

**DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA**

IN THE MATTER OF the Consolidated	)	REGULATORY DIVISION
Petition by Mountain Water Company	)	
for Declaratory Rulings and Application	)	
for Approval of Sale and Transfer of	)	DOCKET NO. D2011.1.8
Stock in Park Water Company	)	

**RESPONSE OF CLARK FORK COALITION TO  
MOUNTAIN WATER COMPANY'S OBJECTION TO INTERVENTION**

Pursuant to the Notice of Application and Intervention Deadline, dated February 1, 2011, the Clark Fork Coalition ("CFC") timely filed its Petition to Intervene, dated February 14, 2011, requesting the Public Service Commission for leave to intervene as a general intervener in the above-captioned proceeding. On February 23, 2011, Mountain Water Company ("Mountain Water") filed an Objection to Intervention requesting the Commission to deny CFC's request.

As set forth below, Mountain Water's Objection to Intervention is based on inaccurate facts concerning CFC's incorporation documents, as well as erroneous statements of the law regarding standing to participate before a state administrative agency. The Commission should therefore overrule Mountain Water's Objection and grant CFC's Petition to Intervene.

I. **Mountain Water's objection must be rejected because it is based on inaccurate facts regarding CFC's corporate purpose which provides for the conduct of "any lawful activity."**

Mountain Water bases its objection to CFC's Petition primarily on its claim that CFC's corporate purpose is too narrowly limited and will not allow CFC's participation in proceedings before the Commission. Mountain Water's Objection 1-2. In support of this assertion, Mountain Water attaches a certified copy of CFC's Articles of Incorporation, filed with the Montana Secretary of State on January 21, 1985. Mountain Water neglected to include, however, CFC's Articles of Amendment filed on June 19, 1996, a certified copy of which is attached hereto as Exhibit A. Regarding CFC's corporate purposes, Article III of CFC's Articles of Amendment state:

Purpose: The purposes of the corporation are to:

- (a) Protect and restore water quality in the Clark Fork-Pend Oreille Basin;
- and
- (b) *To engage in any other lawful activity* (emphasis added).

The Montana Nonprofit Corporation Act, Mont. Code Ann. § 35-2-113, *et seq.*, provides "[a] corporation incorporated under this chapter has the purpose of engaging in any lawful activity unless a more limited purpose is set forth in the articles of incorporation." Mont. Code Ann. § 35-2-117(1). Intervention in this docket is clearly a "lawful activity." Indeed, CFC has an obligation to undertake activities that further its non-profit charter.

Mountain Water concludes its brief reiterating the false assertion that serves as the foundation for its entire Objection: "[g]iven its very limited corporate purpose, [CFC] cannot possibly make the requisite showing for intervention under

the Commission's administrative rules." Mountain Water's Objection 4. When the foundation of an argument is based on information that is incorrect, the argument must fail. Given that Mountain Water has incorrectly stated CFC's corporate purpose, this assertion is based on factually flawed information and Mountain Water's Objection must be denied.

**II. CFC has a right to intervene in this docket due to its substantial interest in the ownership and control of Missoula's public water supply that cannot be adequately represented by any other party.**

- A. As demonstrated by its twenty-six years of work to protect the waters of the Clark Fork Basin, CFC's mission is so intertwined with the security of the Missoula Valley's public water resource that its participation in this docket is essential to ensuring the public interest is served.

For the better part of three decades, CFC has worked to protect and restore the waters of the Clark Fork watershed. With an annual budget of over \$1 million, CFC's work is conducted by a staff of 11, based in Missoula, with a satellite ranch office staffed by 1 employee in the Deer Lodge Valley. CFC has a 17-person board of directors supplying guidance, governance, and oversight, with membership support delivered by nearly 3,000 citizens basin-wide.

CFC's methods are science-driven and results-oriented, with an emphasis on public engagement through energetic outreach at the community level. This approach engages people in caring for their waterways, and it has made CFC a trusted and effective voice for rivers and communities in Missoula and throughout the region. CFC has a record of substantial achievements improving the health of the watershed. Bringing together diverse interests, CFC has spearheaded wide-

ranging initiatives that demonstrate its substantial interest in the protection of the basin's waters. Over the past 26 years, CFC has:

- Prevented a pulp mill west of Missoula from increasing its polluted discharge into the Clark Fork River. (1985)
- Successfully lobbied the U.S. Environmental Protection Agency ("EPA") to designate the entire 120-mile Upper Clark Fork River corridor from Warm Springs to the Clark Fork-Blackfoot confluence as a federal Superfund site. (1985)
- Secured a ban on phosphate detergents in Missoula and 15 other communities and several counties in the watershed. (1987)
- Secured congressional funding for a three-state study of nutrient pollution and algae problems in the Clark Fork and Lake Pend Oreille, which led U.S. EPA to form the Tri-State Implementation Council—a partnership of citizens, business, industry, tribes, government, and environmental groups charged with reducing pollution in the Clark Fork-Pend Oreille basin. (1987)
- Created the Milltown Technical Assistance Committee (later the Clark Fork River Technical Assistance Committee), in conjunction with the U.S. EPA to promote citizen involvement in Superfund issues. (1989)
- Convinced the state to close the Upper Clark Fork River basin to new water rights allocations, preventing further de-watering of streams and rivers. (1991)
- Launched a groundwater education campaign that put hundreds of citizen volunteers to work stenciling Missoula storm drains with "Dump No Waste." (1992)
- Helped state regulators develop a nutrient management plan, called a Total Maximum Daily Load (TMDL), for the watershed. (1994)
- Participated in a working group that created the aquifer protection ordinance adopted by Missoula County. (1994)
- Served on state-appointed committee to develop a water rights management plan for the upper Clark Fork. (1994)

- Co-sponsored the Clark Fork River Symposium with the Montana Academy of Sciences and the University of Montana to create a roadmap of a healthy Clark Fork watershed. The symposium now convenes every 5 years. (1995)
- Organized a campaign to reduce dioxin loading in the Clark Fork. Through its “Reach for Unbleached” public education campaign, the Coalition worked to reduce demand for chlorine-bleached products, contributing to the 1999 announcement that the basin’s largest dioxin polluter would stop using bleach in its processing agents. (1996)
- Partnered with the Tri-State Water Quality Council to broker and implement a Voluntary Nutrient Reduction Program signed by the basin’s four largest discharges. This 10-year program measurably reduced nutrient pollution in the Clark Fork River. Subsequently, the state converted the program’s nutrient targets into law. (1997)
- Convinced the City of Missoula to co-sponsor the study and design of using constructed wetlands and land application to treat effluent and boost capacity at the municipal wastewater treatment plant. (1999)
- Developed a groundwater model used by EPA to predict the water table elevations and flow directions under a dam removal scenario at Milltown. (2002)
- Prepared the “State of the Clark Fork” report, which compiles social, economic, and environmental indicators to inform the broader question of watershed health and its interrelated components. (2005)
- Convinced the Missoula City Council to declare the fourth Saturday in April as Clark Fork River Day, with the goal of encouraging citizen participation in a Coalition-sponsored annual river cleanup and as a reminder to the citizens of Missoula Valley to act responsibly to maintain clean water. (2005)
- Spearheaded the removal of Milltown Dam and the return of a free-flowing Clark Fork-Blackfoot confluence. (2008)
- Researched and authored “Low Flows, Hot Trout: Climate Change in the Clark Fork Basin,” a report that details the predicted impacts of climate change on the resources and communities in the watershed. (2008)
- Supported efforts to catalyze public engagement that resulted in an historic agreement that requires BP-ARCO to pay nearly \$200 million to clean up

toxic mining wastes and restore 50 river miles in the Upper Clark Fork. (2008)

- Secured funding for a land acquisition deal that sets the stage for a public park, river access, and trails at the former Milltown Dam site. (2008)
- Produced a “Stream Care Guide” for residents of the Clark Fork basin, a resource booklet designed to help landowners enjoy their property in a way that enhances creeks, streams, lakes, and wetlands, and benefits the whole Clark Fork watershed. (2009)
- Developed and managed numerous innovative water transactions that re-water and reconnect tributaries to rivers. (2010)

As the preceding examples make clear, ensuring the protection of Missoula’s public water supply falls squarely within CFC’s mission to protect the waters of the basin. CFC has a right to intervene in this docket to protect those substantial interests.

B. A change in ownership and control of Mountain Water falls within the CFC’s interests in protecting the waters of the Clark Fork Basin.

Mountain Water narrowly characterizes this transaction as simply a change in the stock holders of Mountain Water’s parent company that should be of no concern to CFC’s members or to the Commission. The stock in Park Water Company (“Park”) has been held almost exclusively by one person since 1979. Park proposes to sell 100% of its outstanding stock to the Carlyle Group (“Carlyle”) through a merger with one of its subsidiaries. Carlyle is a multi-national corporation with 900 employees in 19 countries whose portfolio companies employ more than 380,000 people worldwide (Mountain Water’s Consolidated Petition for Declaratory Ruling and Application for Approval of Sale

and Transfer of Stock, Exhibit 1, p. 4) and whose investors are undisclosed.<sup>1</sup> This transaction will also mark Carlyle's first acquisition of a public water utility.

The proposed merger of Park with Carlyle will be the first time in 32 years that control in Mountain Water has changed hands. By virtue of its control over access to a sensitive aquifer and large urban watershed, ownership in Mountain Water carries with it certain responsibilities to protect that public resource. As the Commission has recognized, “[p]roperty becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.” *In the Matter of the Joint Application of Northwestern Corporation and Babcock & Brown Infrastructure, Ltd*, 2007 Mont. PUC LEXIS 54, ¶ 23, 259 P.U.R. 4<sup>th</sup> 493, ¶ 23 (July 31, 2007) citing *Munn v. Illinois*, 94 U.S. 113 (1876). No where is this maxim more apparent than when considering the ownership and control of a public resource as essential to the public well being as drinking water.

C. Commission rules on intervention confer on CFC the right to intervene and participate in this proceeding.

According to Commission rules, “[a]ny person interested in and directly affected by the subject matter of any hearing or investigation pending before the Commission may petition to become a party thereto.” Admin. R. Mont. 38.2.2401. The Commission may grant CFC’s petition to intervene, “if it appears, after consideration, that the petition . . . discloses a substantial interest in the subject matter of the hearing, that participation of

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<sup>1</sup> “Carlyle's 1,300 investors from 73 countries are public and private institutional investors and high net worth individuals. Carlyle does not disclose information about its investors.” *Frequently Asked Questions About The Carlyle Group and Alternative Asset Management*, The Carlyle Group, <http://www.carlyle.com/Company/item1678.html#2> (accessed March 3, 2011).

[CFC] will be in the public interest, or that the granting of the petition would not unduly broaden the issues of the proceeding.” Admin. R. Mont. 38.2.2405.

As evidenced above, CFC has a significant interest in ensuring that future ownership and control of public water resources in the Missoula area is vested in competent decision makers. CFC has made a considerable effort over the past three decades to prevent contamination to Missoula’s sole-source aquifer, which Mountain Water taps to provide water for drinking and other domestic and commercial uses to Montanans that live in and around Missoula, and to surface water that is hydraulically connected to groundwater. CFC will therefore be directly affected by the outcome of this proceeding and has a right to intervene to protect its significant investments in the watershed.<sup>2</sup>

- D. Because Mountain Water misstates the law of standing related to state administrative agencies, it fails to put in issue CFC’s standing in this docket.

The Commission does not generally conduct an analysis of standing unless standing is a contested issue. *See, In the Matter of the Complaint of Williamson et al. v. Northwestern Energy*, Docket No. D2010.2.14, Order No. 7084d, ¶ 16 (July 27, 2010). Mountain Water purports to raise the issue of CFC’s standing to participate in this docket, but its argument is based first on a misrepresentation of

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<sup>2</sup> Mountain Water claims that it is the Montana Consumer Counsel (“MCC”) who represents the interests of the consuming public, implying that CFC’s participation in this docket would be redundant. Mountain Water’s Objection 2. To begin with, CFC notes that in many proceedings before the Commission, organizations representing low-income persons participate as interveners and would arguably be protecting similar interests as the MCC. The Commission presumably finds that the public interest is better served through the inclusion of diverse viewpoints. Likewise, in this proceeding, the public interest will be better served through the participation of CFC, which clearly has unique expertise and distinct interests and viewpoints from the MCC. Second, CFC observes that Mountain Water made no objection to the intervention of the City of Missoula in this proceeding, notwithstanding the fact that the City’s interest in intervening was on behalf of its citizens and the fact that the MCC is also an intervener.

CFC's corporate charter as discussed above and second on an incorrect statement of the law regarding standing in state administrative proceedings.

Mountain Water erroneously relies exclusively on the standards relating to standing in causes of action in federal and state courts to assert that CFC has no standing to intervene in this proceeding. Mountain Water's Objection 2-3.

However, the Commission has recently acknowledged that cases involving causes of action initiated in a court of law "should be distinguished from an action initiated before an administrative agency" and that the "case" or "controversy" requirements of "Article III of the United States Constitution and Article VII of the Montana Constitution are not applicable to administrative agencies therefore the standing principles dictated by these constitutional provisions are not directly applicable to administrative agencies." *In the Matter of the Complaint of Williamson*, Docket No. D2010.2.14, Order No. 7084a, ¶ 42 (May 20, 2010).

Mountain Water also wrongly cites Rule 24(a) of the Montana Rules of Civil Procedure as controlling over CFC's ability to intervene. Mountain Water's Objection 3. The Montana Rules of Civil Procedure are clearly only applicable to practice and procedure in state district courts, Mont. R. Civ. Pro. R. 1, while practice and procedure before the Commission are governed by its procedural rules. Admin. R. Mont. 38.2.301, *et seq.*

Because Mountain Water's purported challenge to CFC's standing is based on both incorrect facts and law, CFC's standing is not a contested issue and the Commission should not even entertain the argument.

E. CFC is entitled to intervene in this proceeding.

Notwithstanding the above, if the Commission does determine that CFC's standing is a contested issue, CFC clearly meets the standards applicable for standing to participate in this proceeding. The Commission has found "[i]f standing is a contested issue, the Commission's decision must be governed by the specific Montana statute describing those who have standing to initiate or participate in the proceeding." *In the Matter of the Complaint of Williamson et al.*, Docket No. D2010.2.14, Order No. 7084d, ¶ 16. In *Williamson*, the statute governing standing was Mont. Code Ann. § 69-3-321 (regarding formal complaints against a public utility) which states in relevant part, "[t]he commission shall proceed . . . to make such investigation . . . upon a complaint made against any public utility by . . . any person, firm, or corporation, provided such person, firm, or corporation is directly affected thereby." In that proceeding, the Commission concluded that the complainants did not show that they were "directly affected" by the actions complained of and therefore did not meet the standing requirement in the relevant statute. *In the Matter of the Complaint of Williamson et al.*, Docket No. D2010.2.14, Order No. 7084a, ¶ 59.

This proceeding concerns the potential transfer of assets from Park to Carlyle. Commission jurisdiction in this matter derives from the Commission's inherent authority, as established in Title 69 of the Montana Code, to exercise supervision over public utilities and to safeguard the public. In a similar case the Commission found its authority in "the unique status of public utilities." *In the*

*Matter of the Joint Application of NorthWestern Corporation and Babcock & Brown Infrastructure Limited*, Docket No.D2006.6.82, ¶ 23. As the Commission stated in *NorthWestern*:

Public utilities have an obligation to furnish reasonably adequate service and facilities while charging just and reasonable rates . . . Because of their obligation to serve, public utilities have a special status in the law as entities affected with the public interest . . . ‘When one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has created.’ *Great Northern Utils. Co. v. Public Serv. Comm’n*, 88 Mont. 180, 205, 293 P. 294, 298 (1930).

*Id.*

Accordingly, the entirety of Title 69, which creates public utilities, providing them the competitive economic advantages that come with that status, and, at the same time, establishing Commission regulation of those utilities so as to ensure that the public is not harmed as a result of this status provides the basis for CFC’s intervention. A central mission of CFC is to safeguard the groundwater and surface water resources of the Missoula Valley and its environs. In so doing, CFC seeks to further the public interest. Because CFC and its members will be “directly affected” by the outcome of this proceeding, it has a right to intervene to protect its organizational interests and those of its members.

### III. **Conclusion**

For the foregoing reasons, CFC respectfully requests the Commission to grant CFC’s Petition to Intervene in these proceedings.

Respectfully submitted this 4th day of March, 2011.

**CLARK FORK COALITION**

By:  \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 4th day of March, 2011, the foregoing RESPONSE OF CLARK FORK COALITION TO MOUNTAIN WATER COMPANY'S OBJECTION TO INTERVENTION was served via U.S. mail and electronic mail on:

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By:   
Barbara Hall

## EXHIBIT A

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STATE OF MONTANA  
**FILED**  
JAN 18 1996  
SECRETARY OF STATE  
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ARTICLES OF AMENDMENT  
OF  
CLARK FORK COALITION, LIMITED

We, the undersigned, President and Secretary, respectively, of Clark Fork Coalition, Limited, a non-profit corporation, organized under the laws of the State of Montana, and located in Missoula, Montana, hereby certify as follows:

1. The name of the corporation is "Clark Fork Coalition, Limited."
2. A meeting of the members was held on October 8, 1994 to amend the Articles of Incorporation of "Clark Fork Coalition, Limited".
3. There are 1,000 members. The meeting was attended by 11 members who voted unanimously to amend said Articles.
4. The Certificate of Incorporation of the corporation is hereby amended by the following resolution, adopted by the members of the corporation:

ARTICLE I.

Name. The name of the corporation is The Clark Fork-Pend Oreille Coalition.

ARTICLE II.

Designation. The corporation is a public benefit corporation.

ARTICLE III.

Purpose. The purposes of the corporation are to:

- a. Protect and restore water quality in the Clark Ford-Pend Oreille Basin;
- b. To engage in any other lawful activity.

ARTICLE IV.

Members. The Corporation shall have members. Members shall meet the criteria and satisfy the procedures for admission set forth in the Corporation's Bylaws.

ARTICLE V.

Registered Agent and Office. The address of the registered office of the Corporation is 102 East Main, Missoula, Montana 59802, and the name of the registered agent at that office is Daniel Crockett.

ARTICLE VI.

Distribution and Dissolution. In the event of the dissolution of the Corporation, no Member shall be entitled to any distribution or division of its remaining property or its proceeds, and the balance of all money and other property which the Corporation receives from any source, after the payment of all debts and obligations of the Corporation, shall be used or distributed exclusively for purposes within the intendment of Section 501(c) of the Internal Revenue Code of 1986 and its regulations as the same now exists or as it may be amended from time to time.

ARTICLE VII.

Prohibited Transactions. The Corporation shall not engage in activities prohibited by a corporation exempt from Federal Income Tax under Section 501(c)(3) of the Internal Revenue Code of 1986 and its regulation or any corresponding future provision of the Revenue Code. The Corporation shall not attempt to influence legislation by propaganda or otherwise, nor shall it intervene in, or participate in, any political campaign on behalf of any candidate for public office. No part of the net earnings of this Corporation shall inure to the benefit of any Member or private individual, and no Member, Director, or Officer of the Corporation shall receive any pecuniary benefit from the

Corporation, except such reasonable compensation as may be allowed for services actually rendered to the Corporation.

ARTICLE VIII.

Limitation of Directors' Liability. A Director of the Corporation shall not be liable to the Corporation or its Members for monetary damages for breach of a Director's duties to the Corporation or its Members, except for (a) breaches of the Director's duty of loyalty to the Corporation or its Members, (b) acts or omissions not in good faith or that involve intentional conduct or a knowing violation of the law, (c) transactions from which a Director derived an improper economic benefit, or (d) conflict of interest transactions, loans to or guarantees for Directors and officers or unlawful distributions.

ARTICLE IX.

Amendments. The Corporation may amend these Articles in a manner authorized by law at the time of the amendment.

DATED this 21 day of DECEMBER, 1995.

D. T. Crockett  
President

Hal Frank  
Secretary

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This agreement was signed by Dan Crockett on December 21, 1995, and by Hal Frank on October 28, 1995, known to me to be the persons named above.

Grant D. Parker  
Grant D. Parker  
Notary Public in and for  
the state of Montana,  
Residing in Missoula,  
my Commission expires  
11/24/98.

**STATE OF MONTANA**

Office of the Secretary of State  
I hereby certify this is a true and  
correct copy consisting of 19 pages,  
as taken from the original on file in this  
office. Originality of this certification can  
be determined by the color blue.



DATED: 3-2-11 *Linda McCulloch*  
BY: *Rose Ann Drake* Linda McCulloch  
*Deputy* Secretary of State