
IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA 19-0484

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

Petitioners and Appellees,

v.

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

Respondents and Appellants,

**BRIEF OF *AMICUS CURIAE* MONTANA WATER RESOURCES
ASSOCIATION, MONTANA FARM BUREAU FEDERATION, AND
MONTANA STOCKGROWERS ASSOCIATION**

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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I. STATEMENT OF THE ISSUES

A. Did the District Court err in holding that Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center could maintain objections alleging degradation to “Outstanding Resource Waters” (“ORWs”), as the same are defined in Mont. Code Ann. § 75-5-315(1), when Mont. Code Ann. § 85-2-311(1)(g) states that only the Montana Department of Environmental Quality or a local water quality district may raise such an objection?

II. STATEMENT OF THE CASE

Montana Water Resources Association (“MWRA”), Montana Farm Bureau Federation (“MFBF”), and Montana Stockgrowers Association (“MSGA”) adopt the Statement of the Case, Statement of Facts, and Standard of Review set forth by Appellants RC Resources, Inc. (“RC Resources”) and the Montana Department of Natural Resources and Conservation (“DNRC”) in their principal briefs filed with this Court.

MWRA, MFBF, and MSGA state that on November 21, 2019, said parties filed a motion for leave to file an *amicus* brief in this matter in support of RC Resources and DNRC. MWRA, MFBF, and MSGA’s memberships are frequent DNRC applicants for beneficial water use permits. As such, their interests in this

matter are based upon their members' vested interests in maintaining the integrity of DNRC's permitting processes.

This Court granted leave to file the requested brief on November 21, 2019.

III. SUMMARY OF ARGUMENT

The requirements of Mont. Code Ann. § 85-2-311 are plain on their face.

When the statute is construed in its entirety, it is clear that an applicant for a beneficial water use permit need only address the water quality provisions of Mont. Code Ann. § 85-2-311(1)(f) through § 85-2-311(1)(h) if those provisions are properly raised through valid objection. Mont. Code Ann. § 85-2-311(2). Specifically, an applicant for a beneficial water use permit need only address source classifications pursuant to Mont. Code Ann. § 75-5-301(1) (*i.e.*, “Outstanding Resource Waters” or “ORW”) if the Montana Department of Environmental Quality (“DEQ”) or a local water quality district advances an objection to the application on that basis. Mont. Code Ann. § 85-2-311(2).

Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (collectively, “MEIC”) failed to file the “valid objection” described in statute. Nevertheless, at MEIC’s urging, the District Court stretched other provisions of the statute, specifically the “legal availability” analysis requirement of Mont. Code Ann. § 85-2-311(1)(a)(ii), to incorporate water

quality considerations. This statutory manipulation is contrary to the plain language of the statute and should not be perpetuated by this Court.

Assuming, *arguendo*, that the legal availability requirement of Mont. Code Ann. § 85-2-311(1)(a)(ii) warrants further interpretation, this Court should rest assured that the interpretation advanced by MEIC and held by the District Court: 1) is contrary to the intent of the legislature, 2) fails to comport with the statute as a whole, 3) is contrary to the statutory construction advanced by DNRC, and 4) creates a parade of absurd results.

For the reasons described herein, MWRA, MFBF, and MSGA respectfully request that this Court overturn the District Court's ruling and uphold DNRC's January 29, 2018 "Final Order Granting Motion to Dismiss and Granting Application for Beneficial Water Use Permit No. 76N 30068837 With Conditions" ("Order Issuing Permit").

IV. ARGUMENT

A. **The Plain Language of Mont. Code Ann. §§ 85-2-311(1)(g) and (2) Clearly Precludes ORW Considerations Absent Valid Objection.**

A permit applicant is required to prove that a proposed water use is substantially in accordance with those regulations governing ORWs *only if* DEQ or a local water quality district raises that issue by valid objection. Mont. Code Ann. § 85-2-311(2).

MEIC objected to RC Resources' application on the basis that the requested permit allegedly dewatered an ORW, as the same are governed by the Montana Water Quality Act ("MWQA") and DEQ rule (*i.e.*, Mont. Code Ann. § 75-5-315(1) and Admin. R. Mont. 17.30.705 and 17.30.715). Admin. Rec. 0601 (*Pet'rs' Objs., Ex. B*). ORWs are a product of Mont. Code Ann. § 75-5-301(1), which charges the Board of Environmental Review to

...establish the classification of all state waters in accordance with their present and future most beneficial uses, creating an appropriate classification for streams that, due to sporadic flow, do not support an aquatic ecosystem that includes salmonid or nonsalmonid fish.

Mont. Code Ann. § 75-5-301(1); *see also*, Admin. R. Mont. 17.30.702(19). ORW classifications are implicated in DEQ's nondegradation review and permit procedures set forth in Mont. Code Ann. § 75-5-303 and Admin. R. Mont. 17.30.707.

Mont. Code Ann. § 85-2-311(1)(g) provides the avenue for objections to an application if a proposed permit impacts an ORW, stating that DNRC shall only issue a beneficial use permit if "the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to Mont. Code Ann. § 75-5-301(1)." Mont. Code Ann. § 85-2-311(1)(g). ***However,*** Mont. Code Ann. § 85-2-311(2) states that ***only*** the DEQ or a local water quality district can raise an objection under Mont. Code Ann. § 85-2-311(1)(g).

DNRC correctly held that MEIC’s objection was invalid, per Mont. Code Ann. § 85-2-311(2). Admin. Rec. 0007 (*Final Order Granting Mot. to Dismiss & Granting Appl. for Beneficial Water Use Permit No. 76N-30068837 with Conditions*). DNRC similarly found that MEIC’s “attempt to bootstrap” Mont. Code Ann. § 85-2-311(1)(g) criteria into the legal availability analysis of Mont. Code Ann. § 85-2-311(1)(a)(ii) was contrary to the statute. *Id.* at 0012. Upon judicial review, the District Court found that MEIC could raise its ORW objection as a “legal demand” requiring review under the legal availability analysis of Mont. Code Ann. § 85-2-311(1)(a)(ii) and remanded to DNRC. Order on Pet. for Judicial Rev., 11 (Apr. 9, 2019) (“DC Order”).

This Court’s charge in statutory interpretation is to implement legislative objectives. Bullock v. Fox, 2019 MT 50, ¶ 52, 395 Mont. 35, 435 P.3d 1187 (internal citations omitted). “If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls, and this Court need go no further nor apply any other means of interpretation.” *Id.* (quoting Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont., et al., 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499).

Mont. Code Ann. §§ 85-2-311(1)(g) and (2) make clear that DEQ and local water quality districts are the only entities that can raise an objection on the basis

of ORWs. MEIC is neither the DEQ nor a local water quality district. MEIC's objection advancing the alleged degradation of ORWs is invalid and was properly dismissed by DNRC's Order Issuing Permit. The District Court's decision, which allowed MEIC's objection to persist under the theory that ORWs were "legal demands" to be considered in RC Resources' legal availability analysis (*i.e.*, Mont. Code Ann. § 85-2-311(1)(a)(ii)), is contrary to the express and plain language of the statute.

From an applicant's perspective, the District Court's ruling also creates internal statutory conflict. The statute clearly states that an applicant need only address ORWs *if that issue is raised by valid objection* by DEQ or a local water quality district. Mont. Code Ann. § 85-2-311(2). The practical impact of the District Court's ruling is that applicants must now proactively address ORWs as a legal demand in the initial application, regardless of whether there are any objections to the application at all.

The District Court's order contradicts the plain language of the statute and creates internal conflict within the statute. For these reasons, the District Court should be reversed and DNRC's Order Issuing Permit should be upheld.

B. Even if Mont. Code Ann. § 85-2-311 Were Ambiguous, the Interpretation Advanced by MEIC and Adopted by the District Court is Contrary to the Rules of Statutory Interpretation and Creates Absurd Results.

Assuming, *arguendo*, that Mont. Code Ann. § 85-2-311 is ambiguous and requires further interpretation, the tortured analysis adopted by the District Court is erroneous and creates absurd results. When a statute requires additional consideration beyond the plain language of the statute, the Court reviews four factors:

First, we ask whether the interpretation reflects the intent of the legislature considering the plain language of the statute. We next examine whether the interpretation comports with the statute as a whole. We then consider whether an agency charged with administration of the statute has placed a construction on the statute. Finally, where appropriate, we analyze whether the interpretation avoids absurd results.

Bostwick Props., Inc. v. Mont. Dep't of Nat. Res. & Conservation, 2013 MT 48, ¶ 23, 369 Mont. 150, 155, 296 P.3d 1154, 1159 (internal citations omitted).

As articulated by both RC Resources and DNRC in their opening briefs, the District Court's inclusion of MWQA provisions as a "legal demand" to be considered in a permit applicant's "legal availability" analysis (*i.e.*, Mont. Code Ann. § 85-2-311(1)(a)(ii)) is contrary to legislative intent, the statute as a whole, and DNRC's statutory construction. Additionally, and perhaps most importantly, it

creates a host of absurd results that pose significant threats to MWRA, MFBB, and MSGA members and all Montana water users who seek to appropriate water.

1. ***The District Court's expansive interpretation of "legal demand" requires an applicant to address an unlimited number of factors in order to assess "legal availability."***

The plain meaning assigned to "legal demand" has always been limited to water rights on the source in question. This is the meaning that has been assigned to the term by DNRC since its inclusion in the MWUA, and it is the meaning attributed to the term by applicants. The District Court's finding that ORWs are a "legal demand" subject to an applicant's Mont. Code Ann. § 85-2-311(1)(a)(ii) legal availability analysis is absurd, and creates a catch-all provision of unlimited statutes and rules that an applicant could be required to affirmatively address in future beneficial use permit applications.

If DNRC and applicants are required to consider ORWs as a legal demand on the source, they could also be forced to analyze other DEQ criteria during the DNRC permitting process. For example, DEQ statutes and regulations govern "setbacks" between sewage system components and water sources. *See*, Mont. Code Ann. §§ 76-4-104, 75-5-411; Admin. R. Mont. 17.36.323, 17.30.1702. Under the District Court's reading of "legal demand," permit applicants for a domestic water well may now be forced to affirmatively address in their permit

applications whether said well meets DEQ setback requirements. Similarly, DNRC may now be required to review and interpret DEQ's statutes and rules to determine whether the proposed well meets DEQ setback criteria before issuing a DNRC permit.

The additional content a permit applicant may have to consider when assessing "legal demands" also extends to federal statutes. The Wild and Scenic Rivers Act of 1968 enables Congress or, in certain situations, the United States Department of Interior Secretary, to preserve water sources designated as wild, scenic, or recreational. *See*, The Wild and Scenic Rivers Act, 16 U.S.C. § 1271, *et seq.* (1968). The policy behind the designation is to preserve water sources in their free-flowing states and ensure "that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. § 1271.

On October 12, 1976, stretches of the Flathead River and the Missouri River were designated "wild and scenic." *See*, 16 U.S.C. § 1274 (13) and (14); *see also*, Mont. Code Ann. § 85-20-501, Article I(2); § 85-20-1401, Article I(11). Portions of these "wild and scenic" designations were quantified by water right compact between the State of Montana and the United States Bureau of Land Management

and United States Forest Service (“USFS”). *See*, Mont. Code Ann. § 85-20-501, Article II(A); Mont. Code Ann. § 85-20-1401, Article II(D).

However, East Rosebud Creek, which was only recently designated on August 2, 2018, is not quantified by compact, nor is there any water right associated with its “wild and scenic” status. 16 U.S.C. § 1274(213); East Rosebud Wild and Scenic Rivers Act of 2018, Pub. L. No. 115-229, 132 Stat. 1629. As such, there is no priority date, flow rate, or volume associated with the creek’s designation. Even though there is no way to quantitatively compare East Rosebud Creek’s designation and a proposed water use permit, under the District Court’s reading of “legal demand,” applicants on or near East Rosebud Creek may now be required to consider this federal “wild and scenic” designation as a legal demand when seeking a permit from DNRC. It is unclear how DNRC or an applicant could reasonably undertake a quantification of how much water the East Rosebud Creek “wild and scenic” designation should be allotted, let alone do so in a controlling legal analysis.

The Endangered Species Act (“ESA”) poses another set of ambiguous legal demands, which, under the District Court’s holding, a DNRC permit applicant may have to consider. The purpose of the ESA is to provide for the conservation of endangered and threatened species and their ecosystems. *See*, 16 U.S.C. § 1531, *et*

seq. The ESA makes it unlawful for anyone to “take” a listed animal, which includes significant habitat modification. 16 U.S.C. § 1538; *see also*, Babbitt v. Sweet Home Chapter of Communities for a Great Or., et al., 515 U.S. 687 (1995).

Under the District Court’s overly broad reading of “legal demand,” DNRC applicants could now be required to identify any endangered or threatened species that may exist at the proposed point of diversion or place of use, and assess whether the proposed beneficial use of water will constitute a “taking.” In addition to hiring attorneys and hydrologists to assist in the application process, applicants may now need to budget for wildlife biologists. More disturbing is that DNRC could be forced to quantify how much water an endangered species needs, even though it has no specific legal authority or expertise to do so.

These examples may seem far-fetched to the Court, but are very real concerns of MWRA, MFBBF, and MSGA. If DNRC permit applicants are required to affirmatively consider provisions of the MWQA as part of their legal availability analysis, absent *valid objection*, then there is no limit to what state or federal laws the applicant and DNRC will be required to address next. None of the parties dispute that MWQA has independent legal authority and weight that governs conduct independent of a water use permit. However, forcing DNRC to assume legal authorities beyond its jurisdiction is folly.

MWRA, MFBB, and MSGA advocate balanced and fair approaches to water use on a daily basis, and the District Court's ruling is unprecedented. For these reasons, MWRA, MFBB, and MSGA respectfully request that this Court reverse the District Court and uphold DNRC's Order Issuing Permit.

2. *Requiring DNRC to interpret and apply provisions of the MWQA, absent DEQ participation, creates absurd and unnecessary jurisdictional confusion.*

The District Court's broad interpretation of "legal demand" and what a DNRC applicant is required to demonstrate during the application process will result in inter-agency conflict and jurisdictional quandaries.

"ORW" is a designation developed and applied by DEQ in accordance with the MWQA. Mont. Code Ann. § 75-5-301; Admin. R. Mont. 17.30.702. DEQ is the agency charged with administering MWQA and, using its expertise, has developed regulations to that end. Admin. R. Mont. 17.30.701, *et seq.* As demonstrated by Admin. R. Mont. 17.30.707 and 17.30.715, DEQ has developed procedures for nondegradation review as well as criteria for determining nonsignificant changes in water quality. These procedures and criteria are beyond DNRC's statutory and regulatory scheme, not to mention expertise.

If an applicant is required to analyze ORWs, well setbacks, or any other DEQ water quality criteria in a DNRC new permit application, DNRC will be

placed in the absurd position of making water quality determinations that are governed by DEQ procedures and criteria and that lie squarely within the purview of DEQ. The complexity of this scenario is compounded if an applicant then has to pursue any water quality permits or certifications from DEQ for the same project.

This is the precise situation before the Court now. RC Resources has expressly stipulated with MEIC and the USFS that its DNRC permit is subject to conditions and limitations in the USFS Record of Decision and Plan of Operations, which, in turn, is specifically contingent on receiving the necessary environmental permits from DEQ. Admin. Rec. 0015-0018 (*Stipulation & Agreement*); Admin. Rec. 0019-0027 (*Stipulation & Agreement*). MEIC's argument, and the District Court's order, now (1) requires RC Resources to address DEQ statutes and regulations (*i.e.*, Mont. Code Ann. § 75-5-301; Admin. R. Mont. 17.30.701, *et seq.*) as part of its "legal demand" analysis for a new beneficial use permit, and then (2) requires DNRC to make a determination as to whether the proposed beneficial use permit satisfies DEQ statutes and regulations...all absent DEQ involvement. If RC Resources successfully obtains a beneficial use permit from DNRC on the District Court's remand, RC Resources must then proceed through

extensive DEQ permitting where, undoubtedly, ORWs will be addressed again, this time by the agency correctly charged with their oversight.

In such a scenario, will DNRC's decision to issue a beneficial use permit after reviewing ORWs estop DEQ from reviewing impacts to ORW's per its statutes and rules? What happens if DNRC and DEQ's findings regarding ORWs conflict? Such an outcome would undoubtedly please MEIC, as it would be afforded two bites of the same apple. However, this situation creates obvious concern for RC Resources and DNRC, as well as all Montana water users.

Mont. Code Ann. § 85-2-311(1)(g) currently provides a mechanism by which DEQ can object and address any ORWs implicated by a permit application. Mont. Code Ann. § 85-2-311(1)(g) and (2). This provision allows DEQ to offer its knowledge and expertise to DNRC. DEQ chose not to object to RC Resources' application, presumably because the agency knew it would have the opportunity to address ORWs when RC Resources submits the requisite applications to DEQ.

The District Court's holding creates agency conflict which the agencies themselves recognize and have thus avoided. The *amicus* parties respectfully request that the District Court's holding be reversed and the DNRC's Order Issuing Permit be upheld.

3. *The District Court's order upends Montana's prior appropriation system and threatens the integrity of the MWUA.*

The District Court's determination that "legal demands" require an assessment beyond legal water rights on a source threatens to topple Montana's prior appropriation system, and should be reversed for that reason.

The 1973 Montana Water Use Act ("MWUA") created a centralized record system of all water rights in the State of Montana, so as to maintain the integrity of the prior appropriation system and facilitate apple-to-apple comparisons for priority purposes. Broadly construing the definition of "legal demands" such that DNRC must now consider ORWs (which have no corresponding water rights or elements of a water right) requires an apple-to-orange comparison that DNRC is not equipped to consider and which offends the prior appropriation doctrine.

Water use in the State of Montana is based on the prior appropriation system. "As between appropriators, the one first in time is first in right." Featherman v. Hennessy, 43 Mont. 310, 115 P. 983, 986 (1911) (quoting Rev. Codes § 4845). Prior to 1973, water could be appropriated through either the "statutory method," which required a posted and filed notice of appropriation, or through the local custom of diversion and application to actual beneficial use. Mont. Power Co. v. Carey, 211 Mont. 91, 96-97, 685 P.2d 336, 339 (1984). The MWUA enacted in 1973 developed a new procedure for the appropriation of water,

with the understanding that a “system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana’s water for the state and its citizens...” Mont. Code Ann. § 85-2-101(2); Mont. Power Co., 211 Mont. at 97, 685 P.2d at 339-340. The MWUA protected the prior appropriation system relied upon by water users since territorial days, and incorporated that system into a new procedure, ensuring protection for all water users today. *See*, Mont. Power Co., 211 Mont. at 97-98, 685 P.2d at 340 (The “unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.”).

A crucial component to maintaining the integrity of the prior appropriation system is the ability to compare water rights and, consequently, assess adversity. The ambiguity inserted into “legal demand” by the District Court’s order is contrary to this system. ORWs are prohibitions on activity, but have no defined elements and are not water rights. They are not characterized by flow rate or volume, place of use, period of use, point of diversion, purpose of use, or priority date. *See*, Curry v. Pondera Cty. Canal & Reservoir Co., 2016 MT 77, ¶ 80, 383

Mont. 93, 120, 370 P.3d 440, 458. As such, it is not possible to compare them to existing water rights, let alone uses proposed in new permit applications.

Similarly, infusing “legal demands” associated with DEQ setbacks, “wild and scenic” designations, and the ESA into a legal availability analysis creates the same incommensurate situation. The “wild and scenic” designation of East Rosebud Creek has no associated priority date, flow rate, or volume. Septic systems and ESA listings also lack elements of a water right. Because those designations and systems lack any element of a water right, there is no way for a permit applicant (or DNRC) to assess any associated “legal demands” against an applicant’s proposed appropriation.

The District Court’s holding requires the MWUA to incorporate and account for “legal demands” outside the prior appropriation system. This was never the intent or purpose of the MWUA, and agencies and applicants alike are incapable of incorporating such amorphous considerations into the permitting process. For this reason, the District Court’s decision should be reversed and DNRC’s Order Issuing Permit upheld.

C. The District Court’s Interpretation of “Legal Demand” is Contrary to Public Policy, Which Encourages Beneficial Use.

In addition to creating absurdity and undermining the prior appropriation system, the District Court’s interpretation of “legal demand” similarly thwarts the

same founding principles of water use in Montana that it claims to uphold, namely balanced beneficial use. DC Order at 10.

In support of its holding, the District Court cites Mont. Code Ann. § 85-1-101(5) as a MWUA policy consideration. Mont. Code Ann. § 85-1-101(5) states that Montana’s water resources must be “protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.” *Id.* The Court’s characterization of this provision is wrong for two reasons.

First, Mont. Code Ann. § 85-1-101 is a list of policy considerations justifying the creation of a state water plan...not necessarily the MWUA itself. Mont. Code Ann. § 85-1-101(10). Second, even if the statute did act as a comprehensive policy statement for the MWUA, the Court’s selective reading excludes the following provisions:

(1) The general welfare of the people of Montana, in view of the state’s population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.

(2) The public policy of the state is to promote the conservation, development, and beneficial use of the state’s water resources to secure maximum economic and social prosperity for its citizens.

(3) The state, in the exercise of its sovereign power, acting through the department of natural resources and conservation, shall coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources.

(4) The development and utilization of water resources and the efficient, economic distribution thereof are vital to the people in order to protect existing uses and to assure adequate future supplies for domestic, industrial, agricultural, and other beneficial uses.

...

(8) The greatest economic benefit to the people of Montana can be secured only by the sound coordination of development of water resources with the development and utilization of all other resources of the state.

Mont. Code Ann. § 85-1-101 (emphasis added). These provisions demonstrate clear support and encouragement for smart beneficial use and development.

The clear language of Mont. Code Ann. § 85-2-311 places a significant burden on any applicant for a new appropriation of water. Bostwick, 2013 MT 48, ¶ 41. This Court is no stranger to the rigorous and thorough processes that an applicant must undertake in order to obtain a new permit to beneficially use water or to change a water right. *See generally, id.*; In re Royston, 249 Mont. 425, 816 P.2d 1054 (1991); Mont. Power Co.; Bitterroot River Protective Ass'n, Inc. v. Siebel, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Hohenlohe v. St., Dep't of Nat. Res. & Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628; Flathead Lakers Inc., et al. v. Mont. Dep't of Nat. Res. & Conservation, et al., Cause No. DA 19-0312 (currently pending).

The difficult nature of these processes was recognized and articulated in the Hohenlohe concurrence. There, Justice Wheat recognized that most applicants

would not have the resources to see such a process through to the “bitter end,” and that drawn-out processes could “prevent all but the most fortunate and persistent from pursuing and litigating change of use applications.” *Id.*, 2010 MT 203, ¶ 86 (concurrency). He recognized in that case that such processes could well threaten a Montanan’s ability to beneficial use water. *Id.*

While speaking to an application to change a water right, Justice Wheat’s sentiments equally apply to applications for new beneficial uses. The District Court’s holding in the above-captioned matter threatens to make an already onerous process impossible. The purpose of the permitting system is **not** to make the process so difficult, unwieldy, and jurisdictionally fraught that it becomes unendurable for the applicant. Such a system discourages water development and use, which is in direct contravention to the intent of the MWUA.

MWRA, MFBF, and MSGA respectfully request that this Court uphold the integrity of DNRC’s permitting process by reversing the District Court’s holding.

V. CONCLUSION

The District Court’s determination that an individual must affirmatively address ORWs, absent a valid DEQ objection, in order to obtain a beneficial use permit from DNRC is legal error and should be reversed as such. Mont. Code Ann. §§ 85-2-311(1)(g) and (2) clearly state that an applicant is only required to

prove that a proposed water use is substantially in accordance with the water classifications promulgated under Mont. Code Ann. § 75-5-301(1) (*i.e.* ORWs) if that issue is raised by DEQ or a local water quality district by valid objection.

MEIC's ORW objection is invalid because MEIC cannot raise an objection under Mont. Code Ann. § 85-2-311(1)(g). MEIC's attempts to bootstrap that objection as a "legal demand" requiring consideration under the legal availability analysis of Mont. Code Ann. § 85-2-311(1)(a)(ii) is contrary to the plain language of the statute and should also be set aside.

Even if "legal demand" was ambiguous, the interpretation assigned by the District Court creates a series of absurd results that produce ambiguity, generate interagency conflict, offend Montana's prior appropriation system, and contradict the purposes of the MWUA.

For these reasons, MWRA, MFBBF, and MSGA respectfully ask that this Court reverse the District Court's decision and issue a ruling upholding DNRC's Order Issuing Permit.

DATED this 4th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), we certify that the *Amicus Curiae Brief of the Montana Water Resources Association, Montana Farm Bureau Federation, and Montana Stockgrowers Association* is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2010, is not more than 5,000 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, and any appendices containing statutes, rules, regulations, and other pertinent matters.

DATED this 4th day of December, 2019.

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I hereby certify that on the 4th day of December, 2019, a true and correct copy of the foregoing *Amicus Curiae Brief of the Montana Water Resources Association, Montana Farm Bureau Federation, and Montana Stockgrowers Association* was duly served, via First Class U.S. Mail, postage prepaid, on the attorneys of record addressed as follows:

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