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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

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I. THE ISSUE PRESENTED IS A PURELY LEGAL ISSUE, AND OBJECTORS' ALLEGED FACTS ARE NOT PROVEN OR RELEVANT.

Objectors admit the issue presented is wholly legal. *Resp. Br.*, p.13. RC Resources agrees. Statutory construction is a legal determination.

RC Resources has avoided factual disputes, recognizing that they are irrelevant to the legal issue, and conceding that for purposes of review of a motion to dismiss, courts are to deem admitted all well-pled allegations from the complaint. *Meagher v. Butte-Silver Bow*, 2007 MT 19 ¶¶13-15, 337 Mont. 339, 160 P.3d 552. But Objectors' now attack RC Resources for ***not*** disputing factual allegations. *Resp. Br.*, p.45. So, RC Resources responds.

First, the table on page 6 of *Objectors' Response Brief*, was not prepared by RC Resources, nor was it part of the "2014 Hydrometrics Report." *Compare Resp. Br.* p.6 to AR0088-0240. Objectors created this table and its conclusions – particularly the quantitative percentages of depletions. RC Resources does not agree with its conclusions.

Second, the 2014 Hydrometrics Report does not 'prove' degradation will occur. The 2014 Hydrometrics Report clearly states that while it presents data in a numeric format, the report is qualitative in nature and "should not be used to ***quantify*** predicted changes in base flow at specific locations." AR0217; AR0126

(emphasis added). The reports "generalized assumptions" provide "a qualitative assessment of potential effects." AR0126.

Finally, the issues presented to this court are purely legal. While substantial factual issues remain to be decided later, currently there are no decided "facts." Whether DNRC will be forced to make these factual findings regarding the Water Quality Act – even when it has no statutory authority to do so – is the legal question presented in this case. As such, this Court should simply ignore the Objectors' irrelevant factual assertions.

II. THE DISTRICT COURT'S INTERPRETATION OF § 85-2-311, MCA OMITS RELEVANT STATUTORY LANGUAGE, AND ON APPEAL OBJECTORS NOW INSERT A NEW TERM.

A. The district court's "plain language" interpretation of § 85-2-311, MCA ignores the plain language of the statute.

The district court erroneously determined that Objectors' water quality classification objection falls within the plain language meaning of "legal demand" from § 85-2-311(1)(a)(ii), MCA. *Order p.8, p.11.*

That argument could only makes sense if a court were willing to ignore the plain language of § 85-2-311(1)(g), MCA – which expressly provides for the type of water quality classification objection Objectors attempt to raise. The court's narrow focus on the phrase "legal demands" (*Order.* p.8.) is contrary to every rule of statutory construction confirmed by this Court in *Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 388, 450 P.3d 898.

The plain language of the ***entire*** statute does control, and it says that objections based on Water Quality Act classifications must be brought pursuant to § 85-2-311(1)(g), MCA.

B. Objectors now attempt to insert the term "quantitative" into the meaning of "legal demands."

Objectors attack RC Resources for providing a "parade of horribles" when discussing the effects of the district court's interpretation of "legal demands." *Resp. Br.* p.42. But Objectors do not dispute this "parade of horribles" will occur. Instead they argue that ***in this case*** they are only seeking the inclusion of "quantitative" nondegradation standards of outstanding resources waters. *Resp. Br.* p.42.

This canard is nothing more than a carefully worded sidestep. The plain language of § 85-2-311(1)(a)(ii), MCA does ***not*** say 'quantitative legal demands.' Their insertion of the term "quantitative" provides an illusion of limitation on their exceptionally broad interpretation. Nothing in the term "legal demands" actually distinguishes between quantitative or nonquantitative demands. Moreover, the district court never limited its interpretation of "legal demands" to "quantitative" demands.

Even if "quantitative" was inserted into the meaning of "legal demands," it would sweep a different set of unintended criteria into a water rights legal availability analysis. The nonsignificance rules to which Objectors cite for "quantitative" flow criteria, also contain "quantitative" criteria for carcinogens,

toxins, nitrate, inorganic phosphorus, all harmful parameters, and nutrients. ARM 17.30.715(1)(b)–(g).

Objectors do not actually dispute this "parade of horribles," because it is their desired outcome. When discussing the nondegradation regulations of "high quality" waters, Objectors have already argued that such standards "are not at issue here … and remains a subject for further administrative or judicial interpretation in an appropriate case." *Resp. Br.* p.30. Objectors do not want a ruling which actually defines "legal demands," because that would limit the applicability of the term.

Indeed, Trout Unlimited has already undercut Objectors, and would have this Court rule that statutory basin closures, stream-side depletion zones, and groundwater control areas are all "legal demands" too.[1] *TU Br.* p.23.

Quantitative or not, the district court's interpretation of "legal demands" is so broad as be meaningless. "Legal demands" refers to all the various types of water rights. *See RC's Op. Br.* p.22-23, 25-28.

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[1] TU's analysis is wrong. Each of these laws simply require DNRC to deny an offending application. DNRC does so without undertaking a legal availability analysis.

Basin closures prohibit DNRC from granting an application contrary to the applicable basin closure law. *See e.g.* Section 85-2-330(1), MCA ("… the [DNRC] may not grant an application…").

Controlled groundwater area laws similarly prohibit DNRC from granting applications. Section 85-2-508(2), MCA ("The [DNRC] may not grant a permit if the withdrawal would be beyond the capacity of the aquifer…").

Stream-side depletion zones statutorily limit the amount of water a party can even appropriate. Section 85-2-306(3)(a)(iii)-(iv), MCA.

C. The legislative history of §§ 85-2-311(1)(g) and -311(2), MCA does not support Objectors' current legal arguments.

In 1993, Senate Bill 280 was enacted and is codified at §§ 85-2-311(1)(g) and -311(2), MCA. It contemplated certain limited grounds for objections to water rights permits on water quality grounds.

In 1997, Senate Bill 97 was enacted and "legal demands" was added into 85-2-311(1)(a)(ii), MCA. The impetus of SB97 was to address concerns with the determination of legal availability in the context of tribal reserved water rights. *RC's Op. Br.* p.25-28.

"[A] later, general statute will not affect an earlier specific statute unless the intent to repeal the earlier specific statute is either clearly manifested or unavoidably implied by irreconcilable differences created by the continued operation of the statutes." *Langemo v. Mont. Rail Link, Inc.*, 2001 MT 273, ¶24, 307 Mont. 293, 38 P.3d 782.

This holding is directly applicable. The specific water quality objections enacted in 1993 are the controlling law and provide a specific objection which can be raised pursuant to §§ 85-2-311(1)(g) and -311(2), MCA. The general amendments to the legal availability criteria in 1997 were not intended to modify these water quality objections, and they are not irreconcilable to the continued operation of the statute.

In fact, Objectors Clark Fork Coalition and MEIC, and Amicus Trout Unlimited, all supported SB280 in the House committee hearing in 1993. *Hr'g Min. on 1993 SB280, House Nat. Res. Comm.*, 53rd Leg., p.9, (Mont. Mar., 24 1993) (Appendix Tab F). The version they supported specifically included the language codified at 85-2-311(2) establishing that "only the department of public health and environment" (the predecessor agency to DEQ) could raise a water quality classification objection. *House Standing Comm. Report*, 1993 SB280 (Mar. 29, 1993) and SB 0280/02, 53rd Leg. (Mont., Mar 29, 1993) (together Appendix Tab G). None of them testified the bill was unconstitutional.

DNRC – to which the lower court and this Court owe "great deference" – has not acted arbitrarily or capriciously for simply enforcing the law which Clark Fork Coalition, Trout Unlimited, and MEIC all helped pass in 1993. *Mont. Envtl. Info. Center v. Dept. Envtl. Qual.*, 2019 MT 213, ¶20, reh'g denied (Nov. 19, 2019).

III. THE DISTRICT COURT MISUNDERSTOOD THE OUTSTANDING RESOURCE WATER PROTECTIONS AND NONDEGRADATION LAWS.

A. The Legislature Designated DEQ, not DNRC, to Protect Outstanding Resource Waters.

"The Legislature has authorized DEQ to administer the [Water Quality Act] and the judiciary may not substitute its judgment for that of an agency carrying out a statutory duty assigned to it. Section 75-5-211(1)." *MEIC v. DEQ*, 2019 MT 213, ¶20. Similarly, "[a]dministrative agencies enjoy only those powers

specifically conferred upon them by the legislature." *Bick v. Dep't Justice*, 224 Mont. 455, 457, 730 P.2d 418 (1986).

In accordance with these holdings, a DNRC permit only allows the holder the ability to divert and beneficially use water. It does not allow the holder to contravene or ignore the Water Quality Act. Water rights and water quality are separate statutory sections, overseen by separate agencies. *Compare* Sections 85-2-112; -302, MCA (Water Use Act); to Section 75-5-211, MCA (Water Quality Act).

Yet, the district court has wholly ignored the statutory authorities of both DNRC and DEQ. The district court's order requires DNRC to enforce the Water Quality Act by: (1) expressly determining how much water may be taken out of a given waterbody before such withdrawal is no longer considered "nonsignificant" under the Water Quality Act, and (2) denying any proposed appropriation of water in excess of this amount pursuant to the Water Use Act. DNRC simply cannot do this; it does not have the statutory authority to unilaterally interpret or enforce the Water Quality Act.

The district court's order treats the outstanding resource waters protections as stand-alone restrictions, which all agencies are required to interpret and enforce. To the contrary, outstanding resources waters only exist by virtue of the Water

Quality Act, and only DEQ has statutory authority to enforce those statutes. Sections 75-5-103(25), -211, MCA; ARM 17.30.617.

While the district court quotes § 75-5-315(1), MCA for the proposition that outstanding resource waters are to be afforded "the greatest protection feasible under state law" (*Order*, p.7), it then ignores the very next subsection, which states: "The purpose of 75-5-316 and this section is ***to provide this protection***, when necessary, and to provide guidance to the board [of environmental review] in establishing rules to accomplish that level of protection." Section 75-5-315(1)-(2), MCA (emphasis added). Simply put, the protections for outstanding resource waters are only available through the Water Quality Act, and DEQ is the only agency directed to oversee this act.

Turning to those statutory protections for outstanding resource waters, the Water Quality Act provides: 1) DEQ may not "grant an authorization to degrade," and 2) DEQ may not "allow a new or increased point source discharge that would result in a permanent change in the water quality of an outstanding resource water." Section 75-5-316(2)(a)-(b), MCA. Neither an authorization to degrade nor a point source discharge permit are at issue here, so the statutory protections governing outstanding resource waters have not been violated.

Objectors' argue that it is an "easy" matter for DNRC to simply comply with the district court's order, and to start protecting seven-day ten-year low flows

("7Q10") described in ARM 17.30.715(1)(a) through DNRC's administration of the Water Use Act. *Resp. Br.* p.29. Setting aside that ARM 17.30.715(1)(a) is ***not*** an enforceable nondegradation standard (*Supra, Section III.B.1.*) – this argument requires DNRC to interpret and enforce statutes it has no authority to administer.

For example, there is no comprehensive list of every outstanding resource water in the state. Instead, outstanding resources waters are defined by rule as surface waters wholly within designated national parks or wilderness areas. ARM 17.30.617(1). DNRC will have to interpret and apply this DEQ rule in order to comply with the district court order.

Similarly, there is no list of 7Q10 flows. For most small streams, flow data does not exist and cannot be obtained without the installation of equipment and/or measuring protocols. Any DNRC determination of 7Q10 flows could be significantly contrary to DEQ's, even when both agencies are looking at the same flow parameter.

Moreover, it is not clear which nondegradation standards should be applied. RC Resources' proposed water right is for ***groundwater***. AR0067. But outstanding resource waters are legally defined to be "[a]ll state ***surface waters*** located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995...." ARM 17.30.617(1) (emphasis added). Groundwater is not an outstanding resource water, and it has its own classifications and standards. ARM

17.30.1006. DNRC is certainly not authorized to decide whether the nondegradation standards of outstanding resource waters can be simply applied to a different water source.

Ultimately, these examples show that the district court gave no deference to the regulatory determinations made by DNRC or DEQ while carrying out its statutory duties. This Court has made exceptionally clear that:

> The Legislature has authorized DEQ to administer the WQA and ***the judiciary may not substitute its judgment for that of an agency carrying out a statutory duty assigned to it***. This Court acknowledges that it is not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water ***requires significant technical and scientific expertise beyond the grasp of the Court***. However, the judiciary has an inherent power to review administrative decisions and to interpret the law. To balance these constitutional concepts and to ensure that agency decision-making is scientifically-driven and well-reasoned, ***this Court affords "great deference" to agency decisions implicating substantial agency expertise.***

MEIC v. DEQ, 2019 MT 213, ¶20. (emphasis added). It is simply incomprehensible that a district court, which cannot substitute its judgement for the DEQ, can nevertheless directly order DNRC to do that which it cannot. DNRC's very attempts to comply with the district court order would require it to interpret and apply the Water Quality Act without authorization.

B. The District Court incorrectly turned one of the "nonsignificance" criteria of ARM 17.30.715(1) into a strictly enforced regulatory definition of "degradation."

1. ARM 17.30.715(1) is not a "nondegradation" standard. It is one of eight criteria for analyzing whether a proposed activity is "nonsignificant" and need not undergo a nondegradation review.

The district court has ordered DNRC to calculate whether water is legally available pursuant to the Water Use Act, by first removing +/- 10% of 7Q10 flows from the legally available supply. *Order* p.11-12. The district court is requiring this on the basis that any reduction of more than 10% is unlawful degradation pursuant to ARM 17.30.715(1)(a). *Order* p.11, fn4. Put another way, the district court has erroneously turned ARM 17.30.715(1)(a) into a universally enforceable definition of "degradation."

Contrary to the district court's order, "degradation" is a statutorily defined term: "a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant." Section 75-5-103(7), MCA. The Water Quality Act then sets forth nonsignificance provisions defining whether certain activities or water quality parameters are "nonsignificant." Section 75-5-317, MCA; ARM 17.30.715. A finding of "nonsignificance" thereby establishes that a proposed activity is not "degradation."

Importantly here, ARM 17.30.715 provides an exemption from the

nondegradation review for certain activities that "will result in nonsignificant changes in existing water quality due to their low potential to affect human health or the environment." ARM 17.30.715(1). If all eight of its criteria are satisfied, a proposed activity is "not required to undergo review under [the nondegradation statute] 75-5-303." ARM 17.30.715(1)(a)-(h).

ARM 17.30.715 does not establish anything other than whether an activity is "nonsignificant." The rule does ***not*** attempt to further define if the activity is, or is not, degradation. ARM 17.30.715. To repeat: nonsignificance provisions do ***not*** define degradation, and instead only address whether a proposed activity must undergo a nondegradation review.

Thus, contrary to the district court order (*Order* p.11), ARM 17.30.715(1)(a) does ***not*** define that any +/- 10% change in 7Q10 flow of an outstanding resource water is 'degradation.' Instead, ARM 17.30.715(1)(a) is just one of eight separate criteria that must be satisfied for an activity to be "nonsignificant," and thereby exempted from a nondegradation review. ARM 17.30.715(1).

If an activity does not satisfy the nonsignificance test under ARM 17.30.715(1), then DEQ must analyze the proposed activity through the nondegradation review process of ARM 17.30.706(2) and § 75-5-303, MCA to determine if it is actually degradation.

The nonsignificance review under ARM 17.30.715(1) is not an enforceable

definition of "degradation."

2. The district court order strips DEQ of its regulatory authority concerning nonsignificance / nondegradation reviews.

Moreover, DEQ must exercise discretion in its administration of this nonsignificance review.

For example, DEQ must consider the ARM 17.30.715(1)(a) criteria concerning +/-10% changes in 7Q10 flows when analyzing an activity's nonsignificance. But, "notwithstanding compliance with [that criteria], the [DEQ] may determine that the change in water quality . . . is degradation," based upon a consideration of the criteria of ARM 17.30.715(2)(a)-(g). ARM 17.30.715(2). In other words, even if a proposed change is ***less*** than +/- 10% of the 7Q10 (satisfying the nonsignificance criteria), DEQ still has the discretion to conclude the activity ***is*** degradation.

Correspondingly, even if a change does ***not*** satisfy the nonsignificance criteria of ARM 17.30.715(1), DEQ may nevertheless determine it to be nonsignificant "based on information submitted by an applicant that demonstrates conformance with the guidance found in 75-5-301(5)(c), MCA, [the nondegradation statute]." ARM 17.30.715(3).

Under these rules, DEQ is directed to analyze each situation and waterbody differently and exercise its discretion. ARM 17.30.715(1) is not a universally enforceable standard.

C. Enforcement through the Water Use Act is not required, because a nondegradation review of the Rock Creek Mine will occur.

1. Enforcement of the nondegradation provisions of the Water Quality Act is accomplished through the Water Quality Act, and not the Water Use Act.

Objectors incorrectly argue that they can only enforce the nondegradation standards of the Water Quality Act through an objection in a ***Water Use Act*** permitting proceeding. Objectors' remedy concerning the Water Quality Act, lies with the Water Quality Act – about which Objectors are quite familiar. *See Clark Fork Coal. v. Dep't Envtl. Qual.*, 2008 MT 407, 347 Mont. 197, 197 P.3d 482; *Mont. Envtl. Info. Center v. Dep't Envtl. Qual.*, 1999 MT 248 ¶80, 296 Mont. 207, 988 P.2d 1236 ("*MEIC v. DEQ I*").

Prevention of degradation is already enforced through a Water Quality Act regulatory process administered by DEQ. Specifically, § 75-5-301, *et seq*, MCA requires DEQ to classify state waters, and set degradation standards. Activities which degrade must be reviewed and authorized by DEQ. ARM 17.30.706(2). Sections 75-5-301(4)-(6), -303(1)-(3), MCA. Authorizations are challengeable through a MAPA contested case, and then by judicial review. Section 75-5-303(5), MCA; Section 2-4-702, MCA; *see* Section 2-4-601, *et seq* MCA.

In fact, several of the Objectors have already litigated enforcement of nondegradation standards at the Rock Creek Mine project – and they have done so

through the Water Quality Act, not the Water Use Act. *See Clark Fork Coal.*, 2008 MT 407.

The suggestion that Water Quality Act standards are only enforceable through the Water Use Act is nonsensical. Objectors ask this court to ignore the existing remedies under the Water Quality Act, in the hope that the ***same*** relief will be judicially created within the Water Use Act. But that is expressly contrary to the plain language of §§ 85-2-311(1)(g), and -311(2), MCA. This Court should not ignore the existing remedies of § 75-5-303, MCA, or the plain language of § 85-2-311(2), MCA.

2. The nondegradation standards are also protected through the Metal Mine Reclamation Act.

Proposed mining activities must also undergo nondegradation review pursuant to the Metal Mine Reclamation Act (MMRA). Under MMRA, "a person may not engage in mining ... without first obtaining a final operating permit from the [DEQ]." Section 82-4-335(1), MCA. DEQ may deny an application with a "plan of operation or reclamation [that] conflicts with ... Title 75, chapter 5 ..." Section 82-4-351(1)(a), MCA. "Title 75, chapter 5" is the Water Quality Act, including the nondegradation protections. The MMRA also provides for judicial review. Sections 82-4-349(1), -349(3), MCA.

Thus, to receive an operating permit, the Rock Creek Mine will be subject to nondegradation considerations.

Moreover, RC Resources' has already ***specifically*** executed a stipulation with Objectors that the use of the water right in this case cannot occur unless all necessary permits are received. AR0019-0027.

3. § 75-5-317(2)(s), MCA is not a loophole permitting all water right holders to evade all nondegradation review.

Objectors incorrectly argue § 75-5-317(2)(s), MCA allows water right holders to evade a nondegradation review. *Resp. Br.* p.54-55.

§ 75-5-317(2)(s), MCA does not say water rights holders can evade a nondegradation review. The law states: "***diversions or withdrawals*** of water established and recognized under Title 85, chapter 2" are considered nonsignificant activities in a nondegradation review. Section 75-5-317(2)(s), MCA (emphasis added). It does not say 'mining' or 'reclamation' activities are "nonsignificant."

Objectors interpretation of § 75-5-317(2)(s), MCA renders almost every activity in Montana "nonsignificant." Their interpretation allows municipalities to ignore the nondegradation requirements of a wastewater MPDES permit, simply because the municipality holds a water right. Almost every activity in Montana relies on water use and water rights, and Objectors' interpretation of § 75-5-317(2)(s), MCA reduces the nondegradation review process to a nullity.

Objectors repeatedly cite to *MEIC v. DEQ I,* which successfully challenged the constitutionality of a nonsignificant activity listed under § 75-5-317, MCA. *MEIC v. DEQ I*, 1999 MT 248 ¶80. The obvious holding of *MEIC v. DEQ I* is that

activities listed under § 75-5-317, MCA can be challenged and found not to be nonsignificant. Contrary to this obvious holding, Objectors are now arguing that § 75-5-317(2)(s), MCA is inviolate, and that *MEIC v. DEQ I* therefore demands a constitutional challenge against § 85-2-311(2), MCA. Objectors are turning the holding of *MEIC v. DEQ I*, and a plain reading of the Water Quality Act, on its ear to justify their arguments in this case.

IV. § 85-2-311(2), MCA IS NOT UNCONSTITUTIONAL, AND THE CORRECT STANDARD OF REVIEW IS RATIONAL BASIS.

Section 85-2-311(2), MCA, is constitutional. Objectors contend that Section 311(2) is unconstitutional, because it only allows DEQ or a local water quality district the ability to raise a § 85-2-311(1)(g), MCA water quality classification objection against a DNRC beneficial water use permit. Petitioners argue this contravenes the 'clean and healthful environment' provision of the Montana Constitution. Mont. Const. art.II, §3.

Petitioners' constitutional argument is a red herring because as explained above, the beneficial use permit does ***not*** permit RC Resources a right to degrade any source. *Supra Section III.C.*. Accordingly, there is no state action here that could unconstitutionally violate the 'clean and healthful environment' provision. Any proposed degradation by RC Resources must be authorized by the DEQ pursuant to the Water Quality Act, which is exactly the Framer's intent when they established in article IX, §1(2) that "the ***legislature shall provide*** for the

administration and enforcement of this duty" to maintain a clean and healthful environment. Mont. Const. art.IX, §1(2) (emphasis added). Objectors have adequate and constitutional remedies.

A. There is no constitutional violation of the 'clean and healthful environment' provision because the DNRC beneficial use permit does not authorize any degradation of any waterbody.

Objectors argue that § 85-2-311(2), MCA is unconstitutional because it only permits the DEQ or a local water quality district to raise an objection alleging a DNRC beneficial use permit will not be "substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1)." *See e.g.* Sections 85-2-311(1)(g), -311(2), MCA. Again, they are wrong under this Court's clear precedent.

In *Northern Plains Resource Council v. Montana Board of Land Commissioners*, 2012 MT 234, ¶8, 366 Mont. 399, 288 P.3d 169, Northern Plains sued State Land Board for issuing a lease to Arch Coal without first conducting a Montana Environmental Protection Act analysis concerning potential coal mining on the lease. Northern Plains alleged a violation of the 'clean and healthful environment' provision of the Montana constitution. *Id.*

This Court emphasized the "leases do not authorize or permit any mining activity, and do not authorize or permit any degradation to any land or water." *Id.,*

¶5. "[T]he leases at issue … do not remove any action by Arch Coal from any environmental review or regulation provided by Montana law." *Id.*, ¶19.

Accordingly, this Court upheld the constitutionality of the law in question, because it did not impact or violate the constitutional right to a clean and healthful environment:

> "Because the leases themselves do not allow for any degradation of the environment, conferring only the exclusive right to apply for State permits, and because they specifically require full environmental review and full compliance with applicable State environmental laws, the act of issuing the leases ***did not impact or implicate*** the right to a clean and healthful environment in Article II, Section 3 of the Montana Constitution."

Id., ¶21.

Northern Plains is on all fours here. As in *Northern Plains*, the DNRC permit does not allow RC Resources to degrade the environment or allow the Rock Creek Mine to evade a nondegradation review (*Supra, Section III.C.*). In fact, Objectors and RC Resources have ***specifically*** stipulated that water use under the DNRC permit is "subject to any terms, conditions and limitations" of the Plan of Operations for the Rock Creek Mine. AR0019-0027. Thus, as with the lease in *Northern Plains*, the permit here is specifically contingent upon RC Resources complying with all environmental regulations.

Objectors' constitutional attack on § 85-2-311(2), MCA is an attempt to create a new enforcement mechanism of the Water Quality Act through the Water Use Act.

But, any remedy to a violation of the Water Quality Act already lies within the Water Quality Act as administered by DEQ. This is the directive of the Legislature established by constitutional mandate of article IX, §1(2). Mont. Const. art.IX, §1(2). Thus, the Water Use Act's lack of remedies for violations of the Water Quality Act is not unconstitutional, and fits squarely within the constitutional framework of article IX's 'clean and healthful environment' clause. Objectors are not constitutionally entitled to duplicative reviews and remedies.

Simply put, the issuance of the DNRC permit does not interfere with Objectors existing remedies under the Water Quality Act. Objectors have been, and will continue to be, very active participants in all environmental and water quality litigation regarding the Rock Creek Mine.[2]

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[2] *See Rock Creek Alln. v. U.S. Fish &Wildlife Serv.,* 390 F.Supp.2d 993 (D. Mont. 2005)(challenging biological opinion regarding Rock Creek Mine); *Clark Fork Coal. v. Dept. Envtl. Qual.,* 2007 MT 176, 338 Mont. 205, 164 P.3d 902 (challenging MPDES issued by DEQ to Rock Creek Mine); *Clark Fork Coal.,* 2008 MT 407, 347 Mont. 197, 197 P.3d 482 (challenging MPDES issued by DEQ to Rock Creek Mine); *Rock Creek Alln. v. U.S. Forest Serv.,* 703 F.Supp.2d 1152 (D. Mont. 2010 (dismissing Clean Water Act citizen suit); *Rock Creek Alln. v. U.S. Fish &Wildlife Serv.,* 663 F.3d 439 (9th Cir. 2011)(alleging violations of Endangered Species Act, National Environmental Policy Act, Clean Water Act, Forest Service Organic Administration Act, and National Forest Management Act in permitting of Rock Creek Mine), and *Clark Fork Coal. v. Dep't Envtl. Qual.,* 2012 MT 240, 366 Mont 427, 288 P.3d 183 (challenging general storm water permit issued by DEQ to Rock Creek Mine).

B. The constitutional standard of review in this matter is whether there is a "rational basis" for § 85-2-311(2), MCA.

The *Northern Plains* also establishes that the scrutiny of the constitutional review of § 85-2-311(2), MCA is a rational basis test. *N. Plains,* ¶¶19-20. Objectors incorrectly argue that § 85-2-311(2) must be reviewed under strict scrutiny.

Once again, Objectors are wrong. Strict scrutiny would only apply to the extent the statute "interferes with the exercise" of a right to a clean and healthful environment. *N. Plains,* ¶18, ¶20. There is no interference with Objectors exercise of their rights to a clean and healthful environment. Objectors are still able to enforce the Water Quality Act standards through the Water Quality Act, and the DNRC permit does not allow degradation. *Supra, Section III.C.*

Since "no constitutionally-significant interests are interfered with by [the statute] then the State must only demonstrate that the statute has a rational basis." *N. Plains,* ¶¶19-20. No compelling state interest, or narrowly tailored drafting is necessary.

The rational basis for § 85-2-311(2) is obvious. DNRC has sole authority to enforce the Water Use Act. Section 85-2-112, MCA. DEQ has sole authority to enforce the Water Quality Act. Section 75-5-211, MCA. Thus, DEQ is the primary agency tasked with determining whether a proposed water use "will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1)." Section 85-2-311(1)(g), MCA. Without DEQ's analysis, DNRC

is without authority to determine whether a violation of the Water Quality Act is implicated.

The Montana legislature's enactment of §§ 85-2-311(1)(g) and -311(2), MCA thus grants DEQ the authority ***and discretion*** to raise an objection and show DNRC why the proposed water right permit should be denied because of concerns regarding the Water Quality Act classification of the source water. This discretionary authority reduces duplicative reviews and potentially conflicting decisions across the two acts.

That the general public is not given the right to object is also rational. The general public does not have DEQ's authority or expertise to determine if a water rights permit is "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. Without DEQ's participation, DNRC would be granting or denying permits based on what it thinks DEQ will decide, and without DEQ's expertise. Moreover, the public does have the right to raise degradation concerns regarding this project (*Supra Section III.C*), but the public must do so through the DEQ pursuant to the Water Quality Act and/or the MMRA, and not with DNRC under the Water Use Act.

§ 85-2-311(2), MCA is rationally based and does not contravene the Montana Constitution.

CONCLUSION

This Court should reverse the district court's determination that "legal demands" within § 85-2-311(1)(a), MCA includes analysis of water quality classification standards which are instead addressed in § 85-2-311(1)(g), MCA. Instead, "legal demands" refers to water rights in their various forms. This Court should further find that there is a rational basis for § 85-2-311(2), MCA and that it is not unconstitutional.

Respectfully submitted this 30th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

In compliance with Rule 11(4)(a), M. R. App. P., counsel for Appellants certifies that the foregoing Reply Brief 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, is no more than 5,000 words (excluding this certificate of compliance and the following certificate of service).

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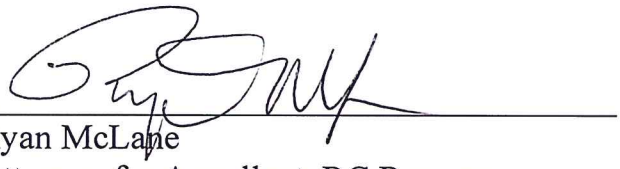

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Appellant, RC Resources* was mailed, via United States Postal Service, First Class Mail, postage fully prepaid thereon, this 30th day of March, 2020:

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