IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 19-0484

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

Petitioners/Appellees,

v.

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

Respondents/Appellants.

On Appeal from the Montana First Judicial District Court, Lewis and Clark County

Honorable Kathy Seeley Presiding

Cause No. CDV-2018-150

APPELLANT MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S OPENING BRIEF

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STATEMENT OF THE ISSUE

Was the Montana Department of Natural Resources and Conservation (DNRC) correct when it concluded that regulations regarding non-degradation of sources classified as "outstanding resource waters" do not constitute "existing legal demands" for purposes of analyzing whether water is reasonably considered legally available pursuant to §85-2-311(1)(a)(ii), MCA?

STATEMENT OF THE CASE

On April 28, 2014, RC Resources, Inc. (hereinafter "RC Resources") submitted its Application for Beneficial Water Use Permit No. 76N-30068837 ("Application") to appropriate groundwater for mining purposes pursuant to the permit provisions of the Montana Water Use Act (MWUA). §85-2-301, *et seq*., MCA. DNRC issued a *Preliminary Decision to Grant Permit* ("*PD to Grant*") the Application on June 22, 2016.

The Clark Fork Coalition, Earthworks, Rock Creek Alliance, and Montana Environmental Information Center ("Appellees") objected to the Application which triggered a contested case proceeding pursuant to the Montana Administrative Procedure Act (MAPA). On January 29, 2018, the hearing examiner presiding over the matter issued a *Final Order Granting Motion to Dismiss and Granting Application for Beneficial Water Use Permit No. 76N-*

30068837 With Conditions ("*Final Order*"), in which he dismissed Appellees' objections and granted the Application consistent with the *PD to Grant*.

Appellees filed a *Petition for Judicial Review of Final Agency Action* ("*PJR"*) with the First Judicial District Court challenging the *Final Order*. On April 9, 2019, the district court issued its *Order on Petition for Judicial Review* ("*Order on PJR*") in which it reversed the *Final Order* and remanded the Application to DNRC for further processing.

DNRC appeals from the *Order on PJR*.

STATEMENT OF THE FACTS

RC Resources' Application seeks authorization to appropriate 857 acre-feet (ac/ft) of groundwater annually for beneficial use at its proposed Rock Creek Mine. Located in the Cabinet Mountains Wilderness, the Rock Creek Mine is the subject of much scrutiny, controversy, and litigation. See, e.g., *CFC v. DEQ*, 2012 MT 240, 366 Mont. 427, 288 P.3d 183; *CFC v. DEQ*, 2008 MT 407, 347 Mont. 197, 197 P.3d 482; *Rock Creek Alliance v US Forest Service*, 390 F. Supp.2d 993 (D. Mont. 2005).

DNRC deemed the Application correct and complete on March 14, 2016. AR_36:0543. [1] Based upon its expertise in water rights and hydrology, DNRC's

[1] References to the Administrative Record follow the following format: AR_Tab #:Bates#

Kalispell Regional Office analyzed the evidence against the requisite permit criteria and issued its *PD to Grant* the Application on June 22, 2016. The *PD to Grant* determined that RC Resources proved the requisite §85-2-311(1), MCA, criteria by a preponderance of the evidence. AR_3:0029-0064.

The *PD to Grant* evaluated whether water was legally available in both the source aquifer and impacted surface water sources by conducting a comparative analysis of the amount of water physically available in those sources to the existing legal demands on those sources. The analysis of the amount of water physically available in the impacted surface water sources was conducted by calculating the median of the mean flow for each month. AR_3:0040-0044 (Tables 1-5), 0546. The amount of depletion to affected surface water sources was calculated using RC Resources' modeling that simulated the general location and magnitude of depletions caused by groundwater withdrawal. AR_3:0044-0048 (Table 6), 0547-0549.

Physical water availability, calculated depletions, and existing legal demands on the affected surface water sources were compared to determine whether water in the amount of the depletion was reasonably considered legally available. §85-2-311(1)(a)(ii), MCA. Consistent with DNRC's longstanding interpretation and application of the permit criteria and its administrative rules, the *PD to Grant* only evaluated water rights on the respective surface water sources to

calculate the existing legal demands. AR_3:0045(Table 7). Based upon that analysis the *PD to Grant* determined that water was legally available in the amount of projected depletions to the affected surface water sources. AR_3:0044-0052 and 0544-0563.

The US Department of Agriculture, Forest Service (USFS) objected to the Application alleging that RC Resources satisfy the possessory interest criterion pursuant to §85-2-311(1)(e), MCA. AR_42:0570-0575. The USFS objection was deemed valid on September 26, 2016. AR_42:0569.

The Appellees' objections asserted that DNRC was required to deny the Application because: a) RC Resources failed to satisfy the possessory interest criterion; b) water was not legally availability pursuant to §85-2-311(1)(a)(ii), MCA, because the proposed use was not substantially in accordance with regulations regarding non-degradation of Outstanding Resource Waters (ORW) classified sources impacted by depletions[2]; and, c) the water quality criterion of §85-2-311(1)(g), MCA, because the proposed use was not substantially in accordance with regulations regarding non-degradation of ORW classified sources impacted by depletions. AR_43:0578-0580, 44:0582-0584, 45:0586-0585, and

[2] RC Resources' proposed groundwater appropriation will deplete surface water sources located in the Cabinet Mountains Wilderness that are classified ORW sources. ARM 17.30.617; §75-5-103(25), MCA.

46:0590-0603.

DNRC determined that Appellees' possessory interest objection was valid. However, it notified the Appellees that the legal availability and water quality objections were deficient. AR_48:0620-0621.

In response, Appellees argued that their legal availability objection was not factually deficient, and whether regulations regarding ORW sources constituted a legal demand was more appropriately decided in a contested case proceeding. AR_47:0609-0613. Although the basis for Appellees' legal availability objection was contrary to DNRC's longstanding interpretation and application of the legal availability criteria, DNRC deemed the legal availability objection valid so it could be resolved by a hearing examiner based upon fully developed arguments of the parties. AR_43:0577, 44:0581, 45:0585, and 46:0589. Appellees' objection regarding §85-2-311(1)(g), MCA, remained invalid.

The valid objections triggered a contested case proceeding. §§85-2-308-309, MCA. Accordingly, a hearing examiner was assigned to preside over the contested case proceeding on the valid possessory interest and legal availability objections. AR_54:0639-0641. RC Resources, the USFS, and Appellees settled the objections regarding possessory interest on July 28, 2017. AR_58:0687-0697. Appellees' legal availability objection was the only remaining issue for the contested case proceeding.

On August 18, 2018, RC Resources filed a *Motion to Dismiss Objections, Or Alternatively Motion for Partial Summary Judgment*. RC Resources argued that the term "legal demands" as used in the MWUA referred to other water rights, not a general recognition of every other law or regulation applicable to a water source; that Appellees' legal availability objection was contrary to the plain language of §§85-2-311(1)(g) and -311(2), MCA; and, that Appellees' legal availability objection conflicted with DNRC's longstanding interpretation of the statutory criteria and administrative rules regarding legal availability. AR_56:0670-0685.

Appellees countered that the plain language of §85-2-311(1)(a)(ii), MCA, required DNRC to analyze legal demands other than water rights; that the regulations regarding non-degradation of ORW classified sources constitute legal demands arising from an independent state-law that DNRC was required to consider in its legal availability analysis; and, the legal availability criteria could not be satisfied if depletions to surface water violated regulations regarding non-degradation of ORW classified sources adopted by the Department of Environmental Quality (DEQ) pursuant to the Water Quality Act. AR_55:0646-0669.

On January 29, 2018, the hearing examiner issued his *Final Order*. Appendix 1. It determined that Appellees' legal availability objection could not

proceed as a matter of law because analyzing depletions for substantial compliance with regulations regarding non-degradation of ORW classified sources as legal demands directly conflicted with the plain language of §§85-2-311(1)(g) and 311(2), MCA. These provisions require proof that a proposed appropriation is consistent with water classifications only if DEQ or a water quality district files a valid objection. The *Final Order* also concluded that Appellees' argument was contrary to DNRC's longstanding interpretation and application of the legal availability criteria which was intended to effectuate the MWUA's primary goal of protecting senior water right holders from encroachment by junior water users. Accordingly, the *Final Order* dismissed Appellees' legal availability objection and granted the Application as set forth in the *PD to Grant*. AR_1:0008-0012.

Appellees filed their *PJR* challenging the *Final Order* on February 23, 2018. Following briefing and oral argument, the district court entered its *Order on PJR*. Appendix 2. The *Order on PJR* determined that the DNRC's longstanding interpretation was not entitled to deference because it was not a formal interpretation of the term legal demands and conflicted with the plain language of §85-2-311(1), MCA. *Order on PJR*, p. 10. The district court further determined that the MWUA protections for "public interests" in water use required the legal availability analysis to include more than just water rights on a source. *Id.*, pp. 8-9. It required DNRC to analyze all relevant data regarding an application that could

violate any legal restrictions on a source as legal demands. *Id.*, pp. 10-11. The district court concluded 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 of water prior to issuing a permit granting an appropriation to RC Resources." *Id.*, pp. 11-12. Therefore, it reversed the *Final Order* and remanded the Application to the DNRC. *Id.*, pp. 15-16.

The DNRC appeals from the district court's erroneous legal analysis and conclusion.

STANDARD OF REVIEW

Review of the DNRC's *Final Order* is governed by MAPA. §2-4-704, MCA. An agency decision may only be reversed or modified if:

> substantial rights of the appellant have been prejudiced because the decision is: (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§2-4-704(2), MCA.

Whether regulations regarding non-degradation of ORW classified sources constitute an "existing legal demand" for purposes of analyzing legally available pursuant to §85-2-311(1)(a)(ii), MCA, is a question of law and statutory interpretation. 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.

The objective of statutory interpretation is to implement the objective the Legislature sought to achieve. *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶20, 384 Mont. 503, 380 P.3d 771. The first step in ascertaining legislative intent is review of the meaning of the plain language of the words used. *Id*. Words and phrases used in a statute must be construed according to the context in which they are found, and according to their normal usage, unless they have acquired some peculiar or technical meaning. *Id.*; §1-2-106, MCA.

A court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." §1-2-101, MCA. Effect should be given to all provisions and particulars of a statute. *Id.* More specific provisions control over general provisions. *Oster v. Valley County,* 2006 MT 180, ¶17, 333 Mont. 76, 140 P3d 1079. Statutory construction that renders any section of a statute superfluous must be avoided. *Montana Trout Unlimited v DNRC*, 2006 MT 72, ¶23, 331 Mont. 483, 133 P.3d 224.

Extrinsic evidence such as the legislative history and prior case law may be utilized by a court to aid in statutory construction. *Grenz v DNRC*, 2011 MT 17, ¶28, 359 Mont. 154, 248 P.3d 785.

While interpretations of law are reviewed for correctness, an agency's interpretation of statute should be upheld where it is reasonable and best effectuates the statute's purpose. *Baitis v. Dep't. of Revenue*, 2004 MT 17, ¶¶22-24, 319 Mont. 292, 83 P.3d 1278. An agency's interpretation of a statute it is charged to administer based on its expertise is entitled to deference. *Montana Power Co. v. PSC*, 2001 MT 102, ¶¶23-25, 305 Mont. 360, 26 P.3d 91. This deference recognizes that agencies are both constrained and empowered by the statutes and regulations they are tasked with implementing. *MEIC, et al. v. DEQ*, 2019 MT 213, ¶¶20 and 22, 397 Mont. 161, ___ P.3d ___.

The long and continuous practical interpretation of statute by the executive agency charged with its administration constitutes an invaluable aid in determining the meaning of a doubtful statute. *Montana Power Co. v. PSC*, ¶25. "[D]eference to agencies is most appropriate when the agency interpretation has stood unchallenged for a considerable length of time, thereby creating reliance in the public and those having an interest in the interpretation of the law." *Lohmeier v. DNRC*, 2008 MT 307, ¶27, 346 Mont. 23, 192 P.3d 1137 (citation omitted). "Where the Legislature acquiesces in long-standing agency interpretation of a statute and takes no action to inform that interpretation, the court will presume that the Department has properly interpreted the law." *Baitis*, ¶24.

An agency's interpretation of its own regulation is entitled to deference if it is consistent with, not in conflict with, and reasonably necessary to effectuate the purpose of the statute. *MEIC,* ¶24. Deference should be given unless the agency interpretation is "plainly inconsistent with the spirit of the rule. The agency's interpretation of the rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording." *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶22, 353 Mont. 507, 222 P.3d 595 (citations omitted).

SUMMARY OF THE ARGUMENT

The *Final Order* correctly concluded that regulations regarding non-degradation of ORW classified sources do not constitute "existing legal demands" pursuant to the §85-2-311(1)(a)(ii), MCA, legal availability criteria.

The *Final Order*'s determination that the legal demands on a source are limited to water rights is consistent the plain language of §85-2-311(1)(a)(ii), MCA, and the MWUA's primary objective of providing a system for development of new water rights that protects senior *water rights* from unregulated encroachment. Moreover, the *Final Order*'s conclusion gives proper effect to the more specific provisions of §§85-2-311(1)(g) and -311(2), MCA, which require consideration of regulations regarding non-degradation to ORW sources only when DEQ or a water quality district file a valid objection.

The *Final Order*'s interpretation is also supported by the case law and legislative history of Senate Bill 97. This history establishes that legislature enacted the legal availability criteria to codify DNRC's longstanding analysis that determine the availability of unappropriated water for new uses by comparing physical water supply to water rights on the source. Adoption of the criteria intended to preserve DNRC's jurisdiction to permit new water rights based on its longstanding practical interpretation of the law during the pendency of the adjudication following this Court's decision in *Ciotti I*. Furthermore, the *Final Order* is consistent with the legislative history of Senate Bill 280, which reflects that the legislature intended to provide *limited* circumstances pursuant to which the DNRC and applicants would be required to address water quality/classification as part of the MWUA permit criteria.

Lastly, the *Final Order*'s interpretation is consistent with DNRC's past decisions and administrative rules, which reflect DNRC's longstanding interpretation that legal demands refers to water rights on the source in the context of the legal availability criteria. As the agency charged with the technical expertise to implement the MWUA, this longstanding interpretation represents a cornerstone of the permitting criteria relied upon by new appropriators and existing water right holders since enactment of the MWUA.

The district court erred when it interpreted the term legal demands contrary to both the plain language of §85-2-311, MCA, and the legislative intent behind codification of DNRC's legal availability analysis. The district court's failure to give effect to the limitations of the water quality/classification criteria not only ignores the express limitations of §§85-2-311(1)(g) and -311(2), MCA, it directly contravenes the legislative intent of those provisions. Finally, the district court failed to properly defer to the DNRC's longstanding interpretation of law regarding the meaning of the term legal demands. It was not the district court's prerogative to ignore the plain language and history of the MWUA to create new public policy.

For these reasons, the DNRC requests that this Court reverse the district court's *Order on PJR* and affirm the DNRC's *Final Order*.

ARGUMENT

"It is often said that, to understand the present, one must first understand the past. This often-trite statement cannot be closer to the truth than it is regarding understanding Montana's present water law." Ted Doney, *Montana Water Law Handbook*, p. 5 (State Bar of Montana 1981). A basic review of the MWUA and the law prior to its adoption is necessary to understand the legislative intent and meaning of the term "legal demands" as used in the context of §85-2-311(1)(a)(ii), MCA.

Montana water law, past and present, is premised on the prior appropriation doctrine. Prior to July 1, 1973, Montana state law recognized two methods of obtaining a water right. One could statutorily obtain a water right by posting and recording notice of the intent to appropriate (referred to as a notice or statutory appropriation). The second method simply required an appropriator put a quantity of water to beneficial use (generally referred to as a use right). *Murray v Tingley*, 20 Mont. 260, 50 P. 723, 725 (1897). Notices for statutory appropriations were recorded locally with the county clerk and recorder. Use rights were not recorded.

The divergent means of appropriation and lack of water right records rendered water right litigation and adjudication by local district courts nearly impossible. *Montana Power Co. v. Carey*, 211 Mont. 91, 97, 685 P.2d 336, 339 (1984). The Water Resource Surveys conducted in the 1950's and 1960's by the then State Engineer's Office illustrated the shortcomings created by lack of meaningful regulation.[3] The State Engineer explained that:

> Since the law places no restriction on the number and extent of the filings which may be made on an unadjudicated stream, the total amount of water claimed is frequently many times the available flow. There are numerous examples of streams becoming over appropriated. Once six appropriators each claimed all of the water in Lyman Creek near Bozeman. Before the adjudication of claims to the waters of Prickly Pear Creek, 68 parties claimed thirty times its average flow of

[3] Water Resources Surveys were authorized by the 1939 legislature and are routinely relied on by Montana courts in water right related matters. 1939 Mont. Laws Ch. 185, §5; see e.g. *Teton Coop. Res. Co.*, 2018 MT 66, 391 Mont 66, 414 P.3d 1249.

> 50 cfs. Today, the Big Hole River with an average flow of 1,131 cfs has filings totaling 173,912 cfs.

Water Resources Survey, Lewis and Clark County Montana, p. 2 (State Engineer's Office June 1957, Reprinted June 1965).[4] These issues were compounded by expensive, inaccurate, and incomplete local district court adjudications. *Id.* pp. 2-3; Albert Stone, *Montana Water Law*, pp. 5–6 and 39–41 (State Bar of Montana 1994).

In 1972, Montana adopted a new constitution which provided that all "waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided for by law" and charged the legislature with providing for the "the administration, control, and regulation of water rights" in Montana. Art. IX, §3, Mont. Const. To that end, the MWUA was adopted and became effective on July 1, 1973. §§85-2-101, *et seq.*, MCA.

The MWUA reflects a comprehensive legislative effort to remedy the problems described above. It mandated that water users file "claims" for existing pre-1973 water rights in what evolved into the present statewide general stream adjudication. The water court was created to adjudicate claims to pre-1973 water rights through statewide litigation of those claims, replacing local district court

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[4] http://dnrc.mt.gov/divisions/water/water-rights/docs/survey-books/lewis-clarkwrs_1965.pdf

adjudications. §§85-2-201 *et seq.*, MCA. The MWUA tasked the DNRC with maintaining a centralized water right database and authorizing post-1973 new appropriations and changes in appropriation. §§85-2-301 and 401 *et seq.*, MCA. Since the passage of the MWUA, an individual who wants to establish a new appropriation must prove specific statutory criteria before the DNRC authorizes a new permit. §§85-2-301, -302, -311, MCA.

All pre-1973 water right claims and post-1973 water rights and change authorization are recorded in DNRC's centralized water rights database. The centralized system of adjudicating, permitting, and recording water rights provides Montana and its citizens reliable records for regulating, administering, and protecting water rights throughout the state. Notwithstanding these changes, the MWUA reflects continued reliance on Montana's prior appropriation principles which are codified throughout its provisions. Stone, pp. 41-42; Doney, pp. 8-9.

The front-end loaded permit process authorizes DNRC regulate new appropriations. *Bitterroot River Protective Ass'n v. Siebel*, 2005 MT 60, ¶¶33-35, 326 Mont. 241, 108 P.3d 518. Although the terminology used in the §85-2-311(1)(a), MCA, criteria has evolved over time, its paramount objective has remained the same: to determine whether water in excess of the water rights on the source is physically available in the amount requested by a new appropriator consistent with fundamental protections provided to senior water rights by the

MWUA. As it has many times, this Court recently explained that the purpose of the MWUA is to:

> strictly adhere to the prior appropriation doctrine and to provide for the "administration, control, and regulation of water rights ... and confirm all existing water rights...." Section 85-2-101(2)(4), MCA. We have explained that "the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." *Mont. Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 (1984). This fundamental purpose is reflected throughout the Act and many of the subsections of the Act begin with a policy declaration stating that the protection of senior water rights and the prior appropriation doctrine is the Act's core purpose. *See*, *e.g.*, § 85-1-101(4), MCA (the Act's purpose is to "protect existing uses"); § 85-2-101(4), MCA (it is "a purpose of this chapter to recognize and confirm all existing rights"); § 85-2-101(4), MCA (the purpose of permitting is to "provide enforceable legal protection for existing rights").

Clark Fork Coalition, ¶24; see also *Lyman Creek, LLC v. Bozeman*, 2019 MT 243, ¶¶9-10; 397 Mont. 365, 450 P.3d 365; *Kelly v. Teton Prairie LLC*, 2016 MT 179, ¶¶11, 19, 384 Mont. 174, 376 P.3d 143 (recognizing primary purpose of MWUA is protection of prior appropriation doctrine); *Montana Trout Unlimited*, ¶¶5-8; *Montana Power Co.*, 211 Mont. at 98, 685 P.2d at 340.

The primary concerns the MWUA sought to address were adjudication of existing water rights, a centralized database to record water rights, and a system for development of new water rights that protects senior water rights from unregulated encroachment. DNRC's interpretation of the permit criteria must be evaluated in the context of these core principles. As explained below, DNRC's interpretation of

the term legal demands as limited to water rights in the context of the §85-2-311(1)(a)(ii), MCA, legal availability criteria best effectuates these principles and is consistent with the MWUA's codification of the prior appropriation doctrine.

I. The *Final Order*'s conclusion is supported by the plain language of §85-2-311, MCA.

The plain language of the permit criteria supports the *Final Order*'s conclusion that the term "legal demands," as used in §85-2-311(1)(a)(ii), MCA, does not require proof that a proposed use will be substantially in accordance with non-degradation regulations for ORW classified sources.

Section 85-2-311, provides:

> (1) . . . the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
>
> (a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and (ii) 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. Legal availability is determined using an analysis involving the following factors: (A) identification of physical water availability; (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
>
> (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the

> exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;
>
> . . . .
>
> (g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and
>
> (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

The plain language of these provisions is analyzed below.

A. Non-degradation regulations for ORW classified sources are not legal demands.

Analysis of plain language begins with the term "existing legal demands" as used in §85-2-311(1)(a)(ii), MCA. Although this term has acquired a specific technical meaning within the MWUA (see *Infra* pp. 32-34 and 40-43), construction of the statute using its ordinary meaning likewise supports the *Final Order*'s conclusion. *Clark Fork Coalition*, ¶20. The common meaning of the term "demand" is "something claimed as due or owed" or "to claim as one's due."[5]

[5] See https://www.merriam-webster.com/dictionary/demand; Black's Law Dictionary (11th ed. 2019)

The regulations regarding non-degradation to ORW classified sources may constitute a layer of legal restriction on activities that degrade surface water. But they are not demands. Unlike water rights on a source, the regulations cannot be demanded as a claim to a right due or owed.

This distinction is illustrated by comparing the regulations regarding non-degradation of ORW classified sources to instream flow water rights on a source. The Montana Department of Fish, Wildlife, and Parks (FWP), DEQ, the USFS, and various non-governmental organizations possess instream flow water rights on sources throughout Montana that protect minimum flows for fisheries, recreation, or water quality. E.g. §§85-2-316 and -408, MCA; Water Right 41I 30017879[6]; Water Right 41H 30008915[7]; §85-20-1401(Art. IV-A), MCA (Table 2 lists instream flow water rights held by USFS); Water Right 76G 30103778[8]. These entities are authorized to claim, to demand, that a quantity of water is owed or due at a point on a source based on the established elements of the water rights.

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[6] DEQ instream flow reservation in the Missouri River for 2,596 CFS for the protection of water quality.

[7] FWP instream flow water right on the Gallatin River for 533.5 CFS for the protection of fisheries.

[8] Clark Fork Coalition instream flow water right on the Clark Fork River for 5.98 CFS for the protection of fisheries.

For example, DEQ can demand, in priority, its right to 2,596 cubic feet per second at the Toston gauging station on the Missouri River to satisfy its water reservation for water quality protection. In response junior users must cease diverting water until the demand of DEQ's water right is satisfied. A senior water right's ability to call a quantity of water to a point on a source is one of the core water right protections under the prior appropriation doctrine and MWUA. *Kelly*, ¶11; *Hohenlohe v DNRC*, 2010 MT 203, 357 ¶25 Mont. 438, 240 P.3d 628 (concluding §85-2-408, MCA, authorizes instream flow protection for fishery resources within the prior appropriation water right system); Matter of Application for Beneficial Use Permit No. 60662-76G by Hadley, *Proposal for Decision*, pp. 6-9 (describing prior appropriator's right to call as "legally entitled to demand" a junior cease diversions to satisfy the senior water right)("*Hadley Proposal for Decision*") Appendix 3. Instream flow water rights constitute demands on a source pursuant to the term's ordinary meaning, the MWUA, and are evaluated as such by DNRC pursuant to §85-2-311(1)(a)(ii), MCA.

The same is not true for DEQ's non-degradation regulations on an OWR classified source.[9] Unlike a water right, these regulations do not provide legal authority to claim or demand a quantity of water must be delivered to a point on

[9] There are no instream flow water rights for water quality/classification protection on any of the sources impacted by RC Resources' proposed appropriation.

the source. Non-degradation is not quantitative like a water right. This is illustrated by the fact that two projects could individually deplete an ORW classified source by nine percent of the seven-day ten-year low flow without triggering the non-degradation rules even though collectively those projects would exceed the ten percent threshold for non-degradation. ARM 17.30.715(1)(a).

The district court erroneously adopted Appellees' argument that non-degradation regulations for ORW classified sources are a "quantitative state-law restriction on the depletion of affected sources" that must be evaluated as part of the legal availability criteria. *Order*, p. 11. Legal *restrictions* under the WQA do not constitute legal *demands* pursuant to the MWUA.

B. Sections 85-2-311(1)(g) and -311(2), MCA, expressly exclude consideration of whether a proposed use is substantially in accordance with non-degradation regulations for impacted ORW classified sources as legal demands.

The *Final Order*'s conclusion that Appellees' legal availability argument directly conflicted with §§85-2-311(1)(g) and -311(2), MCA, is also supported by the plain language of the permit criteria.

An applicant is required to prove that a "proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to §75-5-301(1), MCA," only if a valid objection is filed by the DEQ or a local water quality district. §§85-2-311(1)(g) and -311(2), MCA. Other provisions

likewise require DEQ or other qualified entities to invoke water quality/classification related protections under the MWUA. See §85-2-319(2), MCA (a petition for a surface water basin closure based on water quality must be filed by DEQ); §85-2-506, MCA (petitions for controlled groundwater areas to qualified entities or 1/3 of affected water right holders). These more specific provisions reflect the legislature's intent to limit the inclusion of water quality/classification considerations in the MWUA to those cases where DEQ or another qualified entity with regulatory authority and expertise in water quality presents an objection. *Infra* pp. 37-40.

The district court's conclusion that the DNRC must consider compliance with the ORW classification as a legal demand violates this plain statutory language and ignores the conflict it presents with the more specific provisions of §§85-2-311(1)(g) and -311(2), MCA. This error is compounded by the fact that the non-degradation regulations at issue also apply to sources classified as "high quality waters", which constitute most surface water sources in Montana. See §75-5-103(13), MCA; ARM 17.30.606-629, 650-658, 702(8) and 705. The district court's interpretation requires DNRC and applicants to analyze non-degradation regulations on most of Montana's surface water sources. This obtuse construction of the general term legal demands swallows §85-2-311(1)(g) and -311(2), MCA, whole, impermissibly rendering the more specific provisions superfluous

throughout much of Montana. *Montana Trout Unlimited,* ¶23 and *Oster*, ¶17. It allows water quality/classification considerations to drive the permit criteria while at the same time removing DEQ from the driver's seat, contrary to clear legislative intent. *Infra* pp. 37-40.

Neither DEQ nor a water quality district filed a valid objection in this case. Accordingly, RC Resources was not required to prove, and the DNRC was not authorized to consider, whether the proposed appropriation will be substantially in accordance with regulations regarding non-degradation to the ORW classified sources. The *Final Order* is consistent with the plain language of the permit criteria and properly construes more general provisions of §85-2-311(1)(a)(ii), MCA, in a manner that gives effect to the more specific provisions of §§85-2-311(1)(g) and -311(2), MCA. *Montana Trout Unlimited*, ¶23; §1-2-102, MCA.

C. The *Final Order*'s conclusion gives proper effect to the different terms used in §§85-2-311(1)(a)(ii) and -311(1)(b), MCA.

The district court's determination that legal demands must include more than "water rights of a prior appropriator" because the legislature used different terms for legal availability and adverse effect, places disproportional weight on distinction between the terms used in §§85-2-311(1)(a)(ii) and -311(1)(b), MCA. *Order on PJR*, p. 8. On this point, the *Final Order* correctly concluded that even if the distinction could be construed as requiring evaluation of more than water rights as legal demands, it cannot be interpreted to require proof that the use will be in

substantial accordance with regulation of ORW classified sources because §85-2-311(2), MCA, expressly requires a valid objection by one of the qualified entities. AR_1:0010.

The *Final Order*'s analysis reasonably explains how DNRC's interpretation and application of the permit criteria reflects the difference, albeit slight, between the terminology used in §85-2-311(1)(a)(ii) and -311(1)(b), MCA. Legal demands pursuant to §85-2-311(1)(a)(ii), MCA, involves analysis of water rights collectively to determine whether the water balance between flows and water rights on the source can support the proposed use without constant "call" or "demand" from senior water users. AR_0010-0011; *Hadley Proposal for Decision,* pp. 6-9.

However, because legal availability compares water rights on the source to the median of the mean to determine, the adverse effect analysis may require a more individualized assessment of specific senior appropriators during times of low flow to ensure the applicant's plan for the exercise and control of the permit is adequate to protect the rights of prior appropriators. §85-2-311(1)(b), MCA. The more specific reference to water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation used in §85-2-311(1)(b), MCA, reflects this individualized analysis of potential impacts of the proposed use on specific water rights based upon factors not captured by the legal availability analysis. AR_0010-0011.

The *Final Order* gives effect to all the words used by the legislature, including those provisions requiring proof that the use will be in substantial accordance source classification only when a qualified entity files a valid objection. *Oster*, ¶17.

II. The legislative history regarding the legal availability and water quality criteria supports the Final Order and DNRC's longstanding interpretation.

The case law and legislative histories behind the legal availability criteria and water quality/classification criteria squarely support the *Final Order*'s interpretation of the permit criteria. Senate Bill 97 and the case law leading to its adoption establish that the legislature intended the legal availability criteria to compare physical water supply to water rights on a source consistent with DNRC's longstanding used to determine if "unappropriated waters" were available for a proposed use. The history of Senate Bill 280 reflects that the legislature intended to provide *limited* circumstances pursuant to which the DNRC and applicants would be required to address water quality/classification as part of the MWUA permit criteria. The *Final Order*'s conclusion best serves the legislature's objectives regarding the disputed provisions.

A. Case law and the legislative history for Senate Bill 97 establish that the DNRC's interpretation of legal demands is correct.

The terms "legal availability" and "legal demands" were not used in the MWUA between 1973 and 1997. Instead, an applicant was required to prove that

unappropriated waters were available in the source prior to obtaining a new water use permit. 1973 Mont. Laws Ch. 452, §21. While unappropriated water was not statutorily defined, it meant that the amount of water desired by the applicant was physically available and not subject to a prior appropriator's water right. *Montana Power Co.,* at 97-98, at 340; *Hadley Proposal for Decision*, pp. 6-9. Determination that unappropriated water was available for new uses was one of the driving forces behind adoption of the MWUA and its effort to strike a balance between protecting existing water rights and maximizing beneficial use of Montana's water resources through new appropriations.

1. Case law regarding unappropriated waters and the conflict between permitting and the adjudication.

In *Montana Power Co. v Carey*, this Court evaluated the DNRC's authority to issue and limit new permits based on the MWUA criteria. The amount of water physically available in the source was inadequate to sustain the proposed appropriation along with existing senior water rights throughout the entirety of the proposed period of diversion. *Montana Power Co.*, 211 Mont. at 93-94, 685 P.2d at 338. However, unappropriated water - water in excess of the water right demands on the source - was considered reasonably available during limited times of year. *Id.*, at 94, 98-99, at 338, 340. DNRC issued the permit subject to specific conditions that water could only be used during those periods of time when the evidence established unappropriated water was available in the source. *Id.* On

judicial review, the district court reversed the DNRC and ordered DNRC to issue the permit without conditions. *Id.*, at 93, at 337-38.

On appeal, this Court explained:

> The Water Use Act emphasizes the underlying policy of state participation in water appropriation "to recognize and confirm all existing rights to the use of any waters ...." Section 85-2-101(4), MCA. This unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights. Section 85-2-312, MCA mandates the state's authority to afford such protection.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340. While the Court recognized DNRC's authority to impose conditions, any conditions must be "necessary to protect the rights of prior appropriators or . . . related to time limits to perfect the water right under the permit" consistent with the spirit and purpose of the MWUA. *Id*., at 96, at 339.

Montana Power Co. does not support the district court's contention that the MWUA requires protection of public interests such as water quality/classifications as legal demands. *Order*, p. 9. It simply confirms DNRC's authority to condition new appropriations in a manner consistent with the balance between protection of existing appropriations on a source and authorizing new appropriations of water. That is precisely how the *Final Order* interpreted the legal availability criteria in the present case.

The next challenge to DNRC's authority to condition beneficial water use permits for "unappropriated waters" was addressed by *United States, et al. v DNRC, et al.*, Montana First Judicial District Court, DV No. 50612, *Opinion and Order* (June 15, 1987) (hereinafter "*Don Brown*"). Appendix 4. The DNRC granted a new water use permit in spite of Montana Power Company and the United States Bureau of Reclamation's objections that no unappropriated water was available in the source and that their senior water rights would be adversely affected by the new permit. The *Don Brown* court concluded there is:

> only one way to determine if an unappropriated water right exists in a source of supply: decide how much water is available and how much of it has been appropriated. This obviously requires quantification of existing rights. There is, likewise, only one way to determine whether the water rights of prior appropriators will be adversely affected by additional appropriation. You must begin by determining what the water rights of the prior appropriators are. In either case, the need to determine existing water rights is inescapable and authority to make such a determination is, and has been since 1973, exclusively in the district or water courts.

Opinion and Order, pp. 8-9. Therefore, DNRC lacked the authority to issue the subject permit because, without a quantification of existing water rights by the water court, it was not possible to determine that unappropriated water existed in the source of supply. *Opinion and Order*, pp. 8-13.

Following the *Don Brown* decision, DNRC and the objectors agreed to a path forward that allowed continued permitting on the upper Missouri River

without further litigation. As a practical matter, *Don Brown* did not alter DNRC's interpretation of its authority to determine unappropriated water was available for new permits based upon analysis of physical water supply and the demands of existing water rights on the source. That all changed with this Court's opinion in *Matter of Beneficial Water Use Permit Nos. 66459-76L, Ciotti: 64988-G76L, Starner*, 278 Mont. 50, 923 P.2d 1073 (1996)(*Ciotti I*).

In *Ciotti I*, the Confederated Salish and Kootenai Tribe ("CSKT") challenged DNRC's jurisdiction to issue new permits on the Flathead Reservation before the CSKT's reserved rights were quantified. This Court concluded that the permit criteria required an applicant to prove that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved before a permit could be issued. *Ciotti I*, 278 Mont. at 60-61, 923 P.2d at 1079-80; See §85-2-311(1)(a), (b), and (e), MCA (1995). The *Ciotti I* Court held that DNRC could not issue new permits on the Flathead Reservation because the requisite determination that unappropriated water existed could not be made until the CSKT's water rights were quantified through compact or the adjudication. *Ciotti I*, at 60, at 1080. Justice Nelson's special concurrence contended that the moratorium on permitting new uses on the Flathead Reservation should come as no surprise to DNRC

because *Don Brown* already precluded issuance of new permits until the adjudication quantified existing water rights so that a determination regarding unappropriated could be made. *Ciotti I*, at 62-64, at 1080-82.

The *Ciotti I* opinion and Justice Nelson's interpretation of *Don Brown* effectively resulted in a statewide moratorium on new beneficial water use permits.

2. The amendments to the MWUA and codification of the term legal availability support the Final Order's conclusion of law

In 1997, Montana's 55th Legislature passed Senate Bill 97 to negate the implications of *Ciotti I* and *Don Brown*, and to confirm DNRC's jurisdiction to authorize permits during the pendency of the adjudication. 1997 Mont. Law Ch. 497 (Whereas Clauses and Statement of Intent). SB97 amended eighteen sections of the MWUA related to the adjudication, permitting, and changes to water rights in Montana.

The amendments substituted the "unappropriated waters" terminology with "legal availability" formally introducing the term "legal demands" into the criteria for the first time. 1997 Mont. Law Ch. 497, Sec. 7. The January 17, 1997, Senate Committee on Natural Resources, hearing minutes summarize Don McIntyre's (then DNRC's chief legal counsel) explanation of the amendments:

> Over the years, the department has tried to develop tests that would allow a water development to go on-and to use this adverse affect test and to use the concept of unappropriated water along with it. We have

> now developed guidelines under the law as it's now written that basically incorporate exactly how we're asking the statute to change.
>
> . . .
>
> Physical availability goes back to the historical notion that the water there, or flowing by. Legal availability does not have a definition, but he said he can provide the Committee with the document or guideline used by the Dept.'s field office which is looked at to assess unappropriated water and adverse affect. He said in implementing this language it will then say that an applicant can prove this criteria before the adjudication is complete. . . . He said they were trying to come up with a comprehensive piece of legislation that allows development, and protects existing water rights and takes us out of the state law question that was before the Supreme Court and will leave it purely jurisdictional.

Hearing Minutes SB97, S. Committee Nat. Resources, 55th Leg. Sess., pp. 7-9 (January 17, 1997) Appendix 5.

McIntyre also submitted a written definition of legal availability to the committee, which provided:

> LEGAL AVAILABILITY -- WATER IS LEGALLY AVAILABLE IF PHYSICAL WATER SUPPLY AT THE PROPOOSED [sic] POINT OF DIVERSION EXCEEDS ACTUAL LEGAL USE. (OFTEN ACTUAL USE OF WATER IS LESS THAN CLAIMED OR DECREED LEGAL USES - NOT EVERYONE USES THE MAXIMUM AMOUNT OF THEIR APPROPRIATION ON A DAILY, WEEKLY, MONTHLY OR YEARLY BASIS)

Id. Ex. 5. In response to concerns that the meaning of term legal availability was vague, he explained: "Physical availability [analyzes] actual water existing in the stream and is flowing by. He said legal availability makes you go farther to see

whether there is any left to claim by checking all available records. If there's more water physically available as a result of your measurement than there are claims, then water is legally available." *Hearing Minutes SB97,* p. 12.

The definition of legal availability provided to the committee supports the *Final Order*'s conclusion that legal demands refers to water rights. While the terminology was new to the MWUA, the amendments codified the analysis already used by the DNRC to determine whether unappropriated water was available in a source based upon comparison of physical water supply to water rights on a source. The terminology was substituted to negate the conflict with *Ciotti I* and *Don Brown*, not to change or expand DNRC's analysis beyond water rights on a source. *Hearing Minutes SB97*, pp. 7-10; *Montana Power Co.*, at 94, 98-99, at 338, 340; *Infra*. pp. 42-43; *CSKT v. Clinch*, 1999 MT 342, ¶¶21, 25-28, 297 Mont. 448, 992 P.2d 244 (recognition that the legal availability analysis provides the same protection to water rights that existed prior to adoption of SB97). When the legislature codified DNRC's terminology, it likewise adopted DNRC's interpretation of that terminology. See *Grenz,* ¶41 (when the Legislature amends a statute courts presume that it acts with knowledge of existing administrative rules interpreting the statute and adopts the agency's interpretation)

The other amendments to §85-2-311(1) reflect this intent by insuring that DNRC's authority to evaluate legal demands based on actual use of water rights

does not "alter the terms and conditions of an existing water right. . ." in conflict with the adjudication. 1997 Mont. Law Ch. 497, Sec. 7. The amendments to §85-2-101, MCA, also establish the public policy behind SB97 sought to confirm DNRC's jurisdiction to evaluate *water rights* on a source for purpose of evaluating water availability for new permits during the pendency of the adjudication:

> (5) The legislature recognizes the unique character and nature of water resources of the state. Because water is a resource that is subject to use and reuse, such as through return flows, and *because at most times all water rights on a source will not be exercised to their full extent simultaneously*, it is recognized that an adjudication is not a water availability study. Consequently, *the legislature has provided an administrative forum for the factual investigation into whether water is available for new uses* and changes both before and after the completion of an adjudication in the source of supply. To allow for orderly permitting in the absence of a complete adjudication in the source of supply, permits issued under this chapter are provisional. *A provisional permit is subject to reduction, modification, or revocation by the department as provided in 85–2–313 upon completion of the general adjudication.*
> (6) It is the intent of the legislature that the state, to fulfill its constitutional duties and to exercise its historic powers and responsibilities to its citizens living on and off reservations, comprehensively *adjudicate existing water rights* and regulate water use within the state. It is further the legislature's intent that the state, to the fullest extent possible, retain and exercise its authority to *regulate water use and provide forums for the protection of water rights*, including federal non-Indian and Indian water rights, and resolve issues concerning its *authority over water rights and permits*, both prior to and after the final adjudication of *water rights*. In furtherance of this legislative intent:
> (a) all permits issued as provisional, and *it is the intent of the legislature that this status provide enforceable legal protection for existing rights*. . .

1997 Mont. Law Ch. 497, Sec. 1 (emphasis added). The amendments to §85-2-313, MCA, likewise frame legal availability in the context of water rights, providing that "[b]ecause a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b) [sic], in a show cause hearing under this section*, legal availability must be determined on a consideration of the final decree in the affected basin or subbasin*." See 1997 Mont. Law Ch. 497, Sec. 8 (emphasis added). Of course, a final decree issued by the water court will only adjudicate water rights on a source, not all legal restrictions and regulations.

The above amendments and policy statements in SB97 are replete with references to DNRC's permitting authority in the context of the protection of senior water rights and the adjudication. Indeed, SB97 was enacted in response to case law exclusively concerned with the conflict between permitting new uses based on a determination unappropriated water existed before the senior water rights on a source were quantified by the adjudication. The absence of any reference to water quality/classification or public interest considerations in the extensive legislature history related to enactment of the legal availability criteria contradicts the district court's conclusion that the history of the MWUA requires legal restrictions, regulations, and public interests on a source to be considered legal demands. *Order on PJR*, pp. 9-10.

Rarely does the legislative history of a statute provide such clarity regarding the legislature's intent concerning the meaning of a disputed term. The statement of intent, hearing minutes, definition, and amendments adopted concurrently with the legal availability criteria provide overwhelming support for DNRC's interpretation that legal demands are limited to water rights. The legislature codified DNRC's practice of analyzing whether sufficient unappropriated water existed for a new use based upon senior water rights on a source and to negate jurisdictional conflict between the term "unappropriated waters" and the adjudication of water rights identified by *Ciotti I* and *Don Brown*. The *Final Order* reflects that intent.

B. The legislative history for Senate Bill 280 establishes that the Final Order's interpretation of §§85-2-311(1)(g) and -311(2), MCA, is correct.

The *Final Order*'s interpretation that §§85-2-311(1)(g) and -311(2), MCA, preclude considering whether a proposed permit is consistent with regulations regarding non-degradation to an ORW classified source as legal demands is supported by the legislative history of the water quality/classification provisions of the permit criteria.

The water quality/classification criteria are the product Senate Bill 280, which was adopted by Montana's 53rd Legislature in 1993 in response to recommendations made by the Water Policy Committee and the *1992 Water Plan*.

1993 Mont. Laws. Ch. 460; *Report of the Water Policy Committee to the 53rd Legislature of the State of Montana* (December 1992)(Appendix 8: *Montana Water Plan*, Water Resources Division, Montana Department of Natural Resources and Conservation (Final Nov. 2, 1992)("*1992 Water Plan"*)[10]. The *1992 Water Plan* recommended incorporation of the water quality/classification criteria into the MWUA permit criteria subject to the limitation that an applicant was only required to address those criteria if a valid objection was filed. *1992 Water Plan*, pp. 3, 11. Its noteworthy that the "Options Considered But Not Recommended" section of the *1992 Water Plan* recommended *against* requiring proof that "[t]he state's nondegradation policy, articulated in Section 75-5-303, MCA, will not be violated" as part of the permit criteria, and recommended *against* requiring DNRC to consider the "public interest" in all applications. *Id.*

The legislative history for SB280 reflects the legislature's intent to limit the impact of incorporating water quality/classification considerations into the MWUA. Importantly, SB280 was amended to provide that consideration of whether a proposed use was substantially in accordance with water classifications would only be required if DEQ or a water quality district filed a valid objection. *Hearing Minutes SB280,* 53rd Leg. Sess., House Nat. Resources, Proposed

[10]Available online at: https://leg.mt.gov/content/publications/environmental/1992waterpolicy.pdf

Amendments (March 24, 1993); *House Standing Committee Report SB 280 Amendments*, 53rd Leg. Sess., House Standing Committee (March 29, 1993). Appendix 6.

The legislative history of SB280 and *1992 Water Plan* demonstrate that the legislature considered but elected not to adopt public policy to require consideration of public interest and non-degradation considerations in all permit applications. As previously explained, water quality and public interest were not even referenced in the extensive amendments and legislative history of SB97 pursuant to which the terms legal availability and legal demands were adopted.

DNRC's interpretation does not ignore the MWUA's policy of providing protection and conservation of water resources for public recreation and wildlife conservation. *Order on PJR*, p. 10; §85-1-101(5), MCA. The MWUA provides quantitative protection for these interests through water reservations, leases, and water compacts through the acquisition of water rights. §§85-2-316, and -408, MCA; Title 85, Ch. 20, MCA; *Hohenlohe*, ¶25. These water rights are accorded protection by DNRC and considered legal demands in the §85-2-311(1)(a)(ii), MCA, legal availability analysis. *Supra* pp. 20-21.

Likewise, the DNRC's interpretation does not ignore public interests. The MWUA requires consideration of public interest and public welfare factors for appropriations that exceed a certain threshold or export water out of state for

beneficial use. §§85-2-311(3)-(4), 316(4), and -402(4) and (6), MCA. RC Resources' Application did not trigger these requirements.

The district court's reliance upon *Montana Power Co.* for the proposition that legal demands must include regulations regarding non-degradation to ORW classified sources pursuant to the MWUA's "public interest" protections is misplaced and eviscerates the legislature's express limitations. Compare *Order on PJR*, p. 9 to *Montana Power Co*., at 96-98, at 339-340. Moreover, its determination that public interests must be considered as legal demands directly contradicts the more specific provisions of the MWUA that include public interest criteria for certain appropriations. The district court erred when it treated Appellees' novel argument as the law, inserting a requirement that DNRC consider public interests where none existed and omitting the express statutory requirements of §85-2-311(1)(g) and -311(2), MCA.

The inclusion of water quality/classification considerations as part of the MWUA permitting criteria pursuant to §85-2-311(1)(g), MCA, was expressly predicated upon DEQ or water quality district filing a valid objection before DNRC or an applicant are required to evaluate whether the use is substantially in accordance with a sources water quality classification. The *Final Order*'s conclusion gives effect to these provisions consistent with the legislature's intent.

III. The Final Order is consistent with DNRC's longstanding interpretation of the term legal availability and administrative rules which are entitled to deference

The *Final Order* is consistent with the rules promulgated by the DNRC and the DNRC longstanding interpretation of the permit criteria. The legislature has known of DNRC's interpretation of the legal availability criteria since 1997 when DNRC first proposed codification of its own practice and terminology to ensure the permitting provisions of the MWUA could be implemented during the pendency of the adjudication following *Ciotti I*.

Pursuant to this analysis, DNRC determines whether water can reasonably be considered legally available in the amount requested by an applicant by conducting a comparative analysis of the amount of water physically available in a source to the existing legal demands (senior water rights) on the source. DNRC used the median of the mean monthly flow as a reasonable predictor of the amount of water that will be physically available in a source. AR_3:0041-0044 and ARM 36.12.1702.

Existing legal demands are calculated by adding up the senior water rights on an impacted source. AR_1:0011, 3:0044–0052; ARM 36.12.1704. Like Montana case law and the plain language of the MWUA, DNRC's rules and interpretation are steeped in prior appropriation doctrine terminology and principles supporting this interpretation. For example, ARM 36.12.1704 provides

"*These existing legal demands will be senior* to a new application and the *senior rights* must not be adversely affected." Use of the term "senior" - a prior appropriation term of art used to describe priority of water rights - indicates existing legal demands are limited to water rights.

DNRC's administrative decisions likewise explain that the water is reasonably considered legally available when water in excess of the legal demand of senior water rights on a source is available in the amount the applicant seeks to appropriate. See Matter of Application for Beneficial Water Use Permit Number 76LJ-11583100 by Weidling, *Proposal for Decision*, pp. 12-13 (2002)(adopted by DNRC Final Order (2003)) (explaining that analysis of existing legal demands is determined based upon the department records and "the actual needs of valid water rights" on the source of supply)Appendix 7; Matter of the Application for Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC, *Proposal for Decision*, p.11 (2006)(explaining comparison of physical water supply to existing water rights is "standard analysis accepted by DNRC and is a reasonable assessment of legal water availability")(adopted by DNRC Final Order 2006).

Even before the terms legally available and legal demands were codified, DNRC used those terms to describe the analysis of water rights on a source for purposes of determining unappropriated water availability for new uses. *Hadley*

Proposal for Decision, pp. 6-9(describing unappropriated water as that amount of water that is not diverted, impounded, withdrawn or reserved by another's appropriation and recognizing that senior appropriators are "legally entitled to demand" that a junior seek diversions until its senior rights is satisfied.); Matter of Application for Beneficial Water Use Permit 68695-s76G, By Carlson, *Proposal for Decision*, pp. 5-8(use of the term legally available to describe its analysis of unappropriated water)(Adopted by Final Order October 18, 1989) Attachment 8.

The district court declined to defer to DNRC's longstanding interpretation of the legal availability criteria claiming DNRC "presented no formal interpretation of the term 'legal demands.'" *Order on PJR,* p. 10. Notwithstanding the fact that DNRC's rules and prior decisions constitute formal interpretations, deference to DNRC does not turn on the formality of DNRC's interpretation. Rather, deference is required in this case because DNRC's interpretation, as the agency charged with administering the MWUA pursuant to its expertise, "stood unchallenged for a considerable length of time, thereby creating reliance in the public and those having an interest in the interpretation of the law." *Lohmeier*, ¶¶27-32(deferring to DNRC's interpretation as reflected in its longstanding unchallenged "modus operandi" in spite of a formal rule that was in place for a short period of time).

Moreover, deference is owed because the *Final Order* and DNRC's longstanding interpretation of §85-2-311(1)(a)(ii), MCA, is consistent with the

plain language of the permit criteria, is consistent with the spirit and primary purpose of the MWUA, and is supported by the legislative history of the legal availability criterion. The terms legal availability and legal demands codify DNRC's longstanding evaluation of senior water rights to determine whether water is available for new permits. This interpretation best effectuates the purpose the MWUA permit criteria, is entitled to substantial deference, and should be upheld as correct.

CONCLUSION

The *Final Order* correctly concluded that regulations regarding non-degradation of ORW classified sources do not constitute "existing legal demands" pursuant to the legal availability criteria. This interpretation is required by the plain language of §85-2-311(1)(a)(ii), MCA, consistent with the legislature's intent, reflects DNRC's longstanding interpretation and application of the law, and best effectuates the MWUA's primary goal of protecting senior water users from encroachment by new appropriations.

The district court erred when it interpreted the law in a manner contrary to that enacted by the legislature.

The DNRC respectfully requests this Court to reverse the district court's *Order on PJR* and affirm the DNRC's *Final Order*.

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that *APPELLANT MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION'S OPENING 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 2016, is **9,866 words**, excluding this Certificate of Compliance and the Table of Contents and Table of Authorities.

DATED this 4th day of December 2019.

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Helena MT 59624-1155
Representing: RC Resources, Inc.
Service Method: Conventional

Electronically signed by Aliselina Strong on behalf of Brian C. Bramblett
Dated: 12-04-2019