IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0268

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

Petitioners and Appellants,

v.

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

Respondents and Appellees.

OPENING BRIEF OF THE APPELLANTS

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

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I. Whether Montana's Department of Natural Resources and Conservation violated the Water Use Act, MCA § 85-1-101, *et seq*., by allowing a mining company to pump and impound millions of gallons of groundwater from an aquifer in a highly appropriated basin—without a permit or any mandatory mitigation measures—in order to facilitate the company's underground mining operation.

II. Whether the Department's interpretation of the Water Use Act—which allows for unlimited diversions of groundwater from Montana's limited aquifers without oversight or regulation—would render the statute inadequate to provide for the comprehensive "administration, control, and regulation of water rights[,]" as Montana's Constitution requires. Mont. Const. art. IX, § 3(4).

STATEMENT OF THE CASE

This case presents this Court with an important question of first impression—namely, can the State of Montana allow a mining company to pump and impound millions of gallons of groundwater from an aquifer in a highly appropriated basin, without a permit or any enforceable mitigation requirements, when the diversion is essential to

the company's mining operation? Under the plain language of Montana's Water Use Act and the constitutional provisions it implements, the answer is "no." In reaching the opposite conclusion, the Department of Natural Resources and Conservation defied a host of vital legal protections, establishing an unlimited and unlawful loophole that threatens the integrity of the state's waters and the rights of senior appropriators.

Tintina Montana plans to construct its Black Butte Copper Mine in the Sheep Creek drainage—upstream from the Missouri River and its iconic tributary, the Smith. AR:17 (Prelim. Determination).[1] To carry out the project, the company will have to pump more than 250,000,000 gallons of groundwater from the mine's workings in many years. AR:502 (DNRC Tech. Rep.). Under the Water Use Act, this diversion was subject to both Montana's general permitting requirements and the heightened mitigation standards that protect highly appropriated areas like the Upper Missouri River Basin. *See, e.g.*, MCA §§ 85-2-302(1), 85-2-360, 85-2-362. The Department's permitting analysis, however,

[1] "AR" citations refer to the administrative record in this case, as Bates numbered by DNRC.

addressed only the fraction of Tintina's planned withdrawal that the company plans to dedicate to "industrial purposes" at its mine site. AR:14 n.1 (Prelim. Determination). According to the agency, the rest of the company's diversion—which could reach nearly 150,000,000 gallons a year—is exempt from the statute's requirements because it would be treated, stored, and discharged by Tintina without further "beneficial use." *See id.*

The Department's decision was wrong as a matter of law. The Water Use Act divides diversions into two categories: "beneficial uses," which are subject to the statute's permitting and mitigation requirements, and "waste," which is prohibited. *See, e.g.*, MCA §§ 85-2-102(27), 85-2-301, 85-2-302, 85-2-505. The statute does not recognize a third category of unlimited groundwater pumping for mine dewatering or any other purpose. *See id.* In attempting to rely on such an exemption, the Department defied the Water Use Act's fundamental purpose of protecting Montana's waters and the rights of senior appropriators.

Appellants Trout Unlimited, Montana Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers

filed objections to Tintina's proposed diversion in 2020. AR:655–703. On February 23, 2022, however, a hearing examiner within the Department upheld the agency's dewatering loophole after electing to "presume that DNRC ha[d] interpreted the law correctly." AR:1876 (summary-judgment order). The appellants accordingly challenged the agency's final decision in the Fourteenth Judicial District Court, which similarly deferred to the Department's unlawful interpretation in an April 12, 2023 decision that should be reversed by this Court. *See* Order Denying Pet. for Judicial Rev. and Affirming Final Agency Action, *Montana Trout Unlimited v. DNRC*, No. DV-2022-09 (Apr. 12, 2023) ("District-Court Order").

STATEMENT OF FACTS

The Department's challenged dewatering loophole is irreconcilable with the protections of Montana's Water Use Act—a fact that is best understood in light of the statute's history, purpose, and design.

I. The West's water shortage and Montana's first efforts to limit diversions to "beneficial uses."

The rules governing the allocation of water in the American West are the product of ever-increasing scarcity. Unlike the waterways of the East, the region's snow-fed rivers have long been "inconstant from year

to year and from month to month"—a difficult dynamic that has only deepened with drought. *See* Charles Wilkinson, Intro. to the Culture of Water Symposium, 6 Wyo. L. Rev. 287, 288 (2006); *McDonald v. State*, 220 Mont. 519, 532, 722 P.2d 598, 606 (1986) (noting that "we live in a state with great fluctuation and uncertainty in the amount of water available"). The region's aquifers, which depend on water seeping down from an increasingly arid landscape, have long been slow to replenish. *See Mettler v. Ames Realty Co.*, 61 Mont. 152, 201 P. 702, 704 (1921) (noting that Western water law has had to contend with "the conditions prevailing in the arid or semiarid states of the Rocky Mountain[s]"). And the region's growing population has long demanded access to growing amounts of water, requiring Western states to devise increasingly stringent ways of securing the invaluable resource. *See McDonald*, 220 Mont. at 531 (noting that as "'demands for water … have become more and more pressing, … decisions have become increasingly emphatic in limiting'" appropriations) (quoting *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489, 45 P.2d 972, 997 (1935)).

In Montana, the need to protect the state's limited supply of water was first emphasized by this Court more than a century ago. In 1898—less than a decade after Montana was granted statehood—the Supreme Court declared that "the great value of the use of water ha[d] [already] become more and more apparent." *Power v. Switzer*, 21 Mont. 523, 55 P. 32, 35 (1898). To ensure this value wouldn't be needlessly lost, both the Court and Montana's Legislature joined other Western states in "proceed[ing] with increasing caution to restrict appropriations to spheres of usefulness and beneficial purposes." *Id.*

Under Montana's "prior appropriation" doctrine, the concept of "beneficial use" ultimately came to be recognized as "the *basis*, the *measure* and the *limit* of all rights to the use of water." *McDonald*, 220 Mont. at 530 (emphasis in original). In order to establish a right, an appropriator had to divert water for "some useful or beneficial purpose[.]" *Power*, 55 P. at 35. And as soon as the appropriator "cease[d] to use the water for such purpose," her "right cease[d]." *Id.*; *see also, e.g.*, *79 Ranch, Inc. v. Pitsch*, 204 Mont. 426, 431, 666 P.2d 215, 217 (1983) (same).

II. The Montana Constitution and the Legislature's obligation to establish a comprehensive system for protecting the state's waters.

Though Montana's beneficial-use requirements placed important restrictions on the diversion of the state's waters, they also proved nearly impossible to enforce. For almost a century, Montana's laws provided two ways of perfecting a water right: "A claimant could post a notice at the point of diversion and file a notice with the county clerk pursuant to statute," or she could "simply … put the water to use." *Montana Trout Unlimited v. DNRC*, 2006 MT 72, ¶ 5, 331 Mont. 483, 485, 133 P.3d 224, 226. As this Court later explained, "[t]he adjudication of these rights became increasingly cumbersome and complex as the number of appropriators claiming water rights in Montana increased." *Id.*

"The 1972 Montana Constitutional Convention sought to remedy Montana's antiquated appropriation system." *Id.* ¶ 6. While the state's new Constitution "recognized and confirmed" all "existing rights to the use of any waters for any useful or beneficial purpose[,]" it also emphasized the need for a new and comprehensive means of regulating Montana's hydrological resources—which included "[a]ll surface,

underground, flood, and atmospheric waters within the boundaries of the state[.]" Mont. Const. art. IX, §§ 3(1), (3), (4). Under Article IX of the Constitution, Montana's Legislature was accordingly directed to "provide for the administration, control, and regulation of water rights[,]" and to "establish a system of centralized records, in addition to the … [previous] system of local records." *Id.* § 3(4); *see also id.* § 3(3) (providing that "[a]ll … 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 by law").

III. The establishment of the Water Use Act's permitting and mitigation requirements.

Montana's lawmakers acted "promptly" to fulfill their obligations under Article IX. *Montana Trout Unlimited*, ¶ 6. In 1973, the Legislature promulgated the Water Use Act, a statute that "provide[s] for the administration, control, and regulation of water rights" in order to protect senior appropriators and secure the "preservation and future beneficial use … of Montana's water for the state and its citizens[.]" 1973 Mont. Laws 452, § 2(2) (codified at MCA § 85-2-101(2)); *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 24, 384 Mont. 503, 513–14, 380 P.3d 771, 778–79 (noting that this Court has repeatedly "explained that 'the

Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators'").

Like the laws that came before it, the Water Use Act is centered on a requirement of "beneficial use." *See, e.g.*, MCA § 85-2-101(1). Under the statute, "[a] person may appropriate water only for a beneficial use"—and "the application of water to anything but a beneficial use" is prohibited as an unlawful "waste[.]" *Id.* §§ 85-2-301(1), 85-2-102(27). The comprehensiveness of these provisions is confirmed by the statute's broad definition of "beneficial use," which reaches every "use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses[.]" *Id.* § 85-2-102(5)(a).

To ensure that all diversions of water are limited to beneficial uses, the Water Use Act imposes a strict permitting requirement. Under it, no person may "divert, impound, or withdraw … water[,]" or "commence construction of [a] diversion, impoundment, [or] withdrawal[,]" without first "appl[ying] for and receiv[ing] a permit[.]" MCA §§ 85-2-102(1)(a), 85-2-302(1). And to secure a permit, an

applicant must prove—"by a preponderance of [the] evidence"—that each of the nine criteria in Section 311 of the statute have been fulfilled. *Id.* § 85-2-311(1). This requires applicants to demonstrate, among other things, that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate;" that "the water rights of a prior appropriator under an existing water right … will not be adversely affected" by the proposed diversion; and that "the proposed use of water is[,]" of course, "a beneficial use[.]" *Id.* §§ 85-2-311(1)(a)(i), (1)(b), (1)(d); ARM 36.12.1801(2). An applicant's "[f]ailure to establish any of the [Section 311] criteria necessitates denial of the application." *Flathead Lakers, Inc. v. DNRC*, 2023 MT 85, ¶ 38, 412 Mont. 225, 244, 530 P.3d 769, 782.

When an applicant seeks to divert groundwater in a basin, like the Upper Missouri, that has been "closed" to new appropriations due to excessive claims, an even more demanding standard must be satisfied. *See Montana Trout Unlimited*, ¶¶ 7–8. Under Section 360 of the Water Use Act, the Department "may grant a permit for a new appropriation" in a closed basin "only if the applicant proves by a preponderance of the evidence that … [any] adverse effect [to a prior appropriator] would be

offset through an aquifer recharge or mitigation plan" that meets the statute's requirements. MCA § 85-2-360(3)(c); *see also id.* § 85-2-362; ARM 36.12.120. As the agency's own preliminary determination in this case acknowledged, the burdens the Water Use Act imposes on applicants in closed basins are "'daunting'" and "'exacting,'" and applicants "'must withstand strict scrutiny of each of the legislatively required factors'" in order to qualify for one of the limited statutory exemptions. AR:17–18 (quoting Order Affirming DNRC Decision, *Sitz Ranch v. DNRC*, No. DV-10-13390 (Mont. Fifth Jud. Dist. 2011)). In seeking a permit to pump and impound large volumes of groundwater at its proposed Black Butte Mine, Tintina fell well short of these requirements.

IV. Tintina's plan to build an underground copper mine upstream from the Smith River.

Tintina's planned operation threatens the ecological integrity and recreational value of some of Montana's most cherished waters. The company intends to develop its Black Butte Copper Mine on an 1,888-acre plot of rented ranch land in Meagher County—about 15 miles north of White Sulphur Springs. AR:1676 (Final Envtl. Impact Statement ("FEIS")). The mine's impacts would thus fall within the

Sheep Creek drainage, upstream from the Missouri River and its iconic tributary, the Smith. AR:17 (Prelim. Determination).

The scale of Tintina's proposed operation is difficult to overstate. As the Montana Department of Environmental Quality explained in assessing the likely effects of the mine:

> The Project's major components would include a portal and underground mine workings and utilities, as well as a processing plant that includes a crusher, grinding mills, a flotation circuit, tailings thickener, a paste tailings plant, a Water Treatment Plant … , concentrate storage facility, parking, and two laydown areas. Other surface facilities would include a Process Water Pond … , Contact Water Pond … , Non-Contact Water Reservoir … , Treated Water Storage Pond … , wet well and pipeline, buried drainpipes, roads, a waste rock stockpile, an ore stockpile, three overburden stockpiles, power line, ditches, and fencing.

AR:1679 (FEIS). All told, "[t]he proposed operation would mine approximately 15.3 million tons of material, including 14.5 million tons of copper-enriched rock … and 0.8 million tons of waste rock." *Id.* Once processed, the mine's ore would also result in nearly 13 million tons of toxic tailings that would have to be disposed of on-site. *Id.* at 1680.

Due to the significant threats posed to the region's water quality by the Black Butte Mine, the appellant organizations filed a separate

challenge to Tintina's mining permit in 2020. *See Montana Trout Unlimited v. DEQ*, No. DA 22-0406 (Mont. Supreme Court). At issue in this case are the mine's impacts on water availability within the Upper Missouri River Basin—most of which were unlawfully disregarded by the Department when it reviewed the company's application for a groundwater permit.

V. Tintina's plan for extensive groundwater pumping and storage at the Black Butte Mine.

To access the copper within Meagher County's "Johnny Lee" deposit, Tintina intends to dig a series of tunnels that extend up to 1,640 feet into the ground. AR:22 (Prelim. Determination); AR:1678 (FEIS). As a result, the workings of the Black Butte Mine would be continuously infiltrated by large volumes of groundwater—water Tintina would be continuously required to pump to the surface. AR:22 (Prelim. Determination); AR:1276 (DNRC Staff Expert Rev.) (noting that "Tintina is proposing to pump water from the mine at the same rate it anticipates [water] to naturally infiltrate"). According to the company's own modeling, the total amount of groundwater that would have to be pumped from the mine in a given year could reach 807 acre-feet—or more than 250,000,000 gallons. *See* AR:502 (DNRC Tech.

Rep.).[2] The size of this diversion is all the more striking given the mine's proposed location within the Upper Missouri River Basin, which is already closed to new appropriations due to a "crisis" of "over-appropriat[ion]." *See* MCA § 85-2-343; *Montana Trout Unlimited*, ¶¶ 7–10 (noting that "[t]he Smith River is … subject to the Upper Missouri River basin moratorium[,]" and that DNRC has "recognized the particularly intimate relationship between groundwater and surface water along the Smith River").

Tintina has planned an elaborate system for diverting, treating, and impounding groundwater at the Black Butte Mine. *See, e.g.*, AR:1273 (DNRC Staff Expert Rev.). As the Department explained in its preliminary determination:

> The [proposed] method of water collection inside the mine and means of diversion generally consists of water collecting in sumps within the workings, and then [being] pumped to a main sump near the mine's access ramp. From that point, a high-pressure multistage pump w[ould] divert up to 2.23 [cubic feet per second] from the mine[.]

AR:47.

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[2] One acre-foot is equal to approximately 325,851 gallons of water. *See* ARM 36.12.905(2)(d). As a result, an 807-acre-foot diversion would total 262,961,757 gallons.

Once groundwater has been successfully removed from Tintina's mine, its fate would depend on whatever additional needs the company might have at the time. According to Tintina, an "annual volume of up to 350 acre-feet" of water—or less than half the company's total diversion—would be dedicated to "industrial purposes" at the mine, including "water use in the underground mining operation, and around the mine site in the mill, tailings paste plant, and miscellaneous uses such as dust suppression, ice abatement, and in equipment wash bays." AR:14 (Prelim. Determination). A fraction of the groundwater pumped from the mine—up to 1.11 cubic feet per second—would thus be sent to either a process-water pond or the mine's water-treatment plant before being utilized in the company's operation. *Id.* at 47. The rest of the groundwater diverted by Tintina—up to 457 acre-feet per year—would be conveyed to the mine's treatment plant and discharged through Tintina's "underground infiltration galleries" into the Sheep Creek drainage. *Id.*; *see also* AR:1701 (FEIS) (explaining that Tintina's proposed "infiltration galleries" include "a series of trenches excavated in the Sheep Creek alluvium" that are designed to return water to the underlying aquifer).

VI. Tintina's request for a permit covering only a fraction of its planned groundwater pumping and storage.

In light of the significant diversion of groundwater its mine would require, Tintina could not move forward with the project without first satisfying the provisions of Montana's Water Use Act. Under the law, again, no person may "appropriate water or commence construction of [a] diversion, impoundment[,] … [or] withdrawal … unless the person applies for and receives a permit[.]" MCA § 85-2-302(1). In 2018, the company accordingly submitted its "Groundwater Application for Beneficial Water Use Permit No. 41J 30116562" to the Department of Natural Resources and Conservation. AR:11 (Prelim. Determination).

Rather than addressing the full volume of groundwater that would have to be pumped from the Black Butte Mine, Tintina's application focused on the fraction of the diversion—350 acre-feet—that the company hopes to utilize for industrial purposes in the course of its mining operations each year. *Id.*; AR:83 (Tintina's application). Based on the calculations of its consultant, Tintina acknowledged that even a smaller appropriation of this size would be enough to "deplete surface water in Black Butte Creek, Coon Creek, and Sheep Creek downstream of Little Sheep Creek." AR:26 (Prelim. Determination). The company

proposed to mitigate these surface-water losses to "ensure that no adverse effects [would] result" from the appropriation—as required by the Water Use Act and its "'daunting'" mitigation standards for closed basins like the Upper Missouri. *Id.* at 17, 27; MCA § 85-2-360(3)(c).

Tintina's mitigation plan rests on a bundle of seven additional applications aimed at securing enough water to "replace[] or offset [the depletions] in the affected drainages of Coon Creek, Black Butte Creek, and Sheep Creek." AR:27 (Prelim. Determination). As the Department explained, the plan includes "two scenarios[.]" *Id.* at 27–28. Under the first, "water w[ould] be diverted during high spring flows … and stored in a 291.9 [acre-foot] capacity off-stream reservoir for later release into the drainages[,]" and water would also be "purchased under a marketing for mitigation option." *Id.* Under the second, "two area water right owners ha[d] proposed to retire six existing irrigation rights and leave water instream to offset the mine's depletions, or the marketed water w[ould] be diverted from Sheep Creek and placed into the offstream storage reservoir … for later release into the affected drainages." *Id.* at 28.

After reviewing Tintina's plan, the Department determined that "the combination of water rights to be changed and permitted … [would be] adequate in timing and amount to offset … 340.3 [acre-feet] of … depletions to Black Butte Creek, Coon Creek, and Sheep Creek downstream of Little Sheep Creek." *Id.* at 42. As the remaining portion of Tintina's requested appropriation—9.7 acre-feet—was to be "treated and returned to the aquifer[,]" the agency concluded that the company's overall proposal would be adequate to "mitigate depletions to affected surface waters in full" and that it accordingly satisfied the requirements of the Water Use Act. *Id.* at 15, 30, 47.

VII. The Department's decision to allow unpermitted groundwater pumping and storage at Tintina's Black Butte Mine.

For all their detail, Tintina's application and mitigation plan were most notable for what they ignored: the majority of the groundwater that would have to be pumped from the Black Butte Mine. As noted above, Tintina's own consultants concluded that up to 807 acre-feet of water would need to be removed from the mine annually to facilitate the company's underground operations. AR:145 (Tintina's application). Tintina's plan for mitigating a 350-acre-foot appropriation thus left 457

acre-feet of groundwater—or nearly 150,000,000 gallons—unaccounted for each year. *See id.*

In deciding to grant Tintina's requested permit, the Department excused the inadequacies of the company's application and mitigation plan by misreading the "beneficial use" provisions of the Water Use Act. According to a conclusory footnote in the agency's preliminary determination, "[t]he amount of water proposed in … [Tintina's] application represent[ed] only that amount anticipated to be beneficially used for industrial purposes" at the mine. AR:14 n.1. Because the rest of the groundwater diverted by Tintina would be conveyed to the mine's water-treatment plant and eventually discharged into the Sheep Creek drainage by way of the mine's "infiltration galleries," the Department concluded that it would not be subject to the statute's permitting and mitigation requirements. *Id.* at 14 n.1, 47. Instead, the agency declared, the "non-beneficial portion of Tintina's groundwater withdrawal" would be regulated as a discharge by the Montana Department of Environmental Quality. *Id.*

The State's failure to require a permit and mitigation for the majority of Tintina's diversion has left the region's waters—and senior

appropriators—at risk of significant harm. First, the majority of the water sent to Tintina's "infiltration galleries" would be returned to Sheep Creek and the lower portion of Coon Creek. AR:1700–01 (FEIS). While this "would partially compensate for the loss of base flow in Sheep Creek caused by mine dewatering[,]" none of the discharged water would offset the losses in Black Butte Creek or the portion of Coon Creek above the infiltration galleries. *Id.* And second, rather than being returned to the ground year-round, Tintina's surplus water would be impounded in a treatment pond from July through September of each year in order to avoid violations of a seasonal surface-water standard for total nitrogen. *Id.* As these months fall at the peak of irrigation season, this delay could further exacerbate the mine's impacts on the region's waters and senior appropriators. *See* AR:28–31 (Prelim. Determination) (discussing irrigation rights between April and October of each year). And as substantial amounts of water could evaporate from Tintina's storage pond, a portion of the company's unpermitted—and unmitigated—diversion would never be returned to the ground at all. *See, e.g.*, AR:71–76 (Tintina's application) (acknowledging that "water consumption" will occur as a result of evaporation from the

mine's "process water pond," while ignoring the impacts of evaporation from the mine's "treated water storage pond").

VIII. The appellant organizations' challenge to Tintina's unlawful application and permit.

In an attempt to protect the waters of the Smith River and the rest of the Upper Missouri River Basin, the appellant organizations filed objections to the Department's preliminary permitting decision in July of 2020. AR:664, 675, 686, 697. They noted that the company had failed to "satisfy its burden of proving[,]" among other things, "that water [wa]s legally available, that the beneficial use of water c[ould] be limited to only a fraction of the groundwater pumped, and that issuing the permit w[ould] not trigger adverse effects to public water rights in Sheep Creek, its tributaries, and the Smith River." *Id.*; MCA § 85-2-311(1).

In 2021, the organizations filed a motion for partial summary judgment challenging the Department's determination that most of Tintina's planned diversion would not be put to a beneficial use and was accordingly exempt from the requirements of the Water Use Act. AR:1377. A hearing examiner within the agency's Office of

Administrative Hearings ultimately affirmed the Department's decision in a February 23, 2022 order. According to the examiner:

> The distinction drawn by DNRC in regard to … [Tintina's] Application—that there are certain uses of water that neither rise to the level of beneficial use nor constitute waste but rather fall into a category that is wholly beyond the scope of the Water Use Act's regulatory scheme—[wa]s not a new one. Rather, it is one DNRC has drawn consistently for decades.

AR:1874 (summary-judgment order). In support of this assertion, the examiner was unable to cite a single regulation that reflected the Department's claimed "distinction." *See id.* at 1874–78. Instead, his opinion referenced a small set of decisions in individual permit proceedings, including *In re Applications for Beneficial Water Use Permits by CR Kendall Corp.*, from 1999, and *In re Application for Beneficial Water Use Permit by Kenyon-Noble Ready Mix Co.*, from 1981. *Id.* In light of these unpublished decisions and the unremarkable "fact that the Legislature ha[d] never acted to countermand or modify … [the] interpretation" they espoused, the examiner declared that he was "inclined to presume … [the agency] ha[d] interpreted the law correctly" and accordingly affirmed the agency's unlawful dewatering loophole. *Id.* at 1876.

On July 26, 2022, after the appellants and Tintina had settled the remainder of the organizations' objections, the Department's hearing examiner issued a final order granting Tintina's application for a groundwater permit. AR:2–8 (noting that the order was the Department's final, appealable decision). This challenge followed. In an April 12, 2023 decision, however, the district court similarly elected to defer to the Department's unlawful determination that mine dewatering is exempt from regulation and scrutiny under the Water Use Act. District-Court Order at 11. The court's decision should be reversed.

STANDARD OF REVIEW

In an administrative appeal like this one, the Supreme Court applies "the same standards of review that the district court applies." *S. Montana Tel. Co. v. Montana Pub. Serv. Comm'n*, 2017 MT 123, ¶ 12, 387 Mont. 415, 395 P.3d 473. When evaluating the Department's challenged action, the Court may accordingly "reverse or modify the decision if substantial rights of [the appellants] have been prejudiced" because the action was "in violation of constitutional or statutory provisions[,]" or "affected by other error of law[.]" MCA § 2-4-704(2).

Because the issues raised by the agency's beneficial-use determination are purely legal, moreover, this Court is required to consider them *de novo*—without deference to the district court or the Department. *See Missoula Elec. Coop. v. Jon Cruson, Inc.*, 2016 MT 267, ¶ 15, 385 Mont. 200, 383 P.3d 210; *Montana Envtl. Info. Ctr. v. DEQ*, 2019 MT 213, ¶ 24 n.9, 397 Mont. 161, 176 n.9, 451 P.3d 493, 500 n.9. "Administrative interpretations of statutory language are not binding on Montana courts." *Montana Envtl. Info. Ctr.*, ¶ 24 n.9 (noting that a statute's "'plain meaning controls'"). Even "where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance[,]" both "time and reliance" must "yield" when this Court determines that the agency's interpretation was "wrong[.]" *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 266, 26 P.3d 91, 94.[3]

[3] The appellant organizations' standing to bring the present challenge was demonstrated by the objections they submitted to the Department, AR:655–703, as well as declarations from members David Brooks, Robert Carl, Colin Cooney, Bonnie Gestring, and Steve Gilbert.

SUMMARY OF THE ARGUMENT

The Department's unlimited dewatering loophole is irreconcilable with the language and structure of the Water Use Act. Under the statute, applications of water are divided into two classes: "beneficial uses," which are allowable with a permit, and "waste," which is the unlawful "application of water to anything but a beneficial use." MCA §§ 85-2-102(5), (27); *id.* § 85-2-301(1). Because all of Tintina's groundwater pumping and storage would be for a "beneficial" purpose—mining—it is subject to both the general permitting requirements of the Water Use Act and the more protective mitigation standards that apply in highly appropriated basins like the Upper Missouri. *See* Sections I.A and I.C, *infra.* And because the unpermitted portion of Tintina's diversion would also be used for recharging the Sheep Creek aquifer, it would be put to a second beneficial use, as well. *See* Section I.B, *infra.* The Department's decision to exempt a majority of Tintina's groundwater pumping from the Water Use Act was accordingly unlawful—and cannot be saved by deference. *See* Section I.F, *infra.*

The Department's challenged dewatering exemption also flouts the Water Use Act's fundamental purpose of protecting senior rights

holders, who rely on Montana's increasingly scarce waters for ranching, surface-water flows, and other purposes. *See* Sections I.D and I.E, *infra*. Tintina's entire diversion—not just the fraction utilized by the company for industrial purposes in the course of its mining operations—will change the timing, location, and volume of groundwater accretions to the region's streams. *See* Section I.E, *infra*. To satisfy its legal obligations, the Department was accordingly required to assess and regulate all of Tintina's proposed diversion. Indeed, Montana's Constitution demands nothing less. As the Water Use Act was adopted to fulfill the Legislature's "constitutional dut[y]" to "comprehensively … regulate water use" within Montana, this Court must reject the Department's attempt to allow unlimited and unregulated groundwater pumping at mines across the state. *See* MCA § 85-2-101(6); Section II, *infra*.

ARGUMENT

The Department's decision to exempt most of Tintina's planned diversion from the permitting and mitigation requirements of the Water Use Act was at odds with both the statute and Montana's Constitution. It must be set aside by this Court.

I. In allowing Tintina to pump and impound large volumes of groundwater without a permit or mandatory mitigation measures, the Department violated the Water Use Act.

With the Water Use Act, Montana's Legislature recognized that the state's waters are a vital public resource that can only be "subject to appropriation for beneficial uses[.]" MCA § 85-2-101(1) (noting that "any use of water is a public use"). The statute's permit requirement was designed to enforce this essential limitation. Under it, again, no person may "appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works" without first "appl[ying] for and receiv[ing] a permit" from the Department of Natural Resources and Conservation. *Id.* § 85-2-302(1). And in order to secure a permit, an applicant must prove, among other things, that its "proposed use of water is a beneficial use" that will not "adversely affect[]" the "water rights of a prior appropriator[.]" *Id.* § 85-2-311(1)(b), (1)(d).

As if to eliminate any doubt, the Legislature reinforced the Water Use Act's "beneficial use" requirement with a corresponding prohibition on "waste." *See* MCA § 85-1-101(1) (noting that "[t]he general welfare of the people of Montana … requires that water resources of the state be

put to optimum beneficial use and not wasted"). In the words of the statute, "waste" occurs whenever there is an "application of water to anything but a beneficial use." *Id.* § 85-2-102(27). And in the words of the statute, "[n]o ground water may be wasted." *Id.* § 85-2-505(1). In electing to exempt most of Tintina's planned groundwater pumping and storage from the Water Use Act's permitting and mitigation requirements, the Department ran afoul of these provisions.

A. Tintina's plan to divert large volumes of groundwater for the purpose of dewatering its mine constitutes a "beneficial use" subject to the Water Use Act.

Contrary to the assertions of the Department and the district court, all of the groundwater that would have to be pumped from the Black Butte Mine in the course of Tintina's mining operations—up to 807 acre-feet each year—would be diverted "for a beneficial use[.]" *See* MCA § 85-2-102(1)(a). Under the Water Use Act, the term "beneficial use" is defined—"very broad[ly]"—to include any "use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses[.]" *Id.* § 85-2-102(5)(a); *In re Adjudication of the Existing Rts. to the*

Use of All the Water, 2002 MT 216, ¶ 33, 311 Mont. 327, 342–43, 55 P.3d 396, 405. As the statute itself confirms, every acre-foot of groundwater that Tintina would have to "remove[]" from the ground in order to "permit mining operations" would, in fact, be "use[d]" for mining. *See* MCA § 85-2-505(1)(c) (providing that any groundwater "that must be removed from a mine to permit mining operations" can be legally disposed of "without further beneficial use"). And because this use of groundwater would benefit Tintina—by allowing the company to secure more than 14 million tons of copper-enriched rock—it checks the statute's "beneficial" box, as well. *See id.*; AR:1679 (FEIS). The plain language of the Water Use Act confirms, in short, that the full measure of Tintina's planned diversion is a "beneficial use" subject to Montana's permitting and mitigation requirements.

In concluding otherwise, the district court declared that mine dewatering—while undoubtedly "beneficial" to companies like Tintina—does not amount to "a 'use' of water," somehow, under the Water Use Act. District-Court Order at 11. This assertion simply disregards the ordinary meaning of "use," which isn't otherwise defined in the statute. *See Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15,

19, 221 P.3d 666, 669–70 (noting that "[t]o determine the meaning of a statutorily undefined term," this Court "may consider dictionary definitions"). As the district court noted, Tintina itself has argued that "use" involves elements of "control" and "'employ[ing] something for a purpose[,]'" such as mining. Tintina's Br. in Opp'n to Objectors' Pet. for Judicial Rev., *Montana Trout Unlimited v. DNRC*, No. DV-2022-9 (14th Jud. Dist. Ct.) (Mar. 17, 2023), at 15–16 (citing dictionaries); *see also, e.g.*, Use, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/use (defining "use" as "to put into action or service : avail oneself of : EMPLOY[,]" and "to carry out a purpose or action by means of : UTILIZE").

Every acre-foot of Tintina's proposed diversion falls within the plain meaning of "use." As previously explained, Tintina's operations at the Black Butte Mine would require pumping, treating, and impounding large volumes of groundwater. All of this water, of course, would be under Tintina's complete "control" while it is being pumped, treated, and stored—for up to three months—at the mine site. *See, e.g.*, AR:74 (Tintina's application) (illustrating the company's closed system for diverting and impounding groundwater). And as other potential

users would undoubtedly affirm, the full measure of the company's diversion would be "employ[ed]" for mining purposes—and accordingly unavailable for other purposes—while under the company's control. *See* Employ, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/employ (defining "employ" to include both "devot[ing] to or direct[ing] toward a particular activity or person"); *Montana Trout Unlimited*, ¶ 43 (noting that the "end result" to senior appropriators ultimately matters under the Water Use Act, not the particular way in which "groundwater pumping reduces surface flows"). The district court's unsupported assertion that Tintina's proposed groundwater pumping and storage wouldn't be a "use" should accordingly be rejected by this Court.

B. Tintina's plan to recharge the Sheep Creek aquifer with most of the company's diverted groundwater constitutes a second "beneficial use."

The 457 acre-feet of groundwater that was ignored by Tintina and the Department is also slated for a second beneficial use: recharging the Sheep Creek aquifer. As the Legislature made clear, any "use of water for aquifer recharge or mitigation" is also considered "beneficial" under the Water Use Act. MCA § 85-2-102(5)(e). Because Tintina plans to

discharge the unpermitted portion of its diversion through "underground infiltration galleries" into the Sheep Creek drainage, the diversion accordingly falls within the statute's permitting requirements for a second reason, as well. *See* AR:14 (Prelim. Determination); MCA § 85-2-102(3) (defining "[a]quifer recharge").

With its decision, the district court deemed Tintina's recharging efforts irrelevant under the Water Use Act. District-Court Order at 13. According to the court, the statute's "aquifer recharge" provision is only "implicated if an applicant seeks a new appropriation for a beneficial use in a closed basin—but [it] [wa]s not implicated by the mine dewatering" in this case. *Id.* (citing Tintina's brief). As previously explained, however, Tintina's application requested such an appropriation—and the company's entire diversion would be drawn from an aquifer in the closed Upper Missouri River Basin. Tintina's aquifer-recharging efforts should accordingly be recognized as a "beneficial use" under the plain meaning of the statute. *See* MCA § 85-2-102(5)(e).

The district court's decision also disregarded the implications of Tintina's planned diversion and recharging efforts. According to the

company's own groundwater model, there would be "a 160 [gallon per minute] decrease in groundwater discharge to Sheep Creek" in the absence of the mine's infiltration galleries. AR:1701 (FEIS). As the company's recharging system would thus "partially compensate for the loss of base flow in Sheep Creek caused by mine dewatering[,]" all of the mine's unpermitted diversion would serve a second beneficial purpose at the mine site. *See id.* The district court's unsupported determination to the contrary should be rejected by this Court.

C. The Water Use Act's mine-dewatering provision confirms that all of Tintina's proposed diversion would be a "beneficial use."

The status of Tintina's unpermitted diversion as a "beneficial use" is confirmed by the larger design of the Water Use Act. As previously noted, the statute divides applications of water into two classes: "beneficial uses," which can be authorized by permit, and "waste," which is the unlawful "application of water to anything but a beneficial use." MCA §§ 85-2-102(5), (27) (defining "[b]eneficial use" and "[w]aste"); *id.* § 85-2-301(1) (providing that "[a] person may appropriate water only for a beneficial use"). In defining which uses of groundwater fall into the category of prohibited "wastes," the Legislature chose to

specifically address—and exclude—mine dewatering. According to Section 505 of the statute, "the disposal of ground water without further beneficial use … that must be removed from a mine to permit mining operations" may "not be construed as waste[.]" *Id.* § 85-2-505(1)(c). This language says it twice. Because Tintina's proposed groundwater pumping could "not be construed as waste[,]" it had to be deemed a "beneficial use." *See id.* And because no "further beneficial use" would be required before Tintina could legally dispose of its groundwater, the full volume of the company's planned diversion constituted a "beneficial use." *See id.* The Department's conclusion to the contrary was unlawful. *See* Barbara G. Stephenson & Albert E. Utton, The Challenge of Mine Dewatering to W. Water Law and the N.M. Response, 15 Land & Water L. Rev. 445, 467 (1980) (noting that if "the interpretation of [mine] dewatering as a beneficial use [is] ever … seriously contested [in Montana]," Section 505's dewatering exclusion, "along with the … definition of beneficial use, should dispose of the question").

In rejecting this interpretation of the statute, the Department's hearing examiner quoted an earlier decision suggesting that the "'exclusion of … [mine dewatering] from the meaning of "waste" merely

bespeaks a legislative judgment that such practices should not inevitably and necessarily be curtailed in order to protect water users diverting from some sort of critical groundwater area.'" AR:1874 (quoting *In re Application for Beneficial Water Use Permit by Kenyon-Noble Ready Mix Co.* (July 17, 1981)). This assertion, however, disregards both the structure of the Water Use Act—which deems applications of water either beneficial uses or impermissible wastes—and the statute's fundamental purpose of protecting senior rights holders. *See, e.g.*, MCA §§ 85-2-102(5), (27); *Montana Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 (1984) (noting that the Water Use Act was enacted "to protect senior water rights holders from encroachment by junior appropriators").

Neither the examiner nor the district court got any further in contending, by way of the same decision, that the phrase "without further beneficial use" in Section 505 no more than "'highlight[s] a legislative intention that waters withdrawn and subsequently used for beneficial purposes should be treated as traditional appropriations in terms of ascertaining waste in light of the scope and character of subsequent beneficial use.'" AR:1874 (summary-judgment order)

(quoting *Kenyon-Noble*); *see also* District-Court Opinion at 12–14. Such an interpretation wrongly reads the word "further" out of the statute. *See, e.g.*, *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993) (noting that courts are "required to avoid any statutory interpretation that … does not give effect to all of the words used"). And it again ignores the design of the Water Use Act, which did not establish a third category of unlimited and unregulated diversions for purposes of mine dewatering (or anything else).[4]

[4] The absence of a limitless dewatering loophole is further confirmed by Section 306 of the Water Use Act, which establishes a very limited set of exceptions to the statute's permitting requirements. MCA § 85-2-306. Under the section's "exempt well" provision, "a permit is [generally] *not required* before appropriating ground water by means of a well … *when the appropriation* is outside a stream depletion zone, is 35 gallons a minute or less, and *does not exceed 10 acre-feet a year*[.]" *Id.* § 85-2-306(3)(a)(iii) (emphasis added); *see also id.* §§ 85-2-306(3)(a)(i), (ii), (iv) (establishing additional and similarly limited exceptions for small wells and "developed spring[s]"). Unlike the Department's unlawful dewatering exemption, this language requires unpermitted diversions to remain within strict limits—thereby ensuring that the state's waters and senior appropriators are sufficiently protected. *See Clark Fork Coal.*, ¶ 28 (rejecting a rule that "expanded the narrow exemption to the permitting process" under Section 306 and was accordingly "inconsistent with the stated statutory purpose of the Act"); *see also Montana Power Co.*, 211 Mont. at 96 (noting that "uncontrolled development of a valuable natural resource contradicts the spirit and purpose underlying the Water Use Act").

D. In exempting mine dewatering from the requirements of the Water Use Act, the Department defied the fundamental purpose of the statute.

As demonstrated above, the Department's effort to exclude most of Tintina's proposed diversion from Montana's permitting and mitigation requirements flouted the language and structure of the Water Use Act. Unsurprisingly, the agency's decision also defied the statute's fundamental purpose. With the Water Use Act, the Legislature charged the Department with implementing a "comprehensive[]" system "for the administration, control, and regulation" of all water rights in order to ensure the "protection, preservation, and future beneficial use … of Montana's water for the state and its citizens[.]" MCA § 85-2-101(2); *id.* § 85-2-101(6) (noting the Legislature's "intent … that the state, to fulfill its constitutional duties … , comprehensively adjudicate existing water rights and regulate water use" in Montana). Rather than fulfilling this mandate, however, the Department has attempted to puncture the Water Use Act with a loophole large enough to drain an entire mine. The agency's interpretation—and abdication—must be rejected by this Court.

The Department's dewatering exemption is premised on a basic mischaracterization of the Water Use Act—one the agency has never formalized in a rule. As noted in the hearing examiner's summary-judgment order, the issue of dewatering was raised within the agency in 1999, when CR Kendall—"a mining company that had [initially] filed permit applications"—"shifted gears and requested … [a] find[ing] that its proposed … dewatering efforts were not in fact a beneficial use of water" that would require a permit. AR:1875 (citing Op. on Threshold Issue of Beneficial Use, *In re Applications for Beneficial Water Use Permits by CR Kendall Corp.* (Feb. 3, 1999)). While similar arguments had been addressed by hearing examiners in previous contested-case proceedings, *see id.* at 1874–75, the Department elected to have its "Water Resources Division Administrator, instead of the Hearing Examiner," consider the question and "render[] … [an] opinion" due to "the statewide importance of th[e] issue" and the fact that it "concern[ed] agency function, rather than disputed facts[.]" AR:1408–09 (*CR Kendall* opinion). The agency declined, however, to institute a formal rulemaking process that would have given members of the public an opportunity to address a matter of such vital importance to the

state's waters and senior appropriators. *See id.*; *see also, e.g.*, MCA §§ 85-1-201, 85-2-112, 85-2-113(2) (authorizing the Department to adopt rules).

The administrator's ultimate "opinion" in *CR Kendall* defied the fundamental purpose of the Water Use Act. Rather than recognizing the full reach of the statute's protections, the opinion concluded that proposed diversions are only subject to the act when they "require the security of a water right." AR:1412–13. Because a company seeking to pump water from an underground mine "does not need security against upstream water users"—because it "simply ha[s] no use for the water nor need for a water right"—the opinion declared dewatering a "non-use of water" that lies beyond the Department's statutory "jurisdiction[.]" *Id.* at 1412–13, 1416–17. If senior rights holders are injured as a result of mine dewatering, the administrator asserted, they have no choice but to "go to court in an effort to obtain an injunction." *Id.* at 1417–18.[5]

[5] The administrator's opinion in *CR Kendall* made no mention of a 1981 "policy" document in which a lower-level official—the chief of the Department's Water Rights Bureau—had previously declared a dewatering exemption. *See* AR:1288–91. Given that the policy failed to offer any supporting analysis—relying, instead, on a conclusory assertion that mine dewatering is "a non-beneficial use"—the

This interpretation of the statute turns everything on its head. Instead of being focused on the "security" needs of new diversions, the Water Use Act was enacted "to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." *Mont. Power Co.*, 211 Mont. at 97–98; *see also, e.g.*, *Clark Fork Coal.*, ¶ 24 (noting that "the protection of senior water rights … is the [Water Use] Act's core purpose"); MCA § 85-2-101(4) (noting that the Water Use Act was designed "to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose"). The statute thus prohibits anyone from "appropriat[ing] water or commenc[ing] construction of diversion, impoundment, withdrawal, or related distribution works" without first "appl[ying] for and receiv[ing] a permit[.]" MCA § 85-2-302(1). And it requires every permit applicant to demonstrate, again, that "the water rights of a prior appropriator

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administrator's apparent decision to ignore it wasn't surprising. *See id.* at 1288.

under an existing water right … w[ould] not be adversely affected" by the proposed diversion. *Id.* § 85-2-311(1)(b).[6]

The Water Use Act's protections for senior rights holders are particularly vital in closed basins, like the Upper Missouri, where any new diversion of water could pose a significant threat to prior appropriators. *See Montana Trout Unlimited*, ¶ 30 (noting that the statute's basin-closure provisions "protect senior water rights holders in the Upper Missouri River basin"). In recognition of this fact, the Legislature required the Department to subject groundwater applications in closed basins to even greater scrutiny—by evaluating, among other things, "whether or not there … [would be] an adverse effect on a prior appropriator as the result of … [the] new appropriation right[.]" MCA § 85-2-360(3)(a). As previously noted, moreover, if the Department concludes that a new diversion will negatively impact an existing water right in a closed basin, it "may grant a permit … only if

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[6] In suggesting that senior rights holders should be required to "go to court" in order to protect themselves from mine dewatering, AR:1417–18, the *CR Kendall* opinion further disregarded the Water Use Act's purpose of eliminating the need for "'piecemeal litigation, often repetitive and among the same neighbors, over and over again disputing one another's claims.'" *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 367, 702 P.2d 948, 951–52 (1985).

the applicant proves by a preponderance of the evidence that the adverse effect would be offset through an aquifer recharge or mitigation plan that meets the [statute's] requirements[.]" *Id.* § 85-2-360(3)(c).

The Department's dewatering loophole cannot be reconciled with these protections. If it is allowed to stand, mining companies will be able to pump unlimited amounts of water from the ground—even in closed basins—so long as they avoid putting the water to "further beneficial use" once it's above the soil. *See* MCA § 85-2-505(1)(c). Indeed, nothing would stop mining companies from simply impounding their diverted water and allowing it to evaporate, ensuring it will never be returned to the ground. To protect Montana's waters and the rights of senior appropriators, this Court should reject the agency's unlawful interpretation of the Water Use Act and vacate Tintina's groundwater permit. *See Clark Fork Coal.*, ¶ 20 (noting that a court's "objective in interpreting a statute is to implement the objectives the Legislature sought to achieve[,]" and that "legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used").

E. The threats posed to Montana's waters and senior appropriators by the Department's unlawful exemption are demonstrated by the facts of this case.

The implications of the Department's unlawful dewatering loophole are underscored by the facts of this case. As noted above, Tintina's proposed groundwater pumping promises to deplete surface-water flows in three of the region's creeks: "Black Butte Creek, Coon Creek, and Sheep Creek downstream of Little Sheep Creek." AR:26 (Prelim. Determination). In addressing the fraction of its diversion that would be put to further beneficial use at its mine, Tintina accordingly acknowledged the potential for "adverse effects" on prior appropriators. *Id.* at 17 (noting Tintina's "plans to mitigate adverse effects by offsetting depletions to surface water sources caused by its groundwater appropriation"); AR:98 (Tintina's application) (acknowledging that "[f]or the purpose of … [its] water right analysis [the company] … presumed that any consumptive use of the water put to beneficial use will result in a net depletion to surface water" and "an adverse effect on prior appropriators"). To avoid these effects, the company developed a complex plan for "mitigat[ing] all depletions resulting from its [so-called] beneficial use appropriation" by "replac[ing] or offset[ting]"

nearly 350 acre-feet of water "in the affected drainages of Coon Creek, Black Butte Creek, and Sheep Creek." AR:27–28 (Prelim. Determination) (discussing the seven additional applications Tintina had submitted to "provide sufficient volume to fully mitigate … 340.3 [acre-feet] in depletions"). With respect to the majority of the proposed diversion, however—more than 450 acre-feet—Tintina's plan did nothing at all. *See id.* at 14 n.1. As a result, the company's mitigation plan ultimately—and unlawfully—failed to identify and mitigate most of the significant "adverse effects" that are threatened by groundwater pumping and storage at the Black Butte Mine.

Tintina's unenforceable promise to discharge its excess groundwater into the Sheep Creek aquifer was inadequate to remedy this failure. *See* AR:47 (Prelim. Determination) (asserting that "any water removed from the mine that exceeds 1.11 [cubic feet per second] will be … discharged back into the ground"). Most of the water discharged by Tintina's infiltration galleries, again, would be returned—eventually—to Sheep Creek and the lower portion of Coon Creek. AR:1700–01 (FEIS). These discharges would do nothing, in other words, to offset the losses in Black Butte Creek and the upper portion of

Coon Creek. *Id.*; *see also* ARM 36.12.101(38) (defining "[n]et depletion" in terms of the "calculated volume, rate, timing, and *location* of reductions to surface water resulting from a proposed groundwater appropriation") (emphasis added). And as previously explained, the company also plans to store its excess water from July through September of each year in an effort to avoid violations of a seasonal nitrogen standard. AR:1701 (FEIS). This delay—and the substantial water loss that could result from evaporation at Tintina's storage pond—would further exacerbate the mine's impacts on Montana's waters and senior appropriators. *See, e.g.*, *id.* at 1700–01 (discussing Tintina's storage plans); ARM 36.12.101(14) (defining "[c]onsumptive use" as including water "evaporated from … water surfaces"); *Wheat v. Cameron*, 64 Mont. 494, 210 P. 761, 763 (1922) (noting that "appropriator[s] must make allowance for evaporation and seepage").

Given the unlawful inadequacies of Tintina's mitigation plan for the Black Butte Mine, the Department's decision to approve it and grant the company a groundwater permit should be overturned by this Court. *See* MCA § 2-4-704(2) (authorizing a reviewing court to "reverse

or modify … [an agency] decision" if it is "in violation of … statutory provisions").

F. The Department's unlawful interpretation of the Water Use Act cannot be saved by deference.

All told, both the design of the Water Use Act and the facts of this case make clear that Tintina's entire diversion—more than 250,000,000 gallons of groundwater a year—would be a "beneficial use" subject to Montana's permitting and mitigation requirements. In attempting to justify a different conclusion, both the hearing examiner and the district court ultimately argued that deference should be given to the Department's conviction—never formalized in a rule—that mine dewatering is a "use[] of water … fall[ing] … wholly beyond the scope of the Water Use Act's regulatory scheme[.]" AR:1874–76 (summary-judgment order); *see also* District-Court Order at 14. Under Montana law, however, deference is not allowed—much less required—in this case.

The decisions of this Court have repeatedly affirmed that agencies' unlawful statutory interpretations are not entitled to judicial deference. In *Montana Power Company*, for instance, the Court emphasized that even "where a particular meaning has been ascribed to a statute by an

agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance[,]" that reading of the statute is "not binding on the courts[.]" 2001 MT 102, ¶ 25. Instead, the Court noted, such an interpretation is merely "entitled to 'respectful consideration'"—which isn't deference at all. *Id.* If a reviewing court makes a "determination that [the agency's longstanding] construction is … wrong," both "time and reliance" must "yield" to the correct interpretation of the law. *Id.* For all of the reasons outlined above, this is the proper outcome here.[7]

The hearing examiner got no further in suggesting that deference should be given to the Department's unlawful policy based on some notion of legislative acquiescence. *See* AR:1876 (summary-judgment order). The "goal" of interpreting a statute, of course, is "to give effect to the legislature's intent"—but the best evidence of the legislature's

[7] This isn't to suggest that the Department has done enough to establish a "longstanding" interpretation. *See Montana Trout Unlimited*, ¶ 38. As discussed below, the agency's dewatering loophole has never been formalized by regulation. In similar circumstances, this Court has concluded that no "longstanding agency interpretation" could even be found. *Id.* ¶¶ 14, 38 (dating a DNRC interpretation to its appearance in a rule, despite an earlier "series of letters written by agency officials" that "embodied" the same reading of the Water Use Act).

intent is the text it has actually enacted. *Giacomelli*, ¶ 18 (noting that "[s]tatutory interpretation … begins with the text of the statute"); *see also, e.g.*, *Fliehler v. Uninsured Emps. Fund*, 2002 MT 125, ¶ 13, 310 Mont. 99, 48 P.3d 746 (noting that "[i]f the words of the statute are clear and plain, we discern the intent of the legislature from the text of the statute"). As already explained, the Department's dewatering loophole is at odds with the language and design of the Water Use Act and must accordingly be rejected by this Court.

Even if the statute were ambiguous, moreover, the Department has long failed to formalize its interpretation through notice-and-comment rulemaking. *See* AR:1874–78 (summary-judgment order) (relying on agency decisions in individual permit proceedings). As a result, its interpretation does not constitute the kind of agency action that might even merit deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (noting that an agency interpretation "qualifies for *Chevron* deference" under federal law "when it appears [it] … was promulgated in the exercise of … [delegated rulemaking] authority"); *Montana Envtl. Info. Ctr.*, ¶ 24 n.9 (noting that "this Court applies a

two-step analysis similar to *Chevron* deference … , but much less deferential").

Contrary to the hearing examiner's suggestion, finally, this Court's decision in *Baitis v. Department of Revenue*, 2004 MT 17, 319 Mont. 292, 83 P.3d 1278, does not call for a different analysis. *See* AR:1876 (summary-judgment order). There, the Court confirmed that a statute "must be construed reasonably and in a way that is best able to effectuate its purpose, rather than in a way which would weaken that purpose." *Baitis*, ¶ 22. And it added, moreover, that "[t]he duty of a judge is to look at the words of the statute and ascribe to them their plain meaning"—not to disregard the words of a statute based on actions the Legislature didn't take. *Id.* ¶ 25. Because the language of the Water Use Act does not leave room for the Department's dewatering loophole, in short, the loophole must be rejected.

II. A decision upholding the Department's dewatering loophole would defy the requirements of Montana's Constitution.

For all of the reasons explained above, the Department's dewatering loophole must be overturned by this Court in order to vindicate the language and purpose of the Water Use Act. While this is

more than enough to resolve the present case, there is another reason for the Court to reject the agency's unlawful interpretation: its "duty … to construe statutes in a manner that avoids an unconstitutional interpretation" whenever possible. *Montana Indep. Living Proj. v. Dep't of Trans.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 215, 454 P.3d 1216, 1222.

With Montana's Constitution, "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state" were declared "the property of the state for the use of its people" and made "subject to appropriation for beneficial uses as provided by law." Mont. Const. art. IX, § 3(3). The Constitution accordingly required the Legislature to "provide for the administration, control, and regulation of water rights" and to "establish a system of centralized records[.]" *Id.* art. IX, § 3(4).

Read together, the Constitution's water-rights provisions compel an interpretation of the Water Use Act that will ensure all of Montana's water resources are comprehensively regulated and protected. *See, e.g.*, MCA § 85-2-101(6) (noting the Legislature's "intent … that the state, to fulfill its constitutional duties … , comprehensively adjudicate existing water rights and regulate water use within the state"); *id.* § 85-1-101(3)

(charging the Department with "coordinat[ing] the development and use of the water resources of the state so as to effect [their] full utilization, conservation, and protection"). The Department's dewatering loophole, however, does the opposite—authorizing mining companies like Tintina to divert unlimited amounts of groundwater without regulatory oversight, a permit, or any mandatory mitigation measures. It should accordingly be rejected by this Court. *See Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 11, 296 Mont. 402, 406, 989 P.2d 800, 802 (noting "the duty of the Court to avoid an unconstitutional [statutory] interpretation if possible").

CONCLUSION

In exempting most of Tintina's planned groundwater pumping and storage from the requirements of the Water Use Act, the Department unlawfully undermined the statute's essential—and constitutionally mandated—protections. To secure Montana's waters and the rights of senior appropriators, this Court should accordingly reject the agency's dewatering loophole and vacate the groundwater permit for Tintina's Black Butte Mine.

Respectfully submitted this 22nd day of August, 2023.

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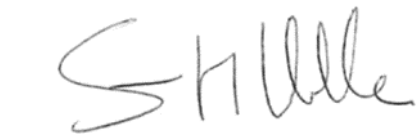
CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that the foregoing brief is double-spaced and printed with a 14-point, proportionately spaced typeface, Century Schoolbook. I further certify that the brief contains 9,955 words.



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