
COMPANY'S (CFAC) APPEAL OF  
DEQ'S MODIFICATIONS OF MONTANA  
POLLUTANT DISCHARGE  
ELIMINATION SYSTEM PERMIT NO.  
MT0030066, COLUMBIA FALLS,  
FLATHEAD COUNTY, MT.**

**CASE NO. BER 2014-06 WQ**

Electronically Filed with the Montana Board of  
Environmental Review

This 1 day of March, 2017  
at 12:30 o'clock p.m.

By: 

**NOTICE TO PARTIES**

The undersigned gives notice that this matter will be included as an action item on the March 31, 2017 agenda of the Board of Environmental Review. The reason for this is the unavailability of the person who presided over the hearing in this matter, more fully set forth in the Memorandum attached to this Notice as exhibit 1. As this is an action item, the parties are entitled to be heard, either in writing, in person, or both. If a party chooses to submit a written statement, it must be filed by **March 13, 2017, at 5:00 p.m.**

DATED this 1st day of March, 2017.

/s/ Andres Haladay  
**ANDRES HALADAY**  
Board Attorney  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Notice to Parties to be mailed to:

Ms. Hillary Houle  
Secretary, Board of Environmental Review  
Department of Environmental Quality  
1520 East Sixth Avenue  
P.O. Box 200901  
Helena, MT 59620-0901  
**(original)**

Mr. Kurt Moser  
Legal Counsel  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Mr. Jon Kenning, Bureau Chief  
Water Protection Bureau  
Department of Environmental Quality  
P.O. Box 200901  
Helena, MT 59620-0901

Ms. Catherine A. Laughner  
Browning, Kaleczyc, Berry & Hoven, P.C.  
801 W. Main, Suite 2A  
Bozeman, MT 59715

Mr. W. John Tietz  
Browning, Kaleczyc, Berry & Hoven, P.C.  
800 N Last Chance Gulch #101  
Helena, MT 59601

DATED: March 1, 2017 /s/ Andres Haladay

**From:** [O'Brien, Lori](#)  
**To:** [cathy1@bkbh.com](mailto:cathy1@bkbh.com); [Kenning, Jon](#); [Moser, Kurt](#); [Houle, Hillary](#)  
**Subject:** BER 2014-06 WQ - Columbia Falls Aluminum Co Appeal  
**Date:** Wednesday, March 01, 2017 12:29:32 PM  
**Attachments:** [Notice to Parties 3-1-17.pdf](#)  
[Memo to Board 3-1-2017.docx.pdf](#)

---

Attached Please find the Notice to Parties and the attached Memorandum to the Board.

*Lori L. O'Brien  
Civil Investigator/Paralegal  
Montana Department of Justice  
Agency Legal Services Bureau  
1712 9<sup>th</sup> Avenue  
Helena, Montana 59620  
(406) 444-1496  
[lobrien@mt.gov](mailto:lobrien@mt.gov)*

-  
*This email contains information from the Montana Department of Justice – Agency Legal Services Bureau which is confidential and/or privileged.*

**STATE OF MONTANA**  
**DEPARTMENT OF JUSTICE**  
**AGENCY LEGAL SERVICES BUREAU**

This 1 day of March, 2017

at 12:30 o'clock p.m.

By: 

P.O. Box 201440  
Helena, MT 59620-1440

Tim Fox  
Attorney General



TO: The Montana Board of Environmental Review

FROM: Andres Haladay, Board Attorney

RE: In the Matter of Columbia Falls Aluminum Company's Appeal of Montana Pollutant Discharge Elimination Permit, BER 2014-06 WQ.

DATE: March 1, 2017

This matter was the subject of a multi-day hearing, presided over by former Board Attorney Ben Reed. At the December 9, 2016 Board of Environmental Review Meeting, former Mr. Reed informed the Board he would retain the above-referenced matter, in order to generate a proposal for decision. Generally, a proposal for decision must be prepared by the person who conducted the hearing. Mont. Code Ann. § 2-4-621.

However, there is an exception if the hearing examiner becomes unavailable. *Id.* In the event the person who conducted the hearing becomes unavailable, proposed findings of fact may be prepared by another person who reviews the evidentiary record. Mont. Code Ann. § 2-4-621(1). There are two circumstances under which this can occur:

1. All parties agree the demeanor of witnesses is considered immaterial; or
2. All parties (1) waive the requirements that the proposed order be prepared by the person who conducted the hearing, and (2) waive any objections to witness demeanor.

Mont. Code Ann. § 2-4-622. If the parties do not agree to either of these options, it appears the only recourse is to hold a new hearing.

I recommend that at the March 31, 2017 Board of Environmental Review Meeting, the Board take action to re-assign this case to its current Board Attorney, and give the parties the options listed above. I believe this is the most prudent course for the Board to ensure a timely proposed order. This item will be placed on the agenda for the March 31, 2017 meeting, and the parties will be given the opportunity to provide comment, in writing beforehand, in person at the Board Meeting, or both.

Board of Environmental Review

March 1, 2017

Page 2

**Recommended Motion:** Move to assign In the Matter of Columbia Falls Aluminum Company's Appeal of Montana Pollutant Discharge Elimination Permit, BER 2014-06 WQ, to the Board Attorney so the Board Attorney can determine how the parties wish to proceed.

**From:** [O'Brien, Lori](#)  
**To:** [cathy1@bkbh.com](mailto:cathy1@bkbh.com); [Kenning, Jon](#); [Moser, Kurt](#); [Houle, Hillary](#)  
**Subject:** BER 2014-06 WQ - Columbia Falls Aluminum Co Appeal  
**Date:** Wednesday, March 01, 2017 12:29:32 PM  
**Attachments:** [Notice to Parties 3-1-17.pdf](#)  
[Memo to Board 3-1-2017.docx.pdf](#)

---

Attached Please find the Notice to Parties and the attached Memorandum to the Board.

*Lori L. O'Brien  
Civil Investigator/Paralegal  
Montana Department of Justice  
Agency Legal Services Bureau  
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*This email contains information from the Montana Department of Justice – Agency Legal Services Bureau which is confidential and/or privileged.*



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[john@bkbh.com](mailto:john@bkbh.com)

*Attorneys for Appellant Columbia Falls  
Aluminum Company*

Filed with the  
MONTANA BOARD OF  
ENVIRONMENTAL REVIEW  
This 13<sup>th</sup> day of March, 2017  
at 4:40 o'clock P.m.  
By: Hillary Houle

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA**

IN THE MATTER OF:  
COLUMBIA FALLS ALUMINUM  
COMPANY'S (CFAC) APPEAL OF  
DEQ'S MODIFICATIONS OF  
MONTANA POLLUTANT DISCHARGE  
ELIMINATION SYSTEM PERMIT NO.  
MT0030066, COLUMBIA FALLS,  
FLATHEAD COUNTY, MT.

Case Nos. BER 2014-06 WQ

**RESPONSE TO MARCH 1, 2017  
NOTICE TO PARTIES**

Columbia Falls Aluminum Company ("CFAC"), by and through its counsel of record, respectfully submits this response to the Board's *Notice to Parties* regarding the availability of former Board Attorney Mr. Ben Reed to continue with the Findings of Fact and Conclusions of Law after presiding over the November 16-18, and 21, 2016 Hearing ("Hearing").

CFAC believes additional information and more detail are needed before it can make a decision on the direction of the pending Hearing Officer matter. On the final day of the Hearing, CFAC learned for the first time that Mr. Reed, the assigned Hearing Officer, would be leaving state employment. Upon learning there was an issue regarding the Hearing Officer, CFAC reserved all arguments concerning the issue. (Tr. 710: 8-14.) Hearing officer Reed indicated to the parties that he was available to draft the findings, conclusion, and order. (Tr. 710: 14-19.) The March 1, 2017 *Memorandum* to the Board from Andres Haladay, attached to the March 1, 2017 Notice notes that Hearing Officer Reed stated on December 9, 2016 that he would retain



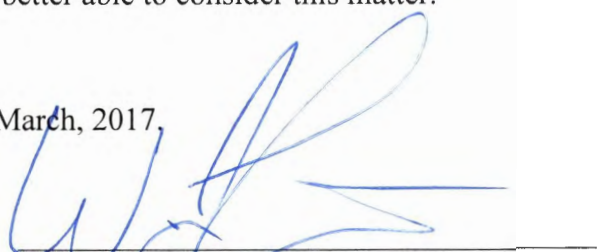
the matter. However, neither the *Notice* nor the *Memorandum* explains the change in circumstances which would make Mr. Reed unavailable.

CFAC requests the following information:

1. An explanation of why Mr. Reed is unavailable.
2. An explanation of why the November Hearing was conducted by Mr. Reed if he was leaving.

After obtaining further information, CFAC will be *better able to consider this matter*.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of March, 2017,



Catherine A. Laughner  
W. John Tietz  
Browning, Kaleczyc, Berry & Hoven, P.C.

*Attorneys for Appellant Columbia Falls  
Aluminum Company*

## CERTIFICATE OF SERVICE

I hereby certify that this 13th day March, 2017, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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Hearing Examiner/Attorney for the Board of Environmental Review


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\_\_\_\_\_  
BROWNING, KALECZYC, BERRY & HOVEN, P.C.



commitment to issue a proposed decision. Furthermore, Mr. Reed requested post-hearing briefing on the matter, which concluded on December 23, 2016, and also required the parties to submit Findings of Fact and Conclusions of Law by February 3, 2017, which both parties have done.

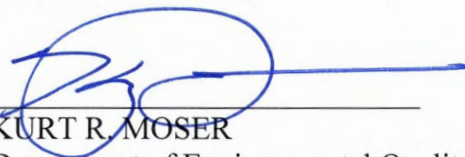
While DEQ can appreciate the Board Attorney's desire to issue a timely decision, there is no statute or administrative rule which requires the Board's Hearing Examiner to issue a proposed decision at this time. Section 2-4-621, MCA, provides that "a final decision must be issued within 90 days after a contested case is considered to be submitted for a final decision, unless, for good cause shown, the period is extended for an additional time not to exceed 90 days." However, as the Montana Supreme Court has clarified, this 90-day deadline only applies to the time period the Board would have to issue a final decision after a hearing examiner issues a proposed decision; it does not apply to the time period the hearing examiner has in which to issue a proposed decision. *See Micone v. DPHHS*, 2011 MT 178, ¶ 17, 361 Mont. 258, 258 P.3d 403 (upholding a decision where a hearing officer took 9 months to issue a proposed decision and clarifying that the administrative board issues the "final decision" not the board's hearing officer).

Furthermore, the Board must also consider the costs of a possible rehearing of the case. A four-day contested case hearing requires significant investment in time and resources. This particular matter included the testimony of several expert witnesses, one from out of state, as well as several DEQ employees who spent considerable amounts of time away from their normal duties to prepare and participate. Considering the potential

for the lost-expense of the first hearing, as well as the potential cost of conducting another hearing, transferring the case at this time is not prudent.

DEQ has no indication that Mr. Reed has abandoned his commitment to issue a proposal for decision at this time. The Board should make efforts to contact and encourage Mr. Reed to fulfill his commitment as Hearing Examiner before it determines a transfer is necessary.

DATED this 13<sup>th</sup> day of March, 2017.



---

KURT R. MOSER  
Department of Environmental Quality  
*Attorney for the Department*

**CERTIFICATE OF SERVICE**

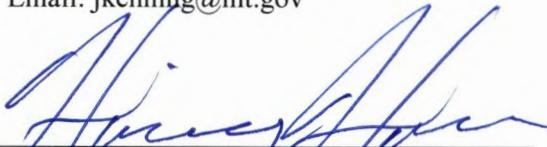
I hereby certify that this 13<sup>th</sup> day of March, 2017, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Catherine A. Laughner	<input type="checkbox"/>	U.S. Mail, postage prepaid
W. John Tietz	<input checked="" type="checkbox"/>	Electronic Mail
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(406) 585-0888		
Email: cathyl@bkbh.com		
Email: john@bkbh.com		
<i>Attorneys for Appellant Columbia Falls</i>		
<i>Aluminum Company</i>		

Andres Haladay, Esq.	<input type="checkbox"/>	U.S. Mail, postage prepaid
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Phone: (406) 444-5779		
Email: ahaladay2@mt.gov		

Ben Reed, Esq.	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Agency Legal Services Bureau	<input type="checkbox"/>	Electronic Mail
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Helena, MT 59620-1440		

Jon Kenning, Bureau Chief	<input type="checkbox"/>	U.S. Mail, postage prepaid
Water Protection Bureau	<input type="checkbox"/>	Electronic Mail
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P.O. Box 200301	<input checked="" type="checkbox"/>	Personal Delivery
Helena, MT 59620		
Phone: (406) 444-0420		
Email: jkenning@mt.gov		

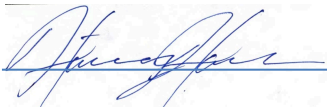


---

Hillary Houle  
MT-Department of Environmental Quality

This 2 day of March, 2017

at 4:18 o'clock p.m.

By: 

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL OF  
SECTION 401 WATER QUALITY  
CERTIFICATION ISSUED FOR DEQ  
APPLICATION NUMBER MT4011012, THE  
CLARK HYDROELECTRIC PROJECT,  
BEAVERHEAD COUNTY, MONTANA

Case: BER 2016-08 WQ

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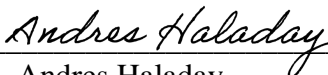
**ORDER FOR DISMISSAL WITH PREJUDICE**

---

Upon the filing of the Stipulation for Dismissal with Prejudice and good cause appearing  
therefore,

IT IS HEREBY ORDERED that Upper Missouri Waterkeeper's appeal is dismissed with  
prejudice, each party to bear its own costs and attorneys' fees.

DATED this 2nd day of March, 2017.

By 

Andres Haladay  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
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**From:** [O'Brien, Lori](#)  
**To:** [guy@uppermissouriwaterkeeper.org](mailto:guy@uppermissouriwaterkeeper.org); [jtuolske@gmail.com](mailto:jtuolske@gmail.com); [peter.mohr@jordanramis.com](mailto:peter.mohr@jordanramis.com); [srbrown@garlington.com](mailto:srbrown@garlington.com); [Kenning, Jon](#); [Houle, Hillary](#)  
**Subject:** 2016 -08WQ - Clark Canyon  
**Date:** Thursday, March 02, 2017 4:18:17 PM  
**Attachments:** [Order dismissing with prejudice.pdf](#)

---

Attached please find the Order on Dismissal

*Lori L. O'Brien  
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*This email contains information from the Montana Department of Justice – Agency Legal Services Bureau which is confidential and/or privileged.*



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Attorneys for Clark Canyon Hydro, LLC

Electronically Filed with the Montana Board of  
Environmental Review

This 2 day of March, 2017

at 12:33 o'clock p.m.

By: 

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL OF  
SECTION 401 WATER QUALITY  
CERTIFICATION ISSUED FOR DEQ  
APPLICATION NUMBER MT4011012, THE  
CLARK HYDROELECTRIC PROJECT,  
BEAVERHEAD COUNTY, MONTANA

Case: BER 2016-08 WQ

---

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

---

COME NOW, Appellant Upper Missouri Waterkeeper, the Montana Department of Environmental Quality and Intervenors Clark Canyon Hydro, LLC, by and through their respective counsel of record and pursuant to Montana Rule of Civil Procedure 41(a)(1)(A)(ii), and hereby submit this Stipulation for Dismissal with Prejudice in the above matter in that the claims have been fully and finally resolved. Each party is to bear its own costs and attorneys' fees. A proposed order of dismissal is attached.

DATED this   1   day of March, 2017.

Attorneys for Clark Canyon Hydro, LLC:

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By  \_\_\_\_\_  
Stephen R. Brown

DATED this \_\_\_\_\_ day of March, 2017.

Attorney for Upper Missouri Waterkeeper

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Telephone (406) 570-2202

By \_\_\_\_\_  
Guy Alsentzer

DATED this \_\_\_\_\_ day of March, 2017.

Attorney for Montana Department  
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By \_\_\_\_\_  
Kurt R. Moser

DATED this \_\_\_\_ day of March, 2017.

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By \_\_\_\_\_  
Stephen R. Brown

DATED this \_\_\_\_ day of March, 2017.

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By  \_\_\_\_\_  
Guy Alsentzer

DATED this \_\_\_\_ day of March, 2017.

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By \_\_\_\_\_  
Kurt R. Moser

DATED this \_\_\_\_ day of March, 2017.

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By \_\_\_\_\_  
Stephen R. Brown

DATED this \_\_\_\_ day of March, 2017.

Attorney for Upper Missouri Waterkeeper

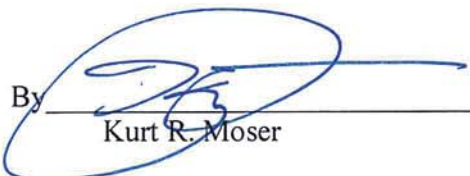
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Bozeman, MT 59715  
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By \_\_\_\_\_  
Guy Alsentzer

DATED this 1<sup>ST</sup> day of March, 2017.

Attorney for Montana Department  
of Environmental Quality

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By  \_\_\_\_\_  
Kurt R. Moser

**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2017, a copy of the foregoing document was served on the following persons by the following means:

- Hand Delivery
- 1 - 6   Mail
- Overnight Delivery Service
- Fax (include fax number in address)
- 1 - 6   E-Mail (include email in address)

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2. John Kenning  
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 Department of Environmental Quality  
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**Original to:**

3. Ms. Hillary Houle  
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6. Andres Haladay  
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 Rhonda Dursma

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL OF  
SECTION 401 WATER QUALITY  
CERTIFICATION ISSUED FOR DEQ  
APPLICATION NUMBER MT4011012, THE  
CLARK HYDROELECTRIC PROJECT,  
BEAVERHEAD COUNTY, MONTANA

Case: BER 2016-08 WQ

---

**ORDER FOR DISMISSAL WITH PREJUDICE**

---

Upon the filing of the Stipulation for Dismissal with Prejudice and good cause appearing  
therefore,

IT IS HEREBY ORDERED that Upper Missouri Waterkeeper's appeal is dismissed with  
prejudice, each party to bear its own costs and attorneys' fees.

DATED this \_\_\_\_ day of March, 2017.

By \_\_\_\_\_

Andres Haladay  
Hearing Examiner  
Agency Legal Services Bureau  
1712 Ninth Avenue  
P.O. Box 201440  
Helena, MT 59620-1440

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**Cc:** [peter.mohr@jordanramis.com](mailto:peter.mohr@jordanramis.com); [Katelyn J. Hepburn](#); [Stephen R. Brown](#)  
**Subject:** BER 2016-08 WQ  
**Date:** Thursday, March 02, 2017 12:33:07 PM  
**Attachments:** [Proposed order dismissing with prejudice.PDF](#)  
[BER 2016-08 WQ Stip Dismiss with Prejudice.pdf](#)

---

Attached is a Stipulation to Dismiss with Prejudice and a proposed Order in the above-mentioned case. If you have any questions, please contact our office.

*Thank you,*

*Rhonda Dursma*

Assistant to Stephen "Steve" Brown  
Direct Line: 406-523-2568  
E-mail: [radursma@garlington.com](mailto:radursma@garlington.com)

[garlington](#) | [lohn](#) | [robinson](#)

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\*\*\*\*\*

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