

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 23-0268

MONTANA TROUT UNLIMITED, TROUT UNLIMITED, MONTANA ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS, and AMERICAN RIVERS

Petitioners and Appellants,

v.

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

Respondents and Appellees.

On Appeal from the Montana Fourteenth Judicial District Court,
Meagher County, Honorable Michael B. Hayworth Presiding
Cause No. DV-2022-09

**RESPONDENT/APPELLEE MONTANA DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION'S
ANSWER BRIEF**

Brian C. Bramblett
Molly Kelly
Montana Department of Natural
Resources and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-9758
(406) 444-5785
bbramblett@mt.gov
molly.kelly2@mt.gov
***Attorneys for Respondent/Appellee
Montana Department of Natural
Resources and Conservation***

Sean Helle
Jenny Harbine
Benjamin Scrimshaw
Earthjustice
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 586-9699
shelle@earthjustice.org
jharbine@earthjustice.org
bscrimshaw@earthjustice.org
Attorneys for Petitioners/Appellants

Patrick Byorth
Megan Casey
Trout Unlimited, Inc., Montana Water
Project
321 East Main St., Ste. 411
Bozeman, MT 59715-4797
patrick.byorth@tu.org
megan.casey@tu.org
***Attorneys for Petitioners/Appellants
Montana Trout Unlimited, Trout Unlimited***

John W. Tietz
Hallee C. Frandsen
Browning, Kaleczyc, Berry & Hoven, P.C.
P.O. Box 1697
Helena, MT 59624-1697
john@bkbh.com
hallee@bkbh.com
***Attorneys for Respondent/Appellee Tintina
Montana, Inc.***

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
STANDARD OF REVIEW	7
ARGUMENT SUMMARY	9
ARGUMENT	11
1. DNRC correctly determined that the removal and disposal of groundwater drained from Tintina’s mining operation is not an appropriation of water for beneficial use under the Act.	12
<i>A. DNRC’s Final Order is supported by the plain language of § 85-2-102(1) and -311, MCA.</i>	18
<i>B. The Final Order correctly interpreted the plain language of § 85-2-505, MCA. Because mine dewatering is not considered waste under the statute does not transform it into a beneficial use under the Act.</i>	22
<i>C. DNRC’s Final Order is supported by DNRC’s longstanding interpretation and application of the law.</i>	24
2. Appellants fail to present a cognizable Constitutional claim.	30
3. Vacatur of the permit is not an available remedy in this appeal.	33
CONCLUSION	35
CERTIFICATE OF COMPLIANCE	36

TABLE OF AUTHORITIES

Cases

<i>350 Montana v. State</i> , 2023 MT 87, 412 Mont. 273, 529 P.3d 847	33
<i>All. For the Wild Rockies v. Savage</i> , 375 F. Supp. 3d 1152 (D. Mont. 2019)	34
<i>Allen v. Petrick</i> , 69 Mont. 373, 222 P. 451 (1924)	14
<i>Baitis v. Dep't. of Revenue</i> , 2004 MT 17 319 Mont. 292, 83 P.3d 1278	8, 28
<i>Baldwin v. Bd. of Chiropractors</i> , 2003 MT 306, 318 Mont. 188, 79 P.3d 810	7
<i>Bitterroot River Protective Ass'n, Inc. v. Siebel</i> , 2005 MT 60, 326 Mont. 241, 108 P.3d 518	16
<i>Bostwick Properties, Inc. v. DNRC</i> , 2013 MT 48, 369 Mont. 150, 296 P.3d 1154	20, 21
<i>Brander v. Director, Montana Dep't. of Institutions</i> , 247 Mont. 302, 806 P.2d 530 (1991)	34
<i>Clark Fork Coal. v. DNRC</i> , 2021 MT 44, 403 Mont. 225, 481 P.3d 198	15, 17, 31
<i>DEQ v. BNSF Ry. Co.</i> , 2010 MT 267, 358 Mont. 368, 246 P.3d 1037	8
<i>Diamond Cross Props. v. State</i> , 2008 WL 3243320 (July 14, 2008)	30
<i>E. Bench Irrigation Dist. v. Open A Ranch, Inc.</i> , 2021 MT 319, 406 Mont. 502, 501 P.3d 380	14
<i>Gen. Agric. Corp. v. Moore</i> , 166 Mont. 510, 534 P.2d 859 (1975)	14
<i>Glendive Medical Center v. Mont. Dep't. of Pub. Health and Human Servs.</i> , 2002 MT 131, 310 Mont. 156, 49 P.3d 560	9
<i>Hendershott v. Westphal</i> , 2011 MT 73, 360 Mont. 66, 253 P.3d 806	23

<i>Irion v. Hyde</i> , 107 Mont. 84, 81 P.2d 353 (1938)	14
<i>Kafka v. Montana Dep't of Fish, Wildlife & Parks</i> , 2008 MT 460, 348 Mont. 80, 201 P.3d 8	15
<i>Kelly v. Teton Prairie LLC</i> , 2016 MT 179, 384 Mont. 174, 376 P.3d 143	14, 15
<i>Lohmeier v. State, Dep't of Nat. Res. & Conservation</i> , 2008 MT 307, 346 Mont. 23, 192 P.3d 1137	27, 28
<i>McDonald v. State</i> , 220 Mont. 519, 722 P.2d 598 (1986)	13
<i>McGree Corp. v. Montana Pub. Serv. Comm'n</i> , 2019 MT 75, 395 Mont. 229, 438 P.3d 326	27
<i>MEIC. v. DEQ</i> , 2019 MT 213, 397 Mont. 161, 451 P.3d 493	9
<i>Mettler v. Ames Realty Co.</i> , 61 Mont. 152, 201 P. 702 (1921)	13
<i>Mont. Power Co. v. Pub. Serv. Comm'n</i> , 2001 MT 102, 305 Mont. 260, 26 P.3d 91	7
<i>Montana Dep't. of Highways v. Midland Materials Co.</i> , 204 Mont. 65, 662 P.2d 1322 (1983)	28
<i>Montana Power Co. v. Carey</i> , 211 Mont. 91, 685 P.2d 336 (1984)	15
<i>Montana Power Co. v. PSC</i> , 2001 MT 102, 305 Mont. 260, 26 P.3d 91	27
<i>Montana Trout Unlimited v. DNRC</i> , 2006 MT 72, 331 Mont. 483, 133 P.3d 224	8
<i>Pollinator Stewardship Council v. EPA</i> , 806 F.3d 520 (9th Cir. 2015).....	34
<i>Power v. Switzer</i> , 21 Mont. 523, 55 P. 32 (1898)	14, 20, 21
<i>Qwest Corp. v. Mont. Dept. of Pub. Serv. Regul.</i> , 2007 MT 350, 340 Mont. 309, 174 P.3d 496	7, 8
<i>Roe v. City of Missoula</i> , 2009 MT 417, 354 Mont. 1, 221 P.3d 1200	8

<i>Roos v. Kircher Pub. Sch. Bd. of Tr.</i> , 2004 MT 48, 320 Mont. 128, 86 P.3d 39	7
<i>Shammel v. Canyon Resources Corp.</i> , 2003 MT 372, 319 Mont. 132, 82 P.3d 912	32
<i>Sitz Ranch v. DNRC</i> , No. DV-10-13390 (Mont. Fifth Jud. Dist. 2011)	16
<i>Sunburst Sch. Dist. No. 2 v. Texaco, Inc.</i> , 2007 MT 183, 338 Mont. 259, 165 P.3d 1073	33
<i>Teton Co-Op Canal Co. v. Teton Coop. Reservoir Co.</i> , 2015 MT 344, 382 Mont. 1, 365 P.3d 442	14
<i>Toohey v. Campbell</i> , 24 Mont. 13, 60 P. 396 (1900)	14, 20
<i>U.S. West, Inc. v. Dep't. of Revenue</i> , 2008 MT 125, 343 Mont. 1, 183 P.3d 16	9
<i>Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regul.</i> , 284 Mont. 245, 944 P.2d 210 (1997)	28
<i>West Side Ditch Co. v. Bennett</i> , 106 Mont. 422, 78 P.2d 78 (1938)	20, 21

Statutes

1-2-101 through 1-2-107	8
1-2-102	8
2-4-704	7, 35
2-4-704(2)	8, 34
75-1-102	32
82-4-301	32
85-1-101(10)	17
85-2-101	32
85-2-101(1)–(3)	15
85-2-102(1)	19
85-2-102(1)(a)	15, 16, 18

85-2-102(16)	21
85-2-102(27)	22
85-2-102(3)	21
85-2-112	23
85-2-114(9).....	32
85-2-234(6)	13
85-2-301	16
85-2-301(1)	18
85-2-302	16
85-2-309	6
85-2-310	6
85-2-310(8)	16, 18, 19, 26
85-2-311	15, 16, 18
85-2-311(1)(d).....	16, 19
85-2-312	16, 18, 19
85-2-360	4
85-2-505(1)(c).....	22
M. R. Civ. P. 56(c)(3)	8
Title 2, ch. 4, part 6	6
Title 75, ch. 5, part 1	5, 11, 19
Title 82, ch. 4, part 3	5, 11, 17, 19
Title 85, ch. 2, part 5	22
Title 85, ch. 2, parts 3 and 4.....	15

Constitutional Provisions

Mont. Const. art. IX, § 3	13
---------------------------------	----

Other Authorities

Hearing on H.B. 178 Before the Comm. on Nat. Res.,
59th Leg. (Mont. 2005).....29

Hearing on H.B. 573 Before the House Comm. on Nat. Res.,
57th Leg., 29 (Mont. 2001).....29

ISSUE PRESENTED

Did the Department of Natural Resources and Conservation (“DNRC”) err when it concluded that the removal and disposal of water from a mine without applying it to beneficial use is not an appropriation of water for which a water use permit is required under the Montana Water Use Act?

STATEMENT OF THE CASE

This case involves a purely legal question of whether the removal and disposal of water from a mine is, in and of itself, an appropriation of water for a beneficial use necessitating a permit from DNRC under the Montana Water Use Act (“Act”), Title 85, ch. 2, MCA.

On September 7, 2018, Tintina filed an Application for Beneficial Water Use Permit No. 41J 30116562 (Application) seeking a water right to appropriate 350 acre-feet of groundwater annually for industrial purposes associated with its proposed underground copper mine known as the Black Butte Project. As the mine is excavated, it will naturally infiltrate with groundwater. Tintina intends to put a portion of that water to beneficial use at the mine. The remaining water being withdrawn to drain the mine of flood water will not be put to beneficial use; it will be disposed of by discharging it back into the ground through an infiltration gallery. On March 13, 2020, DNRC issued a Preliminary Determination to Grant the

Application concluding that Tintina satisfied all applicable criteria necessary to grant the beneficial use permit for the 350 acre-feet for industrial purposes at the mine.

Appellants objected to the Application, which triggered a contested case proceeding before a DNRC Hearing Examiner pursuant to the Montana Administrative Procedure Act. Following discovery, Tintina and the Appellants filed cross-motions for summary judgment. Appellants argued that removal of water from the mine in excess of 350 acre-feet per year was an appropriation of water for beneficial use for which Tintina was required to obtain a permit. Tintina argued that water removed from the mine in excess of the 350 acre-feet would be disposed of without beneficial use and, therefore, was not an appropriation requiring a permit.

The DNRC Hearing Examiner entered an Order on Cross-Motions for Partial Summary Judgment (“Order on PSJ”) in which he concluded that the removal and disposal of flood water from the mine does not, in and of itself, constitute a beneficial use of water for which a permit is required. The Appellants and Tintina subsequently entered a stipulation resolving Appellants’ remaining objections to the Application at issue in the contested case hearing and a Final Order was entered on July 26, 2022, granting the Application and approving Tintina’s permit for 350 acre-feet.

Appellants sought judicial review of the DNRC Final Order. The Fourteenth Judicial District Court affirmed DNRC’s Order on April 12, 2023. Appellants now

appeal the District Court's Order Denying Petition for Judicial Review and Affirming Final Agency Action.

STATEMENT OF FACTS

DNRC notes that Sections I – III of Appellants' "Statement of Facts" consist of legal arguments rather than facts. Those arguments are addressed in the Argument section of this Answer Brief where appropriate. The undisputed facts upon which the Final Order is based are set forth below.

Tintina's Application is one of eight water right applications related to the Black Butte Copper Project in Meagher County. AR0013. The Project is a proposed underground copper mine generally located 15 miles north of White Sulphur Springs in the Sheep Creek drainage. AR0013. As Tintina removes material from the mine workings, the void left behind will flood with water which must be removed for Tintina's mining operations to take place. AR0014. Tintina estimates that approximately 807 acre-feet of ground water will infiltrate the excavated mine and need to be removed from the mine workings annually. AR0014. Tintina intends to beneficially use a portion of this water, 350 acre-feet, per year for industrial purposes. AR0012. Tintina does not plan to put the remainder of the excess water drained from the mine, 457 acre-feet, to beneficial use and did not apply for a permit for that portion.

On September 7, 2018, Tintina filed a bundle of permit and change applications to acquire a water right for the 350 acre-feet of water that will be beneficially used at the mine and to mitigate adverse effects to senior water rights caused by its new “junior” water right permit. AR0062. Application No. 41J 30116562, which sought a water right permit to beneficially use 350 acre-feet for industrial purposes at the mine, is the only application at issue in this appeal. AR0011 and 0012.

The Application is located in the Upper Missouri River basin closure which requires mitigation of depletions from new groundwater water rights that may adversely affect senior water rights. Section 85-2-360, MCA. Tintina proposed a mitigation plan to offset projected depletions of the 350 acre-feet of water for which it sought a new water right.¹ The plan involves providing seasonal mitigation water to Black Butte Creek and year-round mitigation water to Coon and Sheep Creeks. AR0511. Mitigation of adverse effects to senior water rights will be accomplished by changing the consumptive use volumes associated with six irrigation water rights to offset depletions that cause adverse effect (41J 30116553, 41J 30116554, 41J 30116556, 41J 30116557, 41J 30116558 and 41J 30116559), and by Tintina’s permit to appropriate high spring flows from Sheep Creek (41J 30116563). *Id.* Both

¹ The volume of water projected to be consumed under the proposed industrial use is 340.3 acre-feet, with the remaining 9.7 acre-feet of water diverted to be used, treated, and returned to the aquifer. AR0015

mitigation options include storing water in a 292 acre-feet reservoir for releases to help ensure that depletions to surface water caused by Tintina's junior water right will be offset in the amount and timing that those depletions may adversely affect senior water rights. *Id.*

In addition to the 350 acre-feet of water that Tintina will appropriate for beneficial use, Tintina anticipates that 457 acre-feet of water will flood the mine and must be removed and disposed of. Tintina does not intend to beneficially use the excess water. Instead, the excess water that floods the mine will be removed and conveyed to a water treatment plant where it will be disposed of by discharging into an underground infiltration gallery. AR0047. The volume of excess water disposed of through the infiltration gallery is subject to regulation and permitting by the Department of Environmental Quality ("DEQ"). AR0014, n.1; 0047; Title 82, ch. 4, part 3, MCA (Metal Mine Reclamation Act); Title 75, ch. 5, part 1, MCA (Montana Water Quality Act).

DNRC issued a Preliminary Determination to Grant the permit in which it determined that Tintina met the §§ 85-2-311, -342-343, and -360-364, MCA, criteria for a beneficial water use permit for the 350 acre-feet water used for its mining operations. Therefore, DNRC's preliminary determination proposed to grant the Application. AR0052.

Appellants filed valid objections to the Application regarding the legal availability, adverse effect, and beneficial use criteria, asserting that Tintina failed met its burden of proof as to the criteria. AR0660; AR0675; AR0682; AR0693. Specific to this case, Appellants asserted that Tintina was required to obtain a water right permit for the excess water removed from the mine in addition to the 350 acre-feet that Tintina intends to beneficially use for industrial purposes. *Id.*

Appellants' objections triggered a contested case proceeding before a DNRC hearing examiner pursuant to the Montana Administrative Procedure Act. Sections 85-2-309 and -310, MCA; Title 2, ch. 4, part 6, MCA. Tintina and the Appellants filed cross-motions for partial summary judgment on the issue of whether the removal and disposal of 457 acre-feet per year of excess water from the mine constituted an appropriation of water for beneficial use for which a permit was required under the Act. AR1377–1840.

On February 23, 2022, the DNRC Hearing Examiner entered the Order on PSJ in which he determined that the removal and disposal the 457 acre-feet per year of flood water from the mine did not constitute an appropriation of water for which a beneficial water use permit was required because Tintina did not intend to put the water to beneficial use. AR1874. The Order on PSJ further concluded that removal and disposal of the excess flood water without beneficial use did not constitute a waste of water pursuant to § 85-2-505, MCA.

Tintina and the Appellants entered a stipulation settling the remaining objections. The stipulation contained additional measurement conditions in exchange for Appellants withdrawing their objections to the legal availability and adverse effect criteria. AR1851. The Hearing Examiner accepted the stipulation and issued the Final Order granting the Application and issued a water right for Permit No. 41J-30116562. Final Order, Application Nos. 41J-30116562 and 41J-30116563 (July 26, 2022), AR0002–0008.² Based on the stipulation and the Final Order, the only criteria remaining on appeal is the question of beneficial use.

STANDARD OF REVIEW

This Court applies the same standard of review as the district court when reviewing an agency decision. *Qwest Corp. v. Mont. Dept. of Pub. Serv. Regul.*, 2007 MT 350, ¶ 15, 340 Mont. 309, 174 P.3d 496 (citing *Mont. Power Co. v. Pub. Serv. Comm’n*, 2001 MT 102, ¶ 118, 305 Mont. 260, 26 P.3d 91). The Court “must accordingly determine whether an agency’s findings of fact are clearly erroneous and whether its conclusions of law were correct.” *Roos v. Kircher Pub. Sch. Bd. of Tr.*, 2004 MT 48, ¶ 7, 320 Mont. 128, 86 P.3d 39 (citing *Baldwin v. Bd. of Chiropractors*, 2003 MT 306, ¶ 10, 318 Mont. 188, 79 P.3d 810; § 2-4-704, MCA).

² The Final Order in this matter is the final agency action that granted Tintina’s permit application, rejecting Appellants’ beneficial use objection. AR0002. The Order on PSJ contains the substance of the Hearing Examiner’s discussion and conclusion on the issue of beneficial use. AR1874.

A reviewing court considers a petition for judicial review from a final agency action on summary judgment *de novo*, pursuant to Mont. R. Civ. P. 56. Under Mont. R. Civ. P. 56, an agency should grant a party's motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3); *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200.

In an appeal of an agency decision, questions of law are reviewed to determine whether the agency's interpretation of law is correct. *Qwest Corp.*, ¶ 15; § 2-4-704(2), MCA. Statutory construction is a holistic endeavor that must account for the whole of the statute's text and structure. *DEQ v. BNSF Ry. Co.*, 2010 MT 267, ¶ 56, 358 Mont. 368, 246 P.3d 1037; § 1-2-102, MCA. A reviewing court must construe the law as it finds it and ascertain what is in the terms or substance contained therein, not to insert has been omitted, or omit what has been inserted. It must avoid any interpretation that renders any section of a statute superfluous, and that does not give effect to all of the words used. *Montana Trout Unlimited v. DNRC*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224; *Baitis v. Dep't. of Revenue*, 2004 MT 17, ¶¶ 22–24, 319 Mont. 292, 83 P.3d 1278; §§ 1-2-101 through 1-2-107, MCA.

An agency's interpretation of statute should be upheld where it is reasonable and best effectuates the statute's purpose. *Baitis*, ¶¶ 22–24. Ordinarily, courts give

deference to a statutory interpretation advanced by the agency charged with administering the statute. *U.S. West, Inc. v. Dep't. of Revenue*, 2008 MT 125, ¶ 19, 343 Mont. 1, 183 P.3d 16. While this Court will not defer to an incorrect or unlawful agency decision, it will defer to an agency action within permissible statutory bounds. In doing so, it recognizes that agencies are both empowered and constrained by applicable statutes and regulations. *MEIC. v. DEQ*, 2019 MT 213, ¶ 22, 397 Mont. 161, 451 P.3d 493. Where an agency's interpretation of a statute has stood unchallenged for a considerable length of time, it will be regarded with great importance in arriving at the proper interpretation. *Glendive Medical Center v. Mont. Dep't. of Pub. Health and Human Servs.*, 2002 MT 131, ¶ 14, 310 Mont. 156, 49 P.3d 560.

ARGUMENT SUMMARY

The Final Order reflects Montana water law's edict that beneficial use is the basis, limit, and measure of a water right. The diversion of water without a beneficial use does not constitute an "appropriation" for which a water right can be or must be obtained. This principal is emphasized in the plain language of the Act, which provides that DNRC may only grant a water use permit when an applicant proves by a preponderance of evidence that it intends to divert, impound, or withdraw a quantity of water necessary for beneficial use. The Final Order correctly determined that the removal and disposal of excess water drained from Tintina's mine is, in and

of itself, not an appropriation of water for a beneficial use for which a water use permit is required or can be obtained under the Act.

The Final Order also correctly interpreted the plain language of the waste exemption statute, § 85-2-505, MCA. Because mine dewatering is not waste under the statute, it does not transform the use into a beneficial use under the Act.

In this case, Tintina obtained a permit for the quantity of water intentionally withdrawn for beneficial use in the mining operation. In doing so it complied with all the requisite permit criteria and the Upper Missouri River basin closure. However, Tintina was neither required nor entitled to obtain a permit for water removed from the mine and disposed of because it does not intend to put that quantity of water to beneficial use. Rather, that water is only being removed from the mine because it is an impediment to Tintina's mining operation. The purpose of the manipulation of the water being removed is drainage and disposal. The fact that its mine will be flooded with more water than it will beneficially use does not require Tintina to obtain a permit for the remainder because it will not be put to beneficial use and is outside the scope of DNRC's jurisdiction regulating water rights.

Appellants' attempt to expand the Act to regulate all aspects of Montana's water resources is contrary to the plain language of the Act, Article IX, Section 3, of the Montana Constitution, and should be rejected by this Court. DNRC's Final Order is consistent with the fundamental principles of Montana's prior appropriation

doctrine, the plain language of the Water Use Act, and DNRC's longstanding interpretation and application of the law.

Accordingly, DNRC requests that this Court affirm the District Court's Order Denying Petition for Judicial Review and DNRC's Final Order.

ARGUMENT

The sole issue on appeal is whether the removal and disposal of excess water from the mine is an appropriation of water for a beneficial use for which a water right permit is required. As explained below, the Final Order properly determined that the 457 acre-feet of excess water removed from the mine and disposed of without beneficial use is not an appropriation of water for which a water right is required or may be acquired.

Appellants' brief is largely focused on issues not within the scope of appeal. Environmental impacts surrounding the mine are permitted, regulated, and enforced by DEQ, and not at issue in this appeal. *See* Title 82, ch. 4, part 3, MCA (Metal Mine Reclamation Act); Title 75, ch. 5, part 1, MCA (Montana Water Quality Act).

Similarly, Appellants' focus on specific mitigation requirements is misplaced. Appellants request: "Given the unlawful inadequacies of Tintina's mitigation plan for the Black Butte Mine, the Department's decision to approve it and grant the company a groundwater permit should be overturned by this Court." Appellants' Opening Br. 45. Appellants' Opening Br. 11–14, 43–45. Appellants settled all

objections besides the legal issue of beneficial use in the contested case proceedings. AR0002, AR0052. The settled issues include the adverse effect criteria and mitigation requirements. Whether the Final Order properly found that Tintina met the § 85-2-311, MCA, criteria for the 350 acre-feet of water beneficially used at the mine and proved it would effectively mitigate depletions to affected water rights is not at issue on appeal and should be disregarded. Appellants' attempt to conflate the various settled criteria with the sole legal issue on appeal is disingenuous to this Court.

1. DNRC correctly determined that the removal and disposal of groundwater drained from Tintina's mining operation is not an appropriation of water for beneficial use under the Act.

The Final Order's determination that the excess water removed from the mine and disposed of is not an appropriation of water for which a water right is required best effectuates the primary objectives of the Act, is consistent with the plain language of applicable statutes, and is supported by DNRC's longstanding interpretation and application of the law.

It is critical to read the Final Order and the provisions of law at issue in the context of the Act's primary objective to protect and permit water rights consistent with the prior appropriation doctrine. To obtain a water right permit, an applicant must satisfy the requirements for establishing a property right in the quantity of water needed for a beneficial use. It is undisputed that Tintina satisfied the water

right permit criteria for the 350 acre-feet it intends to beneficially use. However, the Act does not require or authorize Tintina to obtain a water right permit for water removed from its mine that it does not intend to beneficially use.

Montana water law, past and present, is premised on the prior appropriation doctrine. Mont. Const. art. IX, § 3 (affirming historical water rights and the common law principles of the doctrine). The primary objective of the prior appropriation doctrine is to administer and protect water rights in priority: “first in time, first in right.” A water right must satisfy essential characteristics of a property right to be protected by the prior appropriation system such as the priority date, purpose of use (beneficial use), water source, and place of use. Section 85-2-234(6), MCA.

As a usufructuary right, a Montana water right is a property ownership interest in the right to *beneficially use* the water; it is not ownership of the water itself. *Mettler v. Ames Realty Co.*, 61 Mont. 152, 162, 201 P. 702, 704 (1921). Accordingly, beneficial use is, and has always been, the touchstone of a Montana water right. It reflects the constitutional limit and the controlling factor of a water right: “*beneficial use* shall be the *basis*, the *measure*, and the *limit* of all rights to use of the water.” *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (emphases in original).

The diversion of water alone is insufficient to acquire the right to its use. *Power v. Switzer*, 21 Mont. 523, 55 P. 32, 34–35 (1898). To “perfect” or vest a water right, one must apply the water to the intended beneficial use within a reasonable period of time. A water right is limited to the quantity of water necessary to satisfy the intended beneficial use. *Irion v. Hyde*, 107 Mont. 84, 96, 81 P.2d 353, 358 (1938). The amount of the water right perfected is the amount applied to the intended beneficial use, not the amount claimed, permitted, or the capacity of the appropriation works. *E.g. E. Bench Irrigation Dist. v. Open A Ranch, Inc.*, 2021 MT 319, ¶ 57, 406 Mont. 502, 501 P.3d 380; *Allen v. Petrick*, 69 Mont. 373, 222 P. 451, 452 (1924); *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900). Even then, the failure to beneficially use water pursuant to a perfected water right for a prolonged period can result in its loss through abandonment. *Teton Co-Op Canal Co. v. Teton Coop. Reservoir Co.*, 2015 MT 344, 382 Mont. 1, 365 P.3d 442.

The priority date of a water right is a critical element of the property right that establishes the enforceability of the water right against other water rights. *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 517, 534 P.2d 859, 863 (1975). The priority date allows a water user to demand delivery of a quantity of water to his point of diversion and exclude junior water users from exercising their water rights until the senior right is satisfied. *Kelly v. Teton Prairie LLC*, 2016 MT 179, ¶¶ 11, 19, 384 Mont. 174, 376 P.3d 143. Together, beneficial use and priority date establish the core

elements of a water right that make it a property right under the prior appropriation doctrine and the Act. *Id.*; see *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 44, 348 Mont. 80, 201 P.3d 8.

The legislature established the Montana Water Use Act in 1973 to codify the prior appropriation doctrine consistent with Article IX, Section 3 of the Constitution, which required that the legislature provide for the administration, control, and regulation of water rights. *Kelly*, ¶ 11. The Act regulates water rights; it does not regulate everything related to Montana hydrologic resources. Consistent with the prior appropriation doctrine principles discussed above and Article IX, Section 3(3) of the Constitution, the Act's permitting criteria provide the law based upon which Montana's water is "subject to appropriation for beneficial uses." Sections 85-2-102(1)(a) and -311, MCA.

The Act charges DNRC with maintaining a centralized administration and records system that recognizes, establishes, preserves, and protects "senior water rights holders from encroachment by *junior appropriators* adversely affecting those rights." *Montana Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 (1984) (emphasis added); *Clark Fork Coal. v. DNRC*, 2021 MT 44, ¶ 41, 403 Mont. 225, 262, 481 P.3d 198; see §§ 85-2-101(1)–(3) and -311, MCA. The Act accordingly tasks DNRC with authorizing post-1973 water rights for new appropriations for beneficial use in fulfillment of Article IX, Section 3. Title 85, ch. 2, parts 3 and 4,

MCA. An appropriation is the diversion, withdrawal, or impoundment of water for a beneficial use. Section 85-2-102(1)(a), MCA.

The Act's front-end loaded permit process requires an individual who wants to establish a new appropriation to prove specific statutory criteria before DNRC authorizes the new water right permit. Sections 85-2-301, -302, -311, MCA; *Bitterroot River Protective Ass'n, Inc. v. Siebel*, 2005 MT 60, ¶¶ 33–35, 326 Mont. 241, 108 P.3d 518. The permit criteria serve to: (1) establish the extent of the junior appropriator's water right based upon the amount needed for the intended beneficial use; and (2) protect senior water rights from encroachment by junior water rights. Accordingly, an applicant must prove that the proposed use is a beneficial use and that the amount of water requested is necessary for the intended beneficial use. Section 85-2-311(1)(d), MCA. DNRC cannot authorize a permit for more than is necessary for the intended beneficial use. Sections 85-2-310(8)³ and -312⁴, MCA; *see Sitz Ranch v. DNRC*, DV-10-13390, Fifth Judicial District Court, Order Affirming DNRC Decision (2011) (affirming DNRC's determination that a water user could not acquire a water right for 800 acre-feet when the applicant only planned to put 200 to 300 acre-feet to beneficial use).

³ DNRC may cease action on a permit application if the application does not demonstrate bona fide intent to appropriate water for a beneficial use.

⁴ DNRC may not authorize a permit for more than will be beneficially used without waste.

Appellants’ arguments are premised on a fundamental misunderstanding that the primary objective of the Act was to “ensure that Montana’s water resources are comprehensively regulated and protected” as reflected in § 85-1-101, MCA. Appellants’ Opening Br. 1. This section pertains to the state water plan and it is not applicable to water rights permitting decisions. Section 85-1-101(10), MCA. This Court recently rejected a similar argument in *Clark Fork Coalition v. DNRC*, where it confirmed that § 85-1-101, MCA, is a general policy statement “underlying the establishment and administration of a ‘coordinated [local, state, and federal] multiple-use water resource plan’ *independent of the MWUA [Act] and outside the mandate of Montana Constitution Article IX, Section 3.*” *Clark Fork Coal. v. DNRC*, n.6 (emphasis added). Appellants’ attempt to have this Court enforce requirements outside the mandates of the Act and Montana Constitution Article IX, Section 3 should be rejected. Contrary to Appellants’ assertion, the Act does not regulate everything to do with water in Montana. *Clark Fork Coal. v. DNRC*, ¶¶ 41, 43, 50. For instance, the Montana Metal Mine Reclamation Act, implemented by DEQ, regulates hard-rock mining activities, including issues related to the impacts caused by the removal and disposal of groundwater from a mine. Title 82, chapter 4, part 3, MCA; *Clark Fork Coal. v. DNRC*, ¶¶ 11–12.

This is the context in which this Court should evaluate DNRC’s conclusion that water removed from Tintina’s mine and disposed of through its wastewater

treatment infiltration gallery is not a beneficial use of water requiring a water right permit.

A. DNRC's Final Order is supported by the plain language of § 85-2-102(1) and -311, MCA.

As explained above, an applicant may only acquire a water right for that quantity of water necessary for an intended beneficial use. Sections 85-2-301(1), -310(8), -311, -312, MCA. These statutory provisions support DNRC's determination that not all withdrawals of water constitute an "appropriation" for which a water right can be obtained.

In 2005, the definition of "appropriate" was amended to clarify this very point consistent with the fundamental principles of the prior appropriation doctrine. Section 85-2-102(1)(a), MCA (2005). The amendment added the underlined language: (1) "Appropriate" means: (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use[.]" The requirement that an appropriation must be for an intended beneficial use is emphasized by the requirements of §§ 85-2-310(8), -311(1)(d), and -312, MCA.

In the present case, Tintina applied for and obtained a water right for the quantity of water being withdrawn from the mine for a beneficial use: 350 acre-feet for industrial purposes. However, the remaining water being "withdrawn" from the mine is being removed to drain the mine of flood water. Tintina does not intend to put that water to beneficial use. Rather it is disposing the water through an

infiltration gallery, which is subject to DEQ's review and authorization pursuant to the Metal Mine Reclamation Act and the Montana Water Quality Act. Title 82, ch. 4, part 3; Title 75, ch. 5, part 1, MCA. Because there is no beneficial use of this water, it does not constitute an appropriation for which a permit may be acquired pursuant to the Water Use Act. Sections 85-2-102(1), -310(8), -311(1)(d), and -312, MCA.

Appellants' attempt to manufacture incidental beneficial uses to justify its reading of the law is misplaced. That Tintina's mining operation necessitates removal and disposal of excess flood water does not convert its actions to an appropriation of water for which a water right may be obtained. In one of Montana's seminal water right cases, this Court held that the diversion of water must be accompanied by the intent to beneficially use the water to constitute an appropriation for which a water right can be acquired:

Plaintiffs admit they never intended to use the water for mining, and, under the evidence, it has been found they never intended to use it for agriculture. Their necessities were evidently merely for its use for domestic purposes, and any use of what was not consumed in those ways was a mere incident, brought about by the natural waste of water after it passed the point where it was utilized for domestic purposes, and was not the result of an attempt to cover the lands so as to make them more productive of hay or other crops. But the mere diversion of a quantity of water from a stream is not a legal appropriation of it A man may divert more water than is necessary for domestic and culinary purposes, and permit the excess to flow on down to his lands; **but if he has no intention of using such excess to irrigate the land upon which the excess so runs, and his purpose is not to raise a crop or run machinery, or to mine, or to otherwise apply it to a useful**

purpose, he acquires no valid right to such excess by the mere fact of a diffusion of waste water upon the grounds, even though they be susceptible of cultivation. The intention of the claimant is therefore a most important factor in determining the validity of an appropriation of water. When that is ascertained, limitations as to the quantity of water necessary to effectuate his intent can be applied according to the acts, diligence, and needs of the appropriator.

Power v. Switzer, 55 P. at 34–35 (emphasis added); *see also Toohey*, 60 P. at 397; *West Side Ditch Co. v. Bennett*, 106 Mont. 422, 78 P.2d 78 (1938) (holding that a farmer who had a swamp on their land could dig a ditch to drain the water without a water right because the farmer was not putting the water to beneficial use or attempting to secure a property interest in the water).

More recently, this Court recognized the legal distinction between water appropriated for beneficial use for which a permit is required, and stormwater runoff diverted and impounded by the development which does not constitute an appropriation of water for which the developer was entitled to a water right. *See Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, ¶¶ 24, 28, 31, 369 Mont. 150, 296 P.3d 1154. It explained that the “legislature listed only factors that concern the appropriated water” and that nothing in the plain language of the Act “requires DNRC to consider sources of water other than the proposed water to be appropriated pursuant to Bostwick’s permit.” *Id.*

Appellants’ position is contrary to Montana case law establishing that the diversion of water without beneficial use is not an appropriation of water. *See*

Power, 55 P., 34–35 and *West Side Ditch*, 78 P.2d at 78. According to Appellants’ logic, a farmer who drains water from a flooded field to prevent saline seep is appropriating water for beneficial use—contrary to the *West Side Ditch* holding. Moreover, Appellants’ definition of beneficial use means the stormwater systems for every city, town, and subdivision in Montana constitute appropriations of water for beneficial use for which a permit is required—contrary to the *Bostwick* holding.

Although the farmer and developer benefit from diverting and removing water from their property, neither requires a water right to do so. Likewise, the withdrawal of water from the mine in excess of the amount needed for Tintina’s contemplated industrial beneficial use is insufficient to create a property right in the excess water despite the fact that removal of the water is necessary to prevent flooding of the mine.

Appellants’ argument that recharge of Sheep Creek constitutes a “second” beneficial use as mitigation or aquifer recharge is also misplaced. Appellants’ Opening Br. 31. It is true that both mitigation and aquifer recharge are recognized by the Act as beneficial uses. However, both are limited in definition to the use of water to offset adverse effects to senior water rights. Sections 85-2-102(3) and (16), MCA; *Bostwick Properties*, ¶ 26. Here, Tintina’s disposal of excess mine water in the infiltration gallery is intended to comply with DEQ permitting requirements, not to offset adverse effects to senior water rights as required to satisfy the DNRC permit

criteria and definition of mitigation or aquifer recharge. *See* District Court Order, 13.

B. The Final Order correctly interpreted the plain language of § 85-2-505, MCA. Because mine dewatering is not considered waste under the statute does not transform it into a beneficial use under the Act.

Appellants’ argument that the specific statutory exemption of mine dewatering and drainage operations from the statutes prohibiting groundwater waste necessarily means that the drainage must be considered a beneficial use misconstrues Montana water law and the statutes controlling groundwater waste.

Waste is defined as “the application of water to anything but a beneficial use.” Section 85-2-102(27), MCA. Part 5 of the Act addresses specific issues related to groundwater and it exempts certain manipulations of groundwater from the prohibition against waste. Title 85, ch. 2, part 5, MCA. One of those exemptions is the dewatering and disposal of water from a mine. The statute expressly provides:

(1) . . . the following withdrawal or use of ground water may not be construed as waste under this part:

....

(c) the disposal of ground water without further beneficial use that must be withdrawn for the sole purpose of improving or preserving the utility of land by draining the same or that must be removed from a mine to permit mining operations or to preserve the mine in good condition[.]

Section 85-2-505(1)(c), MCA.

This exemption supports DNRC’s conclusion and the intent behind the 2005 amendment to the definition of appropriation. The first exemption in -505(1)(c),

establishes that the disposal of water drained from a field without beneficial use, such as was the case in *Westside Ditch*, is not a waste of water. The second exemption establishes that Tintina's disposal of water removed from its mine without beneficial use is not waste.

The exemption reflects the legislature's understanding that the removal and disposal of water from a mine is not, in and of itself, a beneficial use for which a water right can or must be obtained. Indeed, § 85-2-505(1)(c), MCA, protects mine operators from being subject to enforcement for waste for disposing of water withdrawn from a mine without applying it to a beneficial use. *See* § 85-2-112, MCA (providing for judicial enforcement against a person wasting water). If the act of removing water from a mine is per se a beneficial use as argued by Appellants, there would be no need for the statutory waste exemption because the use would already be considered a beneficial use. *Hendershott v. Westphal*, 2011 MT 73, ¶ 20, 360 Mont. 66, 253 P.3d 806 (statutory construction presumes that the legislature does not pass meaningless legislation and acts with deliberation and full knowledge of all existing laws on a subject).

The verbiage "without further beneficial use" in the statute does not transform such practices into beneficial use as Appellants allege. Rather than referring to or modifying any disposals of groundwaters, that language merely serves to highlight a legislative intention that waters withdrawn and subsequently used for beneficial

purposes should be treated as traditional appropriations in terms of ascertaining waste in light of the scope and character of the subsequent beneficial use.

This matter presents the exact scenario contemplated by the “without further beneficial use” provision. A portion of the water removed from the mine is subject to the Act’s water right permitting criteria because Tintina intends to beneficially use that portion for industrial purposes. The remainder excess water being removed from the mine is being removed because it is an impediment to Tintina’s mining activity. It must be drained and disposed of for Tintina to mine. Tintina is not seeking a property right in the water—it would likely prefer the water to not be present.

The District Court agreed with DNRC’s determination, holding that under the plain language of the definitional statutes, mine dewatering is neither a beneficial use of water nor waste. District Court Order, 13–14.

C. DNRC’s Final Order is supported by DNRC’s longstanding interpretation and application of the law.

The Final Order is consistent with DNRC’s longstanding interpretation that drainage of water—such as dewatering a mine—is not, in and of itself, an appropriation of water for beneficial use of water that requires a water right permit. This interpretation has been documented in both written policy and DNRC administrative decisions since 1981. AR1288–1291 (Administrative Policy No. 7, Dewatering (Drainage) Policy (December 11, 1981)). The Policy states that where

there is no intent to apply any of the water to a beneficial use, the mere act of rerouting, draining, or dewatering of a water source does not constitute an appropriation. Therefore, no water right can be obtained solely by dewatering. *Id.*

DNRC has considered the question of drainage and dewatering situations in the context of permitting water rights multiple times and has consistently held that “dewatering schemes, or those dealings with water that are solely motivated by drainage concerns” are not appropriations for beneficial use for which a water right can be obtained. *In the Matter of the Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix (Kenyon-Noble)*, DNRC Final Order and Reasons of Hearing Examiner (July 17, 1981) (AR1420–1475) (Appendix 1). Rather, this type of activity constitutes a manipulation of water outside the scope of the permitting requirements of the Act and DNRC’s jurisdiction.

In *Kenyon-Noble*, DNRC considered and rejected an argument similar to the binary one Appellants bring here: that the exclusion of mine dewatering operations from the statute prohibiting groundwater waste necessarily means that such drainage must be considered a beneficial use requiring a permit. There, DNRC issued a permit for gravel washing water in a gravel mine but determined that the dewatering of the pit was not subject to permitting requirements because it was not a beneficial use. *Id.* The hearing examiner explained that a “sensitive analysis” of § 85-2-505(1)(c), MCA, “yields a conclusion that the legislature intended merely to

salvage such drainage practices from the otherwise statutory proscription against waste. **It does not transform such practices into beneficial uses so as to bootstrap them into the permitting process.**” *Kenyon-Noble*, Reasons of the Hearings Examiner, at 2 (emphasis added).

In *CR Kendall*, DNRC again considered the question of drainage practices and appropriations for beneficial use. *In re Applications for Beneficial Water Use Permits 41T-104524, 41T-104526, 41T-104527 by CR Kendall Corp.*, Opinion on Threshold Issue of Beneficial Use, at 4 (Feb. 3, 1999) (AR1293–1304) (Appendix 2). That case involved a water treatment capture system at a mine that captured contaminated groundwater and prevented it from trickling down through the mine tailings. AR1293. Objectors in the case argued that since the applicant was diverting water, a permit must be obtained. The hearing examiner disagreed, determining that the diversion and disposal of water to avoid pollutant migration was not a beneficial use because a disposal of water is not a beneficial use of water. The hearing examiner noted that the objector’s interpretation “ignores the history of water rights law in Montana and the theme and thrust of the Water Use Act, *i.e.*, water rights protect water use.” *Id.* at 8–9; *see* § 85-2-310(8), MCA. The hearing examiner further explained that “diversions for non-use are not, and never have, qualified for water rights under Montana law” and “the Water Use Act has not changed the time-tested marriage of water rights to water use” and thus the disposal

of contaminated water did not fall within DNRC's jurisdiction of the permitting process. *Id.* DNRC is the regulator of water rights, not of water disposal.

Appellants here incorrectly maintain that DNRC's prior precedent should be ignored because the administrative decisions were not subject to rulemaking and conflict with the legislative intent of the Act. Appellants' Opening Br. 46. However, each of these decisions were properly made by DNRC on a case-by-case basis in its quasi-judicial capacity and were not subject to the requirements that apply to its quasi-legislative rulemaking authority. *McGree Corp. v. Montana Pub. Serv. Comm'n*, 2019 MT 75, ¶¶ 32–34, 395 Mont. 229, 438 P.3d 326 (Noting that an agency's power to adjudicate a contested hearing is a product of its quasi-judicial power "intended to provide for the enforcement of agency statutes and regulations.").

As the agency tasked with implementing the Act, DNRC's longstanding and continuous practical case-by-case interpretation of the Act, which has been "the unchallenged modus operandi of the DNRC" since 1981, is invaluable in determining whether the removal and disposal of water from a mine requires a permit. *Lohmeier v. State, Dep't of Nat. Res. & Conservation*, 2008 MT 307, ¶ 27, 346 Mont. 23, 192 P.3d 1137; *Montana Power Co. v. PSC*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. DNRC's precedents on this issue provides persuasive authority due to the thorough legal analysis of the present issue, consistency with the

intent and plain language of the Act, and consistency with other DNRC precedent related to drainage and disposal of water. *See Montana Dep't. of Highways v. Midland Materials Co.*, 204 Mont. 65, 662 P.2d 1322 (1983) (the persuasiveness of an administrative decision depends upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements of the same agency). It is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure. *Waste Mgmt. Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regul.*, 284 Mont. 245, 257, 944 P.2d 210, 217 (1997). It is both appropriate and necessary for this Court to consider DNRC's longstanding interpretation of the law when evaluating the Hearing Examiner's Final Order and Order on PSJ.

Further, this Court presumes that an agency has properly interpreted the law when the legislature acquiesces in longstanding agency interpretation and takes no action to inform that interpretation. *Baitis*, ¶ 24. The legislature is presumed to be aware of the state of the law. *Lohmeier*, ¶ 29 (citing *Baitis*, ¶ 24 ("It is presumed that the legislature is acquainted with the law; that it has knowledge of the state of it upon the subjects on which it legislates; that it is informed of previous legislation and the construction it has received.")).

The legislature is aware of DNRC's interpretation of the law on this issue. It has heard testimony multiple times regarding DNRC's interpretation that not all water manipulations are beneficial uses for which a permit is required under the Act. As explained by DNRC at the legislative hearing, the intent of the 2005 amendment to the definition of "appropriate" was to inform the public that not all manipulations of water are subject to the permitting requirements of the Act, testifying that "a person who digs a drain ditch to remove water and doesn't use it for any other purpose does not need a water right." *Hearing on H.B. 178 Before the Comm. on Nat. Res.*, 59th Leg. (Mont. 2005) (prepared statement of Jack Stults, Administrator DNRC Water Resources Division). Like the removal of water via a drain ditch, the removal of water from a mine does not require a water right if it is not put to beneficial use. And in 2001, the legislature heard testimony confirming that activities exempted by § 85-2-505(1)(c), MCA, were not considered beneficial uses subject to DNRC permitting. *Hearing on H.B. 573 Before the House Comm. on Nat. Res.*, 57th Leg., 29 (Mont. 2001) (discussion between Rep. Younkin, Rep. Bales, and Holly Franz). DNRC's interpretation of mine dewatering and beneficial use has stood for over 40 years. The legislature knew about DNRC's interpretation and has chosen not to amend the statute.

Finally, a 2008 district court decision involving coalbed methane-produced groundwater discharges into surface water endorsed DNRC's assertion that mine

dewatering is not a beneficial use. *Diamond Cross Props. v. State*, 2008 WL 3243320 (July 14, 2008). The court addressed DNRC's argument that its regulatory jurisdiction under the Act does not extend to every manipulation of water but only to those uses of water that fall within the legal definition of beneficial use. *Id.* at *6. The court accepted DNRC's examples, including examples from *Kenyon-Noble* and *CR Kendall*, agreeing that the examples provided did not constitute waste or beneficial use. *Id.*

The consistent application of DNRC's 1981 Dewatering Policy with administrative decisions such as *Kenyon-Noble*, *CR Kendall Corp.*, and now Tintina's application is not a coincidence. It is the only conclusion supported by the applicable statutes and reflects the well-reasoned, practical, and longstanding interpretation of the agency tasked with implementation of the Act.

The Final Order correctly determined that Tintina's removal of additional water to dewater the mine works is outside the scope of the Act and instead under regulatory jurisdiction of DEQ, consistent with past DNRC precedent interpreting and applying the Act.

2. Appellants fail to present a cognizable Constitutional claim.

Appellants contend that if DNRC's interpretation of dewatering in the context of the Act is correct, the Act violates the Constitution's provisions for water administration under Article IX, Section 3, and provisions against unreasonable

depletion and degradation of natural resources under Article IX, Section 1. Appellants' Opening Br. 49–51. The District Court noted that the Appellants' conclusory constitutional arguments did not meet the minimum legal threshold for a cognizable constitutional challenge. District Court Order, 16, 18. Appellants' argument on appeal fares no better. Appellants present no meaningful legal support upon which a valid constitutional claim could be based. Accordingly, this Court should decline to entertain the cursory, unsupported, and conclusory arguments as did the District Court. *Clark Fork Coal. v. DNRC*, ¶ 48 (holding that a challenging party has the initial burden of showing that the disputed statutory provision substantially interferes with the subject fundamental right, whether facially or as applied).

Contrary to Appellants' assertion, the Act is not designed to comprehensively regulate all things related to water and the environment. As observed by the District Court, the legislature is tasked to enact laws consistent with the Constitution and DNRC is required to implement the law enacted by the legislature. District Court Order, 10. This Court recently concluded that the legislature enacted the Act to regulate water rights and the appropriation of Montana's water for beneficial use. *Clark Fork Coal. v. DNRC*, ¶ 50 (for the "specific purpose of implementing and fulfilling its separate duty under Article IX, Section 3 (in re state ownership of Montana waters and state 'administration, control, and regulation of water rights'").

under a centralized water rights administration and records system).”) The Court explained that the legislature enacted the Montana Environmental Policy Act, the Montana Water Quality Act, and the pertinent provisions of the Metal Mine Reclamation Act, to fulfil the protection against unreasonable depletion of natural resources in Article IX, Section 1, of the Montana Constitution. *Id.*; see § 85-2-101, MCA; compare §§ 75-1-102 and 82-4-301, MCA.

Consistent with both the Act and Article IX, Section 3, DNRC reviewed that portion of water Tintina proposed to appropriate from the mine for beneficial use—for which a water right is required—and granted the permit after determining the requisite criteria designed to protect senior water rights from encroachment by junior water rights were satisfied consistent with the law. The portion of water removed from the mine and disposed of without beneficial use is not an appropriation for beneficial use for which a water right may be established under the Act or the Constitution. The legislature provided a separate statutory scheme, the DEQ permitting process, to address degradation of the environment or the Appellants’ rights in addition to available common law remedies. See § 85-2-114(9), MCA; *Shammel v. Canyon Resources Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912 (mining discharge into water). In fact, Appellants’ challenge of Tintina’s mining permit is presently before this Court on appeal. *Montana Trout Unlimited v. DEQ*, DA 22-0406.

This Court follows the principle that courts should avoid constitutional issues whenever possible. *350 Montana v. State*, 2023 MT 87, ¶ 25, 412 Mont. 273, 529 P.3d 847 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1073). The avoidance doctrine particularly relevant here, where Appellants fail to articulate a cognizable constitutional claim and there are adequate remedies provided by the legislature.

3. Vacatur of the permit is not an available remedy in this appeal.

Finally, Appellants' requested remedy to invalidate the Final Order and vacate Tintina's groundwater permit is not the proper remedy pursuant to the Montana Administrative Procedure Act. Section 2-4-704, MCA, provides that a reviewing court may reverse or modify the Final Order if the substantial rights of the aggrieved party are prejudiced.

Here, Tintina proved that the appropriation of 350 acre-feet of water is needed for beneficial use, provided a mitigation plan to offset adverse effect to other water rights, and satisfied the §§ 85-2-311, -342-43, and -360-62, MCA, criteria. AR0052. The findings and conclusions regarding any of the criteria as to the 350 acre-feet for which a permit was issued are not disputed on appeal. As such, there is no basis for determining that the substantial rights of the Appellants have been prejudiced by issuance of the permit. The Final Order's determination that Tintina satisfied the criteria for the 350 acre-feet is not in conflict with a conclusion

regarding the beneficial use of the excess dewatered water and does not prejudice the Appellants' substantial rights. *Brander v. Director, Montana Dep't. of Institutions*, 247 Mont. 302, 806 P.2d 530 (1991) (District court had no authority to reverse or modify agency decision to terminate employment unless employee's substantial rights were prejudiced for one of the statutory reasons.); § 2-4-704(2), MCA.

The present appeal concerns only the water being removed from the mine for which Tintina has no permit. Even if this Court reverses the District Court's Order affirming the Final Order on the narrow legal question of this case, it does not provide a basis for vacating the permit. Vacatur is a disruptive remedy where a reviewing court must weigh "the seriousness of the agency's errors against 'the disruptive consequences of an interim change that may itself be changed.'" *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). As a general proposition when considering whether to vacate an agency action, courts "should aim to ensure the framing of relief no broader than relief required by the precise facts." *All. For the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1158 (D. Mont. 2019). Here, there are no substantial factual concerns regarding DNRC's permitting process, just a legal question of whether the dewatering of a mine is a beneficial use.

If the Court concludes that the portion of water withdrawn from the mine for dewatering purposes constitutes an appropriation of water for which a water right permit is required, it is only authorized to reverse or modify the Final Order in part to the extent that the Final Order concluded otherwise. Section 2-4-704, MCA. In that case, Tintina could apply for a second permit for water removed from the mine in excess of 350 acre-feet or devise a way to mine without removing more than 350 acre-feet of water annually to comply with the terms of its existing permit. Neither scenario would justify vacating the permit.

CONCLUSION

DNRC's Final Order and reasons for granting partial summary judgment to Tintina correctly concluded that water removed from Tintina's mine and disposed of without beneficial use is not subject to the permitting requirements of the Act. This conclusion is consistent with the intent of the Act; supported by the plain language of the law; and consistent with DNRC's longstanding precedent. DNRC respectfully requests this Court affirm the District Court's Order affirming DNRC's Final Order.

DATED this 23rd day of October, 2023.

/s/ Brian C. Bramblett
BRIAN C. BRAMBLETT
Montana Department of Natural
Resources and Conservation

/s/ Molly Kelly
MOLLY KELLY

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S ANSWER BRIEF* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is 8,613 words, excluding this Certificate of Compliance and the Table of Contents and Table of Authorities.

DATED this 23rd day of October, 2023.

/s/ Molly Kelly
MOLLY KELLY
Montana Department of Natural
Resources and Conservation

CERTIFICATE OF SERVICE

I, Molly Kelly, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-23-2023:

Benjamin James Scrimshaw (Attorney)

313 East Main Street

Bozeman MT 59715

Representing: American Rivers, Earthworks, Montana Environmental Information Center, Montana Trout Unlimited, Trout Unlimited

Service Method: eService

Jenny Kay Harbine (Attorney)

313 E Main St

Bozeman MT 59715

Representing: American Rivers, Earthworks, Montana Environmental Information Center, Montana Trout Unlimited, Trout Unlimited

Service Method: eService

Sean M. Helle (Attorney)

313 East Main St.

Bozeman MT 59715

Representing: American Rivers, Earthworks, Montana Environmental Information Center, Montana Trout Unlimited, Trout Unlimited

Service Method: eService

Brian C. Bramblett (Govt Attorney)

PO Box 201601

helena MT 59620-1601

Representing: Natural Resources and Conservation, Department of

Service Method: eService

Patrick Arthur Byorth (Attorney)

321 E. Main Street, Suite 411

Bozeman MT 59715

Representing: Montana Trout Unlimited, Trout Unlimited

Service Method: eService

Megan Casey (Attorney)

321 E. Main St. No. 411

Bozeman MT 59715

Representing: Montana Trout Unlimited, Trout Unlimited
Service Method: eService

Hallee C. Frandsen (Attorney)
PO Box 1697
801 N. Last Chance Gulch, Ste. 101
Helena MT 59624
Representing: Tintina Montana, Inc.
Service Method: eService

William John Tietz (Attorney)
800 N. Last Chance Gulch
Helena MT 59601
Representing: Tintina Montana, Inc.
Service Method: eService

Ryan P. McLane (Attorney)
PO Box 1155
Helena MT 59624
Representing: Association of Gallatin Agricultural Irrigators, Montana Chamber of Commerce,
Montana Farm Bureau Federation, Montana League of Cities and Towns, Montana Stockgrowers
Association, Inc., Montana Water Resources Association
Service Method: eService

Electronically signed by Jean Saye on behalf of Molly Kelly
Dated: 10-23-2023