IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 19-0484

CLARK FORK COALITION, ROCK CREEK ALLIANCE, EARTHWORKS, and MONTANA ENVIRONMENTAL INFORMATION CENTER,

Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and RC RESOURCES, INC.,

Respondents and Appellants.

On Appeal from the First Judicial District Court,
Lewis and Clark County, Hon. Kathy Seeley
Cause No. CDV-2018-150

RESPONSE BRIEF OF PETITIONERS-APPELLEES CLARK FORK COALITION, ET AL.

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STATEMENT OF ISSUES

I. Whether the Montana Department of Natural Resources and Conservation ("DNRC") violated the Water Use Act, MCA § 85-2-311(1)(a)(ii), by determining that water is "legally available" for appropriation to develop the proposed Rock Creek Mine despite evidence that the requested appropriation would dewater multiple streams in Montana's Cabinet Mountains Wilderness in violation of quantitative state-law limits on depleting flows in streams designated "Outstanding Resource Waters" under state law.

II. Whether, even assuming for the sake of argument that DNRC correctly determined that water is legally available for the proposed appropriation within the meaning of the Water Use Act—which it did not—DNRC's application of MCA § 85-2-311(2) to deprive Appellees of any objection that the proposed appropriation is inconsistent with the Outstanding Resource Waters classification of the affected streams violates Appellees' fundamental rights to a clean and healthful environment under the Montana Constitution, Mont. Const. art. II, § 3, art. IX, § 1.

STATEMENT OF THE CASE

This case presents the question whether DNRC must consider our State's legal protections for Outstanding Resource Waters—a unique class of public waterways that the Legislature singled out to receive "the greatest protection

feasible under state law," MCA § 75-5-315(1)—before issuing a water use permit that, if granted, would effectively nullify those protections as they pertain to streams in the Cabinet Mountains Wilderness of northwest Montana. At issue is DNRC's grant of a water use permit to RC Resources ("RC") authorizing appropriation of groundwater that RC's own permit application shows would permanently dewater wilderness streams in violation of quantitative state-law limits on depletion of Outstanding Resource Waters. See MCA § 75-5-303(7); ARM 17.30.705(2)(c); ARM 17.30.715(1)(a). Once granted, such a permit effectively exempts authorized appropriations from application of state-law nondegradation rules that otherwise would prohibit such depletion. See MCA § 75-5-317(2)(s). Nevertheless, DNRC takes the stark position that it may grant RC's permit request without even considering evidence that the permitted activity would degrade Outstanding Resource Waters in violation of state law.

In an effort to prevent this harm to some of our State's purest waters, Appellees Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (collectively, "CFC") objected to DNRC's proposed decision to grant RC's water use permit application on September 1, 2016. AR:590-607.[1] A DNRC hearing examiner dismissed CFC's objections and

[1] Appellees cite the DNRC administrative record as AR:Bates#.

granted RC's requested water use permit on January 29, 2018. AR:2-13. CFC then challenged DNRC's decision in the district court, which issued an order reversing and remanding DNRC's decision on April 9, 2019. See Order on Pet. for Judicial Review (Mont. 1st Jud. Dist. Ct. Apr. 9, 2019) ("Order") (DNRC App. 2). DNRC and RC now appeal to this Court.

STATEMENT OF FACTS

This controversy began when RC sought to appropriate water to develop and operate the Rock Creek Mine, a proposed underground copper-silver mine that would bore beneath the Cabinet Mountains Wilderness near Noxon, Montana. See AR:72, 595. As required by the Water Use Act, MCA § 85-2-302, RC in April 2014 applied for a water use permit from DNRC to divert and appropriate groundwater for use in ore processing and other mining operations. See AR:74, 32-34. To support its application, RC relied on its consultant's report, "Hydrometrics 2014," which presents three-dimensional modeling results predicting the impact of RC's proposed groundwater withdrawals on streams in the Rock Creek Mine project area. See AR:30-31, 88-240, 250. Based on the best available information, the modeling indicates that RC's proposed appropriation would substantially deplete, or even completely dewater, multiple streams within the Cabinet Mountains Wilderness. AR:217-24, 600.

The affected streams are protected as "Outstanding Resource Waters" under Montana law. ARM 17.30.617(1).[2] Because of their "environmental, ecological, or economic value," the Montana Legislature has declared that such "[o]utstanding resource waters must be afforded the greatest protection feasible under state law, after thorough examination," and directed that the state should "prohibit, to the greatest extent practicable, changes to the existing water quality of those waters." MCA § 75-5-315(1) (emphases added). To implement this mandate, state law prohibits any degradation of Outstanding Resource Waters. MCA § 75-5-303(7); ARM 17.30.705(2)(c). This prohibited degradation includes reductions in the flow of Outstanding Resource Waters below established quantitative limits: state law prohibits any "activities that would … decrease the mean monthly flow of a surface water" designated as an Outstanding Resource Water "by [more than or equal to] 15 percent or the seven-day ten-year low flow by [more than or equal to] 10 percent." ARM 17.30.715(1)(a) (deeming activities that do not exceed these

[2] This designation applies to streams within wilderness areas designated as of October 1, 1995. ARM 17.30.617. Congress designated the Cabinet Mountains Wilderness in 1964. Pub. L. 88-577, § 3, 78 Stat. 890, 891 (1964).

thresholds "nonsignificant" and, assuming other criteria are met, not subject to nondegradation requirements).[3]

RC's own modeling submitted with its permit application shows that its proposed appropriation threatens to permanently degrade Outstanding Resource Waters in violation of these statutory and regulatory requirements. Under all six modeled scenarios, the proposed appropriation would reduce stream baseflows[4] by ten percent or more in wilderness reaches of South Basin Creek, Chicago Creek, the St. Paul Lake drainage, and an Unnamed East Fork Tributary; under three scenarios, the appropriation also would reduce baseflows by more than ten percent in Copper Gulch and Moran Basin Creek within the wilderness; and under one scenario, baseflow reductions of ten percent also would occur in East Fork Bull River within the wilderness. AR:217-24, 600. Under multiple modeled scenarios, the proposed appropriation would drain 100 percent or more of the groundwater discharge to Chicago Creek within the wilderness and more than 50 percent of groundwater discharge to South Basin Creek within the wilderness. AR:600, 607.

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[3] The seven-day ten-year low flow represents "the lowest 7-day average flow that occurs on average once every 10 years." U.S. Envtl. Prot. Agency, "Low Flow and Droughts: Definitions and Characteristics," https://www.epa.gov/ceam/definition-and-characteristics-low-flows (last visited Feb. 13, 2020).

[4] "Baseflow" refers to the sustained flow in a stream in the absence of runoff and generally derives from groundwater contribution. See U.S. Geological Survey, Water Science Glossary of Terms, https://water.usgs.gov/edu/dictionary.html (last visited Feb. 13, 2020).

These prohibited impacts would occur early in mine development and throughout mine operations:

	Outstanding Resource Water	East Fork of Bull River	Unnamed East Fork Tributary	Moran Basin Creek	St. Paul Lake Drainage	Chicago Creek	Copper Gulch	South Basin
	Pre-mining discharge	1.4	0.8	-1	0.7	0.2	0.7	0.5
	Maximum drawdown	1.3	0.5	-1.1	0.5	-0.1	0.6	0.2
	% of dewatering	7.142857143	37.5	10	28.57142857	150	14.28571429	60
Variable Fault 10 ^-6	Year dewatering crosses legal threshold		15		9	9	25	9
	Pre-mining discharge	1.1	0.8	-0.9	0.8	0.3	0.7	0.6
	Maximum drawdown	1.1	0.5	-1	0.7	0	0.6	0.2
	% of dewatering	0	37.5	11.11111	12.5	100	14.28571429	66.66666667
High K Fault 10^-6	Year dewatering crosses legal threshold		9			3	25	3
	Pre-mining discharge	1	0.8	-0.8	0.9	0.3	0.7	0.7
	Maximum drawdown	0.9	0.5	-0.9	0.8	0.1	0.6	0.3
	% of dewatering	10	37.5	12.5	11.11111111	66.66666667	14.28571429	57.14285714
Gouge Fault 10^-6	Year dewatering crosses legal threshold	29	9	25	25	25		2
	Pre-mining discharge	1.1	0.9	-0.9	0.7	0.3	0.7	0.7
	Maximum drawdown	1.1	0.7	-0.9	0.6	0.2	0.7	0.5
	% of dewatering	0	22.22222222	0	14.28571429	33.33333333	0	28.57142857
Variable Fault 10^-9	Year dewatering crosses legal threshold		9			15		15
	Pre-mining discharge	0.8	0.8	-0.8	0.9	0.4	0.7	0.8
	Maximum drawdown	0.8	0.7	-0.8	0.8	0.2	0.7	0.5
	% of dewatering	0	12.5	0	11.11111111	50	0	37.5
High K Fault 10^-9	Year dewatering crosses legal threshold		25			15		15
	Pre-mining discharge	0.7	0.8	-0.7	1	0.5	0.7	0.8
	Maximum drawdown	0.7	0.7	-0.7	0.9	0.3	0.7	0.6
	% of dewatering	0	12.5	0	10	40	0	25
Gouge Fault 10^-9	Year dewatering crosses legal threshold		25			15		25

Data derived from Hydrometrics 2014

AR:607. Accordingly, RC's own application demonstrated that its appropriation threatens prohibited impacts on waters that the Legislature has afforded "the greatest protection feasible under state law." MCA § 75-5-315(1).

Moreover, under Montana law, DNRC's grant of RC's requested water use permit would also effectively grant RC's proposed project an exemption from state laws prohibiting such depletion of flows in the affected Outstanding Resource Waters. This is because Montana law provides that "diversions or withdrawals of water established and recognized" under the Water Use Act are treated as "nonsignificant" regardless of their actual impact on Outstanding Resource Waters, and therefore are categorically exempt from the dewatering limitations imposed by the nondegradation rules. MCA § 75-5-317(2)(s); see also id. § 75-5-303(2).

Thus, DNRC's issuance of the water use permit requested by RC threatened to effectively insulate the company's authorized activities from any enforcement of Montana's strict nondegradation protections for Outstanding Resource Waters by CFC, Montana's Department of Environmental Quality ("DEQ"), or anyone else.

Nevertheless, DNRC failed to consider the impact of RC's proposed appropriation on flows in Outstanding Resource Waters before granting the company's application. Under the Water Use Act, DNRC may not issue a water use permit unless the applicant proves that its proposed appropriation satisfies the so-called "311 criteria" set forth in MCA § 85-2-311(1)(a)-(h). One of these criteria, subsection 311(1)(a)(ii), requires the applicant to demonstrate that "water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department." Id. § 85-2-311(1)(a)(ii). This criterion directs DNRC to determine legal availability by considering, among other things, any "existing legal demands on the source of supply throughout the area of potential impact by the proposed use." Id. § 85-2-311(1)(a)(ii)(B); see also ARM 36.12.1704(2)(a), 36.12.1705(2) (providing that legal availability analysis for groundwater appropriations must consider "existing

legal demands for any surface water source that could be depleted as a result of the groundwater appropriation").[5]

In assessing whether RC satisfied the legal-availability criterion, the only "existing legal demands on the source" DNRC considered were existing water rights in affected drainages; the agency disregarded the quantitative limits on dewatering of Outstanding Resource Waters imposed by state law. AR:44-52. Based on this limited analysis, DNRC's preliminary determination on RC's application, issued on June 22, 2016, found that RC satisfied the legal-availability criterion. AR:48, 52.

CFC objected to DNRC's preliminary determination. AR:590-607; see MCA § 85-2-308 (providing for objections process). CFC asserted that RC cannot satisfy the legal-availability criterion because its application shows that its proposed appropriation would dewater Outstanding Resource Waters in the Cabinet Mountains Wilderness in violation of state law (the "legal-availability objection"). AR:599-601. CFC simultaneously objected to RC's application based on an additional section 311 criterion, subsection 311(1)(g), arguing that RC's

[5] All applicants must prove that their proposed appropriation satisfies the criteria in subsections 311(1)(a)-(e), including the legal-availability criterion, MCA § 85-2-311(1)(a)(ii). An applicant must prove that its proposed appropriation satisfies the criteria in subsections 311(1)(f)-(h), including the water-classification criterion discussed infra, id. § 85-2-311(1)(g), only if DNRC receives a valid objection based on those criteria, id. § 85-2-311(2).

proposed appropriation would conflict with the Outstanding Resource Waters "classification of water set for the source of supply" under the Water Quality Act, MCA § 75-5-301(1) (the "water-classification objection"). MCA § 85-2-311(1)(g); AR:601-02.[6]

DNRC deemed CFC's legal-availability objection valid and set the matter for an administrative hearing before a hearing examiner pursuant to the contested case provisions of the Montana Administrative Procedure Act, MCA §§ 2-4-601–2-4-631. AR:567, 577, 581, 585, 589. However, DNRC determined that CFC's water-classification objection was not valid, citing a provision of the Water Use Act, MCA § 85-2-311(2), stating that water-classification objections can be raised only by DEQ or a local water quality district. AR:616. Given that determination, DNRC did not conduct further administrative review of CFC's water-classification objection.

Thereafter, CFC and RC agreed that CFC's legal-availability objection could be addressed most efficiently through RC's filing of a motion to dismiss, and motions practice ensued. AR:670-86, 700-01. On January 29, 2018, the hearing examiner issued a Final Order granting RC's motion to dismiss. AR:2-13. The

[6] CFC further objected that RC lacked the requisite authorization to occupy National Forest lands for its proposed diversion and water use, AR:597-99; see MCA § 85-2-311(1)(e), but that objection was resolved by stipulation and is not at issue, AR:19-27, 687-697.

hearing examiner concluded that existing water rights are the only "legal demands" on the source water that DNRC must consider in evaluating whether water is legally available and, therefore, DNRC need not consider evidence in the permit application that the proposed appropriation would violate quantitative state-law restrictions on dewatering Outstanding Resource Waters. AR:9-12. The hearing examiner further concluded that concerns regarding a proposed appropriation's consistency with these state-law restrictions must be raised under subsection 311(1)(g)'s water-classification criterion, MCA § 85-2-311(1)(g), and, under MCA § 85-2-311(2), only DEQ or a water quality district may raise such an objection. AR:10, 12. The hearing examiner did not address CFC's argument, advanced during dismissal briefing, AR:667-68, that applying MCA § 85-2-311(2) to preclude CFC from raising its water-classification objection violates the clean and healthful environment provisions of the Montana Constitution, Mont. Const. art. II, § 3, art. IX, § 1. Based on the hearing examiner's conclusions, DNRC issued RC a permit to "divert and impound groundwater," including in the Cabinet Mountains Wilderness. AR:62-63; see AR:12.

CFC then challenged DNRC's action in the district court. CFC's petition for review, filed on Feb. 26, 2018, argued that DNRC's legal-availability analysis violated the Water Use Act by failing to consider state-law limitations on dewatering of Outstanding Resource Waters, and that DNRC's application of

MCA § 85-2-311(2) to bar CFC from raising a water-classification objection to RC's application violated CFC's constitutional right to a clean and healthful environment, Mont. Const. art. II, § 3, art. IX, § 1.[7]

The district court issued an order on April 9, 2019 agreeing with CFC's legal-availability claim. Order 6-12. The district court reasoned that the Water Use Act's plain language supports CFC's argument because restricting the legal-availability analysis to existing water rights, as DNRC did here, affords the legal-availability criterion of subsection 311(1)(a)(ii) no different statutory meaning than an entirely separate section 311 criterion, subsection 311(1)(b), that specifically requires a permit applicant to demonstrate that existing water rights will not be adversely affected. Id. 8-9. The district court rejected DNRC's argument that the Water Use Act's sole purpose is to protect senior water rights and the agency's request for deference to its interpretation of "legal demands," finding that the Water Use Act also serves a broader public interest and that DNRC demonstrated no formal statutory interpretation. Id. 9-10. The district court also rejected DNRC's contention that requirements established by DEQ pursuant to Montana's Water Quality Act are inapplicable to the legal-availability analysis, noting that

[7] Pursuant to Montana Rule of Civil Procedure 5.1(a), CFC served notice of its constitutional claim on the Montana attorney general. See Notice of Constitutional Challenge (filed in district court on Feb. 26, 2018).

section 311 explicitly addresses other water-quality issues and, in any event, that state-law limitations on dewatering Outstanding Resource Waters present "a question of water quantity." Id. 11. Accordingly, the district court ruled that state-law restrictions on "dewatering Outstanding Resource Waters [are] a known legal demand on the water to be appropriated in this case and must be included in the analysis of legal availability of water prior to issuing a permit granting an appropriation to RC Resources." Id. 11-12.

Because the district court agreed with CFC on the legal-availability issue, it did not resolve CFC's alternative claim that DNRC's application of MCA § 85-2-311(2) to bar CFC's water-classification objection violated CFC's constitutional rights. Id. 12-15. Based on its rulings, the district court reversed DNRC's order granting RC's water use permit application and remanded the matter to DNRC. Id. 15-16. DNRC and RC appealed to this Court.

STANDARD OF REVIEW

"In an administrative appeal, [this Court applies] the same standards of review that the district court applies." S. Mont. Tel. Co. v. Mont. Pub. Serv. Comm'n, 2017 MT 123, ¶ 12, 387 Mont. 415, 395 P.3d 473. Accordingly, this Court "may reverse or modify [DNRC's] decision if substantial rights of [CFC] have been prejudiced because … the administrative findings, inferences, conclusions, or decisions are … in violation of constitutional or statutory

provisions," "affected by other error of law," or "arbitrary or capricious." MCA § 2-4-704(2). Further, DNRC issued the order at issue in response to RC's motion to dismiss, which "has the effect of admitting all well-pleaded allegations in the complaint"—here, CFC's administrative objection—and should be granted only if "it appears beyond reasonable doubt that the [objector] can prove no set of facts which would entitle him to relief." Meagher v. Butte-Silver Bow City-Cty., 2007 MT 129, ¶¶ 13, 15, 337 Mont. 339, 160 P.3d 552 (citations omitted). Because the issues before DNRC were purely legal, Order at 4, this Court reviews DNRC's final order de novo. See Missoula Elec. Coop. v. Jon Cruson, Inc., 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210. Although DNRC contends this Court should defer to the agency's interpretation of the Water Use Act provisions at issue, DNRC Opening Br. 10-11, 40-43 (Dec. 4, 2019) ("DNRC Br."), for the reasons discussed infra no deference is warranted.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's judgment reversing and remanding DNRC's decision. DNRC's legal-availability analysis under subsection 311(1)(a)(ii) defies the plain language and structure of the Water Use Act, as well as explicit statutory direction regarding protection of Outstanding Resource Waters. See Point I.A, infra. Appellants' contrary arguments misapply the Water Use Act, misconstrue legislative history, inappropriately seek judicial deference,

and overstate the scope and implications of the district court's ruling. See Point I.B, C, infra. They should be rejected.

Even assuming for the sake of argument that Appellants' legal-availability arguments were correct—which they are not—DNRC's decision still should be reversed and remanded because DNRC's application of MCA § 85-2-311(2) to bar CFC's water-classification objection under subsection 311(1)(g) violates CFC's fundamental constitutional rights to a clean and healthful environment by effectively exempting RC's appropriation from nondegradation requirements and depriving CFC of any remedy to protect its interest in legally protected flows in Outstanding Resource Waters. Because no legitimate state interest justifies DNRC's encroachment on CFC's rights, and MCA § 85-2-311(2) as applied in this context is not narrowly tailored to promote any such interest, DNRC's application of § 85-2-311(2) does not pass constitutional muster. See Point II.A, infra. Appellants ignore this issue on appeal, apart from a meritless waiver argument by RC, but the arguments they advanced in the district court fail to justify DNRC's action. See Point II.B, infra. Accordingly, DNRC's constitutional violation offers an alternative basis to invalidate the agency's decision.

ARGUMENT

This Court should affirm the district court's judgment because DNRC unlawfully dismissed CFC's legal-availability objection. Alternatively, DNRC's

rejection of CFC's water-classification objection violates the Montana Constitution.

I. DNRC WRONGLY DETERMINED THAT WATER IS LEGALLY AVAILABLE FOR RC'S APPROPRIATION DESPITE EVIDENCE THAT IT WOULD UNLAWFULLY DEPLETE OUTSTANDING RESOURCE WATERS

As the district court correctly concluded, DNRC's decision granting RC's water use permit violated the Water Use Act because DNRC unlawfully determined that water is "legally available" for RC's appropriation despite information in RC's own application demonstrating that the appropriation would violate a quantitative state-law limitation on depletion of Outstanding Resource Waters. Appellants fail to demonstrate otherwise.

A. DNRC's Decision Defies the Water Use Act's Plain Language and Structure

DNRC's decision that water is legally available for RC's appropriation despite evidence that the appropriation will deplete wilderness stream flows in violation of state law is contrary to the plain language and structure of the Water Use Act. Subsection 311(1)(a)(ii) of the Water Use Act requires a permit applicant to prove that water is "legally available during the period in which the applicant seeks to appropriate, in the amount requested." MCA § 85-2-311(1)(a)(ii). The Act directs DNRC to analyze legal availability by (1) identifying the quantity of water that is physically available; (2) identifying the "existing legal demands on

the source of supply throughout the area of potential impact"; and (3) analyzing "the evidence on physical water availability and the existing legal demands," including by comparing the physical water supply with existing legal demands. Id. While this Court in Confederated Salish & Kootenai Tribes v. Clinch ("CSKT") described this section 311 framework as "circular" in defining "legally available," 1999 MT 342, ¶ 15, 297 Mont. 448, 992 P.2d 244, any reasonable, plain-language interpretation of "legally available" water must, at a minimum, mean water that is available under governing legal standards. See State v. Running Wolf, 2020 MT 24, ¶ 15 (stating that "cardinal first step in statutory construction" involves "reasonably and logically interpret[ing statute's] language, giving words their usual and ordinary meaning") (quotations and citations omitted).

The Legislature reinforced this plain-meaning interpretation by mandating in subsection 311(1)(a)(ii)(B) that DNRC's legal availability analysis must consider, without limitation, "existing legal demands on the source of supply"—a broad phrase that on its face encompasses all legal constraints on withdrawals from the water source. MCA § 85-2-311(1)(a)(ii)(B). To be sure, such "legal demands" include existing water rights. But as a matter of plain language and logic, they also include other quantitative legal constraints on water availability, including nondegradation limits on depleting Outstanding Resource Waters.

Indeed, the quantitative limits on depleting Outstanding Resource Waters imposed by Montana law share key features with certain Indian reserved water rights that this Court in CSKT, ¶ 28, held must be considered in DNRC's legal-availability analysis. In particular, "[t]he right to water reserved to preserve tribal hunting and fishing rights is … non-consumptive," consisting of a legal constraint preventing "appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies." Id., ¶ 12 (quotations and citations omitted). Thus, unlike appropriative water rights that "are based on actual use," these reserved rights "need not be diverted from the stream" to be recognized. Id. (quotations and citation omitted). Despite these differences from traditional appropriative water rights, this Court in CSKT "interpret[ed] 'legally available'" under subsection 311(1)(a)(ii) "to mean there is water available which, among other things, has not been federally reserved for Indian tribes." Id., ¶ 28 (emphasis added).

Like the tribal reserved rights to preserve hunting and fishing, Montana's legal protections for Outstanding Resource Waters are non-consumptive, involve no diversion, and instead consist of a constraint on depletion below a protected level. See MCA § 75-5-303(7); ARM 17.30.715(1)(a). In fact, the Outstanding Resource Waters protections are in at least one respect more similar than tribal reserved rights to appropriative water rights because the Outstanding Resource

Waters protections impose quantitative limits, see ARM 17.30.715(1)(a), while "the extent of the Tribes' reserved water rights remains unknown" pending settlement or adjudication, CSKT, ¶ 12 (quotations and citation omitted). Accordingly, just as this Court in CSKT, ¶ 28, held that "legal demands" encompasses, "among other things," Indian reserved water rights, the Court should now hold that such "other things" also include the Outstanding Resource Waters protections.

The structure of the Water Use Act supports this conclusion. The Act requires DNRC to undertake the legal-availability analysis in subsection 311(1)(a)(ii) and then, in the very next subsection, specifically requires the agency to assess whether "the water rights of a prior appropriator" will be "adversely affected." MCA § 85-2-311(1)(b). These directly adjacent provisions demonstrate that the Legislature knew how to specify "water rights" when it meant to limit DNRC's consideration to water rights. See McPhail v. Mont. Bd. of Psychologists, 196 Mont. 514, 517, 640 P.2d 906, 908 (1982) (rejecting agency rule that imposed chronological order on educational and experience requirements for psychologist's license because authorizing statutory provision imposed no such requirement and Legislature demonstrated that it "knew how" to impose such a requirement by doing so in separate statutory provision).

Further, because "[d]ifferent language is to be given different construction," Gregg v. Whitefish City Council, 2004 MT 262, ¶ 38, 323 Mont. 109, 99 P.3d 151, these adjacent provisions also demonstrate that, when the Legislature referred to "legal demands" instead of "water rights" in subsection 311(1)(a)(ii), the Legislature meant something other than simply water rights. See Zinvest, LLC v. Gunnersfield Enters., Inc., 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270 ("Because the enacting Legislature did not use identical language in the two provisions, it is proper for us to assume that a different statutory meaning was intended … ."). The district court correctly applied this rule, reasoning that, "[w]hen a different term is used, a different definition should apply." Order at 8-9.

Conversely, DNRC's statutory interpretation posits that the Legislature used different language in adjacent section 311 criteria—"legal demands" in subsection 311(1)(a)(ii)(B) and "water rights" in subsection 311(1)(b)—to reference the same thing: water rights. However, courts "must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used." Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conservation, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224 (citation omitted). If DNRC were correct that the "legal demands" it must consider in determining legal availability are synonymous with, and limited to, water rights, the legal-availability criterion would become meaningless surplusage.

DNRC's decision similarly contravenes explicit legislative direction regarding protection of Outstanding Resource Waters. The Legislature has mandated that "[o]utstanding resource waters must be afforded the greatest protection feasible under state law, after thorough examination," and the state should "prohibit, to the greatest extent practicable, changes to the existing quality of those waters." MCA § 75-5-315(1) (emphases added). DNRC hardly affords such waters "the greatest protection feasible" and "practicable"—much less "thorough examination," id.—when it fails even to consider quantitative limits on depleting Outstanding Resource Waters in determining legal availability. Instead, it effectively nullifies these mandates. DNRC's approach violates this Court's well-established "presumption that the Legislature does not pass meaningless legislation," and its direction to "harmonize statutes relating to the same subject in order to give effect to each statute." State v. Brendal, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. By contrast, the district court's ruling faithfully reflected this Court's direction by holding that "[d]egradation shown to violate the applicable [Outstanding Resource Waters] legal restrictions must be considered as part of the 'legal demands' 'within the area of potential impact'" under the Water Use Act. Order at 10 (footnote omitted).[8]

[8] DNRC and RC ignore Montana's statutory protections for Outstanding Resource Waters in their opening briefs.

B. DNRC's Contrary Arguments Are Meritless

DNRC mounts numerous attacks on the district court's reasoning, many of which are repeated more vehemently by RC. None salvages DNRC's unlawful legal-availability analysis.

1. DNRC's Statutory-Language Arguments Are Flawed

DNRC argues that the plain meaning of "demand" favors its position, citing dictionaries to claim that "demand" means "'something claimed as due or owed.'" DNRC Br. 19-20 & n.5. However, DNRC ignores the more basic legal definition of "demand" as "[t]he assertion of a legal or procedural right," Black's Law Dictionary (11th ed. 2019), as well as a more specific definition that is most apt in the water-appropriation context, which is "the requirement … of the expenditure of a resource."[9] Both definitions encompass both water rights and Outstanding Resource Waters protections.

DNRC nevertheless contends that "[n]on-degradation is not quantitative like a water right." DNRC Br. 22. However, the nondegradation requirements at issue are quantitative: they prohibit activities that would reduce baseflows by more than 10 percent. See ARM 17.30.715(1)(a); see also MCA § 75-5-303(7) (forbidding

[9] "Demand," Merriam-Webster Dictionary Online (2020), https://www.merriam-webster.com/dictionary/demand?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Feb. 13, 2020).

issuance of authorization to degrade Outstanding Resource Waters). This constitutes a quantitative restriction on water depletion that can be assessed through modeling of the sort in the record here or by field measurements. While DNRC claims that "two projects could individually deplete" an Outstanding Resource Water "even though collectively those projects would exceed" the regulatory limit on depletion, DNRC Br. 22, this overlooks ARM 17.30.715(2)(a), which establishes that an activity otherwise complying with the depletion limit may nevertheless constitute prohibited degradation based upon "cumulative impacts or synergistic effects." In any event, no such cumulative depletions are at issue here because RC's appropriation threatens prohibited depletion of Outstanding Resource Waters by itself.

DNRC similarly fails to justify the hearing examiner's assertion that interpreting "legal demands" under subsection 311(1)(a)(ii)(B) to encompass only water rights does not render that provision improperly duplicative of subsection 311(1)(b)—even though the latter explicitly requires DNRC to consider adverse effects on water rights. DNRC Br. 24-26; AR:10-11. The hearing examiner claimed that, "[b]ecause physical availability is based upon a 'mean of the median' flow in a source, there may be water 'legally available' (physical availability exceeds legal demands) on a source at times, yet a new appropriation may still result in an adverse effect," for example "during drought periods." AR:10. Even

DNRC characterizes this proffered distinction between subsections 311(1)(a)(ii) and 311(1)(b) as "slight," DNRC Br. 25, but it is actually non-existent. Under the hearing examiner's scenario, the subsection 311(1)(a)(ii) legal-availability analysis still has no independent utility because the subsection 311(1)(b) adverse-effect criterion separately requires DNRC to determine whether a proposed appropriation will adversely affect "the water rights of a prior appropriator," MCA § 85-2-311(1)(b), which requires an accounting of all "water rights" on the source and an analysis whether those rights will be harmed by a proposed appropriation, see id. That analysis necessarily will disclose any interference with existing water rights regardless whether flows are low or high. See id. (requiring that adverse-effect determination must assess whether "the water right of a prior appropriator will be satisfied"). Accordingly, the legal-availability criterion adds nothing to the statutory permitting analysis if "legal demands" means nothing more than existing water rights. For this reason, the Court should reject DNRC's argument. See Bates v. Neva, 2014 MT 336, ¶ 18, 377 Mont. 350, 339 P.3d 1265 (rejecting party's statutory interpretation because "[i]f improved or unimproved property is read simply to refer to vacant housing, the term will add nothing to the statute that is not already included in 'housing accommodation'").

2. DNRC Ignores Statutory Purposes That Contradict Its Argument

DNRC also errs in attempting to ground its position in the purpose of the Water Use Act. DNRC claims the Act's "paramount objective" is to establish a system that "protects senior water rights from unregulated encroachment." DNRC Br. 16-17. This argument ignores the Legislature's other purposes in regulating water use, which include conserving state waters "for public recreational purposes and for the conservation of wildlife and aquatic life." MCA § 85-1-101(5). Indeed, the Water Use Act itself declares that its purposes include providing for the wise use "and conservation" of the state's waters "with the least possible degradation of the natural aquatic ecosystems." Id. § 85-2-101(3) (emphases added); see RC Resources Br. 38 (Dec. 4, 2019) ("RC Br.") (recognizing that "relevant policy controlling DNRC's permitting authority … is contained in § 85-2-101, MCA"). Accordingly, while protecting senior water rights is certainly a "core purpose" of the Act, Clark Fork Coal. v. Tubbs, 2016 MT 229, ¶ 24, 384 Mont. 503, 380 P.3d 771 (quoted in DNRC Br. 17), it is not the only one. DNRC's approach defeats the Act's explicit nondegradation purpose, which is served by considering impacts on Outstanding Resource Waters. This Court should not adopt an interpretation of the Water Use Act that would "defeat its evident object or purpose." Howell v. State, 263 Mont. 275, 286-87, 868 P.2d 568, 575 (1994) (citation omitted).

DNRC also attacks the district court's discussion of Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (1984) (discussed in Order 9). DNRC Br. 39; see also id. 28. However, the district court addressed Montana Power only to reject DNRC's reliance on that case to argue that the Water Use Act aims solely to protect senior water rights. Order 9. As the district court correctly observed, Montana Power itself recognized that the Act responded to the State's need not only to "protect existing senior water rights" but also "to insure that the public interest was being promoted." 211 Mont. at 97, 685 P.2d at 339. Accordingly, DNRC identifies no reason to question the district court's determination of the Water Use Act's purpose, which was, in any event, supported not only by Montana Power but also by the statutory language discussed above. See Order 10 (citing MCA § 85-1-101(5)).[10]

3. DNRC Misapplies MCA § 85-2-311(2)

DNRC fares no better in attempting to defend the hearing examiner's conclusion that interpreting "legal demands" to include Outstanding Resource

[10] RC criticizes the district court's reference to Wyoming Hereford Ranch v. Hammond Packing Co., 33 Wyo. 14, 236 P. 764 (1925), dismissing it as "a Wyoming case that predates the Water Use Act by nearly 50 years!" RC Br. 36. However, the district court merely quoted this Court's reliance on Wyoming Hereford Ranch in Montana Power, where this Court stated that enactment of the Water Use Act "was formulated upon beliefs similar to those expressed" in Wyoming Hereford Ranch. Order 9 (quoting 211 Mont. at 97, 685 P.2d at 340).

Waters protections "ignores the express legislative intent that water quality objections under Section 311(1)(g) can only be raised by the DEQ or a water quality district" under MCA § 85-2-311(2). AR:10; see DNRC Br. 22-24; see also RC Br. 13-20. As an initial matter, by its plain terms § 85-2-311(2) does not apply to CFC's legal-availability objection under subsection 311(1)(a)(ii). Nor does the mere fact of subject-matter overlap between CFC's legal-availability objection and the grounds for its water-classification objection demonstrate an erroneous statutory interpretation; there is obvious overlap among the section 311 criteria and, indeed, DNRC's own statutory argument advocates virtually complete overlap between the subsection 311(1)(a)(ii) legal-availability and subsection 311(1)(b) adverse-effects criteria. DNRC Br. 25.

DNRC nevertheless claims § 85-2-311(2) reflects specific legislative intent to inject "water quality/classification considerations" into the water use permit analysis only "where DEQ or another qualified entity with regulatory authority and expertise in water quality presents an objection." DNRC Br. 23; see also RC Br. 18-19. This argument ignores subsection 311(1)(f), which authorizes an objection that "the water quality of a prior appropriator" will be "adversely affected," and subsection 311(1)(h), which authorizes an objection that "the ability of a discharge permitholder to satisfy effluent limitations" of a Water Quality Act permit will be "adversely affected." MCA §§ 85-2-311(1)(f), (1)(h). Any party with standing

may raise these water-quality based objections; the Water Use Act does not limit either objection to DEQ or other expert regulatory agencies. Id. § 85-5-311(2). Thus, contrary to DNRC's argument, the Act does not simply channel all water-quality/classification-related issues into subsection 311(1)(g) and then prohibit objections concerning such issues unless DEQ or a water quality district raises them under § 85-2-311(2). Rather, like CFC's legal-availability objection under subsection 311(1)(a)(ii), objections under subsections 311(1)(f) and 311(1)(h) may implicate water-classification issues that could also be raised under subsection 311(1)(g), but are not subject to § 85-2-311(2)'s limitation on subsection 311(1)(g) objections.

For this reason, interpreting the statute to allow objections by interested members of the public that overlap with a potential water-classification objection under subsection 311(1)(g) does not a fortiori "render[] § 85-2-311(2) superfluous," as DNRC concluded. AR:9. Rather, the pertinent question is how to determine the appropriate scope of § 85-2-311(2)'s restriction on subsection 311(1)(g) objections in light of the entire section 311 framework and the "underlying legislative intent" to carve out some sphere of objections raising water-classification-related issues under the Water Quality Act that are available only to expert regulatory agencies. Hohenlohe v. Mont. Dep't of Nat. Res. & Conservation, 2010 MT 203, ¶ 40, 357 Mont. 438, 240 P.3d 628 (recognizing this

Court's "affirmative duty to interpret statutes" to "give effect the underlying legislative intent"). In this regard, most Water Quality Act requirements focus principally on the "prevention, abatement, and control of water pollution," MCA § 75-5-101(2) (emphasis added), and MCA § 75-5-301(1)'s water-classification system implements this statutory focus by requiring classification of all state waters "in accordance with their present and future most beneficial uses," id. § 75-5-301(1), and then imposing pollution-discharge limits sufficient to maintain those uses, see generally ARM 17.30 subchap. 6 (Surface Water Quality Standards and Procedures). As the district court observed, a typical subsection 311(1)(g) water-classification objection under this framework would arise "when a proposed appropriation might affect water quality, thereby compromising source water which may provide drinking water." Order 13 (footnote omitted). Presenting and resolving such pollution-related objections may well require DEQ or water quality district expertise and thereby justify application of § 85-2-311(2)'s limitation on standing to raise such objections.

But the nondegradation protections for stream flows are different. These protections are unique among Water Quality Act requirements in that they impose numeric limits on the quantity of water that may be withdrawn from protected streams. See ARM 17.30.715(1)(a). Thus, while most Water Quality Act requirements limit what a regulated entity may put into a stream, these protections

regulate what such an entity may take out of it. As the district court concluded, these protections present "a question of water quantity"—not water pollution—that fits squarely within "DNRC's responsibilities and authority regarding water use permitting." Order 11. Considering these quantitative protections through the legal-availability analysis under subsection 311(1)(a)(ii) simply requires DNRC to account for the fact that 90 percent of the baseflow of wilderness streams is unavailable for appropriation due to Outstanding Resource Waters flow requirements—just like DNRC routinely determines that specific quantities of stream flow are unavailable for appropriation due to existing water rights. In this case, that task could not be easier: the modeling report in RC's own permit application shows that baseflow reductions in wilderness streams predicted from RC's appropriation would exceed state-law limits. See AR:600. This straight-forward analysis requires no application of special expertise by DEQ or a water quality district, and therefore § 85-2-311(2)'s purpose is not implicated.

For much the same reason, DNRC overstates the district court's ruling in arguing that it requires "DNRC to analyze all relevant data regarding an application that could violate any legal restrictions on a source." DNRC Br. 7-8 (emphasis added). The district court's ruling went no further than to order that "dewatering Outstanding Resource Waters is a known legal demand on the water to be appropriated in this case and must be included in the analysis of legal

availability" under subsection 311(1)(a)(ii). Order 11-12. Further, given that Outstanding Resource Waters exist only in national parks and wilderness areas designated as of October 1, 1995, ARM 17.30.617, the likely impact of the district court's ruling on DNRC's water use permit administration is limited in scope.

Although DNRC suggests that the ruling has broader implications, it ignores that only Outstanding Resource Waters are subject to "the greatest protection feasible under state law," MCA § 75-5-315(1), and that the district court's ruling relied on the quantitative nature of that protection, which is unique in the Water Quality Act framework. Order 11. While DNRC points out that quantitative nondegradation protections also apply to designated "high quality waters," Montana law actually applies only qualified nondegradation protection to such waters, allowing degradation if certain determinations are made by DEQ, unlike the categorical prohibition on degradation and "greatest protection feasible," MCA § 75-5-315(1), that apply to Outstanding Resource Waters. Compare MCA § 75-5-303(2), (3), ARM 17.30.705(2)(b), and ARM 17.30.308 with MCA § 75-5-303(7) and ARM 17.30.705(2)(c). The interplay of the Water Use Act with Montana's qualified nondegradation scheme for "high quality waters," including application of MCA § 85-2-311(2) in such circumstances, is not at issue here, was not addressed by the district court, and remains a subject for further administrative or judicial interpretation in an appropriate case. But even if DNRC were required to

consider dewatering impacts on "high quality waters" in its legal-availability analysis, consideration of such a water-quantity issue would impose no novel burden on the agency and may be necessary to ensure meaningful implementation of Montana's fundamental nondegradation protection for state waters, MCA § 75-5-303(1), given that DNRC's issuance of a water use permit effectively insulates the permitted appropriation from further nondegradation review, see MCA § 75-5-317(2)(s).

4. Legislative History Does Not Support DNRC's Position

DNRC errs in seeking to salvage its statutory interpretation with legislative history. DNRC Br. 26-39; see also RC Br. 25-28. As an initial matter, where, as here, the Court can determine statutory intent "from the plain meaning of the words used in a statute, [the Court] may not go further and apply any other means of interpretation" such as legislative-history analysis. Running Wolf, ¶ 15 (quotations and citation omitted). However, even if this Court were to consider legislative history, it fails to support DNRC's position and actually refutes DNRC's argument.

DNRC offers a lengthy analysis of the legislative history of the 1997 Legislature's SB 97, which established today's section 311 criteria. DNRC Br. 31-36. DNRC asserts that "[r]arely does the legislative history of a statute provide such clarity regarding the legislature's intent," and claims "overwhelming support"

from its cited legislative history materials. Id. 36. In reality, DNRC's purported "overwhelming support" is an illusion conjured up through the agency's selective and incomplete presentation.

The centerpiece of DNRC's argument is a January 17, 1997 Senate Natural Resources Committee hearing on SB 97, which included testimony and a written submission by DNRC's counsel addressing "legal availability" that DNRC contends "supports the [hearing examiner's] conclusion that legal demands refers to water rights." DNRC Br. 31-33. But DNRC omits the fact that this testimony and submission discussed the intent underlying the introduced version of SB 97, which Senator Grosfield sponsored at the request of DNRC, and which differed in critical respects from the final, enacted version regarding the legal-availability analysis. See History & Final Status of Bills & Resolutions, 55th Leg. 54 (Mont. 1997) (Senate hearing on SB 97 held after first reading of introduced bill) (CFC App. 1). The introduced version of SB 97 included no independent section 311 criterion concerning legal availability and contained no "legal demands" language at all, but instead required consideration of "whether water can reasonably be considered legally available" only as a subcomponent of DNRC's assessment whether "the water rights of a prior appropriator will … be adversely affected" under subsection 311(1)(b). See SB 97.01, 55th Leg., § 7 (Mont. 1997) (CFC App. 2). Given that this original, DNRC-proposed version of the bill explicitly relegated

the legal-availability analysis to a subcomponent of the subsection 311(1)(b) inquiry concerning adverse effects on water rights, it is not surprising that the hearing testimony on this version discussed legal availability in relation to "unappropriated water." Hearing Minutes on SB 97 before the S. Comm. Nat. Res., 55th Leg. 9 (Mont. Jan. 17, 1997) (statement of Don McIntyre, DNRC Counsel) (DNRC App. 5).[11]

Although this subordination of the legal-availability analysis into DNRC's framework for determining adverse effect on water rights persisted in an amended version of SB 97 that the Senate transmitted to the House, see SB 97.02, 55th Leg., § 7 (Mont. 1997) (CFC App. 3), the House changed it. The House amended SB 97 by removing the legal-availability analysis as a component of the framework for determining adverse effect on water rights under subsection 311(1)(b); establishing a new, independent legal-availability criterion in subsection 311(1)(a)(ii); and

[11] Even in this inapposite context concerning the originally introduced version of SB 97, DNRC's cited legislative history statements do not articulate a coherent approach to legal availability. DNRC Br. 32-33. The written submission by DNRC's counsel suggested that the legal-availability analysis should focus on "actual legal use" that may be "less than claimed," Hearing Minutes on SB 97 before the S. Comm. Nat. Res., supra, Ex. 5 (DNRC App. 5), but his oral statement suggested that legal availability should be evaluated based simply on "claims," id. at 12. During this same hearing, four separate commenters—including RC's counsel in this case, Ms. Franz, then representing Montana Power Co.—expressed confusion as to whether "legal availability" meant unappropriated water or something more. Id. at 4-6.

requiring that DNRC consider all "legal demands on the source of supply" as part of this new freestanding legal-availability analysis. SB 97.03, 55th Leg., § 7 (Mont. 1997) (CFC App. 4). Further, contrary to DNRC's argument that the Legislature simply "codified the analysis already used by the DNRC," DNRC Br. 33, Rep. Harper, who served on a House subcommittee that developed the House amendment to SB 97, explained that, as amended, "this bill changes to a degree what you are going to have to do … to get a new permit issued, and changes to a degree the process that we use." Hearing Minutes on Executive Action on SB 97 before the House Nat. Res. Comm., 55th Leg. 4 & audio recording at minutes 42:46-43:08 (Mont. Mar. 21, 1997) (CFC App. 5); see Hearing Minutes on SB 97 before the House Nat. Res. Comm., 55th Leg. 4 (Mont. Mar. 5, 1997) (assigning subcommittee) (CFC App. 6). The Senate then concurred in the House amendments, which were enacted in the final version of SB 97. See History & Final Status of Bills & Resolutions, supra, 54 (CFC App. 1); Act of May 1, 1997, ch. 497, § 7, 1997 Mont. Laws 2789, 2799-2800 (CFC App. 7).

In sum, DNRC's legislative history argument concerning SB 97 rests on the history of bill text that was never enacted. The Legislature rejected a version of SB 97 that folded the legal-availability analysis into DNRC's assessment of adverse effect on water rights and instead established the legal-availability analysis as an independent criterion serving its own distinct role in the section 311 analysis.

The Legislature thus did not accept DNRC's "proposed codification of its own practice and terminology" that was embodied in the introduced version of SB 97, as DNRC claims, DNRC Br. 40, and instead enacted an amended version that changed the permitting status quo. Yet DNRC now asks this Court to limit the legal-availability analysis to an examination of water rights as though the rejected, DNRC-sponsored, originally introduced version of SB 97—not the final, amended version—had been enacted. However, the Legislature "does not intend sub silentio to enact statutory language that it has earlier disregarded in favor of other language." Smith v. Burlington N. & Santa Fe Ry. Co., 2008 MT 225, ¶ 23, 344 Mont. 278, 187 P.3d 639 (2008) (quotations and citation omitted). The Court should reject DNRC's argument.

DNRC's remaining legislative history arguments also are unpersuasive. DNRC observes that SB 97 prevented the agency's water use permit determinations from altering an existing water right, declared the Legislature's intent to authorize permit issuance even absent an adjudication of all water rights in the source, and provided for modifying provisional permits based on a final adjudication of water rights in an affected basin. DNRC Br. 33-35. However, these provisions shed no light on the limits of the legal-availability analysis under subsection 311(1)(a)(ii)—indeed, the last-described provision references subsection 311(1)(b), see MCA § 85-2-313—and instead appear calculated to

further the Legislature's express purpose of negating this Court's decision in In re Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, 278 Mont. 50, 923 P.2d 1073 (1996). See ch. 497, 1997 Mont. Laws at 2790 (Statement of Intent).[12]

Regarding the 1993 Legislature's SB 280, which added MCA § 85-2-311(1)(g) and 311(2) to the Water Use Act, DNRC notes that it responded to a 1992 Montana Water Plan in which the "Options Considered But Not Recommended" included clarifying DNRC's authority to condition or deny permits to prevent violations of Montana's nondegradation policy. DNRC Br. 36-37; see DNRC, Mont. Water Plan 3 (Nov. 2, 1992) (CFC App. 8 (excerpt)). However, even DNRC would apparently admit that SB 280 did authorize DNRC to deny a water use permit that would violate the nondegradation policy where DEQ

[12] RC quotes a portion of SB 97 explaining that a "Statement of Intent" was "desired for this bill in order to provide guidance [to DNRC] concerning implementation and interpretation of the physical availability of water and reasonable legal availability of water criteria." RC Br. 27 (quoting 1997 Mont. Laws at 2790); see also id. 32. However, RC omits the very next sentence detailing the Legislature's guidance:

> To find that water is available for the issuance of a permit, the department shall require a three-step analysis involving the following factors: identify physical water availability, identify existing legal demands on the source of supply, and compare and analyze the physical water supply at the proposed point of diversion with the existing legal demands on the source of supply.

1997 Mont. Laws at 2790. This general guidance does not direct DNRC only "to quantify existing water rights." RC Br. 27.

or a water quality district objects under MCA § 85-2-311(1)(g). See DNRC Br. 37-39. Moreover, this same list of "Options Considered But Not Recommended" includes numerous other items that the Water Plan nevertheless recommended and the Legislature enacted, including authorizing DNRC to deny a water use permit if a proposed appropriation would harm the water quality of a prior appropriator or substantially impact existing beneficial uses based on the classification of the source of supply, and allowing "certain state agencies to object to new permits and changes on the basis of water quality." Compare Mont. Water Plan 3, 11 with MCA § 85-2-311(1)(f), (g), & 311(2). Accordingly, the list referenced by DNRC is not a reliable guide to the legislative intent underlying SB 280. As for DNRC's reliance on the amendment to SB 280 adding § 85-2-311(2), DNRC Br. 37-38, this legislative history sheds no light on the intended scope of that provision and CFC has addressed the proper interpretation of § 85-2-311(2) above.

5. DNRC Fails To Justify Judicial Deference

DNRC's bid for judicial deference is unjustified. DNRC repeatedly invokes its purported "longstanding interpretation and application of the legal availability criteria," DNRC Br. 5; see id. 3, 6, 7, 10, 12, 13, 40-43, claiming "the district court failed to properly defer" to the agency's interpretation of "legal demands," id. 13; see also RC Br. 28-32. However, DNRC has failed to demonstrate an agency interpretation to which this Court might defer. While DNRC has accepted a

comparison of physical water availability with existing water rights as a satisfactory legal-availability demonstration under subsection 311(1)(a)(ii), DNRC cannot identify any circumstance in which it actually considered whether the Water Use Act's language and structure require the legal-availability inquiry to extend further to encompass other quantitative constraints on water depletion, such as the Outstanding Resource Waters protections—until this case.

In this regard, the degree of judicial deference owed to an agency's statutory interpretation depends on circumstances including "the degree of the agency's care" in developing its interpretation, "its consistency, formality, and relative expertness, and [] the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 & nn.7-10 (2001) (footnotes omitted). In particular, to justify judicial deference to its position, the agency must show that it has actually undertaken to construe the relevant statute to address the interpretive question at issue. See Lyman Creek, LLC v. City of Bozeman, 2019 MT 243, ¶ 23, 397 Mont. 365, 450 P.3d 872 (finding no statutory construction to which the Court might defer where DNRC publication cited no authority to justify its legal assertion).

Here, DNRC cites no agency regulation, decision, guidance, memorandum or anything else that explicitly addressed whether the subsection 311(1)(a)(ii) legal-availability analysis must look beyond water rights. Indeed, even in its brief

DNRC does not claim to have squarely addressed this question before this case, but instead cites to administrative decisions that, without further analysis, simply found permit applicants had satisfied legal-availability requirements by examining existing water rights in circumstances where no other "legal demands" were at issue. DNRC Br. 41 (citing decisions); accord AR:10-11 (hearing examiner decision). As the district court aptly ruled, "DNRC showed a practice of not requiring water use applicants to address any legal demands beyond those of existing water rights but presented no formal interpretation of the term 'legal demands.'" Order 10. Accordingly, while DNRC invokes public reliance on its interpretation to justify deference, DNRC Br. 42, this argument rings hollow when the agency fails to identify any statutory interpretation addressing the relevant question on which the public might rely.

Similarly, although DNRC invokes ARM 36.12.1704, it does not claim that regulation resolves the issue but instead merely avers that its language is "steeped in prior appropriation doctrine terminology and principles." DNRC Br. 40. However, the regulation simply provides that "existing legal demands" will be treated as "senior rights" and may include "prior appropriations and water

reservations"; it does not foreclose other similarly quantitative restrictions from enjoying such "senior" status. ARM 36.12.1704(1).[13]

DNRC also cites administrative decisions issued prior to the 1997 Legislature's addition of the subsection 311(1)(a)(ii) legal-availability criterion to the Water Use Act. DNRC Br. 41-42. However, as discussed at Point I.B.4, supra, the 1997 Legislature did not accept DNRC's proposal to codify the agency's then-existing practice that folded the legal-availability analysis into the agency's inquiry concerning adverse effects on existing water rights.

Further, even assuming for the sake of argument that DNRC demonstrated a "longstanding interpretation of the legal availability criteria," DNRC Br. 42—which it has not done—that still would not justify its decision. Even where an agency actually interprets an ambiguous statute, this Court affords "only respectful consideration"—not complete deference—to such an interpretation. Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality, 2019 MT 213, ¶ 24 n.9, 397 Mont. 161, 451 P.3d 493 (quotations and citation omitted). In particular, as the district court correctly ruled, "when the agency interpretation and practice is inconsistent with

[13] RC takes DNRC's argument regarding ARM 36.12.1704 one step farther by claiming that a provision of ARM 36.12.101 "specifically defines the term 'senior' as prior appropriations of water." RC Br. 30. However, RC's cited provision, ARM 36.12.101(67), defines the term "show cause" and does not address "senior" rights. While RC may have intended to cite ARM 36.12.101(65), that provision defines the term "senior water right," which does not appear in ARM 36.12.1704.

statutory language," no deference is warranted. Order 10; see Clark Fork Coal. v. Tubbs, ¶¶ 20, 25-28 (invalidating longstanding DNRC administrative rule construing Water Use Act because it was "inconsistent with the plain language" of the Act). As discussed at Points I.A and I.B.1, supra, here DNRC's decision defies the plain language and structure of the Water Use Act, as well as the plain language of MCA § 75-5-315(1) mandating that "[o]utstanding resource waters must be afforded the greatest protection feasible under state law, after thorough examination." No deference to this decision is warranted.

C. RC's Additional Arguments Fail to Salvage DNRC's Decision

RC's independent efforts to shore up DNRC's decision are meritless.

First, RC misstates the facts. RC claims that CFC "first" attempted to raise its concern about depletion of Outstanding Resource Waters as a water-classification objection under subsection 311(1)(g) and then, only after DNRC invoked MCA § 85-2-311(2) to rule that CFC "had not presented a valid objection pursuant to Section 311(1)(g)," did CFC "[a]rtfully" attempt to "re-name[]" its water-classification objection as a legal-availability objection under subsection 311(1)(a)(ii). RC Br. 6-7, 15, 17. In fact, from the initial administrative objection filed in this case, CFC has, first, argued that RC's proposed appropriation failed to satisfy the legal-availability criterion of subsection 311(1)(a)(ii) and, second, argued the "additional reason" that RC's appropriation is objectionable under

subsection 311(1)(g), further contending that applying MCA § 85-2-311(2) to bar CFC's subsection 311(1)(g) objection violates the Montana Constitution. AR:601-02. These are the same arguments CFC advances here. RC's apparent attempt to suggest improper gamesmanship by CFC fails.

Second, RC errs in asserting that the district court's ruling means that applicants for water use permits must address a proposed appropriation's consistency with all "water quality classification laws and regulations arising under the Water Quality Act" and even restrictions under "the Endangered Species Act, community water supply regulations, or even county subdivision codes." RC Br. 21, 22-24, 34. This parade of horribles ignores the points, discussed at Point I.B.3, supra, that the district court explicitly required DNRC to consider only depletion of Outstanding Resource Waters in its legal-availability analysis, and any broader implications of the district court's decision are limited by both the uniquely categorical nature of the protections afforded by the Legislature to Outstanding Resource Waters, MCA §§ 75-5-315(1), 75-5-316(2), and the district court's grounding of its analysis in the quantitative nature of the protections at issue, Order 11. These factors serve to distinguish the other Water Quality Act requirements that RC invokes, as well as the other rules and prohibitions that RC wrongly claims

are necessarily swept into the water use permit analysis by the district court's ruling.[14]

Further, while RC decries the burden allegedly placed on permit applicants by the district court's decision, RC Br. 22-24, this argument rings hollow given the limited geographic scope of Outstanding Resource Waters protections in Montana. Indeed, RC's contention that the district court's ruling shifts a new "burden of production onto applicants," RC Br. 23, ignores the basic fact that RC's own permit application demonstrated the prohibited depletion of Outstanding Resource Waters that DNRC refused to consider in this case. AR:88-240. Thus, the district court's ruling imposes no burden on RC that the company did not already meet in the application it filed before the district court ruled.

In sum, DNRC and RC offer no legitimate defense of DNRC's decision to exclude Montana's extraordinary Outstanding Resource Waters protections from

[14] These same distinguishing factors equally dispose of the argument advanced by amici curiae Montana Water Resources Association, et al. ("MWRA"), that the district court's ruling converts subsection 311(1)(a)(ii) into "a catch-all provision of unlimited statutes and rules" including DEQ sewage-setback requirements, federal Wild and Scenic River protections, and Endangered Species Act taking prohibitions. MWRA Br. as Amicus Curiae Supporting Appellants 8-11 (Dec. 4, 2019) ("MWRA Br."). These examples are indeed "far-fetched," id. 11, given the uniquely categorical and explicitly quantitative nature of the Outstanding Resource Waters protections addressed in the district court's legal-availability ruling.

the agency's subsection 311(1)(a)(ii) legal-availability analysis for RC's proposed appropriation. This Court should affirm the district court's judgment.

II. DNRC UNCONSTITUTIONALLY APPLIED MCA § 85-2-311(2) TO BAR CFC'S WATER-CLASSIFICATION OBJECTION

Even assuming for the sake of argument that Appellants' defenses of DNRC's legal-availability determination were correct—which they are not for the reasons stated—DNRC's decision to grant RC's water use permit application over CFC's objection still was unlawful and should be reversed and remanded. This is because DNRC's application of MCA § 85-2-311(2) to bar CFC's alternative water-classification objection under subsection 311(1)(g) violates CFC's fundamental Montana constitutional right to a clean and healthful environment. Appellants do not address this issue, apart from RC's erroneous waiver argument, but it constitutes an alternative basis to affirm the district court's judgment.[15]

A. Applying Section 311(2) to Bar Petitioners' Water-Classification Objection is Unconstitutional

DNRC determined that CFC had improperly "attempt[ed] to bootstrap the criteria of § 85-2-311(1)(g)," addressing water-quality classifications, "onto the

[15] In addition, because "it is preferable to construe" the Water Use Act "in a manner which sustains its constitutional validity," CSKT, ¶ 28, the constitutional infirmity of DNRC's preclusion of CFC's water-classification objection constitutes further reason for this Court to affirm the district court's ruling on CFC's legal-availability objection.

criteria of § 85-2-311(1)(a)(ii)," addressing legal availability, and therefore rejected CFC's legal-availability objection. AR:12. But DNRC also rejected CFC's alternative attempt to raise a water-classification objection under subsection 311(1)(g), applying MCA § 85-2-311(2) to hold that "only the Department of Environmental Quality or a local water quality district … may file a valid objection" for this criterion. AR:616. Importantly, neither DNRC nor RC has ever attempted to argue that RC's proposed appropriation is consistent with the Outstanding Resource Waters classification of the wilderness streams it would permanently deplete. Yet the combined impact of DNRC's determinations is to bar CFC from raising any objection based on the inconsistency of RC's appropriation with the flow protections for Outstanding Resource Waters established by Montana law. DNRC thus effectively exempted RC's appropriation and its associated impacts from Montana's nondegradation policy and deprived CFC of any adequate remedy to protect its interests in the wilderness waters threatened by RC's groundwater pumping. As a result, DNRC's application of MCA § 85-2-311(2) violates CFC's fundamental constitutional rights to a clean and healthful environment. Mont. Const. art. II, § 3, art. IX, § 1.

The Montana Constitution provides that all persons have an inalienable right to a clean and healthful environment, id. art. II, § 3, and requires that "[t]he state and each person shall maintain and improve a clean and healthful environment in

Montana for present and future generations," id. art. IX, § 1. To this end, the Legislature has a constitutional obligation to "provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Id. With respect to water resources in particular, the Constitution further states that "[a]ll … waters within the boundaries of the state are the property of the state for the use of its people." Id. art. IX, § 3.

"The right to a clean and healthful environment is a fundamental right," and "a statute that impacts that right to the extent that it interferes with the exercise of that right, is subject to strict scrutiny." N. Plains Res. Council v. Mont. Bd. of Land Comm'rs, 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169 (citing Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality, 1999 MT 248, ¶¶ 55, 60, 63, 296 Mont. 207, 988 P.2d 1236 ("MEIC")). A statute "can only survive strict scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." MEIC, ¶ 63. The burden falls on DNRC to make this showing. See In re Adoption of A.W.S., 2014 MT 322, ¶ 17, 377 Mont. 234, 339 P.3d 414.

MCA § 85-2-311(2), as applied by DNRC in this case, violates CFC's constitutional right to a clean and healthful environment. DNRC acknowledged in

the district court that CFC's "concerns regarding wilderness stream dewatering give rise to a water classification objection" under subsection 311(1)(g). DNRC Resp. Br. 16 (filed in district court on June 1, 2018). But DNRC applied § 85-2-311(2) to foreclose that objection. If accepted, DNRC's application of § 85-2-311(2) would effectively exempt RC's proposed appropriation from the nondegradation requirements that protect Montana's Outstanding Resource Waters and CFC's constitutionally protected interest in them.

The Montana Constitution does not permit DNRC to exempt activities that adversely affect state waters from nondegradation requirements in this manner. See MEIC, ¶¶ 79-80. In MEIC, this Court held that a provision of the Water Quality Act that categorically exempted a specified class of industrial activity from the Act's nondegradation requirements violated the clean and healthful environment provisions of the Montana Constitution. Id., ¶¶ 6, 37, 79-80. The Court concluded that,

> to the extent [the statute] arbitrarily excludes certain "activities" from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.

Id., ¶ 80. That holding applies equally here. As the district court below commented before declining to resolve CFC's constitutional claim:

> Although the Court in MEIC limited its decision to a specific code section as applied to the facts of that case, it is safe to assume that the

> drafters of the Montana Constitution would have considered potential degradation of wilderness streams to be a covered "activity" under Article II, section 3, and Article IX, section 1.

Order 15.

Yet § 85-2-311(2), as applied by DNRC in this case, allowed DNRC to issue a water use permit without regard to evidence that the proposed appropriation would cause prohibited depletion of Outstanding Resource Waters. This agency determination provided RC not only with a permit enabling it to undertake an appropriation that would degrade Outstanding Resource Waters without further Water Quality Act review, MCA § 75-5-317(2)(s), but even provided RC with a usufructory property right "to make a use of waters owned by the state" as authorized by DNRC's permit, Mont. Trout Unlimited v. Beaverhead Water Co., 2011 MT 151, ¶ 31, 361 Mont. 77, 255 P.3d 179. As a result, DNRC gave RC a legal authorization to deplete these streams, thereby violating express state-law protections for flows in Outstanding Resource Waters, as articulated through the nondegradation requirement and the Water Quality Act's specific mandate that "[o]utstanding resource waters must be afforded the greatest protection feasible under state law." MCA § 75-5-315(1).

RC's exercise of that authorization would directly injure the constitutionally protected interests of CFC and its members in enjoying and preserving the affected streams in the Cabinet Mountains Wilderness and the native fish and wildlife that

depend on them. AR:595-97; see MEIC, ¶ 80 (holding that environmental protections in Water Quality Act, including nondegradation provisions, are "a reasonable legislative implementation of the mandate provided for" in the Constitution's clean and healthful environment provisions). Further, blocking CFC from objecting in the water use permitting process to the environmental degradation threatened by RC's appropriation has left CFC with no adequate remedy to vindicate its right to a clean and healthful environment, contrary to the Constitution's requirement that the Legislature "provide adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. art. IX, § 1; see also Mont. Trout Unlimited v. Beaverhead Water Co., ¶¶ 29-30, 33-34, 41 (holding that constitutional protection for public ownership of state waters mandates broad public participation in water rights disputes). Indeed, as discussed below and contrary to Appellants' representations, affirming DNRC's permitting decision in this case would guarantee that the nondegradation requirements that would otherwise protect flows in Montana's most prized waters cannot be brought to bear against RC's authorized activities under its water use permit.

For these reasons, MCA § 85-2-311(2), as applied by DNRC in this case, can survive only if DNRC establishes that the section is narrowly tailored to promote a compelling state interest. MEIC, ¶¶ 63-64. DNRC has made no attempt

to carry that burden and could not do so in any event. First, no legitimate state interest justifies depriving CFC of any remedy to protect its documented interest in preserving the Outstanding Resource Waters of the Cabinet Mountains Wilderness before DNRC grants RC a legal right to degrade those waters. The only suggestion of such an interest in the agency proceedings was that § 85-2-311(2)'s standing limitation is necessary to ensure that DNRC does not trespass on DEQ's supposed exclusive jurisdiction over all water-quality-related issues. See AR:682-83. But, as discussed at Point I.B.3, supra, the Outstanding Resource Water protections at issue present "a question of water quantity." Order. 11 (emphasis added); see ARM 17.30.715(1)(a). Further, section 311 requires DNRC—not DEQ—to address other water-quality issues, such as whether a proposed appropriation will adversely affect "the ability of a discharge permitholder to satisfy effluent limitations of" a water-quality permit, or whether "the water quality of a prior appropriator will … be adversely affected." MCA § 85-2-311(1)(f), (h). Thus, any claim that the Legislature intended to wall DNRC off from all water-quality issues, and that § 85-2-311(2) advances that supposed intent, fails.

Second, DNRC cannot show that § 85-2-311(2) is narrowly tailored—i.e., "the least onerous path that can be taken to achieve the State's objective." MEIC, ¶ 63. Depriving the public of any opportunity to object to DNRC's issuance of a water use permit that authorizes unlawful depletion of Outstanding Resource

Waters does not advance an interest in ensuring that DEQ's expertise is brought to bear on water-quality matters. As stated, the objection at issue raises water quantity concerns and does not call for any application of water-quality expertise. In any event, to the extent the Legislature wanted DEQ to aid DNRC in assessing water-classification objections, the Legislature could instead have required, for example, that such objections be raised to DEQ in the first instance, that DEQ would have the power to review DNRC's determinations in that regard, or that DNRC should consult with DEQ when water-classification issues are raised. The wholesale elimination of public remedies is the clumsiest possible tool to accomplish that purpose. Ultimately, DNRC's application of section 311(2) ensures only that, in cases like this, legal protections for flows in Outstanding Resource Waters will not be enforced, to the detriment of the constitutional values those protections are designed to serve.

As stated, the Montana Constitution provides that all Montanans have an inalienable "right to a clean and healthful environment," Mont. Const., art. II, § 3, which is implemented through the nondegradation requirements and other protections of the Water Quality Act, MEIC, ¶ 80. DNRC cannot ignore that right and permit RC to violate legal restrictions on withdrawals from Outstanding Resource Waters on the basis of an unconstitutional application of MCA § 85-2-311(2) of the Water Use Act. To vindicate CFC's fundamental constitutional

rights, CFC must be permitted to object to DNRC's decision authorizing RC's substantial depletion of Outstanding Resource Waters in the Cabinet Mountains Wilderness.

B. Appellants Cannot Justify DNRC's Unconstitutional Action

Although Appellants have not addressed the merit of CFC's constitutional claim in their opening briefs before this Court, RC wrongly claims CFC has waived this claim. RC Br. 14. Further, Appellants raised a number of responsive arguments in the district court that fail to justify DNRC's unconstitutional action.

1. RC Wrongly Argues Waiver

RC argues that, because CFC "did not file a cross-appeal with this Court," CFC "do[es] not challenge that an invalid Section 311(1)(g) objection is prohibited by Section 311(2)." RC Br. 14; see also id. 10 n.2. Contrary to RC's argument, CFC was not required to cross-appeal. The district court found that it "need not address whether [CFC's] fundamental constitutional rights are violated" by MCA § 85-2-311(2) given the district court's ruling in CFC's favor on the legal-availability issue. Order 15. Because the district court issued no ruling on CFC's constitutional claim and granted CFC the complete relief that CFC requested, CFC was not "aggrieved by" any aspect of the district court's judgment. Cf. Bucy v. Edward Jones & Co., L.P., 2019 MT 173, ¶ 23, 396 Mont. 408, 445 P.3d 812 ("[A] party aggrieved by any issue 'separate and distinct' from the issue(s) raised by an

opposing party on appeal must generally cross-appeal to preserve the issue for appellate review.") (emphasis added). Accordingly, there was nothing to cross-appeal. Instead, because CFC "(1) was the prevailing party below; (2) responsively raised the [constitutional] issue on appeal in defense of the judgment at issue; and (3) previously raised the issue below regardless of whether relied on, rejected, or considered in the lower court decision," id. ¶ 24, no cross-appeal was required and CFC did not waive its constitutional challenge to section 311(2).

2. Appellants' District-Court Arguments Failed to Reconcile DNRC's Action with Constitutional Requirements

The arguments that Appellants advanced in the district court to oppose CFC's constitutional claim are meritless.

Appellants argued that CFC is not denied a remedy to vindicate its right to a clean and healthful environment because MCA § 85-2-311(2) grants discretion to DEQ or a local water quality district to raise water-classification objections. DNRC Resp. Br. 16-18; RC Resp. Br. 8-11 (filed in district court on June 1, 2018). However, there is no water quality district with jurisdiction over the affected Cabinet Mountains Wilderness streams. As for DEQ's authority to object, DEQ did not exercise that authority in this case and CFC's constitutional interests were left unprotected. More fundamentally, the Montana Constitution does not make CFC's constitutional rights subject to DEQ's discretion, instead providing that "[t]he state and each person shall maintain and improve a clean and healthful

environment in Montana." Mont. Const. art. IX, § 1 (emphasis added). Moreover, DEQ is not an adequate representative for CFC given that MCA § 85-2-311(2) does not require DEQ to object where warranted or even to justify its failure to do so. MCA § 85-2-311(2). For example, in this case there is no decision from DEQ in the record (or anywhere else) to reflect any considered judgment by that agency as to whether a water-classification objection was warranted, and therefore no opportunity for this Court to ascertain whether DEQ elected to forego action that might have shielded CFC's constitutional interests from harm for a non-arbitrary and otherwise lawful reason.

Appellants also argued that there is no constitutional violation because DNRC's permit issuance does not authorize evasion of other legal requirements, which purportedly protect CFC's interest in the affected Outstanding Resource Waters. DNRC Resp. Br. 16-18; RC Resp. Br. 8-11. Although not addressing CFC's constitutional claim on its merits, RC's opening brief here essentially echoes these arguments, contending that "[n]othing in the water right permit allows RC Resources to … ignore environmental regulations or review[] or violate existing water quality laws." RC Br. 9; see also MWRA Br. 13-14.

However, this contention disregards MCA § 75-5-317(2)(s), which provides that, once RC secures a valid water use permit from DNRC "establish[ing] and recogniz[ing]" its right to appropriate water under the Water Use Act, DEQ no

longer has authority to enforce nondegradation requirements—including the quantitative Outstanding Resource Water protections—against RC's permitted water use. Thus, RC's suggestion that DEQ would somehow "address the nondegradation issue through DEQ's Water Quality Act procedures," RC Br. 6, see also id. 15; MWRA Br. 13-14, is wrong. Further, while RC invokes the pendency of further DEQ permitting processes for the Rock Creek Mine under the Water Quality Act, RC Br. 15, such processes afford no protection to CFC's interest in preventing depletion of Outstanding Resource Waters. The Water Quality Act grants DEQ authority to issue permits regulating pollutant discharges into state waters, not water withdrawals such as RC's planned appropriation. See MCA §§ 75-5-401–75-5-402; see also, e.g., ARM 17.30.1301 (describing DEQ's authority to issue permits regarding "point sources discharging pollutants into state waters"); ARM 17.30.1005 (describing standards governing DEQ's regulation of pollutant "discharges to ground water"). Thus, while the Water Quality Act grants DEQ permitting authority over discharges of pollutants from RC's proposed Rock Creek Mine project, there will be no Water Quality Act permitting process in which DEQ evaluates whether the impacts from RC's planned water withdrawals violate nondegradation requirements.

RC nevertheless asserts that the U.S. Forest Service will protect Montana's Outstanding Resource Waters because that agency's Record of Decision approving

an initial phase of RC's Rock Creek Mine proposal is contingent on RC "receiving all necessary environmental permits, authorizations, and reviews." RC Br. 7-9, 15. RC also repeatedly references a stipulation arising from the DNRC proceedings that incorporated these Forest Service requirements. See id. However, the Forest Service does not administer the Montana Water Quality Act or Water Use Act. Further, the Forest Service's decision document demonstrates that the Forest Service will not independently review RC's operations to ensure their consistency with Montana's nondegradation provisions or other requirements of Montana's Water Quality Act or Water Use Act; instead, the Forest Service made clear that it defers to permitting decisions made by DEQ and DNRC to demonstrate compliance with these state-law requirements. See U.S. Forest Serv., Final Record of Decision, Rock Creek Project 33 (providing that "state water quality permits or certification[] will constitute compliance with Montana water quality requirements"), 40 (stating that, "[f]ollowing [RC's] acquisition of water rights for all surface water and groundwater appropriations, [RC's project] will comply with the Montana Water Use Act") (Aug. 2018) (emphasis added) (CFC App. 9 (excerpt)).

Thus, this is not a case like Northern Plains Resource Council v. Montana Board of Land Commissioners, where this Court found no interference with the plaintiffs' Montana constitutional right to a clean and healthful environment

because the action at issue—issuance of state coal-mining leases—did "not allow for any degradation of the environment," instead conferring only an exclusive right to apply for further state permits that would be subject to "full environmental review and full compliance with applicable State environmental laws." 2012 MT 234, ¶ 19. Here, DNRC's challenged permit itself authorizes RC to "divert and impound groundwater," AR:62-63; see AR:12; issuance of that permit shields RC's appropriation and its associated impacts from further nondegradation review, MCA § 75-5-317(2)(s); and, as discussed, no other state or federal processes provide a safety net for CFC's interest in preventing prohibited depletion of Outstanding Resource Waters. Accordingly, DNRC's decision regarding RC's water use permit, not the other governmental actions identified by RC, dictates whether Outstanding Resource Waters in the Cabinet Mountains Wilderness will receive "the greatest protection feasible under state law," MCA § 75-5-315(1)—or no protection at all.

In sum, DNRC's application of MCA § 85-2-311(2) in this case violated CFC's Montana constitutional rights to a clean and healthful environment and DNRC cannot demonstrate that § 85-2-311(2) advances a compelling state interest and is narrowly tailored to effectuate that interest. For this reason too, this Court should affirm the district court's judgment reversing and remanding DNRC's decision.

CONCLUSION

For the foregoing reasons, Appellees Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center respectfully request that this Court affirm the district court's judgment.

Respectfully submitted this 14th day of February, 2020.

/s/ Timothy J. Preso

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e) and this Court's Order of Feb. 3, 2020 granting leave to file an overlength response brief, I certify that this response brief is printed with a proportionately spaced Times New Roman typeface of 14 points; is double-spaced; and contains 12,645 words, as counted by Microsoft Word for Windows.

/s/ Timothy J. Preso
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CERTIFICATE OF SERVICE

I, Timothy J. Preso, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-14-2020:

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