

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Cause No. DA 19-0484

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

*Petitioners and Appellees,*

v.

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

*Respondents and Appellants.*

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**AMICUS CURIAE BRIEF OF MONTANA TROUT UNLIMITED**

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ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT  
COURT LEWIS AND CLARK COUNTY, STATE OF MONTANA

CAUSE NO. CDV-2018-150

HON. KATHY SEELEY, DISTRICT COURT JUDGE PRESIDING

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Comes now, Montana Trout Unlimited (“Trout Unlimited”) respectfully submitting as *amicus curiae* this brief in support of Appellees Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (together called “the Coalition”), in their challenge to a new groundwater permit issued for the Rock Creek Mine to be developed in the Cabinet Mountains Wilderness by Appellant RC Resources. Based on our long history of protecting streamflows for native and wild trout, and frequent participation as an applicant or collaborator in DNRC administrative water right processes, Trout Unlimited urges this Court to uphold the District Court’s decision, because Outstanding Resource Waters are protected against depletions under Montana law and warrant consideration as a legal demand on Cabinet Wilderness streams.

Trout Unlimited comprises approximately 155,000 members nationwide, and Montana Trout Unlimited has a membership of nearly 4,000 that associate with thirteen Chapters across the state. Trout Unlimited members enjoy angling on rivers and streams throughout Montana, volunteer hundreds of hours each year to restore streams, educate youth and the broader community about the benefits of healthy water systems, and actively work to protect rivers and streamflows.

Over the past twenty years, Trout Unlimited has also invested significant resources to reconnect tributary streams to their mainstems, and enhance baseflows that are critical to native Bull Trout and Westslope Cutthroat trout for spawning,

rearing, resident fish, and as cold water refugia in times of drought. As part of this effort, Trout Unlimited has successfully shepherded dozens of complex water right transactions through DNRC's permitting and review processes and is actively engaged in related legislative and administrative rulemaking of Montana water law. Trout Unlimited has a strong interest in protecting its leased instream flow rights, and those instream rights and reservations held by the Montana Fish, Wildlife, and Parks for the benefit of the public and Montana's fisheries. Accordingly, Trout Unlimited has a vested interest in ensuring that applications for new water uses go through the proper channels of review including thorough analysis of existing legal demands.

### STATEMENT OF THE FACTS

Trout Unlimited adopts the facts set forth in the brief of the appellees, but wishes to provide context regarding the fisheries at stake. The tributaries of the Bull River at issue in this case provide pristine and vitally important habitat for Bull Trout, Westslope Cutthroat Trout, and other native and non-native fishes. Appellant RC Resources' application for new groundwater pumping shows that the proposed groundwater permit would allow the company to deplete baseflows of these creeks in the Cabinet Mountains Wilderness by up to one hundred percent, in contravention of the creeks' Outstanding Resource Water



quantified flow protections, codified in state law and regulations. Data modelling indicates unlawful depletions could occur in the East Fork Bull River, South Basin Creek, Chicago Creek, Copper Gulch, Moran Basin Creek, an unnamed tributary of the East Fork, and the St. Paul Lake drainage. Depletions of streamflow have a direct impact on habitat quality which directly diminishes survivorship of native Bull Trout, Westlope Cutthroat Trout, and other native and wild fishes. (Ron Pierce, et. al. Response of Wild Trout to Stream Restoration over Two Decades in the Blackfoot River Basin. 142 Trans. Am. Fish. Soc. 68-81, 77 (2013).

#### STATEMENT OF THE ISSUE

Whether the Montana Department of Natural Resources and Conservation (“DNRC”) violated Mont. Code Ann. § 85-2-311(1)(a)(ii) of the Water Use Act by failing to consider the known, quantified limitations on dewatering Outstanding Resource Waters, despite evidence that the application for a new groundwater permit would allow RC Resources to deplete baseflows of several wilderness creeks by up to one hundred percent, in clear contravention of the creeks’ Outstanding Resource Water protections. Rather, the analysis of legal availability is not exclusive to the tabulation of existing water rights, as the agency must also consider other quantitative, legal allocations of water before issuing a new permit.

## STANDARD OF REVIEW

The Montana Administrative Procedure Act (“MAPA”) directs that this Court “may reverse or modify [DNRC’s] decision if substantial rights of [the Coalition] have been prejudiced because ... the administrative findings, inferences, conclusions, or decisions are ... in violation of constitutional or statutory provisions,” “affected by other error of law,” or are “arbitrary or capricious.” Mont. Code Ann. § 2-4-704(2). In an administrative appeal, this Court applies the same standard of review as the district court. Srn. Mont. Tel. Co. v. Mont. Pub. Serv. Comm’n, 2017 MT 123, ¶12, 387 Mont. 415, 395 P.3d 473. “A court reviews an administrative decision in a contested case to determine whether . . . its interpretation of the law is correct.” Id., citing Nw. Corp. v. Mont. Dep’t of Pub. Serv. Regulation, 2016 MT 239, ¶25, 385 Mont. 33, 380 P.3d 787; see also, Order at 4 (“A conclusion of law is reviewed to determine if the agency’s interpretation is correct, without applying an abuse of discretion standard,” citing Steer, Inc. v. Dep’t of Revenue, 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990).

“The parties agree that the issues raised in this case are legal issues.” Order at 4. Because the issues are purely legal, this Court reviews the hearing examiner’s final order de novo. See Missoula Elec. Coop. v. Jon Cruson, Inc., 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210. DNRC contends that with regard to the central legal issue of this case, it has a “longstanding interpretation and application of the

legal availability criteria,” DNRC Br. 5; see id. 3, 6, 7, 10-11, 12, 13, 40-43, and therefore claims that “the district court failed to properly defer” to the agency’s interpretation of “legal demands,” id. 13; see also RC Br. 28-32.

The degree of judicial deference owed to an agency’s statutory interpretation depends on circumstances; including “the degree of the agency’s care” in developing its interpretation, “its consistency, formality, and relative expertness, and, “the persuasiveness of the agency’s position.” United States v. Mead Corp., 533 U.S. 218, 228 nn.7-10 (2001) (footnotes omitted). To justify judicial deference to its position, the agency must show that it has actually undertaken to construe the relevant statute to address the interpretive question at issue. See Lyman Creek, LLC v. City of Bozeman, 2019 MT 243, ¶ 23, 397 Mont. 365, 450 P.3d 872 (finding no statutory construction to which Court might defer where DNRC publication cited no authority to justify its legal assertion). Here, DNRC cites no agency regulation, decision, guidance, memorandum or anything else that explicitly addressed whether subsection 311(1)(a)(ii)’s “legal demands” analysis must ever look beyond water rights. Similarly, the district court found that the DNRC “presented no formal interpretation of the term ‘legal demands.’” Order at 10.

This is case of first impression, for the DNRC, the hearing examiner, the district court, and for this Court. The narrow question before the Court is whether

the quantified flow protections for Outstanding Resource Waters prescribed by state law constitute a “legal demand” under Mont. Code Ann. § 85-2-311(1)(a)(ii), in addition to any existing water rights on the source. The DNRC has not previously contemplated nor decided this issue before this case. As a result, no deference to the agency is warranted. As the district court correctly applied, “[a] conclusion of law is reviewed to determine if the agency’s interpretation is correct . . .” Order at 4 (citations omitted).

## SUMMARY OF THE ARGUMENT

DNRC’s analysis of legal availability failed to include the Outstanding Resource Water designation for every stream within Wilderness Areas. Legal availability is not exclusive to the tabulation of existing water rights, rather the agency must also consider other quantitative, legal allocations of water before issuing a new permit. Given the rarity of applications for new appropriations in Wilderness Areas and the pristine fisheries at stake, this a case of first impression for the State of Montana, warranting Trout Unlimited’s participation as *amicus curiae*.

## ARGUMENT

### I. Water Quality and Quantity are not Separate under Montana Law.

Justice O'Connor called the separation of water quality and water quantity an "artificial distinction." PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 719 (1994). Indeed, every aspect of water quantity pervades water quality. Adam Schmepp. At the Confluence of the Clean Water Act and Prior Appropriation: The Challenge and Ways Forward. 18-20, Environmental Law Institute, Washington, D.C. (2013). This artificial distinction is at the heart of this case. DNRC would have us believe they have no responsibility over water quality (Opening Brief at 23) and the Department of Environmental Quality ("DEQ") would issue a mining permit depleting streamflows claiming they have nothing to do with water rights. Both agencies abdicate their constitutional and statutory mandates: both agencies share authority and responsibility for preventing the degradation of Montana's waters (e.g. Mont. Code Ann. § 85-2-311(1)(g) (2019)).

The artificial distinction between water quality and quantity administration arose in the Wallop Amendment of Section 101(g) of the Clean Water Act, where Congress expressed its policy that the Act shall not supersede or abrogate allocation of waters by the States and demanding that Federal agencies cooperate with State and Local agencies to prevent, reduce and eliminate pollution. 33 U.S.C. §1251(g) (2019). This Amendment was promulgated by Senator Wallop, who characterized his amendment as "an attempt to recognize the historic allocation

rights contained in State constitutions." Remarks of Senator Wallop from 123 Cong. Rec. 39212 (1977), quoted in, PUD No. 1 of Jefferson County, at 17.

Montana codified this principal in Section 705 of the Montana Water Quality Act: "Nothing in [Part 7 of the Act] may be construed to divest, impair, or diminish any water right recognized pursuant to Title 85." Mont. Code Ann. § 75-5-705.

DNRC claims it is obligated only to protect senior water rights. However, the Montana legislature had allocated those Outstanding Resource Waters, even in specified, measurable quantities. Yet DNRC proposes to issue a new water right that will ignore the Legislature's Outstanding Resource Water allocation, guaranteeing future immunity in perpetuity for the new water permit against any conditions to prevent water quality degradation in these wilderness streams; the precise opposite of the Legislature's mandate for higher protection for these Outstanding Resource Waters.

DNRC could have simply incorporated the legislatively-created Outstanding Resource Water quantities in their legal demands analysis, and even issued a provisional permit conditioned upon preserving those levels. Instead, DNRC ignored the legislature's designation, ignored this Court's legal precedent, and then requested deference to their long-held interpretation of a statute, backed by neither administrative rule nor written agency policy. All this for a very narrow application

of a rare circumstance. Few Outstanding Resource Waters are likely to be subject dewatering by mines under congressionally-established wilderness areas.

## II. This Court has Held that “Legal Demands” is More than just Water Rights.

DNRC’s grant of RC Resources’ application for groundwater pumping, despite the application’s evidence that the pumping will deplete wilderness stream flows protected by state law, is contrary to the plain language of Section 311. Subsection 311(1)(a)(ii) of the Water Use Act requires a permit applicant to prove that water is “legally available during the period in which the applicant seeks to appropriate, in the amount requested.” Mont. Code Ann. § 85-2-311(1)(a)(ii). The Act directs DNRC to analyze legal availability by (1) identifying the quantity of water that is physically available; (2) identifying the “existing legal demands on the source of supply throughout the area of potential impact”; and (3) analyzing “the evidence on physical water availability and the existing legal demands,” including by comparing the physical water supply with existing legal demands. Id.

DNRC’s legal availability analysis must consider, without limitation, “existing legal demands on the source of supply”—a broad phrase that on its face encompasses all legal constraints on withdrawals from the water source. Mont. Code Ann. § 85-2-311(1)(a)(ii)(B). To be sure, such “legal demands” include a broad set of water rights. The parties all agree that “legal demands” include

established water rights on the water source. Where there *are no other* “legal demands,” the DNRC’s review of established water rights is sufficient to determine legal availability under the section 311 criteria. MCA § 85-2-311(1)(a)(ii); DNRC Br. 41 (citing decisions with no other legal demands); accord AR:10-11 (Hearing Examiner Decision).

But as a matter of plain language and logic, “legal demands” also include other quantitative legal constraints on water availability, including the quantitative flow protections for Outstanding Resource Waters prescribed by state law. The “cardinal first step in statutory construction” involves interpreting the statute’s plain language, “giving words their usual and ordinary meaning.” State v. Running Wolf, 2020 MT 24, ¶ 15.

State law protects wilderness and national park stream segments in Montana designated as Outstanding Resource Waters from significant depletion. While some depletion is allowed, reductions in the flow of Outstanding Resource Waters beyond established, quantitative limits is not. State law prohibits any “activities that would ... decrease the mean monthly flow of a surface water” designated as an Outstanding Resource Water “by [more than or equal to] 15 percent or the seven-day ten-year low flow by [more than or equal to] 10 percent.” Mont. Admin. R. 17.30.715(1)(a) (deeming activities that do not exceed these thresholds as “nonsignificant” and, assuming other criteria are met, not subject to



nondegradation requirements).<sup>1</sup> See also Mont. Code Ann. § 75-5-303(7) and Mont. Admin. R. 17.30.705(2)(c) (state law prohibits any degradation of Outstanding Resource Waters).

There is no factual dispute in this case that RC Resources’ own permit application shows that the depletion limits on protected, wilderness streams will be exceeded if the permit is issued. AR:217-24, 600, 607. In overturning the DNRC’s grant of RC Resources’ pumping permit, the district court ruled that state-law restrictions on “dewatering Outstanding Resource Waters [are] a known legal demand on the water to be appropriated in this case and must be included in the analysis of legal availability of water prior to issuing a permit granting an appropriation to RC Resources.” Order at 11-12.

The district court holding was correct and followed controlling precedent of this Court. This Court, in Confederated Salish & Kootenai Tribes v. Clinch (“CSKT”) similarly found that still-unquantified, federally-reserved tribal water right claims are “legal demands” within the Section 311 framework, rejecting the DNRC’s contradictory assertion. 1999 MT 342, ¶ 28, 297 Mont. 448, 992 P.2d

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<sup>1</sup> The seven-day ten-year low flow represents “the lowest 7-day average flow that occurs on average once every 10 years.” U.S. Environmental Protection Agency, “Low Flow and Droughts: Definitions and Characteristics,” <https://www.epa.gov/waterdata/definition-and-characteristics-low-flows> (last visited February 21, 2020).

244. CSKT held that Indian reserved water right claims must be considered in DNRC’s legal-availability analysis under Section 311. Id. The Section 311 language this Court analyzed in CSKT is the same statutory language at issue in this case, because the CSKT Court reviewed the statute from the then-recently passed Senate Bill 97, as amended by the House in the 1997 Montana Legislative Session, which created the current Section 311 framework. See History & Final Status of Bills & Resolutions, 55th Leg. 54 (Mont. 1997), (Coalition Appendix 1); Act of May 1, 1997, ch. 497, § 7, 1997 Mont. Laws 2789, 2799-2800 (Coalition Appendix 5).

The quantitative limits on depleting Outstanding Resource Waters under Montana law share similar traits with the tribal reserved water rights that this Court considered in CSKT. In particular, “[t]he right to water reserved to preserve tribal hunting and fishing rights is ... non-consumptive,” consisting of a legal constraint preventing “appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right applies.” Id., ¶ 12 (quotations and citations omitted). Thus, unlike appropriative water rights that “are based on actual use,” these reserved rights “need not be diverted from the stream” to be recognized. Id. (quotations and citation omitted).

Like the tribal reserved rights to preserve hunting and fishing, Montana’s legal protections for Outstanding Resource Waters are non-consumptive, involve

no diversion, and instead consist of a constraint on dewatering below a protected level. See Mont. Code Ann. § 75-5-303(7); Mont. Admin. R. 17.30.715(1)(a). In fact, the Outstanding Resource Water protections are in at least one respect more similar to appropriative water rights than the tribal reserved rights considered in CSKT, because the Outstanding Resource Water protections impose quantitative limits, see Mont. Admin. R. 17.30.715(1)(a), while at the time of the case, “the extent of the Tribes’ reserved water rights remains unknown.” CSKT, ¶ 12 (quotations and citation omitted). Accordingly, just as this Court in CSKT, ¶ 28, held that “legal demands” encompasses, “among other things,” unquantified Indian reserved water rights, the Court should now hold that such “other things” include Outstanding Resource Waters. The district court ruling should be affirmed consistent with this Court’s holding in CSKT.

### III. Legal Demands Include Other “Non-Water Right” Appropriations.

Legal demands in Montana take on many shapes beyond water rights alone. Like the quantitative limits that protect tribal reserved water rights and state-held instream flow reservations from depletion by new water uses, DNRC has also had to adjust its permitting process to accommodate other non-water right legal demands placed on regional and local sources. These include closed basins, controlled groundwater areas, and stream depletion zones.

Increasing groundwater demand in Montana’s most densely-populated regions, along with the innate complexity of aquifer hydrogeology, has pressed state decision-makers to consider what kinds of regulatory and statutory administration would best address the demands on susceptible sources. In 1983, the Montana Legislature crafted a new tool to explicitly allow the state to close “highly appropriated” basins to new appropriations. Mont. Code Ann. § 85-2-319(1). Section 319 authorizes the state and department to adopt rules that restrict applications for new appropriations and applications for state water reservations in highly appropriated basins. *Id.* Generally, this means that in a legislatively or administratively closed basin, no surface water is legally available as a matter of law. To date, at least five basins in Montana have been closed to new surface water uses by legislative action, ten by administrative rule, and two basins have been closed by DNRC-order.<sup>2</sup>

A controlled groundwater area is another, more localized form of an administrative basin closure that may be designated to limit new or certain types of appropriations on a specific source due to water availability or water quality

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<sup>2</sup> Mont. Code Ann. § 85-2-319, 329-351 (2019). See also Montana’s Basin Closures and Controlled Ground Water Areas, DNRC, Water Resource Division, Water Rights Bureau, Helena Mont., June 2016, available at <http://dnrc.mt.gov/divisions/water/water-rights/docs/new-appropriations/montana-basin-closures-and-controlled-groundwater-areas-2016.pdf>. (last visited February 14, 2020).

degradation. Mont. Code Ann. §§ 85-2-501, et. al. The DNRC may not issue a groundwater permit that proposes to pump “beyond the capacity of the aquifer . . .” Mont. Code Ann. § 85-2-508. Further quantitative limitations are then typically tailored to hydrologic conditions specific to the impetus of the closure. For example, the Horse Creek Controlled Groundwater Area was designated in 2012 in response to concerns by the Horse Creek Water Users that the groundwater development of a 65-lot subdivision would interfere with the recharge of springs that fed Horse Creek on which water users relied for stock watering. Mont. Admin. R. 36.12.905.<sup>3</sup> For new appropriations within the roughly twelve square-mile area, a permit applicant is required to prove that water is “legally available during the period in which the applicant seeks to appropriate, in the amount requested, considering the specific quantitative limits...” far beyond a list of water rights. Id.

A stream depletion zone is a third type of regional legal demand with quantitative limitations to new water developments. By statutory definition, a stream depletion zone is “an area where hydrogeologic modeling concludes that as a result of a ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the ground water withdrawn within 30 days after the

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<sup>3</sup> See also <http://dnrc.mt.gov/divisions/water/water-rights/controlled-ground-water-areas/horse-creek> (last visited February 14, 2020).

first day a well or developed spring is pumped at a rate of 35 gallons a minute.”

Mont. Code Ann. § 85-2-102(25).

Each of these examples of non-water right legal demands frontally challenges the DNRC’s assertion that it has an enduring practice of confining its legal availability analysis to a ledger of water rights. Basin closures, groundwater control areas, and stream depletion zones are all part of the agency’s actual, ongoing practice of accounting for a variety of legal demands. Outstanding Resource Waters are decidedly more quantifiable than these administrative legal demands and are a very narrow field of legal demands.

#### IV. Outstanding Resource Waters are a Rare Circumstance, Not a Sea Change.

The narrow legal issue before the Court in this case is whether Outstanding Resource Waters are “legal demands” under Section 311’s permit criteria. Mont. Code Ann. § 85-2-311. This narrow legal issue is all the more site-specific because, by law, only “state surface waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995 are outstanding resource waters (ORWs).” Mont. Admin. R. 17.30.617(1). The administrative process for designating additional Outstanding Resource Waters—which includes final approval by the legislature—sets a high bar, and no other waters besides those in national parks or wilderness areas have been designated. Id.

All of Montana’s 16 wilderness areas were designated by 1995. These 16

wilderness areas cover roughly 3.5 million acres (about 3.75 percent) of Montana, and include our highest peaks and low-lying marshlands. They harbor high-quality fish and wildlife habitat, including habitat of threatened or endangered species. Montana's largest and best-known wilderness areas are the rugged mountains of the Absaroka-Beartooth Wilderness (920,343 acres) and the adjacent Bob Marshall<sup>4</sup> (1,063,053 acres), Great Bear (286,700 acres) & Scapegoat (259,966 acres) Wilderness, which collectively about Montana's largest and best-known National Parks, Yellowstone and Glacier National Parks, respectively.

The Cabinet Mountains Wilderness (94,272 acres), lies within the Kootenai National Forest and about 15 miles southwest of Libby, are the streams protected as Outstanding Resource Waters at issue in this case. Designated in 1964, the Cabinet Mountains Wilderness comprises a narrow north-south range of snowcapped peaks, glacial lakes, and valleys cut by streams and waterfalls. Thick lowland forests of western red cedar, Douglas fir, western white pine, western hemlock, and other conifers are plentiful. Although it is not a lofty range, rugged peaks, sharp ridges, and glacial cirques rise above the forests, lakes, and subalpine meadows, with sheer walls plunging 1,000 feet into deep valleys. There

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<sup>4</sup> 67,000 acres of the Bob Marshall were added as part of the Rocky Mtn Front Heritage Act which Congress passed in 2014. Public Law No. 113-291 (2014). Streams within these newly-added 67,000 acres are not Outstanding Resource Waters.

are more than 80 lakes in this Wilderness.

Along the two, major, north-south ridges that divide the Cabinets, Lake Creek flows north to the Kootenai River, and the Bull River runs south to the Clark Fork River. Several tributaries of the Bull River provide pristine and vitally important habitat for bull trout, westslope cutthroat trout, and other native and non-native fishes. RC Resources' own application for new groundwater pumping shows that the proposed groundwater permit would allow the company to deplete baseflows of several wilderness creeks by up to one hundred percent, in contravention of the creeks' Outstanding Resource Water quantified flow protections, codified in state regulation. The company's submitted data modelling indicates depletions exceeding the flows protected by Outstanding Resource Water designation would likely occur in the East Fork Bull River, South Basin Creek, Chicago Creek, Copper Gulch, Moran Basin Creek, an unnamed tributary of the East Fork, and the St. Paul Lake drainage, all located in the Cabinet Mountains Wilderness.

In all qualifying wilderness areas, along with Yellowstone and Glacier National Parks, Trout Unlimited could only find one modern mine, in addition to the proposed Rock Creek Mine, that has drilled tunnels near wilderness. The East Boulder/Stillwater platinum/palladium mine has tunneled under the Beartooth Mountain Range, but appears to have avoided tunneling under Wilderness. (See



Stillwater Mining Company's Revised Water Management Plans and Boe Ranch LAD, Final Environmental Impact Statement. May 2012. Mont. Dept. of Env'tl. Quality. Helena.)

RC Resources' development of a mine adjacent to wilderness is a rare occurrence, and new demands for water use large enough to require a permit and to deplete wilderness or national park streams appear unlikely in the foreseeable future. However, the habitat value for the imperiled, native species of Bull and Westslope cutthroat trout in the Outstanding Resource Waters of the Cabinet Mountains Wilderness is worth investing in. The arguments we have presented here are consistent with the legal protections the generation-before-ours put in place to protect our most pristine waters and our most beloved, wild landscapes. While a narrow legal issue applying to less than 5% of Montana's area, the decision of the district court puts the flow protections of Outstanding Resource Waters in the appropriate context in the Montana Water Use Act's new water use permit review process, and should be affirmed.

V. Cautionary Note: "Existing Water Rights" is a Term of Art.

Unfortunately, certain terms pertaining to water rights are often casually applied throughout the record and briefing that could potentially create confusion and certainly bear clarification. The term "existing water rights" has specific constitutional meaning in reference to those water rights that were recognized in

Article IX, Section 3(1), Montana Constitution. “Existing water rights” in Montana refer only to a right to use water obtained through putting water to a recognized beneficial use—such as irrigation, mining, or fish and wildlife—before the 1973 Montana Legislature passed the Water Use Act, Mont. Code Ann. §§ 85-2-101, *et seq.* The Act specifically defines the term: “‘Existing right’ or ‘existing water right’ means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.” Mont. Code Ann. § 85-2-102(13). After the 1973 passage of the Water Use Act, other than water reservations by a state agency or unit of local government, the only way to lawfully obtain a new water use is to obtain a water use permit by applying to the DNRC. Mont. Code Ann. § 85-2-102(20) (“Permit” means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314). This class of water use is referred to as “permitted” use through a water use permit. *Id.* The more encompassing term “water right” is also defined in the Water Use Act: “Water right” means the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or a compact. Mont. Code Ann. § 85-2-102(32).

The parties, hearing examiner, and even this Court on occasion have used the term “existing water right” casually, when the more broad “water right” - or

perhaps “established” water right - would more properly describe the universe of “an existing water right, a certificate, a permit, or a state water reservation.” Mont. Code Ann. § 85-2-311(1)(b). These definitions are important in the context of this case. For example, in spite of its generally careful use of the terms, on occasion the parties have given the impression that **only** “existing water rights” are “legal demands” under Section 311. (e.g. Opening Brief of DNRC at pages 12, 27, 30, 41. Hearing Examiner Decision, at ¶ 25, ¶ 26 (Jan. 29, 2018.) (The hearing examiner says “existing water rights on the source” is the *only* measure of legal demand.) Precise use of these terms of art is critical in this case. If the measure of legal demands is indeed only pre-1973 “existing water rights” then a whole universe of other post-1973 established “water rights” like water reservations, certificates, and permits are effectively eliminated from consideration in permitting.

## CONCLUSION

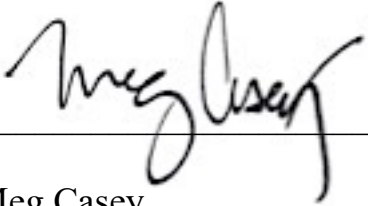
For the foregoing reasons, the district court ruling should be affirmed. The district court correctly held that Outstanding Resource Waters must be taken into consideration during DNRC’s legal availability analysis, in spite of DNRC’s argument that only water rights should be considered. Along with Outstanding Resource Waters, many other non-water right legal demands exist in Montana Law that have a direct bearing on legal availability analyses. Among these are non-

quantified tribal water rights that this Court recognized as a legal demand under Section 311 in CSKT ¶ 28. Basin closures, groundwater control areas, and streamside depletion zones are other examples of non-water right legal demands that by law, DNRC must consider when processing permit applications. This case is a narrow, case of first impression and a rare circumstance that warrants affirming the district court.

CERTIFICATE OF COMPLIANCE

This document is proportionately spaced using a 14 point, Times New Roman typeface. The document is double-spaced, totaling 4741 words.

Signed this 21st day of February 2020.

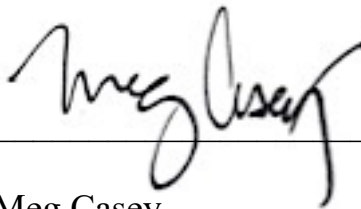
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served upon the following at their addresses, by electronic filing, the 21st day of February 2020.

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