IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0484

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

Petitioners and Appellee

vs.

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

Respondents and Appellant

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, CAUSE NO. CDV-2018-150, HON. KATHY SEELEY,

BRIEF OF APPELLANT, RC RESOURCES

APPEARANCES:

Holly Jo Franz
Ryan McLane
Franz & Driscoll, PLLP
21 N. Last Chance Gulch, Ste. 210
P.O. Box 1155
Helena, MT 59624-1155
Telephone: (406) 442-0005
Facsimile: (406) 442-0008
hollyjo@franzdriscoll.com
ryan@franzdriscoll,com

Attorneys for Appellant, RC Resources

Brian C. Bramblett
Danna R. Jackson
Special Assistant Attorneys General
Department of Natural Resources
and Conservation
1539 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Telephone: (406) 444-1451
bbramblett@mt.gov
jacksondanna@mt.gov

Attorneys for Appellant, Department of Natural Resources and Conservation

Katherine K. O'Brien
Timothy J. Preso
Earthjustice
313 East Main Street
Bozeman, MT
Telephone: (406) 586-9699
Facsimile: (406) 586-9695
kobrien@earthjustice.org
tpreso@earthjustice.org

Attorneys for Appellees, Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center

Oliver J. Urick
Hubble Law Firm
P.O. Box 556
Stanford, MT 59479
Stanford Tel: (406) 566-2500
Lewistown Tel: (406) 538-3181
Facsimile: (406) 566-2612
o_urick@hubblelandandlaw.com

Attorneys for Amicus Curiae Montana Stockgrowers Association

Rachel K. Meredith
Doney Crowley P.C.
Diamond Block, Suite 200
P.O. Box 1185
Helena, MT 59624-1185
Telephone: (406) 443-2211
rmeredith@doneylaw.com

Attorneys for Amicus Curiae Montana Water Resources Association and Montana Farm Bureau Federation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

Session Laws

Administrative Rules of Montana

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Whether the district court erroneously interpreted § 85-2-311, MCA, as allowing private-parties to raise a water quality classification objection against an application for a water right, when the statute provides "only the department of environmental quality or a local water quality district . . . may file a valid [water quality classification] objection."

STATEMENT OF THE CASE

RC Resources' filed an application for beneficial water use permit with the Montana Department of Natural Resources ("DNRC") to obtain a new water right permit. DNRC preliminarily approved RC Resources' application and provided public notice of the application. Clark Fork Coalition, Rock Creek Alliance, Earthworks, and Montana Environmental Information Center (collectively "Objectors") and the United States Forest Service ("Forest Service") filed objections against the permit alleging RC Resources did not have a possessory interest in the place of use or point of diversion. The objections on possessory interest were settled by stipulations between the parties.

However, at issue in this appeal, Objectors also alleged the application should be denied based on the criteria of legal availability of water and the effect on the water quality classification. DNRC issued an objection deficiency notice, ruling the

objection based on the water quality classification was invalid because only the Montana Department of Environmental Quality ("DEQ") or a local water quality district can bring this objection. Initially, DNRC also ruled the objection based on legal availability was invalid because it relied on the same argument related to the water quality classification that can only be challenged by DEQ or a local water quality district. Objectors responded to DNRC's objection deficiency notice by raising the same objections but contending they were entitled to argue their legal availability theory before the DNRC hearings examiner. DNRC once again ruled the water quality classification objection invalid, but then allowed Objectors to proceed to a contested case on their legal availability objection.

During the contested case, RC Resources filed a motion to dismiss Objectors' objection based on the legal availability of water. Objectors' legal availability objection alleged water was not legally available because the legal demands on the source of supply include the water quality classifications of the Montana Water Quality Act. RC Resources contended Objectors could not bring this objection because § 85-2-311(2), MCA, specifically states only DEQ or a local water quality district may object to a water use permit application based on water quality classification concerns.

DNRC granted RC Resources' motion and dismissed Objectors' objection. DNRC ruled that even if legal demands on a water supply can be interpreted to mean

something more than other water rights, it cannot include water quality classifications since such a statutory interpretation would render § 85-2-311(2), MCA, superfluous. AR0010, at ¶21 ("*Final Order*")(Appendix Tab B). Having dismissed Objectors' legal availability objection, DNRC issued RC Resources' water use permit subject to the stipulations between RC Resources, Objectors, and the Forest Service.

Objectors filed a judicial review action seeking reversal of DNRC's order dismissing the legal availability objection and raising constitutional concerns. The district court reversed and ruled water quality classifications are a legal demand on water and can be considered as part of a legal availability objection. Having reversed DNRC on the statutory interpretation of legal demands, the district court determined it did not need to address Objectors' constitutional arguments. From this order, RC Resources and DNRC appeal.

STATEMENT OF FACTS

RC Resources holds mining claims and fee simple ground in the Kootenai National Forest near Libby, Montana. RC Resources seeks to operate the Rock Creek Mine at this location. AR0033-0035. The water right permit issued to RC Resources is only one of many permits required before mining may commence. RC Resources is currently going through an extensive process of obtaining all necessary governmental reviews, permits, and authorizations. The mine was initially proposed

in the late 1980s and has undergone decades of environmental review. See e.g. Clark Fork Coal. v. Mont. Dep't Envtl. Qual., 2012 MT 240, ¶5, 366 Mont. 427, 288 P.3d 183. The Forest Service and Montana Department of Environmental Quality ("DEQ") have issued numerous environmental impact statements for the mining project. See Rock Creek Alliance v. U.S. Forest Serv., 703 F.Supp.2d 1125, 1164 (D. Mont. 2010) aff'd in part sub nom. Rock Creek Alliance v. U.S. Fish & Wildlife Serv., 663 F.3d 439 (9th Cir. 2011).

To satisfy the requirement to obtain a water right permit, RC Resources filed an application for beneficial water use permit on April 28, 2014, seeking a water right allowing them to divert and beneficially use up to 3,000 gallons per minute and 833 acre-feet per year of groundwater for mining purposes. AR0067-0076. As the applicant, RC Resources was required to satisfactorily address all statutory and regulatory requirements; specifically, the criteria of Section 85-2-311, MCA. ("Section 311"). DNRC extensively reviewed the application, and RC Resources expended substantial time and effort addressing Section 311. See DNRC Administrative Record *in toto*. See e.g. AR0001-0750.[1]

[1] Citations to the DNRC Administrative Record will be in the format of "AR" followed by the Bates Stamp Number placed on the specific pages. When DNRC transmitted the administrative record to the district court, it included an index which aids the location of documents.

The DNRC issued a *Preliminary Determination to Grant*, granting RC Resources a water right permit to use groundwater for mining purposes at the proposed Rock Creek Mine. AR0002-0027 ("*Final Order"*)(Appendix Tab B); AR0034 ("*Preliminary Determination to Grant"*). The DNRC determined that RC Resources had satisfied all of the 311 Criteria.

The *Preliminary Determination to Grant* went out for public notice. AR0527-0537. Other parties were entitled to file objections, but, "objection[s] to an application for a permit must state . . . facts indicating that one or more of the criteria in 85-2-311 are not met." § 85-2-308(1)(b), MCA. DNRC is prohibited from entertaining an 'invalid' objection, which does not raise a Section 311 criteria as its basis. §§ 85-2-308(6); 309(1), MCA. Objections are strictly limited to the criteria described in Section 311.

The Objectors filed objections asserting several grounds, including two alleging non-compliance with the water quality classifications set forth in the non-degradation provisions of the Montana Water Quality Act. AR0590-0608; see also AR0577-0589. Objectors alleged the proposed groundwater permit would degrade certain surface water sources in the Kootenai National Forest contrary to the water quality classifications found in § 75-5-301, MCA, and Admin. R. Mont. 17.30.705(2)(c) (Nondegradation Policy – Applicability And Level Of Protection).

Objectors first attempted to raise this objection pursuant to Section 311(1)(g), correctly admitting that their alleged non-degradation water quality classification objection fell within the ambit of that statutory criteria. AR0579; AR0583; AR0587; AR0591. A water quality classification objection may be filed if the proposed use is not "substantially in accordance with the classification of the water set for the source of supply pursuant to 75-5-301(1)." Section 311(1)(g). Objectors alleged RC Resources' proposed water use is not appropriate for the water quality classification of the source (as classified under the Water Quality Act) because it will degrade outstanding resources waters. AR0601 (Objectors' *Objection to Application*, Exhibit B).

Because Section 311(2) provides only DEQ or a local water quality district are statutorily permitted to raise a water quality classification objection, DNRC correctly found that Objectors' had not presented a valid objection pursuant to Section 311(1)(g), and dismissed it. AR0589; AR0585; AR0581; AR0577. Objectors were aware of this limitation and requested that DEQ file a Section 311(g) water quality classification objection against RC Resources' water right permit application. DEQ declined to do so, apparently preferring to address the nondegradation issue through DEQ's Water Quality Act procedures. AR0602.

Objectors then attempted to raise this same water quality classification objection pursuant to Section 311(1)(a)(ii), which is the objection related to the

legal availability of water for appropriation under the proposed water right. AR0579; AR0583; AR0587; AR0591. The Objectors' explain the basis for their 311(1)(a)(ii) "legal availability" objection is that the proposed use violates the legal demands governing surface waters by dewatering, and thus degrading, outstanding resource waters. AR0601.

Objectors' stated basis for their Section 311(1)(a)(ii) "legal availability" objection is the ***exact*** same non-degradation water quality objection they previously attempted to raise under the Section 311(1)(g) but were prohibited from doing so pursuant to Section 311(2). Compare AR0599-0600 to AR0601. Objectors argued their water quality classification objection could simply be re-named a "legal demand" for purposes of a legal availability objection and could thereby circumvent the plain prohibitional language of Section 311(2). AR0611.

Objectors and the Forest Service also filed objections alleging RC Resources did not have a possessory interest in the place of use or points of diversion. AR0569-0576. RC Resources and the Forest Service reached a stipulated settlement which resolved all objections of the Forest Service. AR0015-0018. RC Resources and Objectors reached a similar stipulated agreement resolving all of the Objectors' objections except one. AR0019-0027. (Collectively, "Stipulations").

The Stipulations are nearly verbatim, and resulted in certain terms and conditions being placed on the face of the permit. AR0015-0018; AR0019-0027;

AR0002-0013 (*Final Order*) (Appendix Tab B). Pertinent here, water use under the permit is subject to "any terms conditions and limitations related to the use of water contained in the Forest Service's Record of Decision and Plan of Operations for the Rock Creek Mine, including any future modifications to those Forest Service authorizations." AR0019-0027 (*Final Order*, Exhibit B) (Appendix Tab B). The Record of Decision and Plan of Operations for the Rock Creek Mine is specifically contingent upon receiving all necessary environmental permits, authorizations, and reviews. *Final Record of Decision, Rock Creek Project*, p.5-6 (Aug. 2018)(Appendix Tab C) (The purpose of the ROD includes "ensur[ing] the alternative selected in this ROD requires the operator to comply with applicable federal and state laws and regulations.") The Stipulations were approved by the hearing officer. AR0002-0027. They resolve all objections of the Forest Service, and all objections of the Objectors, other than their Section 311(1)(a)(ii) legal availability objection. AR0002-0027.

Pursuant to the Montana Water Use Act and Montana Administrative Procedures Act, a DNRC hearing's officer was appointed for a contested hearing. AR0639-0640. As a result of the Stipulations, the only remaining issue for hearing was Objectors' Section 311(1)(a)(ii) objection.

RC Resources filed a motion to dismiss this remaining objection, contending that the plain language of Section 311(2) prohibits Objectors from raising water

quality classification objections, regardless of whether the Objectors present the objection under the legal availability criteria. AR0670-0688.

After briefing, the DNRC hearing officer entered its *Final Order* granting RC Resource's motion and holding that: (A) the substance of Objectors' remaining objection is what matters; (B) Objectors are expressly prohibited from raising this particular water quality classification objection pursuant to Section 311(2); and (C) dismissing Objectors' Section 311(1)(a)(ii) objections. AR0002-0013. With all objections resolved, RC Resources' water right permit was granted, subject to the terms of the Stipulations. AR0002-0013.

Nothing in the water right permit allows RC Resources to begin mining operations, ignore environmental regulations or review, or violate existing water quality laws. AR0002-0029 ("*Final Order"*)(Appendix Tab B); AR0034 ("*Preliminary Determination to Grant"*). In fact, the plain language of the permit states that any use of water must be in accord with the Record of Decision and Plan of Operation, which includes compliance with all environmental regulations. AR0019-00027 (*Final Order, Exhibit B*).

Objectors appealed to the First Judicial District Court, petitioning for judicial review of the agency decision. *Pet. Rev. Final Agency Action*, First Jud. Dist. Ct., CDV-2018-150 (Feb. 23, 2018). Objectors argued they should be able to raise precisely the same water quality classification objection that Section 311(2)

expressly prohibits them from raising, so long as they re-named the water quality objection as a "legal availability" issue under Section 311(1)(a)(ii).[2] *Pet'r's. Opening Br.*, First Jud. Dist. Ct., CDV-2018-150 (May 3, 2018). RC Resources and DNRC disagreed, maintaining that the plain language of Section 311(2) expressly prohibits the substance of Objectors' contemplated water quality classification objection. *Resp. Br. of Dept. Nat. Res. Consv.*, First Jud. Dist. Ct., CDV-2018-150 (Jun. 1, 2018); *RC Res.' Resp. Br.*, First Jud. Dist. Ct., CDV-2018-150 (Jun. 1, 2018).

The district court ruled in Objectors' favor, holding that the water quality classification objection – specifically addressed in Section 311(1)(g), and which Objectors are prohibited from raising pursuant to Section 311(2) – can nevertheless be raised if it is presented to the DNRC as a Section 311(1)(a)(ii) objection. *Order Pet. Jud. Rev.*, p.11-12, First Jud. Dist. Ct., CDV-2018-150 (Apr. 9, 2019) (Appendix Tab A) (hereinafter "*Order Pet. Jud. Rev."*).

STANDARD OF REVIEW

The issue presented in this matter is a question of law, because it concerns a question of statutory construction.

[2] Objectors also raised a constitutional challenge to Section 311(2), arguing that any person should be permitted to raise the water quality objections of 311(1)(g). The District Court did not rule in Objectors' favor on that issue, and Objectors did not appeal it.

The Montana Supreme Court reviews an administrative appeal under the same standards of review that the district court applies. McGree Corp. v. Mont. Pub. Serv. Comm'n, 2019 MT 75, ¶6, 395 Mont. 229, 438 P.3d 326.

In turn, judicial review of an administrative decision is governed by the Montana Administrative Procedure Act. It provides:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
> (a) the administrative findings, inferences, conclusions, or decisions are:
> (i) in violation of constitutional or statutory provisions;
> (ii) in excess of the statutory authority of the agency;
> (iii) made upon unlawful procedure;
> (iv) affected by other error of law;
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (b) findings of fact, upon issues essential to the decision, were not made although requested.

§ 2-4-704, MCA.

Under this standard, conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Mont. Dep't Revenue, 245 Mont. 470, 474, 803 P.2d 601, 602 (1990). An agency decision is properly affirmed if the agency reached the right result, even if for the wrong reason.

Thayer v. Uninsured Empl'rs' Fund, 1999 MT 304, ¶31, 297 Mont. 179, 991 P.2d 447.

When interpreting a statute courts must apply the plain language if it is unambiguous. Clark Fork Coal. v. Tubbs, 2016 MT 229, ¶10, 384 Mont. 503, 511, 380 P.3d 771, 711; § 1-2-101, MCA. If courts must look beyond the plain language of the statute, they must comply with 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 Nat. Res. & Cons., 2013 MT 48, ¶23, 369 Mont. 150, 155, 296 P.3d 1154, 1159 (internal citations omitted).

Moreover, courts "afford great deference to agency decisions implicating substantial agency expertise." Mont. Envtl. Info. Ctr. v. Mont. Dep't Envtl. Qual., 2019 MT 213, ¶20, 397 Mont. 161, 451 P.3d 493, *reh'g denied* (Nov. 19 2019). The public should be entitled to reasonably rely upon long-standing interpretations of an agency. Mont. Power Co. v. Mont. Pub. Serv. Comm'n, 2001 MT 102, ¶23, 305 Mont. 260, 26 P.3d 91.

SUMMARY OF ARGUMENT

The district court erroneously determined that a private-party objector may simply re-frame a Section 311(1)(g) water quality classification objection into a Section 311(1)(a)(ii) legal availability objection in order to circumvent the prohibitions of Section 311(2). Pursuant to the plain language of Section 311(2), only the DEQ or a local water quality district may raise a Section 311(1)(g) water quality classification objection. Section 311(2) substantively prohibits Objectors' objection, despite their procedural attempts to circumvent the law. The district court failed to interpret Section 311 as a whole which resulted in an absurd result and ignored DNRC's construction of the statute.

ARGUMENT

I. A PRIVATE-PARTY OBJECTOR MAY NOT SIMPLY RE-FRAME A SECTION 311(1)(g) WATER QUALITY CLASSIFICATION OBJECTION AS A SECTION 311(1)(a)(ii) LEGAL AVAILABILITY OF WATER OBJECTION IN ORDER TO CIRCUMVENT SECTION 311(2).

A. Pursuant to the plain language of Section 311(2), only the DEQ or a local water quality district may raise a Section 311(1)(g) water quality objection.

Objectors attempted to raise a Section 311(1)(g) water quality classification objection, alleging the proposed groundwater use is contrary to the classification of water set for certain surface water sources under the Water Quality Act. AR0599-0602 (Petitioners' Objections, Exhibit B). Section 311(1)(g) criteria provides:

> the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1).

§ 85-2-311(1)(g), MCA. Pursuant to Section 311(2), the DNRC correctly determined that this Section 311(1)(g) objection was invalid, and dismissed it. AR0579; AR0583; AR0587; AR0591. Section 311(2) provides:

> The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met ***only*** if a valid objection is filed. . . . For the criteria set forth in subsection (1)(g), ***only*** the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

§ 85-2-311(2), MCA (emphasis added). Objectors sought judicial review from the district court of the DNRC decision to dismiss Objectors' water quality classification objection, but the district court did not overrule that portion of DNRC's decision. Objectors did not file a cross-appeal with this Court, and therefore do not challenge that an invalid Section 311(1)(g) objection is prohibited by Section 311(2).

The plain language of Section 311(2) expressly provides that only the DEQ or a local water quality district is entitled to raise that objection; all other parties are prohibited. § 85-2-311(2), MCA. And, an applicant for a water right permit is under no duty to even address the Section 311(1)(g) criteria unless and until a valid objection is filed. Id.

For this reason, RC Resources need not address any water quality classification criteria to receive its water use permit, because no such objection has

been properly raised. This is particularly true where there is a separate water quality, nondegredation review and permitting process run by the DEQ. See § 75-5-303, MCA; A.R.M. 17.30.707. Moreover, RC Resources specifically agreed in the Stipulations entered in this case, that water use under the permit is conditioned upon compliance with "any terms conditions and limitations related to the use of water contained in the Forest Service's Record of Decision and Plan of Operations for the Rock Creek Mine" which document in turn requires compliance with all state and federal environmental laws and regulations. AR0019-0027 (*Final Order*, Exhibit B)(Appendix Tab B); *Final Record of Decision, Rock Creek Project*, p.5-6 (Aug. 2018)(Appendix Tab C).

B. Artfully presenting a Section 311(1)(g) water quality classification objection as a Section 311(1)(a)(ii) legal availability objection is immaterial, because Section 311(2) still prohibits a private party from raising a water quality classification objection.

Despite the clear prohibition of Section 311(2), Objectors contend that the exact same water quality classification objection may be raised pursuant to Section 311(1)(a)(ii) concerning legal availability of water. Specifically, they argue the Water Quality Act's classification of Outstanding Resources Waters and the associated anti-degradation regulations are "legal demands."

Objectors' do not deny that their attempted Section 311(1)(g) water quality classification objection and their Section 311(1)(a)(ii) legal availability objection are exactly the same. Under either theory, Objectors allege that RC Resources'

proposed groundwater permit will reduce flows in nearby surface water sources contrary to the classification of those waters as Outstanding Resource Waters under the Water Quality Act. AR0599-0601.

Objectors specifically explain the basis for their invalid Section 311(1)(g) water quality classification objection as follows:

> The Applicant cannot meet the statutory criteria for a water right permit because the proposed use will degrade outstanding resources waters in violation of their classification under the Water Quality Act. Montana law prohibits DNRC from issuing a water right unless the applicant can show that "the proposed use will be substantially in accordance with the classification of water set for the sources of supply pursuant to 75-5-301(1)," the Water Quality Act. MCA § 85-2-311(1)(g).

AR0601 (Objectors' *Objection to Application*, Exhibit B). But the Objectors also admit that the exact same water quality classification issue is the basis for their 311(1)(a)(ii) "legal availability" objection:

> Here, the reduction of water flow associated with the Applicant's appropriation would violate the legal demands governing surface waters within the impact area by dewatering outstanding resource waters. As described above, the proposed use will have the illegal effect of decreasing the mean monthly flow of several outstanding resource waters by more than or equal to 15% or the seven-day ten-year low flow by more than or equal to 10%. See id. § 17.30.715(1)(a). This is degradation in violation of Montana law. MCA § 75-5-315(1); ARM § 17.30.705(2)(c).

AR0601 (Objectors' *Objection to Application*, Exhibit B)(parentheticals omitted).

The Objectors have simply re-named their Section 311(1)(g) water quality classification objection, and called it a Section 311(1)(a)(ii) legal availability objection.

Turning to Section 311(1)(a)(ii), it addresses the legal availability of water on a stream (i.e. the amount of water in the stream already held under another water right). Section 311(1)(a)(ii) provides:

> Water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
> (A) identification of physical water availability;
> (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
> (C) analysis of the evidence on physical water availability and the existing legal demands including but not limited to a comparison of physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

§ 85-2-311(1)(a)(ii), MCA.

Objectors contend, and the district court agreed, that the identification of existing "legal demands" on the source of supply includes water quality classifications found in the Water Quality Act. As discussed herein (supra, Sect. C.3), the DNRC has never held that water quality laws fall within the definition of "legal demands" as part of the legal availability analysis required by Section 311.

Based on DNRC's interpretation, no applicant has ever had to try and address those water quality laws through the factual, legal availability analysis. It cannot be understated that there is no precedent for Objectors' arguments that water quality laws should be incorporated into the legal availability analysis.

The only reason Objectors characterize their water quality objection as a "legal demand," is to attempt to evade the prohibitions of Section 311(2). This argument should be unavailing, because its premise is that form is more important that substance.

When Section 311(2) states: "for the criteria set forth in subsection (1)(g)," it means the criteria ***substantively*** described by subsection 311(1)(g). § 85-2-311(2), MCA. The Montana Legislature certainly did not intend to prohibit private-parties from raising a Section 311(1)(g) objection simply because the numbering "(1)(g)" was somehow offensive. Yet that premise is exactly what Objectors (and the district court) have absurdly concluded: that Section 311(2) applies only to Section 311(1)(g), in form, and not to the substance of what Section 311(1)(g) describes. To the contrary, courts are to construe a statute "to ascertain and declare what is in terms ***or in substance*** contained therein . . . ." § 1-2-101, MCA (emphasis added). The district court's decision disregards this fundamental rule of statutory construction.

Assuming, *arguendo*, that "legal demands" are broader than just water rights, the district court still mis-construed Section 311 and should have affirmed the dismissal of the Objectors' Section 311(1)(a)(ii) objection. This is because the district court improperly elevated a general statutory provision over a specific statutory provision. Oster v. Valley Cty., 2006 MT 180, ¶17, 333 Mont. 76, 140 P.3d 1079 (holding that more specific statutes prevail over general provisions of law). It is confounding to characterize the Objectors' water quality classification objection as falling within the general language of the Section 311(1)(a)(ii), when the specific language of the Section 311(1)(g) was purposefully and plainly drafted to describe exactly that water quality classification issue. Regardless of whether the water quality issue ***can*** be characterized as a "legal demand" under Section 311(1)(a)(ii), it was specifically intended by Montana statute to fall within Section 311(1)(g). Accordingly, Objectors are prohibited from raising that objection by Section 311(2).

Thus, the district court committed reversible error when it ignored the substance and the plain language of Section 311(2). See § 1–2–101, MCA (Courts must "not to insert what has been omitted or to omit what has been inserted."). Upon determining that Section 311(2) prohibits private-parties from raising an objection based upon the classification of a water body under the water quality act (See *Order Pet. Jud. Rev.*, p.12(Appendix Tab A)), the district court could not

simply ignore that subsection when construing Section 311(1)(a)(ii). In doing so, the district court failed to interpret Section 311 as a whole and did not give meaning to Sections 311(1)(g) and 311(2), reducing them to surplusage. Mont. Trout Unlimited v. Mont. Dept. Nat. Res. & Cons., 2006 MT 72, ¶23, 331 Mont. 483, 133 P.3d 224 (Courts avoid a statutory construction that renders provisions superfluous or fails to give effect to all of the words used). If water quality objections can simply be characterized as legal demands, and validly raised pursuant to Section 311(1)(a)(ii), then there is no meaning or purpose to Sections 311(1)(g) and 311(2). This construction of the statute is absurd, andcannot be supported.

C. Section 311(1)(a)(ii), the legal availability of water criteria, is not a catch-all provision to analyze every law potentially governing water.

After ignoring the plain language of Section 311(2) and failing to interpret the statute as a whole, the district court essentially directs DNRC to broaden the interpretation of "legal demands" contained in Section 311(1)(a)(ii) into a catch-all provision, in which almost any issue could be deemed a valid legal availability objection. This is contrary to the statutory structure of Section 311. § 85-2-311(1), MCA.

Section 311 provides "The [DNRC] ***shall*** issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met . . . ." § 85-2-

311(1), MCA (emphasis added). Section 311 then identifies specific enumerated criteria, (a) through (h).[3] Id. If the applicant addresses these specific criteria, the DNRC is mandated to grant the water right permit. The DNRC does not have discretion under the statute to add criteria. Correspondingly, these criteria are the only basis for valid objections. § 85-2-308(1)(b), MCA ("The objection to an application for a permit must state . . . facts indicating that one or more of the criteria in 85-2-311 are not met."). And, the DNRC does not have discretion to entertain an objection that is not based on the Section 311 criteria. §§ 85-2-308(6); 309(1), MCA.

While Section 308 and Section 311 expressly contemplate discrete permitting criteria, the district court's interpretation of "legal demands" would allow ***any*** objection to be brought. Under the district court's interpretation, "legal demands" includes water quality classification laws and regulations arising under the Water Quality Act. The district court's ruling provides no rational basis for limiting the ruling to enforcement of the Water Quality Act regulations. Under the district court's order there is no meaningful distinction between enforcement of the Water Quality Act, and any other laws that could affect water use. This may include the Endangered Species Act, community water supply regulations, or even county subdivision codes, as being within the meaning of a "legal demand." Such

[3] Note that pursuant to Section 311(2), no applicant is required to address subsections (f) through (h) in their applications, unless and until a valid objection raises that criteria. § 85-2-311(2), MCA.

interpretation is so broad as to swallow the underlying limited, discrete application criteria contained in the statute.

1. The district courts' interpretation of "legal demands" in Section 311(1)(a)(ii) creates conflict and ambiguity in the statute.

Section 311(2) dictates that "[t]he applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met ***only*** if a valid objection is filed." § 85-2-311(2), MCA (emphasis added). This portion of the statute is critically important, because it is a narrow exception to the general language of Section 311(1). Applicants are expressly required to satisfy the Section 311(1)(a) through (e) criteria as part of their ***initial*** application. Only after the applicant satisfies these criteria will the DNRC issue a preliminary determination. The Section 311(1)(f) through (h) criteria, on the other hand, only gets addressed (if at all) if a valid objection is raised. See § 85-2-311(2), MCA.

The district court, however, stood this plain statutory framework on its ear. By determining that the Section 311(1)(g) water quality criteria can also be shoe-horned within Section 311(1)(a)(ii) criteria, applicants are now required to affirmatively address water quality concerns during the initial application process – despite a plain statutory provision dictating that an applicant was under no duty to do so.

In other words, Section 311 can be thought of as an applicants' "checklist." If an item is on the checklist, it needs to be addressed by the applicant. If an item is not on the checklist, it does not need to be addressed. Each criteria under Section 311, subsections (a) through (h), is a discrete 'checklist' item intended to specifically address a discrete issue. Some of these checklist items – subsections (a) through (e) – must be affirmatively addressed by an applicant in their application to the DNRC. But checklist items (f), (g), and (h) do not get addressed in the application. Instead, these items are only 'added' to the checklist through a valid objection specifically raising the (f), (g), or (h) issues. The district court's decision, however, renders checklist item (g) as part of checklist item (a). This has the effect of now always requiring every applicant to address items (a) through (e), ***and (g)***, during the application phase, even if nobody ever 'adds' a (g) objection at the objection phase. The district court's interpretation of "legal demands" as including water quality classifications for purposes of a Section 311(1)(a)(ii) legal availability objection fails to comport with Section 311 as a whole.

This is prejudicial to applicants and counter to the plain language of the statute. The district court has shifted the burden of production onto applicants – requiring them to address this water quality classification criteria in the initial application phase, even without DEQ raising the issue. The statue, however, provides that an applicant is under no duty to address this criteria in their

application, and that objectors are required to produce "substantial credible" evidence that a water quality criteria will not be satisfied before that issue can even be raised. § 85-2-311(2), MCA. This court order shifts the burden from the objector to the applicant.

Because of this, the district court's interpretation ignores the plain language of the statute and reaches absurd results. See State v. Triplett, 2008 MT 360, ¶25, 346 Mont. 383, 195 P.3d 819 (Courts must "construe each statute as a whole so as to avoid an absurd result . . . ."). It reaches this erroneous interpretation by focusing solely on the phrase "legal demand" within 311(1)(a)(ii), and ignoring the rest of the section. See Worldwide Holdings, Inc. v. CH SP Acquisition LLC, 2015 MT 225, ¶21, 380 Mont. 215, 355 P.3d 724 (Courts must "read[] and interpret[] the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature.").

The district courts' interpretation of Section 311(1)(a)(ii) erroneously introduces conflict into Sections 311(1)(a)(ii), 311(1)(g), and 311(2), and it must be overturned. Courts are directed to "harmonize statutes relating to the same subject, as much as possible, giving effect to each." Oster, 2006 MT 180, ¶17. Statutes must be "reconcile[d] … if it is possible to do so in a manner consistent with legislative intent." Ross v. Great Falls, 1998 MT 276, ¶19, 291 Mont. 377, 967 P.2d 1103; § 1-2-101, MCA ("Where there are several provisions or

particulars, such a construction is, if possible, to be adopted as will give effect to all."). The district court did not do this, and committed reversible error. The interpretation that actually harmonizes the statute is the one put forth by DNRC, where legal availability is a quantification of existing water rights on the stream, and where water quality classification issues fall within Section 311(1)(g).

2. The Montana Legislature intended "legal demands" in Section 311(1)(a)(ii) to refer to the many types of 'water rights' in Montana.

"Legal demands" is not a catch all, and instead refers to water rights. The statutory amendments which added "legal demands" to Section 311, expressly contemplated how to include all water rights, including unquantified (and potentially unidentified) tribal reserved water rights.

Prior to 1997, Section 311 addressed legal availability of water through two criteria, Section 311(a) (1995) and Section 311(e) (1995). See MCA 85-2-311(a); -311(e) (1995). This prior version of the statute did not include the phrase "legal demands" and instead referred to "unappropriated waters" and "planned uses or developments for which a permit has been issued or for which water has been reserved." Id.

In 1997, the statute was amended to its current form, adding the terms "legal availability" and "legal demands." This legislation was a direct response to the Montana Supreme Court decision In re Application for Beneficial Water Use

Permit No. 66459–76L, Ciotti ("Ciotti"), 278 Mont. 50, 923 P.2d 1073 (1996), as amended on denial of reh'g (Sep. 24, 1996).

In Ciotti, this Court addressed the 1995 version of Section 311's legal availability criteria. Ciotti, 278 Mont. at 60, 923 P.2d at 1079; See MCA 85-2-311(e) (1995). The issue in Ciotti was whether DNRC could grant new permits or changes of water rights on the Flathead Indian Reservation, when the "legal availability" of water could not be determined because the Confederated Salish and Kootenai Tribe's reserved water rights had not yet been quantified. Ciotti, 278 Mont. at 60, 923 P.2d at 1079. This Court made clear that Ciotti was about legal availability, and that legal availability meant quantification of other existing water rights, whatever their nature:

> [T]he elusive nature of Indian reserved water rights underscores both the difficulty of quantifying those rights and the difficulty a water permit applicant would have proving that his proposed use will not interfere with those rights. . . .
>
> Nothing . . . , however, relieves an applicant of his burden to meet the statutory requirements of § 85–2–311, MCA, before DNRC may issue that provisional permit.

Ciotti, 278 Mont. at 60, 923 P.2d at 1079.

In response to this decision, DNRC prepared a bill ("S.B. 97") that was specifically intended to negate Ciotti, by modifying the language concerning the legal availability criteria. Ch. 497, 1997 Mont. Session L., p.2790 (Appendix Tab D). The legislation contains the following express statement of legislative intent:

> The legislature intends that the Montana Supreme Court's decision in [Citotti], be negated by the passage and approval of this bill. The legislature further intends that the portion of . . . [Ciotti], determining that in the absence of a ***quantification of existing water rights***, the [DNRC] does not have the authority to issue a permit for a new water application when questions of senior conflicting claims are raised, ***be negated by the passage and approval of this bill***, specifically by the passage and approval of the amendments to 85-2-311. A statement of intent is desired for this bill in order ***to provide guidance to the [DNRC] under 85-2-311*** concerning implementation and interpretation of the physical availability of water and reasonable ***legal availability*** of water criteria. . . .

Ch. 497, 1997 Mont. Session L., p.2790. The Montana legislature made absolutely clear: SB 97 is intended to direct DNRC how to quantify existing water rights, which is the legal availability analysis of Section 311(1)(a)(ii). Substantively, SB 97 amended Section 311(1)(a) to include the terms "legal availability" and "legal demand" now contained in Section 311(1)(a)(ii). Ch. 497, 1997 Mont. Session L., Sect. 7, p.2799-2802.

In response to S.B. 97, the Confederated Salish and Kootenai Tribes again brought a challenge, in Confed. Salish & Kootenai Tribes v. Clinch ("Clinch"), 1999 MT 342, 297 Mont. 448, 992 P.2d 244. They again challenged the legal availability provisions of Section 311 (1997). In Clinch, this Court again interpreted the "legal availability" criteria of Section 311, and again determined "legal availability" meant a determination of whether water is available that was not already legally demanded by an existing water right. Clinch, ¶28. This Court

again held DNRC cannot issue permits on the Flathead Indian Reservation because it cannot determine whether water is legally available until the Tribes' reserved water rights are quantified. Id.

It is immaterial that throughout this history "legal demand" was not expressly defined in statute as being a 'water right.' What Ciotti, and S.B. 97, and Clinch all illustrate is that this Court and the Montana Legislature were attempting to address the quantification of 'water rights,' (whether they be state-based, reserved, or federally reserved, and to say nothing of the potential review of the extent of actual historical beneficial use). Arguing that "legal demands" could be interpreted as broader than 'water rights' erroneously ignores the clear legislative intent and history which created the term. § 1–2–102, MCA ("In the construction of a statute, the intention of the legislature is to be pursued if possible."); Richards v. JTL Grp., Inc., 2009 MT 173, ¶26, 350 Mont. 516, 526, 212 P.3d 264 (holding that disagreement as to an interpretation of a term does not create an ambiguity.)

The district court committed reversible error when it failed to review this legislative and judicial history and ignored the plain legislative intent.

3. DNRC's comprehensive regulatory determinations that "legal demands" are water rights is entitled to great deference.

The Montana DNRC has the authority to enforce Title 85, Part 3 (including Section 311) and to promulgate rules concerning that section. §§ 85-2-113; -302(2), MCA. More importantly, the Montana legislature specifically directed:

"The [DNRC] may adopt rules to implement the provisions of [Section 311]." § 85-2-311(7), MCA.

Under that authority, the DNRC has at all times interpreted "legal availability" and "legal demands" to be an analysis addressing the amount of water on a source that is already allocated to other water rights. (As explained above, the statement of legislative intent for SB 97 directs them to do so.) The district court committed reversible error when it determined that the DNRC had not "formal[ly]" interpreted these terms, and it wholly ignored the DNRC's comprehensive regulatory framework for addressing legal availability. It compounded this error by failing to apply the deferential standard of review required when analyzing those rules.

DNRC promulgated the following rule interpreting "legally available": "To determine if water is legally available, the department will compare the physical water supply at the proposed point of diversion and the legal demands within the area of potential impact." Admin. R. of Mont. 36.12.1705(1).

In turn, the DNRC promulgated the following rule describing "legal demands": "Legal demands usually exist on the source of supply or its downstream tributaries and may be affected by a proposed water right application, including prior appropriations and water reservations. These existing legal demands will be ***senior*** to a new application and ***the senior rights*** must not be

adversely affected . . . ." A.R.M. 36.12.1704(1) (emphasis added). The concept of seniority and "senior rights" is a concept inherent to water rights and the prior appropriation doctrine. § 85-2-401(1), MCA; Kelly v. Teton Prairie LLC, 2016 MT 179, ¶11, 384 Mont. 174, 376 P.3d 143. In fact, Rule 36.12.101(67), Admin. R. of Mont., specifically defines the term "senior" as prior appropriations of water. This overarching regulatory scheme contemplates that "legal demands" are water rights.

Where the DNRC has specifically promulgated these rules interpreting "legally available" and "legal demands," the district court was without basis to hold: "DNRC . . . presented no formal interpretation of the term 'legal demands.'" *Order Pet. Jud. Rev.*, p.10.(Appendix Tab A) To the contrary, there are rules interpreting "legal availability" and "legal demand," and the DNRC has expressly promulgated a rule wherein: ***"[t]he department*** will identify the existing legal demands on the source of supply . . . ." A.R.M. 36.12.1704(2) (emphasis added). That interpretation was promulgated consistent with the express statement of legislative intent contained in SB 97.

Pursuant to that rule, all past practice of DNRC has been to treat water rights as the only "legal demands" on a source. This past practice is well-articulated in the following DNRC contested hearing order:

> Applicant originally compared an estimate of the existing legal demands from the DNRC [water rights]

> database (2252.37 acre-feet diverted) with the Applicant's earlier proposed request (of 582.2 acre-feet diverted at the 800 gpm pumping rate) for a total demand of 2834.57. Demands were compared to an estimate of the [physically available] volume of water flowing through the combined Tertiary and Quaternary aquifers in the area of potential impact (11250.6 acre-feet/year) of the 800 gpm wells. . . . Water available in the aquifer is greater than the existing demands including the Applicant's request. . . . ***This is a standard analysis accepted by DNRC and is a reasonable assessment of legal water availability***. Applicant has shown that water is legally available. . . .

Proposal for Decision, Finding of Fact No. 15, p.11, *In the Matter of the Application for Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (Nov. 9, 2006)(emphasis added)(Appendix Tab E). Such "long and continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement constitutes an 'invaluable aid in determining the meaning of a doubtful statute.'" Mont. Power Co. v. Mont. Pub. Serv. Comm'n, 2001 MT 102, ¶24, 305 Mont. 260, 26 P.3d 91.

Courts are directed to "afford[] great deference to agency decisions implicating substantial agency expertise." Mont. Envtl. Info. Ctr. v. Mont. Dep't Envtl. Qual., 2019 MT 213, ¶20, 397 Mont. 161, 451 P.3d 493, *reh'g denied* (Nov. 19 2019). Determining the "legal demands" on a source requires precisely this "substantial agency expertise." The DNRC is statutorily and constitutionally directed to maintain a centralized record system of every water right in Montana.

Mont. Const. art. IX, § 3(4); § 85-2-112(3), MCA. Even a cursory review of Ciotti, Clinch, or *Utility Solutions, LLC* clearly illustrates that identifying and quantifying the "legal demands" associated with even just the existing water rights on a source is a complicated and technical determination. Moreover, the Montana legislature specifically directed DNRC to interpret "legal availability" and "legal demands" as directed in the statement of legislative intent contained in SB 97. Ch. 497, 1997 Mont. Session L., p.2790 (Appendix Tab D). It cannot be said that the DNRC's determinations on legal demands are unreasonable, arbitrary, contrary to the statement of legislative intent, or based on anything other than substantial agency expertise. The DNRC's long-standing determination that "legal demands" means water rights is accurate and entitled to great deference. The district court committed reversible error by failing to consider DNRC's interpretation of "legal demands" for purposes of a Section 311(a)(ii) legal availability objection.

II. THE DNRC HAS NO AUTHORITY TO QUANTIFY WHAT THE 'DEMANDS' OF AN OUTSTANDING RESOURCE WATER ARE, OR TO QUANTIFY ANY OTHER WATER QUALITY CLASSIFICATION STANDARD.

Perhaps most disconcerting in this issue, is the unintended regulatory overreach that Objectors' arguments would impose. Pursuant to Section 75-5-211(1), Montana Code Annotated, the DEQ is responsible for administration of Title 75 Chapter 5, the Water Quality Act. § 75-5-211(1), MCA. The DNRC has no authority for administering Title 75. See §§ 85-2-113; -302, -311 MCA.

Nevertheless, Objectors would have the DNRC – independent of the DEQ – determine whether Water Quality Act regulations or laws exist upon a stream, and then numerically quantify the amount of water needed to satisfy those laws. Such determination would impermissibly intrude upon DEQ's express statutory authority and run contrary to the long-held administrative law that "[a]n administrative agency may not assume jurisdiction without express delegation by the legislature." Auto Parts of Bozeman v. Emp't Rels. Div. Uninsured Emp'rs' Fund, 2001 MT 72, ¶38, 305 Mont. 40, 23 P.3d 193.

The Objectors' response to this issue has been the strawman argument that: DNRC is not limited to addressing 'water quantity' issues. But, RC Resources has never argued that DNRC is limited to 'water quantity' issues. That is not the issue. The issue is that DNRC has no statutory authority to interpret or enforce the Water Quality Act – ***except*** in the very limited circumstance specifically addressed in Section 311(1)(g), which Objectors adamantly maintain is ***not*** the basis for their objection.

Instead, the DEQ has the general authority to interpret and enforce the Water Quality Act. The Montana Legislature tempered any authority DNRC has to deny a water rights application on Water Quality Act classification grounds, by requiring the DEQ or a local water quality district to raise that objection and be an active party in the proceeding. § 85-2-311(2), MCA. This makes perfect sense, as

the DEQ does have authority to interpret the Water Quality Act and is fully aware of its separate permitting and enforcement powers. The DNRC can regulate that issue so long as an agency delegated authority over the Water Quality Act is a party to the proceeding.

If this Court determines that Section 311(1)(a)(ii) is a catch-all provision, and any law touching on a water source could be a "legal demand," then this Court will have directed the DNRC to start interpreting and enforcing laws without authority or expertise. Hypothetical examples could be quantification of outstanding resources water regulations, quantification of county sanitation ordinances, or quantification of the needs of Arctic Grayling under the Endangered Species Act. None of these laws is within the DNRC's area of expertise and they have no delegated authority to enforce them. Such a ruling sets the DNRC up to fail, requiring it to continually guess, without authority or expertise, as to the quantifiable demands of any given law.

Yet this appears to be the desired outcome Objectors would have, wherein Section 311(1)(a)(ii) is simply a tool to force water use applicants to comply with the separate permitting processes of other areas of law. Such an interpretation of Section 311(1)(a)(ii) is not just contrary to legislative intent, it is contrary to fundamental concepts of limited agency authority and powers.

III. GENERAL STATEMENTS OF 'PUBLIC POLICY' DO NOT SUPERSEDE THE PLAIN LANGUAGE OF A SPECIFIC STATUTE, OR A SPECIFIC STATEMENT OF LEGISLATIVE INTENT.

After deciding that "legal demands" in Section 311(1)(a)(ii) do not mean 'water rights' (See *Order Pet. Jud. Rev.*, p.8. (Appendix Tab A)), the district court attempts to justify its decision. In that process, the district court erroneously refers to 'public interest' policies to support its conclusion that water quality classification issues should be analyzed as a "legal demand." But the court still failed to actually define the term "legal demand." While the district court overturned the DNRC's reasonable agency interpretation of a statutory term, it replaced that definition with nothing, and provided no substance or guidance to its own interpretation of "legal demand."

In its analysis of the meaning of "legal demands," the district court first looks to Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (1984) and Wyoming Hereford Ranch v. Hammond Packing Co., 236 P.764, 769 (Wyo. 1925). Based on these two cases (neither applicable), the district court broadly holds:

> "The history of the [Montana Water Use Act] makes clear that the intent of the Act includes protection of the "public interest" in water use, not only protection of senior appropriators rights. 'When interpreting a statute, our objective is to implement the objectives the legislature sought to achieve." Westmoreland Res. Inc. v. Dep't of Revenue, 2014 MT 212 ¶11, 376 Mont. 180, 330 P.3d 1188 (citation omitted).

Order Pet. Jud. Rev., p.9 (Appendix Tab A). This is a troubling conclusion about the "history" of the Montana Water Use Act, because Montana Power Co. was only decided 9 years after enactment of the Montana Water Use Act, and 13 years before "legal demands" was added. Mont. Power Co., 695 P.2d at 339 (1984). Moreover, Montana Power Co. bolsters' RC Resources' arguments on appeal, specifically holding that restrictions may be added to water right permits "***to protect the rights of prior appropriators***." Id.(emphasis added). And, Wyoming Hereford Ranch, is a Wyoming case that predates the Water Use Act by nearly 50 years! Wyo. Hereford Ranch, 236 P.764 (Wyo. 1925).

RC Resources would be content if the district court had actually complied with the quote it cited from Westmoreland, and simply interpreted Section 311 consistent with the legislature's "objectives." *Order Pet. Jud. Rev.*, p.9 (Appendix Tab A); See Westmoreland, 2014 MT 212 ¶11. The 'objectives the legislature sought to achieve' are expressly stated in SB 97, and further discussed in the Clinch decision, but the district court appears to have ignored them.

In addition, when the legislature wanted DNRC to consider the "public interest" in its permitting decisions, it included those interests in the statutory criteria. For example, for proposed water right permits for 5.5 cubic feet per second and 4,000 acre-feet per year, the Section 311(3) criteria include a requirement that the proposed appropriation is a reasonable use which must

consider, among other requirements, minimum streamflows for aquatic life, the benefits to the state, and the probable significant adverse environmental impacts. § 85-2-311(3), MCA.

Similarly, this heightened "public interest" permitting criteria applies when water is transported for use outside the state, requiring the same showing as Section 311(3) plus a consideration of water conservation in Montana and the public welfare of the citizens of Montana. §85-2-311(4), MCA. There are no similar "public interest" criteria set forth in Section 311(1) which applies to RC Resources' permit application. The legislature included "public interest" criteria under Section 311 for certain water right permit applications, but those "public interest" criteria are not at issue in this case because RC Resources' application did not trigger those statutory criteria.

Next, ignoring DNRC's comprehensive regulatory scheme governing "legal availability" and "legal demand," the district court then erroneously decided that the "[Montana Water Use Act] itself states policy considerations . . . including that '[t]he water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.' Mont. Code Ann. § 85-1-101(5)." Order on Pet'n Judc'l R, p.10 (Appendix Tab A). Contrary to this erroneous conclusion, § 85-1-101(5), MCA, does not apply generally to the Montana Water Use Act. Instead, that

section lists the policy considerations that should be considered in the states' water plan. § 85-1-101(10), MCA. The relevant policy controlling DNRC's permitting authority under the Water Use Act is contained in § 85-2-101, MCA, and includes the overarching policy that the waters within the state are the property of the state for the use of its people, "subject to appropriation for beneficial uses as provided in this chapter." § 85-2-101(1), MCA.

Pertinent on appeal, the district court's flawed analysis of the meaning of "legal demands" never actually defines the meaning of the term. Nor does it improve or replace the DNRC's current interpretation of that term. It is deeply frustrating to see the district court undertake this fruitless analysis without analyzing the entire statute, reviewing DNRC's rules, or giving meaning to the legislative history and express statement of legislative intent. The district court failed to undertake any 'hard-look' statutory analysis of the term as required under the court's rules of statutory construction. See Bostwick, ¶23. Instead the district court cherry-picked random statutes and cases to support its conclusion.

While RC Resources agrees with policies supporting 'public interest,' such policies are not universally controlling, and do not control in this situation. If the district court intended to overrule the DNRC's long-standing interpretation that the term "legal demands" means 'water rights,' then it needed to establish what "legal demands" actually means. Simply stating that 'public policy' supports the

outcome is not enough. The district court committed reversible error when it overturned the DNRC's interpretation of "legal demands," but never actually defined what that term means. A peremptory conclusion that 'public policy' is best served by the outcome does not resolve the statutory confusion the district court created.

CONCLUSION

The district court committed reversible error when it erroneously interpreted Section 85-2-311(1)(a)(ii), MCA, as allowing private-parties to raise a water quality classification objection against an application for a water right, when subsection (2) of that same section provides "only the department of environmental quality or a local water quality district . . . may file a valid objection." The district court *Order on Petition for Judicial Review* (Appendix Tab A) should be reversed, and the DNRC's *Final Order* (Appendix Tab B) affirmed.

Respectfully submitted this 4th day of December, 2019.

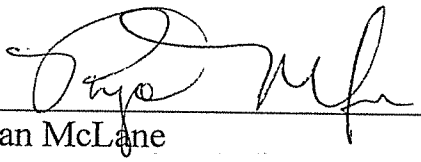
FRANZ & DRISCOLL, PLLP

Ryan McLane
Holly Franz
Attorney for Appellant, RC Resources

CERTIFICATE OF COMPLIANCE

In compliance with Rule 11(4)(a), M. R. App. P., counsel for Appellants certifies that the foregoing Brief of Appellant is printed with a proportionately spaced Times New Roman font of 14 points; is double-spaced (excluding captions and quotes); and the word count calculated by Microsoft Word 2010, is no more than 10,000 words (excluding this certificate of compliance and the following certificate of service).

FRANZ & DRISCOLL, PLLP



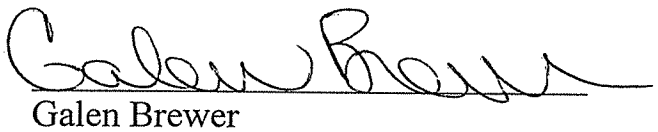
Ryan McLane
Attorney for Appellant, RC Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Opening Brief of Appellant, RC Resources* was mailed, via United States Postal Service, First Class Mail, postage fully prepaid thereon, this 4th day of December, 2019 to:

Katherine K. O'Brien
Joshua Purtle
Earthjustice
313 East Main Street
Bozeman, MT 59715

Brian Bramblett
Melissa Hornbein
DNRC Legal Division
P.O. Box 201601
Helena, MT 59620-1601



Galen Brewer