

**403 Mont. 225  
481 P.3d 198  
2021 MT 44**

**CLARK FORK COALITION, Rock Creek  
Alliance, Earthworks, and Montana  
Environmental Information Center,  
Petitioners and Appellees,**

**v.**

**MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION, and RC  
Resources, Inc., Respondents and  
Appellants.**

**DA 19-0484**

**Supreme Court of Montana.**

**Argued and Submitted: July 15, 2020**

**Decided: February 17, 2021**

For Appellants: Brian C. Bramblett (argued),  
Danna R. Jackson, Department of Natural  
Resources and Conservation, Helena, Montana  
Ryan P. McLane (argued), Holly Jo Franz, Franz  
& Driscoll, PLLP, Helena, Montana (for RC  
Resources, Inc.)

For Appellees: Katherine K. O'Brien (argued),  
Timothy J. Preso, Earthjustice, Bozeman,  
Montana

For Amici Curiae: Oliver J. Urick, Hubble Law  
Firm, Stanford, Montana (Montana  
Stockgrowers Association) Jack G. Connors,  
Doney Crowley P.C., Helena, Montana (for  
Montana Water Resources Association and  
Montana Farm Bureau Federation) Meg K.  
Casey, Laura S. Ziemer, Patrick A. Byorth, Trout  
Unlimited, Bozeman, Montana

Justice Dirk Sandefur delivered the Opinion of  
the Court.

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¶1 RC Resources, Inc. (RCR) and the Montana  
Department of Natural Resources and  
Conservation (DNRC) appeal the judgment of the

Montana First Judicial District Court, Lewis and  
Clark County, reversing a DNRC contested case  
decision granting RCR a beneficial water use  
permit pursuant to §§ 85-2-301(1), -302(1), and  
-311, MCA. The permit would have authorized  
RCR to annually appropriate up to 857 acre-feet  
of groundwater that will flow into the  
underground adits and works of the proposed  
Rock Creek Mine near Noxon, Montana. We  
address the following issues on appeal:

*1. Whether DNRC correctly  
concluded that, as used in §  
85-2-311(1)(a)(ii), MCA, "legal  
demands" does not include  
consideration of whether the subject  
water use complies with applicable  
MWQA nondegradation standards?*

*2. Whether § 85-2-311(2), MCA,  
violates Article II, Section 3, and  
Article IX, Section 1, of the Montana  
Constitution (right to clean and  
healthful environment) as applied to  
Objectors' MWQA nondegradation  
objections to the proposed MWUA  
beneficial use permit?*

We reverse.

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## **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 The narrow issues presented are purely legal  
issues of statutory and constitutional  
construction that do not depend upon  
adjudication of related factual issues. These  
issues do not arise in a vacuum, however. At the  
core of the issues presented is the assertion of  
the petitioner Objectors that DNRC's  
construction and application of the pertinent  
provisions of the Montana Water Use Act, Title  
85, chapter 2, MCA (MWUA), will deny them an  
adequate remedy to ensure that RCR's proposed  
groundwater use will comply with applicable  
nondegradation standards of the Montana Water  
Quality Act, Title 75, chapter 5, MCA (MWQA). A  
general overview of the extensive developmental  
and regulatory history and status of the Rock

Creek Mine Project (RCMP) is thus necessary to contextually frame the issues.

### 1. RCMP Description.

¶3 The RCMP is a proposed two-phase underground mining operation spread across various sites in and about the Kaniksu National Forest in Sanders County, northeast of Noxon, Montana. The Kootenai National Forest (KNF) of the United States Forest Service (USFS) administers the Kaniksu National

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Forest under federal law.<sup>1</sup> The ultimate goal of the project is to commercially mine silver and copper from an underground ore body over a 30-plus year period. The current applicant-operator of the project is RCR, a wholly-owned subsidiary of Hecla Mining Company, an Idaho corporation.<sup>2</sup> The proposed project sites will be primarily located on USFS-KNF land, with secondary support sites on adjoining private land owned by RCR, in and about the Rock Creek drainage in Montana's Cabinet Mountains range. From the conflux of its east and west forks, Rock Creek runs down and ultimately drains into the Clark Fork River below the Noxon Rapids Dam.

¶4 As currently planned, proposed Phase 1 will include construction of a 6,700-foot evaluation adit (*i.e.* tunnel/shaft), 16-18 feet high by 20 feet wide, with the surface portal located on a 10.4-acre adit site on USFS-KNF land at an approximate elevation of 5,775 feet. The adit

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site is adjacent to an unnamed tributary of the West Fork Rock Creek which, at that location, is an ephemeral stream fed by seasonal snow melt. It later becomes a perennial stream about 0.8 mile below the evaluation adit site where further fed by two underground springs. From its surface portal, the evaluation adit will traverse under USFS-KNF land on a -10% grade, continue under a small parcel of adjoining RCR-owned land, and on to the target ore body largely located under the Cabinet Mountains Wilderness

(CMW) area of the KNF. The proposed Phase 1 adit surface portal site is on USFS-KNF land outside the CMW.

¶5 Phase 1 will include construction of various support facilities and related improvements on the adit site including, *inter alia*, a temporary steel shop building, a lined ground/storm water retaining pond, and a pumping system which will pump retained stormwater and adit groundwater down mountain through a temporary 6-inch pipeline to a wastewater treatment facility to be constructed on a lower Phase 1 support site on RCR-owned land near the bottom of the Clark Fork River valley. Phase 1 will also include construction of various other support facilities on the secondary support site, as well as various improvements on a 2.5 mile stretch of one of two existing USFS roads that will provide access from the support site to Phase 1 facilities.<sup>3</sup> As currently proposed, Phase 1 will disturb a total of 19.6 acres on public and private land and involve excavation of approximately 178,000 tons of waste rock and ore from the evaluation adit. The limited purpose of Phase 1 is to obtain additional metallurgical, geotechnical, and hydrological data necessary for further assessment of the technical, economic, and legal feasibility of commercial mining operations under

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proposed Phase 2. Initial construction of the Phase 1 adit and related facilities is estimated to take 18-24 months.

¶6 As currently proposed, Phase 2 will include construction of an underground room and pillar mine, largely located under USFS-KNF land within the CMW, with two 15,530-foot production adits (*i.e.* a conveyor adit and

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a service adit) down to the ore body from surface portals on the proposed Phase 2 mill site located on USFS-KNF land outside the CMW. The Phase 2 adit portals and mill site will lie at a 3,040-foot elevation, below the conflux of the east and west forks of Rock Creek. The proposed

Phase 2 mill site will include a mill facility using a conventional crushing and froth flotation process, adit conveyor facilities, a sewage treatment facility, and various office, shop, and warehouse buildings. RCR plans to ship processed ore concentrates from the mill by rail to a smelting facility in another area. Phase 2 will also include construction of a paste tailings facility (designed to reduce mine tailings to a benign paste-like substance), a paste tailings material storage facility, and related support facilities on RCR-owned land near the bottom of the valley.

¶7 In accordance with state and federal law, the Phase 1 and Phase 2 plans call for bonded reclamation of all disturbed sites. If the project does not proceed to Phase 2, the Phase 1 plan calls for RCR to perform required reclamation on all Phase 1 facilities and sites.<sup>4</sup> If Phase 2 proceeds, the Phase 2 plan calls for the Phase 1 evaluation adit to serve as an additional ventilation shaft and secondary escapeway for the mine, but for RCR to remove other facilities from the Phase 1 adit site.<sup>5</sup>

## 2. Affected State Waters and Cabinet Mountains Wilderness.

¶8 In the Cabinet Mountains, groundwater collects and recharges in bedrock faults and fractures from seasonal snow-melt and rain. Where groundwater feeds (*i.e.* is hydraulically connected<sup>6</sup>) to surface waters, changes in groundwater volume can affect the volume and base flows of those surface waters. Significant reduction of surface water volume

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or base flows can in turn degrade surface water quality. Accordingly, based on area geology, hydrology, and the proposed mine and adit locations, depletion of groundwater volume due to ongoing underground adit inflow will reduce water volume and base flows to various degrees in various area surface water bodies in the various affected drainages of the Clark Fork River including, as pertinent here, the East Fork Bull River, Bull River (including Copper Gulch creek), Rock Creek (including east and west

forks), and various source tributaries.

¶9 The CMW is a federally-protected wilderness area in the Kaniksu and Kootenai National Forests as designated under the National Wilderness Preservation Act of 1964.<sup>7</sup> However, as characterized by the USFS:

The Wilderness Act requires the Forest Service to ensure that valid [mineral] rights exist before approving mineral activities inside a congressionally designated wilderness area. To establish valid existing rights, mining claimants must show they have made a discovery of a valuable mineral deposit on the claim(s) before the withdrawal date and have maintained that discovery. In 1985, the Forest Service determined that RCR's predecessor-in-interest had established valid existing rights to the deposit[s] ... [at issue here].

In accordance with the Wilderness Act, RCR's predecessor-in-interest received a patent only to the minerals within the wilderness, with the federal government retaining the surface estate. For those claims outside the wilderness, RCR received title to both the surface and mineral estate. These patented mining claims contain the ore reserves RCR has proposed to mine. Holders of validly existing mining claims within National Forest Wilderness are accorded the rights provided by U.S. mining

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laws and must comply with the Forest Service mineral regulations. Mining operations can occur in the wilderness but may be subject to additional management requirements to those imposed on operations outside of a wilderness, provided those requirements do not

prevent the operator from exercising their rights under U.S. mining laws.

2018 ROD, § 1.1.

¶10 Except for the underground extensions of the proposed Phase 1 and Phase 2 adits and Phase 2 mine body, the proposed RCMP surface

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portals, sites, and related facilities on USFS-KNF land lie outside the CMW. While various unnamed tributaries of the East Fork Rock Creek emanate from the CMW, neither the east or west fork, nor mainstem, of Rock Creek lie within the CMW.<sup>8</sup> South Basin Creek is a basin creek that emanates and flows south from Cliff Lake in the CMW and then eventually flows out of the CMW to its conflux with the East Fork Rock Creek. Bull River is a river on USFS-KNF land outside of the CMW. The East Fork Bull River is a river that emanates from near Saint Paul Lake within the CMW and eventually flows west out of the CMW to its conflux with the Bull River. Chicago Creek is a basin creek that emanates from and flows through the CMW to its conflux with Copper Gulch creek, another basin creek that emanates from within the CMW. Copper Gulch creek then flows west out of the CMW to its conflux with the Bull River.

### 3. Pertinent Federal and State Regulatory Schemes.

¶11 Both phases of the proposed RCMP are subject to a myriad of federal and state regulations and permitting requirements which, *inter alia*, require compliance with various federal and state water quality and other environmental protection standards. See Organic Administration Act of 1897 (OAA),<sup>9</sup> National Forest Management Act of 1976 (NFMA),<sup>10</sup> General Mining Act of 1872,<sup>11</sup> Mining and Minerals Policy Act of 1970,<sup>12</sup> MWUA, Alaska National Interest Lands and Conservation Act,<sup>13</sup> federal Clean Air Act,<sup>14</sup> federal Clean Water Act

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(CWA),<sup>15</sup> federal Endangered Species Act (ESA),<sup>16</sup>

National Environmental Policy Act (NEPA),<sup>17</sup> Montana Metal Mine Reclamation Act (MMRA),<sup>18</sup> Montana Clean Air Act (MCAA),<sup>19</sup> MWQA, and Montana Environmental Policy Act (MEPA).<sup>20</sup> The federal OAA is the overarching federal regulatory scheme and mechanism for ensuring that all mining operations on USFS land otherwise authorized by the federal General Mining Act are "conducted ..., where feasible, to minimize adverse environmental impacts" in accordance with all applicable federal and state air quality, water quality, solid waste, scenic preservation, wildlife preservation, and reclamation laws and regulations. 36 C.F.R. 228.1 and 228.8 (2019). USFS-KNF is responsible for administering the OAA as applied to mining activities on USFS lands. The MMRA, MWQA, and MEPA govern all water quality

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issues, *inter alia*, regarding mining operations under Montana law. MDEQ is responsible for administering the MMRA, MWQA, and related MEPA issues.<sup>21</sup> In contrast, within the framework of a statutory priority system, the MWUA governs who, how much, and for what purposes individuals and entities may use water in Montana.<sup>22</sup> DNRC is responsible for administering the MWUA.<sup>23</sup>

¶12 In tandem, federal and state law generally present corresponding hurdles that RCR must clear prior to commencing each phase of the RCMP. Under the umbrella of the federal OAA and NEPA, the operator must obtain, upon application, review, and approval for

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compliance with all applicable federal and state regulatory schemes, USFS approval of an "environmentally preferred" plan of operations for each proposed phase.<sup>24</sup> Under Montana law and the overarching administration of MDEQ, Phase 1 generally requires an MMRA "exploration license" based on MDEQ review and approval of a proposed plan of operations for compliance with the pertinent operational, environmental, and reclamation requirements of the MMRA,<sup>25</sup> MCAA,<sup>26</sup> MWQA,<sup>27</sup> and MEPA,<sup>28</sup> as



applicable. Phase 2 will require an MMRA "operating permit" based on a plan of operations reviewed and approved by MDEQ in accordance with the operational, environmental, reclamation, and bond requirements of the MMRA,<sup>29</sup> MCAA, MWQA, and MEPA. The MWUA will separately require the mine operator to obtain a beneficial water use permit from DNRC in order to divert and use inflowing adit groundwater for Phase 2 without adverse effect to preexisting third-party water rights.<sup>30</sup> For purposes of federal law, the OAA allows USFS to accept "[c]ertification or other approval" from the responsible state agencies that an OAA-governed project complies with applicable state laws and regulations "relating to mining operations." 36 C.F.R. 228.8(h) (2019).

##### 5. RCMP History and Environmental Review Status.

¶13 In 1987, the American Smelting and Refining Company (ASARCO) submitted a proposed RCMP plan of operations, for what is

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now essentially proposed Phase 2, to USFS-KNF and MDEQ's predecessor agency (Montana Department of State Lands(MTDSL)) for environmental review and applicable approvals and permits under the OAA, MMRA, CWA, MWQA, NEPA, MEPA, etc. In 1992, ASARCO submitted a separate plan of operations for review and permitting regarding the proposed evaluation adit and related facilities (*i.e.* Phase 1). USFS-KNF and MTDSL/MDEQ subsequently commenced joint environmental review under NEPA and MEPA. As indicated in the initial USFS-KNF/MDEQ draft Environmental Impact Statement (EIS) in 1995 and supplemental draft EIS in 1998, proposed Phase 1 was largely as now proposed except that the original plan called for disposal of treated groundwater from the evaluation adit by direct discharge into the Clark Fork River.

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¶14 In 1999, with federal and state review still underway, Sterling Mining Co. (Sterling)

acquired the RCMP claims and other related private property from ASARCO, thereby succeeding ASARCO as the applicant for the pending federal and state approvals. Sterling later morphed into Revett Silver Co. and assigned all incidents of the project to its wholly-owned subsidiary, RCR. Revett Mining Co. (Revett), formerly Revett Minerals Inc., later acquired Revett Silver Co., and thereby RCR and the RCMP.

¶15 In 2001, USFS-KNF and MDEQ issued a final EIS (2001 EIS) purporting to encompass both phases of the proposed RCMP, subject to a myriad of specified environmental protection conditions. *Inter alia*, the 2001 EIS listed all of the various federal, state, and local permits and approvals sequentially required for each phase of the project. In December 2001, based on their joint 2001 EIS, USFS-KNF and MDEQ issued a joint Record of Decision (2001 ROD) conditionally approving the separate plans of operation for each proposed phase of the RCMP. The 2001 ROD approved Phase 1 based on, *inter alia*, an MDEQ-approved surface water discharge permit (MPDES permit) for the proposed discharge of treated evaluation adit water into the Clark Fork River<sup>31</sup> and the operator subsequently obtaining an MMRA exploration

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license conditioned upon posting of a specified reclamation bond.<sup>32</sup>

¶16 In 2002, various environmental groups, including the Clark Fork Coalition, Rock Creek Alliance, and Cabinet Resource Group, *inter alia*, promptly filed a Montana state court action alleging that MDEQ illegally issued the 2001 MPDES permit without conducting a full MWQA nondegradation review of the proposed discharge into the Clark Fork River.<sup>33</sup> Meanwhile, USFS-KNF independently withdrew its portion of the joint 2001 ROD in 2002 based on a separate litigation-related withdrawal of an underlying United States Fish and Wildlife Service (USFWS) biological opinion regarding the impact of the RCMP on endangered bull trout and grizzly bear populations under the

federal ESA.<sup>34</sup> Upon further review and a revised no-jeopardy/no-adverse-modification opinion from USFWS, USFS-KNF re-issued its portion of the 2001 ROD in 2003 without significant revision other than incorporation of the revised USFWS opinion (2003 USFS-KNF ROD).

¶17 With the 2002 state court challenge to the 2001 MDEQ MPDES permit pending, several of the environmental groups who instituted the challenge (including some of the Objectors here) filed a separate federal lawsuit challenging the sufficiency of the revised 2003 USFWS biological opinion regarding endangered bull trout and grizzly bear impacts under the ESA.<sup>35</sup> In 2005, the federal court ruled that USFWS's revised no-jeopardy/no-adverse-modification opinion was

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deficient in various regards as alleged, and thus remanded for further review by USFWS.<sup>36</sup>

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In January 2006, with the 2002 state court challenge of the 2001 MDEQ MPDES permit regarding the proposed Clark Fork River discharge still pending, Revett, by way of RCR, began revising its plan of operations for the evaluation adit to incorporate the various requirements of the 2003 USFS-KNF ROD and still-effective MDEQ portion of the 2001 ROD. RCR, *inter alia*, revised its proposed Phase 1 treated adit water disposition plan to call for alternate discharge into infiltration ponds on RCR-owned land for diffusion into area groundwater, rather than direct discharge into the Clark Fork River as originally proposed.<sup>37</sup> Two months later, the state court ruled that the challenged 2001 MDEQ MPDES surface water discharge permit under the original Phase 1 plan did not violate applicable MWQA nondegradation standards.<sup>38</sup>

¶18 In 2007, based on an again-revised 2006 no-jeopardy/no-adverse-modification biological opinion and 2007 supplement opinion issued by USFWS on remand from the 2005 federal court decision, USFS-KNF determined that no further

review of bull trout and grizzly bear impacts was necessary under its 2003 ROD. The challenging environmental groups responded with additional federal claims alleging, *inter alia*, that the 2003 USFS-KNF ROD, and underlying 2001 EIS, still failed to adequately consider endangered grizzly bear and bull trout impacts, and further failed to adequately consider the adverse surface water quality impact on bull trout that would result from sediment-laden stormwater runoff into Rock Creek during Phase 1 construction and operation.<sup>39</sup>

¶19 In April 2008, after testing site percolation and finalization of plans for the revised Phase 1 plan discharge pipeline and water treatment plant, RCR submitted a revised application to MDEQ for an MMRA exploration license that, *inter alia*, further outlined its new proposal to discharge treated evaluation adit water into infiltration ponds for dispersal into area groundwater, rather than the Clark Fork

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River. In July 2008, as a "tiered" supplement to the water quality component of the joint 2001 EIS underlying the 2001 and 2003 USFS-KNF/MDEQ RODs, MDEQ issued a draft checklist environmental assessment under MEPA regarding RCR's revised MMRA exploration license application (2008 MDEQ Draft EA).<sup>40</sup> *Inter alia*, the draft EA included review of the revised plan for treated evaluation adit water to "be disposed as ground water ... in three infiltration ponds" on a one-acre site in the "Miller Gulch drainage" near the proposed Phase 1 water treatment facility.<sup>41</sup> Similar to the adit water treatment methodology originally proposed, reviewed, and approved by MDEQ under the 2001 EIS, the draft EA noted that the proposed adit water treatment methodology would:

include precipitation, clarification, and filtration for solids and metals[,] an ion exchange system[,] and a biological nitrification/denitrification system to remove inorganic nitrogen. Manganese exceedances would be resolved by additional

treatment. Treatment quality would meet [MWQA] non-degradation requirements before discharge to [the] ground water disposal [ponds] or MPDES ... limits.<sup>[42]</sup>

The 2008 MDEQ Draft EA further explained that "treated adit water meeting criteria under [MWQA] non-degradation rules would [then] be discharged to ground water via [the specified] infiltration ponds" and that "[t]he majority of the treated adit water would [then] enter the basal gravel into the fractured

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bedrock[,] and flow southwestward toward, and eventually" disperse into "the Clark Fork River alluvium."<sup>43</sup> *Inter alia*, the 2008 MDEQ Draft EA, and MDEQ's responses to public comments submitted in response thereto, noted that the area geology/hydrogeology and a referenced tracing study

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indicated no direct hydrological flow or connection between the treated groundwater discharge point and Rock Creek, the Clark Fork River, or record private wells in the area.<sup>44</sup> The draft EA thus concluded that, because the "treat[ed] water [will] comply with [MWQA] ground water standards and non-degradation standards at the end of the pipe prior to discharge" into the infiltration ponds, "[t]here [will] be no impacts to Rock Creek, fisheries, other aquatic life or their habitat as a result" of the proposed groundwater discharge of treated adit water.<sup>45</sup> In response to public comments, including those of the Cabinet Resource Group and Earthworks, *inter alia*, MDEQ again addressed concerns, previously addressed in the 2001 EIS, that the anticipated groundwater inflow and discharge of treated adit water will adversely

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affect nearby surface and ground water levels and quality.<sup>46</sup>

¶20 In December 2008, with MDEQ's final environmental assessment on RCR's revised Phase 1 exploration plan still pending, we reversed the 2006 state court ruling and held that MDEQ erroneously issued the disputed 2001 MPDES surface water discharge permit without considering whether the apparent perpetual nature of the originally-proposed Clark Fork River discharge *might* warrant full nondegradation review under alternative MWQA criteria.<sup>47</sup> We thus remanded for further MDEQ consideration of that issue.<sup>48</sup> Later in December, however, MDEQ approved its 2008 draft EA, with responses to public comment and additional specified conditions, as its final environmental assessment (2008 MDEQ EA) regarding RCR's 2008 revised application for Phase 1 MMRA exploration license.<sup>49</sup> The additional conditions included "additional groundwater monitoring," beyond the 36 monitoring wells referenced in the 2008 MDEQ Draft EA.<sup>50</sup> The 2008 MDEQ

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EA thus approved issuance of the requested MMRA exploration license, contingent on posting the necessary Phase 1 reclamation bond and compliance with specified conditions.<sup>51</sup> In 2009, MDEQ accordingly issued an annually renewable MMRA exploration license to RCR pursuant to §§ 82-4-331 and -332, MCA, thus authorizing RCR to proceed with Phase 1 upon posting of the requisite reclamation bond.

¶21 In 2010, in the federal challenge to the sufficiency of the

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USFWS/USFS-KNF review of grizzly bear and bull trout impacts under NEPA, OAA, NFMA, and ESA, the federal court ruled that the revised 2006/2007 USFWS no-jeopardy/no-adverse-modification biological opinion was generally adequate in regard to grizzly bear and bull trout impacts, except for certain deficiencies that still remained under the 2001 FEIS and 2003 USFS-KNF ROD regarding measures necessary to further reduce stormwater-related sedimentation in Rock Creek, consideration of certain updated information regarding bull trout

impacts, and identification of necessary riparian habitat conservation areas.<sup>52</sup> In July 2011, in a related state challenge pending since 2008, a Montana district court invalidated a general MDEQ MPDES permit that temporarily authorized stormwater runoff into Rock Creek during Phase 1 construction.<sup>53</sup>

¶22 In February 2016, after additional review on remand from the 2010 federal court decision, USFS-KNF issued a draft supplemental EIS (2016 Draft SEIS) regarding proposed Phase 1 including, *inter alia*, the NEPA-related deficiencies noted in the 2010 federal court ruling. The 2016 Draft SEIS identified and required additional Rock Creek sediment source reduction measures in accordance with referenced MDEQ MPDES stormwater discharge permits, reflected consideration of supplemental and updated Rock Creek bull trout impact analysis, and precise identification and updated analysis (including related sediment mitigation in accordance with referenced MDEQ MPDES permits) of riparian habitat conservation areas.<sup>54</sup> The 2016 Draft SEIS further noted USFS-KNF acknowledgement of RCR's revised Phase 1 adit water disposal plan, as addressed under the 2008

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MDEQ EA and 2009 MDEQ MMRA exploration license, and further addressed and imposed various measures to minimize water quality degradation, including the effects of adit-inflow-related groundwater depletion.<sup>55</sup>

¶23 In November 2017, the USFWS issued yet another revised biological opinion, again ultimately concluding that RCR's revised Phase 1 plan of operations is " 'not likely to jeopardize' the continued existence of bull trout and bull trout critical habitat, and 'would not result in the adverse modification or destruction of designated bull trout critical habitat.'"<sup>56</sup> Later in 2018, based on the 2016

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Draft SEIS and 2017 USFWS revised no-jeopardy/no-adverse-impact opinion, USFS-KNF

issued a final supplemental EIS (2018 SEIS) favorably analyzing the environmental effects of Phase 1 as specified and conditioned, and as previously reviewed and approved for water quality compliance by MDEQ under its 2008 EA/2009 MMRA exploration license.<sup>57</sup> The 2018 SEIS expressly clarified that the forthcoming USFS-KNF record of decision would approve only revised Phase 1 as specified, and that USFS-KNF "will make a new decision regarding Phase II [upon] a separate decision [process and] document[s]" upon further review after "completion of Phase I."<sup>58</sup>

¶24 In August 2018, based on its 2018 SEIS, USFS-KNF issued its final record of decision approving RCR's revised Phase 1 plan in accordance with the OAA and related federal and state law, including the MWQA. The 2018 ROD expressly noted that MDEQ did not participate in the 2016 SEIS or 2018 ROD and that all prior MDEQ determinations, including the MDEQ portion of the 2001 ROD and related aspects of the underlying 2001 EIS, 2008 EA, and resulting 2009 MMRA exploration license independently remained in effect under those "separate decision documents."<sup>59</sup>

##### 5. 2016 MWUA Beneficial Use Permit Application.

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¶25 In March 2016, as the federal environmental review process proceeded before USFS-KNF on remand from the 2010 federal court ruling, DNRC determined that RCR had submitted a legally complete application for consideration of a requested MWUA beneficial water use permit pursuant to §§ 85-2-301, -302(1), and -311, MCA. The application sought MWUA authorization from DNRC for RCR to divert and beneficially use up to 857 acre-feet of area groundwater during proposed Phase 2 operations, calculated as the maximum annual amount of groundwater projected to flow into the proposed Phase 1 evaluation adit, and Phase 2 production adits and mine workings. In June 2016, following a clarification meeting with RCR and a review of the impacts of the proposed diversion and use on superior water rights in the Clark Fork River and



its affected drainages, *i.e.* Rock Creek, East Fork Bull River, Bull River, and Copper Gulch creek, DNRC issued a preliminary determination of intent to grant the requested MWUA permit. The preliminary determination noted that the proposed Phase 2 groundwater water use would involve pumping of groundwater inflow from:

the Rock Creek Mine ... [for diversion] directly from the active mining areas or from the sumps for mining purposes. ... The Applicant will store up to 130 AF of water at any point in time within the mine during a year and divert up to 857 acre-feet (AF) of water from the mine per year.

...

Water [will leave] the production adit portal (surface access point) [at the Phase 2 mill site] via a 12-inch pipe and enter[ ] the closed loop water distribution system which conveys water to the [various locations of the] mill site, concentrate dewatering facility, paste [tailings] plant [facility], tailings impoundment area and then back to the mill site or wastewater treatment plant. ... From the mill a 4-inch pipeline conveys the concentrate slurry ... to the concentrate dewatering facility and another 16-inch pipeline conveys the tailing[s] slurry (ground rock no longer containing significant ore minerals ...) to the paste plant[ ]. ... All reclaimed water is returned to the closed process circuit for reuse and sent back to the mill. ... Precipitation that falls on the tailings storage area and seepage from the tailings is collected in under-drains[.] ... Most on-site water is captured and recycled back in the processes loop.

¶26 In accordance with § 85-2-311(5), MCA, RCR

supported its MWUA permit application with a "[r]evised three-dimensional finite element [403 Mont. 253]

groundwater flow model" (2014 Hydrometrics Model) prepared by a [481 P.3d 211]

third-party engineering firm (*Hydrometrics, Inc.*) calculating the estimated amount of annual groundwater inflow into the Phase 2 adits (*i.e.* evaluation adit, conveyor adit, and service adit) and the resulting estimated depletions, in terms of monthly acre-feet volume and mean monthly flow (CFS), of the affected area drainages and surface water sources including East Fork Bull River, Bull River below East Fork Bull River conflux, Copper Gulch creek, Rock Creek, and the Clark Fork River below the Noxon Rapids Dam.<sup>60</sup> Based on the 2014 Hydrometrics Model and various other cited sources of area hydrological data and analysis, DNRC found and concluded that the subject water volume (up to 857 acre-feet per year) was "physically available" in the area under the applicable MWUA criteria.<sup>61</sup>

¶27 Upon identification of the extent to which, if any, competing groundwater or surface water rights existed in the affected drainages and surface water sources, and recognition of "the connectivity between surface water and ground water and the effect of pre-stream capture on surface water[,]" the preliminary DNRC determination compared the "legal demands" of those rights to the proposed RCR use to ultimately find and conclude that RCR had proven by a preponderance of the evidence that the subject volume of water (up to 857 acre-feet per year) was "legally available" for purposes of § 85-2-311(1)(a)(ii), MCA.

¶28 Based on the calculated "monthly net depletions" of the affected and presumed hydraulically-connected surface and ground water sources, subtracted "from the flow rate/volume of water legally

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available on those sources," DNRC concluded that, "[f]or every month of the proposed period of diversion[,] the flow rate/volume on [the affected] sources exceed[s] all legal demands" of existing senior water rights on those sources. Based on that fact, and the groundwater quality monitoring and degradation mitigation plan requirements specified in the 2016 USFS-KNF Draft SEIS, DNRC found and concluded that RCR had proven by a preponderance of the evidence that the proposed RCMP water use will not adversely affect the "water rights of a prior appropriator" under an existing water right, certificate, permit, or state water reservation for purposes of § 85-2-311(1)(b), MCA. In conjunction with other similarly affirmative findings and conclusions under § 85-2-311(1)(c)-(e), MCA (adequate diversion means, beneficial use, and possessory interest requirements), the preliminary determination thus stated DNRC's intent to grant the requested permit, subject to the additional conditions that RCR install and monitor an "in-line flow meter" at a DNRC-approved "point in the delivery line" and further provide DNRC a biennial report summarizing the status of RCR's request for approval of the RCMP under federal law, the timeline for initiating the permitted water use, and RCR's permitted water use over the biennium, etc.

¶29 Upon the separate timely objections of USFS-KNF and Objectors here, DNRC set the MWUA matter for a contested case hearing pursuant to § 85-2-309(1), MCA. The USFS-KNF objection challenged whether RCR's application, or the preliminary DNRC determination, reflected compliance with the possessory interest requirement of the

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MWUA.<sup>62</sup> Objectors similarly objected and further asserted that the proposed use did not comply with § 85-2-311(1)(g), MCA (conformance with MWQA source water classification and MWQA nondegradation standards), and that the subject volume of water was not "legally available" as required by § 85-2-311(1)(a)(ii), MCA.

¶30 In June and July 2017, USFS-KNF and

Objectors respectively filed stipulations conditionally eliminating their possessory interest objections. In accordance with a prior oral stipulation to resolve the remaining legal availability issue as a matter of law on motion practice (whether under M. R. Civ. P. 12(b)(6) or Rule 56 ), RCR moved for judgment as a matter of law on Objectors' legal availability objection. On January 29, 2018, upon consideration of the parties' briefing, the hearing examiner issued a final contested case decision which: (1)

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deemed the prior possessory interest objections withdrawn as stipulated;<sup>63</sup> (2) concluded that Objectors' water quality objection under § 85-2-311(1)(g), MCA, was invalid because not raised by either MDEQ or a local water quality district and therefore precluded by § 85-2-311(2), MCA ; (3) concluded that Objectors' MWQA objections were not pertinent to whether the proposed volume of water is legally available as referenced in § 85-2-311(1)(a)(ii), MCA ; and (4) granted the requested beneficial use permit in accordance with DNRC's prior preliminary determination, as incorporated by reference into the final decision.

¶31 In February 2018, Objectors petitioned for judicial review of DNRC final agency decision pursuant to §§ 2-4-701 and -702(1), MCA (Montana Administrative Procedure Act (MAPA)). In essence, they asserted, *inter alia* , that DNRC erroneously concluded that their MWQA objections were not pertinent as a matter of law to whether the proposed volume of water is legally available as referenced in § 85-2-311(1)(a)(ii), MCA. They alternatively asserted that, even if DNRC both correctly interpreted § 85-2-311(1)(a)(ii), MCA, and concluded that § 85-2-311(2), MCA, precluded their § 85-2-311(1)(g), MCA, objection; § 85-2-311(2), MCA, would violate Article II, Section 3, and Article IX, Section 1, of the Montana Constitution by denying them an adequate remedy to enforce MWQA nondegradation standards in this case. On the parties' briefs and available administrative record, the District Court concluded that the term "legal demands" as referenced in §

85-2-311(1)(a)(ii)(B), MCA, requires compliance with applicable MWQA nondegradation standards, particularly including Admin. R. M. 17.30.715(1)(a) (2017) (precluding decreasing mean monthly flow of surface water in "outstanding resource waters" by 15 percent or more or the seven-day ten-year low flow by 10 percent or more). Citing *Montana Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality (MEIC)*, 1999 MT 248, ¶¶ 77 and 80, 296 Mont. 207, 988 P.2d 1236, the court further suggested, but stopped short of concluding, that § 85-2-311(2), MCA, violates Article II, Section 3, and Article IX, Section 1, of the Montana Constitution as asserted by Objectors. Thus, based on its construction of § 85-2-311(1)(a)(ii)(B), MCA, the District Court reversed DNRC's issuance of the subject beneficial use permit and remanded to DNRC for further consideration of Objectors' MWQA objection under Admin R. M. 17.30.715(1)(a) (2017).

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## STANDARD OF REVIEW

¶32 We review a district court grant or denial of summary judgment de novo for correctness in conformance with M. R. Civ. P. 56. *Smith v. B.N.S.F. Railway*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639; *Montana Trout Unlimited v. Montana Dep't of Nat. Res. & Conservation*, 2006 MT 72, ¶ 17, 331 Mont. 483, 133 P.3d 224. We review district court conclusions and applications of law de novo for correctness. *Smith*, ¶ 11. Interpretations and applications of constitutional and statutory law are conclusions of law reviewed de novo for correctness.

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¶33 MAPA (Title 2, chapter 4, part 7, MCA) governs judicial review of contested case final agency decisions. Section 2-4-702(1), MCA; *Flathead Lakers v. Montana Dep't of Nat'l Res. & Conservation*, 2020 MT 132, ¶ 7, 400 Mont. 170, 464 P.3d 396. The standard of judicial review of a final agency decision is whether the decision prejudiced the "substantial rights" of the party seeking review based on a clearly erroneous finding of fact, erroneous conclusion

or application of law, or an abuse of discretion. See § 2-4-704(2), MCA; *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989). An agency abuses its discretion if it exercises discretion based on a clearly erroneous finding of material fact,<sup>64</sup> without consideration of all pertinent law or material facts, based on a clearly erroneous conclusion or application of law, or without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. See § 2-4-704(2), MCA; *Montana Fish, Wildlife, and Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 11, 391 Mont. 328, 417 P.3d 1100; See *Clark Fork Coal. v. Montana Dep't of Env'tl. Quality (Clark Fork I)*, 2008 MT 407, ¶¶ 19-21, 347 Mont. 197, 197 P.3d 482; *North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871. See also *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241 (abuse of discretion standard); *Hulit v. St. Vincent's Hosp.*, 164 Mont. 168, 174-75, 520 P.2d 99, 102 (1974) ("an arbitrary and capricious decision" is the opposite of a "conscientious decision" within the bounds of reason).

¶34 An agency decision is not arbitrary or capricious "merely

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because the record contains inconsistent evidence or evidence which might support a different result." *Montana Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877. A decision is arbitrary and capricious only if apparently "random, unreasonable or seemingly unmotivated based on the existing record." *Montana Wildlife Fed'n*, ¶ 25. While we may not substitute our judgment for the judgment of an agency, we will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision under the governing standard of judicial review. *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972; *North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871.

**DISCUSSION**

¶35 1. *Whether DNRC correctly concluded that, as used in § 85-2-311(1)(a)(ii), MCA, "legal demands" does not include consideration of whether the subject use complies with applicable MWQA nondegradation standards?*

¶36 Our role in statutory construction is to simply "ascertain and declare what is in terms or in substance contained therein," not "insert what has been omitted" or "omit what has been inserted." Section 1-2-101, MCA. We must, to the extent possible, effect the manifest intent of the Legislature in accordance with the clear and unambiguous language of its enactments, without resort to other means of construction. *Larson*, ¶ 28 (citing *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499). We must do so by first attempting to construe the subject term or language in accordance with the plain meaning of its express language, in context of the statute as a whole, and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in which it is included. *Mountain Water Co. v. Mont. Dep't of Revenue*, 2020 MT 194, ¶ 27, 400 Mont. 484, 469 P.3d 136 (citing § 1-2-106, MCA, and *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666); *City of Bozeman v. Lehrer*, 2020 MT 55, ¶ 11, 399 Mont. 166, 459 P.3d 850 (citing *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426 and

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*S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948); *In re Marriage of McMichael*, 2006 MT 237, ¶ 14, 333 Mont. 517, 143 P.3d 439. Where "technical words and phrases ... have acquired a peculiar" or special legal meaning, we must construe them in accordance with that meaning, rather than their plain meaning in ordinary usage. Section 1-2-106, MCA. In

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construing several statutory "provisions or particulars," we must, to the extent possible,

construe them in harmony and give effect to all. Section 1-2-101, MCA. Resort to extrinsic considerations beyond the plain or technical meaning of the subject statutory language in context is necessary and proper only if the express language of the statute is vague or ambiguous. *See* § 1-2-106, MCA. *Ravalli County v. Erickson*, 2004 MT 35, ¶ 12, 320 Mont. 31, 85 P.3d 772. *See also Trap Free Mont.*, ¶ 14 (citing *Mont. Contractors' Ass'n v. Dep't of Highways*, 220 Mont. 392, 394, 715 P.2d 1056, 1058 (1986)); *In re Estate of Garland*, 279 Mont. 269, 273-74, 928 P.2d 928, 930-31 (1996).

¶37 For purposes of the MWUA, and as pertinent here, the term "appropriate" means "to divert, impound, or withdraw ... a quantity of water for beneficial use." Section 85-2-102(1)(a), MCA. The term "water" includes "all waters of the state, surface and subsurface, regardless of its character or manner of occurrence." Section 85-2-102(28), MCA. *Inter alia*, a "water right" is "the right to appropriate water pursuant to an existing right, a permit, [or] a certificate of water right." Section 85-2-102(32), MCA. The term "appropriation right" has the "same meaning as 'water right.'" Section 85-2-102(2), MCA.

¶38 Except as otherwise provided by the Act, the term "beneficial use" includes, *inter alia*, "a use of water for the benefit of the appropriator, ... including ... mining ... uses." Section 85-2-102(5)(a), MCA. The MWUA generally prohibits appropriating water or "commenc[ing] construction of diversion, impoundment, withdrawal, or related distribution works" except as authorized under an MWUA beneficial use permit issued by DNRC pursuant to §§ 85-2-306 through -314, MCA. Sections 85-2-102(20), -301, and -302(1), MCA. *See also* §§ 85-2-301(3) and -311(6), MCA. The applicant for an MWUA beneficial use permit has the burden of "prov[ing] by a preponderance of evidence" that:

(1) the quantum of water at issue is "physically available at the proposed point of diversion" based on pertinent hydrological and geological evidence;



(2) the quantum of water at issue "can reasonably be considered *legally available* during the period in which the applicant seeks to appropriate";

(3) the "rights of a prior appropriator under an *existing water right* ... will not be *adversely affected* " as "determined based on ... an applicant's plan for the exercise of the permit ... demonstrat[ing] that the ... [water] use ... will be controlled so the water right of a prior appropriator will be satisfied";

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(4) "the proposed means of diversion, construction, and operation of the appropriation works are adequate";

(5) "the proposed use ... is a *beneficial use* ," as defined by § 85-2-102(5), MCA ; and

(6) the applicant has a sufficient "*possessory interest* ... in the property where the ... beneficial use" is to occur or "any written special use authorization required by federal law" for such "use on national forest system lands."

See § 85-2-311(1)(a)-(e) and (5), MCA (emphasis added). As pertinent here, to satisfy the preponderance of evidence standard under § 85-2-311, MCA, the proof presented by the applicant must, *inter alia* , include "hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies." Section 85-2-311(5), MCA.<sup>65</sup> Based on the plain meaning of the clear and unambiguous language of § 85-2-311(1)(a)(i), MCA, in the context of the balance of § 85-2-311, MCA, the "physical availability" of the quantum

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of water at issue is a threshold determination and function of the subject volume/flow of water compared to the total physical volume/flow of water actually available in and from the source supply at the contemplated point of diversion. See § 85-2-311(1)(a)(i), MCA.

¶39 To prove the "legal availability" element of § 85-2-311, MCA, the applicant must further:

(1) identify the "physical availability" of the quantum of water at issue in accordance with § 85-2-311(1)(a)(i), MCA ;

(2) identify the "*existing legal demands* on the source of supply throughout the area" potentially impacted by the proposed use "based on the records of the department," *inter alia* ; and

(3) demonstrate the "legal availability" of the subject quantum of water based on analysis of *physical water availability* and *existing legal demands* by "comparison of the physical water supply at the proposed point of diversion with the *existing legal demands* on the supply of water" and any other related evidence.

Section 85-2-311(1)(a)(ii), MCA (emphasis added). Viewed in isolation in accordance with the plain meaning of the language, "existing legal demands" on the subject water source is seemingly synonymous with "existing legal requirements" on the subject water source or supply,

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and thus arguably sufficiently broad to encompass all legal requirements or demands applicable to the contemplated use of the subject water. Objectors thus assert that "legal demands" as referenced in § 85-2-311(1)(a)(ii), MCA, is a distinctly broader term than "water

rights" as defined by § 85-2-102(32), MCA, and thus indicative of legislative provision or intent to encompass legal demands other than the demands of existing water rights on the source, such as MWQA nondegradation standards applicable to the MWQA classification of the source water supply. We agree that, as defined and referenced in the MWUA, the terms "water rights" and "existing legal demands" are distinct terms with distinct meanings. However, the distinction is subtle and the terms have narrow and closely related meaning in context.

¶40 As defined by § 85-2-102(32), MCA, a "water right" is a legal right to use a specific quantum of water from a particular water source. In context of § 85-2-311, MCA, as a whole, the question of whether the quantum of water at issue is "legally available" is specifically a function of only two considerations—"physical availability" of that quantum of water at the point of proposed diversion, based on pertinent hydrological and geological evidence, and "existing legal demands on the [subject] source of supply" throughout the potentially impacted area "based on the records of the department ." Section 85-2-311(1)(a)(ii), MCA (emphasis added). As referenced in § 85-2-311(1)(a)(ii), MCA, "records of the department" means the "centralized record system of all existing [water] rights and ... permits, certificates, claims of existing rights, applications, and other documents filed [with DNRC] under [the MWUA]." See §§ 85-2-101(2) and -112(3), MCA. Compare § 85-2-311(1)(a)(ii), MCA. Thus, based on the plain language of § 85-2-311(1)(a)(ii), MCA, in the context of the balance of § 85-2-311, MCA, and the larger scheme of the MWUA as a comprehensive whole, "existing legal demands" is thus the aggregate quantum of water (volume/flow) allocated or reserved under existing water rights of record from the subject "source of supply throughout the area of potential impact" for beneficial use by the holders of those rights. See §§ 85-2-101(2), -102(32), -112(3), and -311(1)(a)(ii), MCA.

¶41 Nothing in the clear and unambiguous language of the above-referenced MWUA provisions constitutes or manifests any

legislative provision or intent to incorporate compliance with MWQA classification-based nondegradation standards, independently applicable to the subject use under the MWQA, as a required or permissible MWUA consideration regarding "existing legal demands

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on the source [ ] supply" of water as referenced in § 85-2-311(1)(a)(ii), MCA. This straightforward textual interpretation is consistent with the primary purpose of the MWUA to provide for beneficial use of Montana waters through a centralized administration

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and records system that recognizes, establishes, preserves, and protects ordered water rights of record priority from encroachment by later appropriators. See §§ 85-2-101(1) - (3) and -311, MCA ; *Montana Power Co. v. Carey* , 211 Mont. 91, 98, 685 P.2d 336, 340 (1984).

¶42 Nonetheless, as noted by the District Court and Objectors, the MWUA also has a related secondary purpose in conjunction with its primary purpose, *i.e.* , "to provide for the wise utilization, development, and conservation of [state] waters ... for the maximum benefit of [the] people with the least possible degradation of the natural aquatic ecosystems." Section 85-2-101(3), MCA.<sup>66</sup> In furtherance of that related purpose, the District Court cursorily concluded without further analysis that:

[water quality] [d]egradation shown to violate applicable legal restrictions [of the MWQA] must be considered as part of the "legal demands" [referenced in § 85-2-311(1)(a)(ii), MCA<sup>67</sup>]. In the context of ... § 85-2-311 and the MWUA, when deciding ... legal availability, the term "legal demands" requires DNRC to include analysis of relevant data provided in the [RCR] application of potentially unlawful dewatering.<sup>[68]</sup>

...

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[Thus,] ... dewatering Outstanding Resource Waters [as defined by the MWQA] is a known legal demand ... and must be included in the analysis of legal availability of water prior to issuing an ... [MWUA beneficial water use permit].

¶43 However, while often a relevant aid in the construction of vague or ambiguous statutory provisions, a general statement of legislative policy or purpose is insufficient alone to contradict, circumvent, or even supplement a clear and unambiguous statutory provision or scheme. We must necessarily read the secondary MWUA water quality protection purpose stated in § 85-2-101(3), MCA, in context of the manifestly narrow meaning and scope of the term "existing legal demands on the source [water] supply" as referenced in § 85-2-311(1)(a)(ii), MCA, as well as the express means chosen by the Legislature to further that secondary purpose, particularly in contrast to the comprehensive scheme separately provided to protect Montana waters against degradation under the MWQA.

¶44 As pertinent here, the MWUA provision for discretionary objection by MDEQ, as the administrator of the MWQA, is manifestly the means chosen by the Legislature to

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further the secondary water quality protection purpose of the MWUA. See § 85-2-311(1)(g) and (2), MCA.<sup>69</sup> Absent a constitutional violation, the wisdom of that choice is within the constitutional prerogative of the Legislature and generally not for us to question. The secondary water quality protection purpose

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stated in the MWUA, and manifestly served in the limited manner specified in § 85-2-311, MCA, cannot and does not alone give rise to a broader interpretation of the specifically narrow, clear, and unequivocal language of the balance of §

85-2-311, MCA. We hold that the District Court erroneously concluded that "legal demands," as referenced in § 85-2-311(1)(a)(ii), MCA, necessarily includes and requires DNRC consideration of whether the proposed use also complies with the MWQA classification, and applicable MWQA nondegradation standards, independently applicable to the source and affected waters under the MWQA.

¶45 2. *Whether § 85-2-311(2), MCA, violates Article II, Section 3, and Article IX, Section 1, of the Montana Constitution (right to clean and healthful environment) as applied to Objectors' MWQA nondegradation objections to the proposed MWUA beneficial use permit?*

¶46 In addition to the general proof requirements of § 85-2-311(1)(a)-(e), MCA, applicable in every case, the MWUA imposes additional proof requirements upon certain limited types of MWQA-related water quality objections to a proposed beneficial water use permit. Sections 85-2-311(1)(f)-(h) and -311(2), MCA. At issue here, upon a "valid objection" that the proposed use will not "substantially" comply with standards applicable to the MWQA "classification ... [of] the source [water] supply," the applicant must affirmatively prove the contrary by a preponderance of the evidence. Section 85-2-311(1)(g) and (2), MCA (referencing § 75-5-301(1), MCA). However, the MWUA expressly provides that "[o]nly [MDEQ] or a local water quality district ... may file a valid objection" on such grounds. Section 85-2-311(1)(g) and (2), MCA.<sup>70</sup> Based on the predicate assertion that § 75-5-317(2)(s), MCA, of the MWQA completely exempts the proposed RCMP Phase 2 groundwater use from MWQA nondegradation review, Objectors assert

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that § 85-2-311(2), MCA, of the MWUA violates their Montana constitutional right to a clean and healthful environment by depriving them of an adequate remedy to protect affected area surface waters from degradation by advance review of the proposed Phase 2 groundwater use for compliance with applicable MWQA nondegradation standards.

¶47 Article II, Section 3, of the Montana Constitution expressly guarantees all individuals the "inalienable ... right to a clean and healthful environment." The right to a clean and healthful environment is a fundamental right which government action may not infringe except as permissible under strict constitutional scrutiny. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs.*, 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169; *MEIC*, ¶¶ 62-63. To effect that fundamental right,

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Article IX, Section 1, of the Montana Constitution expressly requires the "state ... [to] maintain and improve a clean and healthful environment in Montana" and for the Legislature to accordingly "provide for the administration and enforcement of this duty" by providing "adequate remedies for the protection of the environmental life support system from degradation." Mont. Const., art. IX, § 1. Reading Article II, Section 3, and Article IX, Section 1 in tandem, any failure by the Legislature to provide adequate remedies for *advance* environmental review and protection before government approval of activities with potential for significant environmental degradation is a violation of the fundamental right to a clean and healthful environment. *See Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶¶ 18-34 and 89, 402 Mont. 168, 477 P.3d 288 (holding *inter alia* that elimination of MEPA permit stay/invalidation remedy pending adequate MEPA review facially violated Article II, Section 3, and Article IX, Section 1, of the Montana Constitution); *Northern Plains*, ¶¶ 18-19 (categorical environmental review exemption under statute governing state land leases did not interfere with right to clean and healthful environment because any subsequent mining use of the land was independently subject to advance MEPA review incident to all applicable state and federal laws regulating mine siting, operations, and reclamation); *MEIC*, ¶¶ 63-80 (holding that a categorical exemption ( § 75-5-317(2)(j), MCA (1995) ) of certain water well related activity from advance MWQA nondegradation review violated right to clean

and healthful environment as applied).

¶48 On a substantive due process challenge, the challenging party has the initial burden of showing that the disputed statutory provision

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substantially interferes with the subject fundamental right, whether facially or as applied. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173-74 (1996) (citing *Arneson v. Mont. Dep't of Admin.*, 262 Mont. 269, 272, 864 P.2d 1245, 1247 (1993)); *Cooper v. Harris*, --- U.S. ---, 137 S. Ct. 1455, 1463-64, 197 L.Ed.2d 837 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, --- U.S. ---, 137 S. Ct. 788, 800-01, 197 L.Ed.2d 85 (2017). *See also McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 34, 305 Mont. 462, 29 P.3d 992. Only upon satisfaction of that threshold burden does strict scrutiny apply and the burden then shifts to the state or defending party to show that the subject statutory provision is narrowly tailored to further a compelling government interest. *See McDermott*, ¶¶ 31-32; *Wadsworth*, 275 Mont. at 299 and 302, 911 P.2d at 1172 and 1174; *Cooper*, --- U.S. at ---, 137 S. Ct. at 1463-64; *Bethune-Hill*, --- U.S. at ---, 137 S. Ct. at 800-01; *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204-05 (2d Cir. 2006). Whether the challenged statutory provision substantially interferes with a fundamental right, facially or as applied, is a question of law. *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71. Accordingly here, based on the challenge asserted, Objectors have the initial burden of showing that, by limiting the scope of permissible MWQA nondegradation objections under the MWUA pursuant to § 85-2-311(2), MCA, the Legislature has failed to provide an adequate remedy for advance environmental review and protection of affected surface waters from the risk of degradation posed by the proposed RCMP Phase 2 groundwater use. *See Park Cty*, ¶¶ 60-89; *Northern Plains*, ¶¶ 18-19.

¶49 If we were to view § 85-2-311(2), MCA, in isolation as suggested by Objectors, the narrow question would be whether the limited scope of



MWQA objections to beneficial water use permits under the MWUA is sufficient to satisfy the Legislature's constitutional environmental protection duty under Montana Constitution Article II, Section 3, and Article IX, Section 1. As a threshold matter, however, Article II, Section 3, and Article IX, Section 1 do not entitle Objectors to any particular type or means of remedy—only that the Legislature provide some adequate remedy for advance environmental review and protection of the subject water use, whether within or independent of the MWUA. Thus, in light of the applicable remedy provided by the Legislature under the MWQA and MMRA here, we need not view § 85-2-311(2), MCA, in isolation.

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¶50 Unlike with MEPA, the MWQA, and pertinent provisions of the MMRA, the Legislature did not enact the MWUA for the primary purpose of implementing, satisfying, or tailoring it to its environmental

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protection duty under Montana Constitution Article II, Section 3, and Article IX, Section 1. See § 85-2-101, MCA. Compare §§ 75-1-102, 75-5-102, and 82-4-301, MCA. The Legislature enacted the MWUA for the specific purpose of implementing and fulfilling its separate duty under Article IX, Section 3 (in re state ownership of Montana waters and state "administration, control, and regulation of water rights" under a centralized water rights administration and records system). Section 85-2-101, MCA.

¶51 While the MWUA also has a secondary stated purpose (*i.e.* to "provide for the wise utilization, development, and conservation" of state waters "for the maximum benefit" of Montanans "with the least possible degradation of the natural aquatic ecosystems"), the Legislature served that secondary purpose, extraneous and without reference to its Article IX, Section 1 environmental protection duty, by providing for discretionary objection by MDEQ or a water quality district. See §§ 85-2-101(3), -311(1)(g), and (2), MCA. The manifest rationale

for the limited scope of water quality nondegradation objections under the MWUA is that, in furtherance of its Article IX, Section 1 environmental protection duty, the Legislature separately charged MDEQ with the duty and expertise to administer applicable MWQA nondegradation standards and, as specifically applicable to the mining-related water uses and impacts at issue here, the operating permit requirements of the MMRA. See § 85-2-311(1)(g) and (2), MCA. Compare §§ 75-1-102, 75-5-102, and 82-4-301, MCA (MEPA, MWQA, and MMRA).

¶52 In *Northern Plains*, aside from various distinctions not material here, we dealt with a strikingly analogous situation where an environmental protection group objected to a legislatively authorized lease of state land to a private coal company for the proposed strip-mining of a 20,000-acre coal deposit under a checkerboard of state, federal, and private land in the Otter Creek drainage of the Tongue River in southeast Montana. *Northern Plains*, ¶¶ 3-4. As the responsible government leasing body, the State Land Board, upon study and public comment, determined the particular terms of the lease and, pursuant to a statutory provision categorically exempting such leases from MEPA review, approved and executed the lease without environmental review. *Northern Plains*, ¶¶ 4-8. Concerned about the potential for a myriad of adverse environmental impacts, the objectors sued to invalidate the lease on the asserted ground that the categorical exemption of state land leases from MEPA review violated their right to a clean and healthful environment by depriving them of

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an adequate remedy for advance environmental review and protection from the proposed strip-mining. *Northern Plains*, ¶¶ 8 and 13-14.

¶53 We affirmed a district court ruling rejecting that assertion on the ground that, though the lease was a necessary prerequisite to the proposed strip-mining, the exemption of the lease decision from environmental review did not substantially interfere with the objectors' right to a clean and healthful environment

because the lease itself did not authorize any environmental degradation, only the right to mine the minerals under the leased land if and when authorized under various state and federal law permit requirements (including an MMRA operating permit, *inter alia*) which were in turn subject to advance environmental review under MEPA/NEPA. *Northern Plains*, ¶¶ 6 and 16-20. In other words, the lease of the subject state land was not the governmental action that would directly authorize the potentially degrading activity to proceed, nor did it exempt or preclude that activity from advance environmental review under other applicable forms of state and federal government approval required for the potentially harmful activity to proceed.

¶54 Similarly here, with central focus on relative physical and legal availability of the subject quantum of water vis-à-vis the existing record water rights of other appropriators, the MWUA beneficial water use permit at issue does not authorize degradation of affected surface waters independently subject to advance environmental review and

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regulation under more specifically-applicable state and federal regulations. Nor does the MWUA exempt or preclude the subject use from advance environmental review and regulation thereunder. As in *Northern Plains*, the subject MWUA permit itself would only grant RCR the right to appropriate and use a particular quantum of water for the proposed RCMP Phase 2 use *if and when* this particular proposed use is independently authorized to proceed under the MMRA, and incorporated MWQA nondegradation standards. See § 85-2-311, MCA (MWUA beneficial water use permits). Compare §§ 82-4-303(16) - (17), (32) - (33), (35), -335, and -351(1), MCA (MMRA operating permit requirements). See also 16 U.S.C. § 551 and 36 C.F.R. part 228 (2019) (overarching federal OAA).

¶55 As applicable to RCMP Phase 2, the MMRA prohibits any disturbance of land unless and until, if ever, RCR applies for, and upon MEPA review, obtains an MMRA hard rock mining

operating permit in compliance with MMRA operating and reclamation requirements, and incorporated MWQA nondegradation standards. See §§ 82-4-303(9), (12), (17), (19), -331, -332, -335, and -351, MCA. The proposed

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RCMP groundwater use has in fact already been subject to preliminary MWQA nondegradation review regarding potential contaminant discharge and adit-caused groundwater depletion under MEPA/NEPA, the MMRA, and the federal OAA. See USFS-KNF/MDEQ 2001 EIS and 2001 ROD.<sup>21</sup> If and when RCR applies for the MMRA operating permit required to proceed with proposed RCMP Phase 2, the application will trigger final comprehensive MEPA/NEPA-required review of the proposed Phase 2 operations and activities at issue under the requested permit before any disturbance of ground or related groundwater diversion under Phase 2. See §§ 82-4-301(2)(a), -335(4)(a), (5)(k), (m), -351(1)(a), and -355(2)(b), MCA (MMRA) and §§ 75-1-102(1), (3), -201(1)(b)(iv), (c), and -220(5), MCA (MEPA). Objectors have not shown that the future MMRA-triggered MEPA review of potential Phase 2 surface and ground water depletion and discharge impacts on affected MWQA-defined "high-quality waters" and "outstanding resource waters" will not include MEPA-required review of all Phase 2 water quality impacts (including groundwater depletion and surface/ground water discharge impacts) in accordance with MWQA nondegradation standards under §§ 75-5-103(7), and -301(1)-(2), (5)(a), and (5)(c), MCA.<sup>22</sup> They instead carefully assert that current MWQA *permitting* requirements apply only to surface and ground water "discharges," and thus effectively exempt the proposed Phase 2 groundwater depletion from review and compliance with nondegradation standards applicable to "outstanding resource waters." That narrow assertion does not account for the application of MWQA standards and restrictions under the MMRA operating permit process.

¶56 In pertinent part, the MWQA essentially includes four provisions in furtherance of the Legislature's constitutional environmental

protection duty and the corresponding requirements of the federal CWA, to wit:

(1) classification of all state waters "in accordance with their

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present and future most beneficial use" and imposition of corresponding water quality standards, including implementation of the Montana "nondegradation policy" regarding "high quality waters" and "outstanding resource waters." Sections 75-5-102, -103(7), (10), -301(1)-(2), (5)-(6), and -303, MCA ; *Clark Fork I* , ¶¶ 30-31 ; Admin. R. M. Title 17, chapter 30, parts 1, and 5-7;

(2) establishment of a permit system governing "point source" surface water "discharges" in accordance with the established

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nondegradation policy, *inter alia* . Sections 75-5-102, -103(29), -304(d) -401, and -402, MCA (emphasis added); *Clark Fork I* , ¶ 30 ; Admin. R. M. 17.30.102(4) (1991), 17.30.702(15), (20) (2019), 17.30.1202(28) (2011), and Title 17, chapters 11-13 ("Montana pollutant discharge elimination system" or "MPDES" permit system);

(3) establishment of a permit system governing "point source" groundwater "discharges" in accordance with the established nondegradation policy, *inter alia* . Sections 75-5-102, -103(29), -304(d) -401, and -402, MCA (emphasis added); *Clark Fork I* , ¶ 30 ; Admin. R. M. 17.30.102(4) (1991), 17.30.702(16), (20) (2019), 17.30.1001(4), (10) (2019), and Title 17, chapter 10 ("Montana ground

water pollution control system" or "MGWPCS" permit system); and

(4) establishment of a "nondegradation policy" prohibiting degradation of "outstanding resource waters" and requiring advance MDEQ authorization for degradation of "high quality waters." Section 75-5-303, MCA ; Admin. R. M. Title 17, chapter 30, part 7.

Within that framework, the MWQA categorically exempts various enumerated classes of water use and activities from its high quality waters degradation authorization, MPDES permit, and MGWPCS permit requirements. Sections 75-5-103(7), -303(2)-(3), -317, and -401, MCA. As pertinent here, the MWQA exempts MMRA-defined "mineral exploration " activities that do not result in a surface water discharge and "diversions or withdrawals of water" established or recognized under the MWUA. *See* §§ 75-5-103(7), -303(2)-(3), -317(2)(q), (s), and -401(5)(j), MCA (emphasis added).<sup>23</sup> In contrast, while categorically

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exempt from MWQA MGWPCS groundwater discharge permit requirements, mining and ore/tailings processing activities subject to MMRA "operating permit" requirements are not categorically exempt from MWQA nondegradation standards applicable to "outstanding resource" and "high quality" waters incident to issuance of an MMRA hard rock mining operating permit. *See* §§ 75-5-103(7), -303, -316, and -317, MCA. *Compare* §§ 82-4-303(12), (17), (32), (33), (35), -331(1), -335, and -351(1), MCA.<sup>24</sup> *See also* § 82-4-355, MCA (in re private actions and MDEQ complaints by affected property owners regarding mining-related "loss in quantity or quality of the water supply"). Mining-related activities subject to MMRA operating permit requirements are definitionally excluded from MWQA degradation authorization and prohibition requirements only upon a case-specific showing, and MDEQ finding under applicable Montana Board of Environmental Review rules, that a particular

activity will not result in significant changes in water quality. See §§ 75-5-103(7), -301(5)(c), -303(2)-(3), (7), -316, and -317, MCA. As applicable here, the MMRA triggers that showing and MDEQ review and decision point as a condition of issuance of an MMRA hard rock mining operating permit. See §§ 82-4-303(12), (17), (32), (33), (35), -331(1), -335, and -351(1), MCA. See also §§ 75-1-101, -103, -201, and -208, MCA (MEPA).

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¶57 As to the "diversions or withdrawals of water established and recognized under [the MWUA]" categorically exempted from the MWQA definition of "degradation," and related nondegradation standards and limitations, by operation of

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§§ 75-5-103(7), -301, -303(2)-(3), and -317(2)(s), MCA, the MWUA beneficial use permit requirement broadly applies to nearly limitless numbers and types of diversions, impoundments, and withdrawals of Montana surface and ground waters for beneficial use. See §§ 85-2-102(1), (5), -301(1), and -311, MCA. If applied in isolation to the sweeping scope of the MWUA beneficial use permit requirement, § 75-5-317(2)(s), MCA, would exempt from MWQA nondegradation standards compliance almost every number and type of beneficial water use, including the very nondegradation standards compliance objection that Objectors assert is within the meaning of "legal demands" as referenced in § 85-2-311(1)(a)(ii), MCA. Such an expansive construction of the MWQA exemption would absurdly defeat its essential environmental protection purpose and effect, contrary to Article II, Section 3, and Article IX, Section 1, of the Montana Constitution and the federal CWA.

¶58 As applicable here, the general MWQA exemption provided by § 75-5-317(2)(s), MCA (regarding MWUA established/recognized uses), must be read in context of the statutory scheme that specifically regulates the particular type of beneficial water use at issue. The proposed RCMP Phase 2 groundwater diversion at issue

under the MWUA is a necessary incident of mining construction and operations specifically governed by the operating permit requirements of the MMRA. See §§ 82-4-303(16) - (17), (32) - (33), (35), -335, and -351(1), MCA.

Consequently, the MMRA prohibits RCR from disturbing the subject land for Phase 2 construction and operations unless and until it obtains an MMRA operating permit. See §§ 82-4-303(9), (16) - (17), (20), (32) - (33), (35), and -335, MCA. In contrast to the distinct constitutional purpose of the MWUA, the express purpose of the MMRA in regard to underground hard rock mining activities and operations is to provide "adequate remedies for the protection of the environmental life support system" and necessary land reclamation in accordance with Article II, Section 3, and Article IX, Sections 1 and 2, of the Montana Constitution. Sections 82-4-301(1) - (3) and 302(1), MCA. The MMRA authorizes issuance of an operating permit only upon MDEQ review and approval of the proposed operations and reclamation plans for compliance with MMRA requirements including, *inter alia*, compliance with MWQA nondegradation standards and requirements. See §§ 82-4-303(9), (16) - (17), (35), -335(1), (4)-(8), and 351(1), MCA. To that end, the MMRA expressly contemplates comprehensive MEPA review of all potential adverse surface and ground water quality impacts of the proposed

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mining activity. See §§ 82-4-335(5)(k), (m), -337(1)(f), (h)(iv), (2)(c), and -351(1)(a), MCA. See also §§ 75-1-101, -103, -201, and -208, MCA (MEPA).

¶59 As possible, we must construe statutes to effect the intent of the Legislature as manifest by the express language of its enactments, read as a whole, with effect to all, in a manner that is reasonable and avoids absurd results. Section 1-2-101, MCA; *Mashek v. Dep't of Pub. Health & Human Servs.*, 2016 MT 86, ¶ 10, 383 Mont. 168, 369 P.3d 348; *Fliehler v. Uninsured Employers Fund*, 2002 MT 125, ¶ 13, 310 Mont. 99, 48 P.3d 746. To the extent of any inconsistency, more specific statutory provisions control over more general. Section 1-2-102, MCA



; *Trustees, Carbon Cty. Sch. Dist. No. 28 v. Spivey*, 247 Mont. 33, 36, 805 P.2d 61, 63 (1991). As applied to surface and ground water quality impacts, the MMRA provision requiring compliance with the MWQA as a condition of approval of MMRA operating permits is more specific than the general categorical MWQA exemption for MWUA-established/recognized "diversions or withdrawals of water." See §§ 82-4-301, -302(1), -335(1), (4)-(8), -351(1), and -355, MCA. Compare § 75-5-317(2)(s), MCA.

¶60 The Legislature is presumed to be aware of all of its enactments, as well as all related constitutional duties and limitations. See *Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 29, 382 Mont. 256, 368 P.3d 1131; *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448;

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*Keller v. Smith*, 170 Mont. 399, 407, 553 P.2d 1002, 1007 (1976); *In re Wilson's Estate*, 102 Mont. 178, 194-95, 56 P.2d 733, 737 (1936). In providing the general categorical MWQA exemption for MWUA "diversions or withdrawals," the Legislature was thus aware of the specific provision of the MMRA requiring compliance of approved mining activities with the MWQA in contrast to the general and nearly unlimited MWUA beneficial water use permit requirement. If it had intended to exempt mining activities subject to MMRA operating permit requirements from MWQA nondegradation standards and restrictions, the Legislature could have in the same manner that it specifically exempted certain MMRA-governed "exploration" activities from MWQA nondegradation standards and restrictions. See § 75-5-317(2)(q), MCA.<sup>75</sup> But, it did not.

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While § 75-5-317(2)(s), MCA, categorically exempts water uses established or recognized under the MWUA from MWQA nondegradation standards when not otherwise more specifically provided by other statutes, there is no manifestation in the clear and unequivocal language of § 75-5-317(2)(s), MCA, or related

MWQA and MWUA provisions, indicating that the Legislature intended it to trump the more specific environmental protection provisions of the MMRA to exempt proposed hard rock mining activities and operations from compliance with MWQA nondegradation standards and requirements. Thus, we hold that § 75-5-317(2)(s), MCA, does not apply to and exempt the appropriation of water for hard rock mining operations separately governed by the MMRA and MWUA from the MWQA nondegradation standards and requirements of §§ 75-5-103(7), (13), (25), -301, -303, -304, -316, and -317, MCA, and underlying administrative rules.

¶61 Here, similar to the multi-faceted regulatory scenario in *Northern Plains*, the proposed RCMP Phase 2 groundwater water diversion/use is and will be subject to final advance review and approval under MMRA operating permit requirements and MEPA for compliance with MWQA nondegradation standards, or case-based insignificant water quality impact determination, by MDEQ incident to any future application for a requisite MMRA operating permit required before any disturbance of ground for Phase 2 operations and activities. Thus, as in *Northern Plains*, the disputed MWUA beneficial water use permit does not directly authorize the mining-related activity which will be the direct cause of any potential degradation of affected "high quality" or "outstanding resource" waters, whether by contaminant discharge or groundwater depletion. In tandem, the MMRA, MEPA, and related MWQA provisions provide for comprehensive advance water quality nondegradation review of the proposed RCMP Phase 2 groundwater diversion and use, and related surface water impacts, as applicable on its particulars. As in *Northern Plains*, and contrary to the categorical exclusion at issue in *MEIC*,<sup>76</sup> § 85-2-311(2), MCA, does not deprive

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Objectors of the independent MEPA and MMRA/MWQA remedies provided by the Legislature for advance environmental review and protection regarding the subject water use at issue under the MWUA here. We hold that the

limited scope or manner of MWQA nondegradation review under the MWUA provided by § 85-2-311(1)(g) and (2), MCA, does not substantially interfere with Objectors' fundamental right to a clean and healthful environment

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under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution as applied here. Strict constitutional scrutiny thus does not apply and Objectors have not shown that § 85-2-311(2), MCA, is not rationally related to a legitimate government interest.

## CONCLUSION

¶62 We hold that the District Court erroneously concluded that "legal demands," as referenced in § 85-2-311(1)(a)(ii), MCA, of the MWUA includes and requires DNRC consideration of whether the proposed water use complies with MWQA classifications, and related nondegradation standards and restrictions, applicable to source water supplies. We hold further that the limited scope or manner of MWQA nondegradation review under the MWUA, incident to issuance of MWUA beneficial water use permits under § 85-2-311(1)(g) and (2), MCA, does not violate Objectors' fundamental right to a clean and healthful environment under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution as applied here. We therefore reverse the April 2019 judgment of the District Court on judicial review and affirm the January 2018 final agency decision of DNRC conditionally granting MWUA beneficial water use permit No. 76N-30068837.

We concur:

MIKE McGRATH

JAMES JEREMIAH SHEA

BETH BAKER

JIM RICE

Justice Laurie McKinnon, dissenting.

¶63 Petitioners raise two objections to DNRC's issuance of a water permit which would enable RC Resources to appropriate and substantially deplete multiple streams within the Cabinet Mountain Wilderness (CMW). First, Petitioners argue that DNRC violated the MWUA when the DNRC concluded that water was "legally available" for appropriation in violation of quantitative State-law limits on depleting flows in streams designated as ORWs. Second, Petitioners

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object to DNRC's application of § 85-2-311(2), MCA, to deprive them of their objection under § 85-2-311(1)(g), MCA, that DNRC improperly reclassified the ORW. Section 85-2-311(2), MCA, provides that only the MDEQ, or a water quality district, can raise a challenge to reclassification of a waterway.

¶64 We need only address Petitioners' first objection to resolve this case. The Court's exhaustive effort to demonstrate the MWQA will adequately address degradation of Montana's streams is misplaced and weakens the infrastructure intended by the legislature to protect our streams. As the issue presented here is whether the MWUA was correctly interpreted and applied, the Court's analysis should remain confined to the MWUA. If there is a loophole between the MWUA, MWQA, or MMRA, such that degradation occurs, this is a concern properly addressed by the legislature and not through an explanation by this Court of how statutes not at issue should work.

¶65 Fundamentally, there is a more troublesome concern arising from the Court's error. The Court assumes our Constitution and legislature, by enacting the MWUA and MWQA, intended that the overseeing agencies, the DNRC and MDEQ, were to have *mutually exclusive* responsibilities in their roles of protecting Montanans' constitutional right to a clean and healthful environment. While dewatering of a stream or waterway is a form of "degradation" under MDEQ regulatory rules,<sup>1</sup> degradation is also a concern of the MWUA, and the dewatering of ORWs by the Rock Creek Mine

project is quintessentially a water *quantity* analysis falling squarely within the oversight of the DNRC and application of the 311 criteria. The preservation of ORWs and prevention of their dewatering is not statutorily or constitutionally committed to the exclusive oversight of one particular agency, nor should they be. Our constitutional right to a clean and healthful environment and protections

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against degradation and dewatering of our streams should not perilously hang on whether the Court can find protections in alternative statutory schemes when indeed the pertinent legislation itself speaks to an overarching purpose of protecting Montana's environment. Both agencies, as provided in the MWUA and the MWQA, are charged with overseeing these important constitutional protections. While the MDEQ is legislatively responsible for the quality of state waters pursuant to the MWQA—which includes

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dewatering—the 311 criteria of "legal availability," which is predicated on "legal demands," also ensures the State meets its mandated responsibility to protect our waters. In particular, the preservation and distribution of in-stream flows is an issue the DNRC is resourced and experienced at addressing. The ORWs, through federal and State laws, are afforded a greater protection than other waterways. These heightened protections are in place to protect against dewatering of streams which have particular value because of their pristine attributes. Thus, ORWs are protected against dewatering *even at the expense of a water right having seniority*. It is illogical to hold that the DNRC, when issuing a permit to appropriate a quantity of water from a stream, is not obligated to consider the dewatering effect the permit will have on the more coveted and protected ORW. For these reasons, I would affirm the District Court's reasoning that "legal demands" and "legal availability" under the 311 criteria includes consideration of whether an ORW will be dewatered.

### **ORWs & their Protections Under the MWUA, MWQA, and the Montana Constitution**

¶66 The proposed Rock Creek Mine project lies within the CMW in Northwest Montana. The CMW is a federally-protected wilderness area—designated as such by the National Wilderness Preservation Act of 1964. *See* 16 U.S.C. §§ 1131 - 36. Pursuant to the Act, "wilderness" is defined as:

A wilderness, in contrast with those areas where man and his work dominate the landscape, is hereby recognized as an area where the earth and its community of life are *untrammelled by man*, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land *retaining its primeval character and influence*, without permanent improvements or human habitation, which is *protected and managed so as to preserve its natural conditions* and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (emphasis added). This definition requires the overseeing agency to preserve the natural and primitive conditions of

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the wilderness area, which includes its waters.

The Wilderness Act therefore instills a duty upon the overseeing agency to ensure that valid rights exist before approving projects within the area, like those at issue here—i.e., mineral rights. RC Resources' predecessor received a patent only to the minerals within the CMW, with the federal government retaining the surface estate.

¶167 Importantly, Montana state surface waters within a Wilderness Area are protected and held to the same preservation standard mandated by the Wilderness Act. *See* Admin. R. M. 17.30.617(1) (2006) and § 75-5-103(25), MCA, ("All state surface waters located wholly within the boundaries of designated national parks or wilderness areas as of October 1, 1995, are outstanding resource waters (ORWs)."). Title 75, chapter 5, MCA, encompasses the Water Quality Act—the unit of statutes pertaining to depletion and degradation of State waters. ORWs are afforded protection under §§ 75-5-315 and -316, MCA. Section 75-5-315(1), MCA, states:

[t]he legislature, understanding the requirements of applicable federal law and the uniqueness of Montana's water resource, recognizes that certain state waters are of such environmental, ecological,

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or economic value that the state should, upon a showing of necessity, prohibit, to the greatest extent practicable, changes to the existing water quality of those waters. *Outstanding resource waters must be afforded the greatest protection feasible under state law, after thorough examination .*

(Emphasis added.) Thus, in a striking resemblance to the Wilderness Act, § 75-5-315, MCA, mandates the overseeing agency afford heightened protections to ORWs under state law. As such, the DEQ may not "grant an authorization to degrade under § 75-5-303 in outstanding resources waters." Section 75-5-316(2)(a), MCA. Montana's administrative rules "express in unequivocal terms that

'degradation of national resource waters is prohibited.' " *See* Admin. R. M. 16.20.702(3) (1992). "The Montana regulations limit 'national resource waters' by definition to only 'surface waters in national parks, wilderness or primitive areas.' This definition is critical, in that it establishes a class of waters that cannot be degraded, regardless of any economic or social development that would be denied in the process." John L. Horwich, *Water Quality Nondegradation in Montana: Is Any Deterioration too Much?*, 14 Pub. Land L. Rev. 145, 176 (1993).

¶168 The DNRC and this Court reason that this mandate is *solely* the responsibility of the MDEQ due to its placement within the MWQA. However, when not only the quality, but the quantity of ORWs are at

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issue, the overseeing responsibilities of the DNRC under the MWUA are necessarily implicated. The District Court properly emphasized this and held:

While true that DNRC's responsibilities and authority regarding water use permitting extend primarily to water quantity, *water quantity and quality inherently overlap* as evidenced in the regulations for legal availability and for water quality, or degradation. The rule regarding degradation of [ORWs] requires DEQ to determine whether activities would " 'decrease the mean monthly flow of a surface water by ... [more] than 10 percent[.]'" Admin. R. M[ont]. 17.30.715(1)(a). This is a *question of water quantity* .

(Emphasis added.) As the District Court succinctly framed the issue, "water quality and water quantity are not solely in the province of either agency." In my opinion, the District Court was correct in concluding that protection against dewatering of ORWs was the responsibility of both overseeing agencies.



¶69 On a grander scale, Montana's Constitution provides for the conservation of the State's natural resources and guarantees the people of the state the fundamental right to a clean and healthful environment. *See* Mont. Const., art. II, § 3. Montana's framers of the 1972 Montana Constitutional Convention wanted "the strongest environmental protection provision found in any state constitution." *MEIC*, ¶ 66. Accordingly, Montana's Constitution provides: "The state and each person *shall maintain and improve a clean and healthful environment* in Montana for future and present generations ... [and] ... the legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to *prevent unreasonable depletion and degradation of natural resources* ." Mont. Const., art. IX, § 1 (1), (3) (emphasis added). These rights are connected, and laws implicating either provision are subject to strict scrutiny. *See Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 60, 402 Mont. 168, 477 P.3d 288 (citing *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2019 MT 213, ¶¶ 63-64, 397 Mont. 161, 451 P.3d 493 ).

¶70 This Court recently addressed the strength of the right to a clean and healthful environment in the context of the larger question whether the constitutional right can serve as an overarching mandate to lesser statutory authorities, such as MEPA, MMRA, MWUA, and MWQA. *Park County*, ¶¶ 52-89. We explained, "Montana's right to a clean and healthful environment is complimented by an affirmative

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*duty upon their government to take active steps to realize that right* ." *Park County*, ¶ 63 (emphasis added). In *Park County*, this Court observed that MEPA expressly provided "[t]he legislature recognized each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

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*Park County*, ¶ 65 (quoting § 75-1-103(3), MCA ). We determined the 2011 Amendments to MEPA "[fell] short of the constitutional guarantee and were therefore facially unconstitutional." *Park County*, ¶ 89.

¶71 Petitioners have raised their objection under both §§ 85-2-311(1)(a)(ii) and -311(1)(g), MCA. Addressing the later subsection and its counterpart § 85-2-311(2), MCA, the Court concludes that "[Section] 85-2-311(2), MCA, does not deprive Objectors of the independent MEPA and MMRA/MWQA remedies provided by the legislature for advance environmental review and protection regarding the subject water use at issue under the MWUA here." Opinion, ¶ 61. I would agree. Moreover, the statutory scheme is clear—the MDEQ or a water quality district are the only entities that can make an objection regarding reclassification of water. Section 85-2-311(2), MCA. Once again, though, Petitioners' claim is not based solely on improper reclassification, and the Court misses the point by evaluating the availability of remedies under the MMRA and MWQA. Petitioners raise an objection based on *quantity* and *dewatering* of ORWs and, ultimately, the State's duty to conserve the natural environment. The Court mistakenly reasons the inclusion of nondegradation standards within the meaning of "legal demands" would "absurdly defeat the [MWQA]'s essential environmental protection purpose and effect, contrary to Article II, Section 3, and Article IX, Section 1, of the Montana Constitution and the federal CWA." Opinion, ¶ 57. However, the MWUA also expressly requires that the DNRC ensure that Montana's waterways are used wisely and that they be preserved "*with the least possible degradation of the natural aquatic ecosystems* ." Section 85-2-101(3), MCA (emphasis added). More particularly, the degradation at issue here concerns the quantity of water and the proposed project's undisputed dewatering effect of an ORW—something the DNRC addresses on a daily basis and is specifically and statutorily resourced to handle. Ultimately, the Court's reasoning undermines the purpose and strength of the right to a clean and healthful environment by removing the protective reach of a

complimentary statutory scheme and overseeing agency equally committed by the legislature to ensuring the protections of Montana's

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streams. The Court's analysis is tenuously tied to its conclusion that an alternative statutory scheme protects against degradation because the MDEQ's administrative rules include dewatering as a form of degradation. The Court thus predicts that Petitioners' lengthy, costly, and laborious pursuit to protect Montanans' constitutional rights and ORWs will ultimately be vindicated through MEPA and the procedures of the MMRA and MWQA; concluding that there are no loopholes between the statutes which would allow degradation of these pristine streams, in the end, to occur. I cannot subscribe to imposing these laborious requirements on Petitioners' fundamental constitutional rights because the DNRC offers that its records do not contain ORW data entries which would allow assessment of a permit's effect on dewatering of these highly protected streams. The Court's search to find protections elsewhere is a misconceived application of the plain language of § 85-2-311, MCA, and dilutes the heightened protections afforded to ORWs. The District Court correctly explained the drafters of the Montana Constitution would have considered potential degradation of wilderness streams, here dewatering, to be a covered "activity" under Article II, Section 3 and Article IX, Section 1, and that the issue is most appropriately addressed by 311 criteria requiring consideration of the "availability" of water.

### **Rock Creek Mine Project**

¶72 The Rock Creek Mine project proposed appropriation would drain 100 percent from groundwater discharge to Chicago Creek and more than 50 percent of groundwater discharge to South Basin Creek ... "except for the underground extensions of the proposed Phase 1 and Phase 2 adits and Phase 2 mine body, the proposed RCMP surface portals, sites, and related facilities on USFS-KNF land lie outside the CMW." Opinion, ¶ 10. Rock Creek—a major ORW located within the CMW—originates from

the alpine lake, Rock Lake; from there, it flows out of the CMW. Multiple unnamed tributaries leave Rock Creek (also referred

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to as East Rock Fork Creek) before Rock Creek meets West Fork Rock Creek just north of National Forest Road 2285 and National Forest Development Road 2285. Rock Creek continues south where two larger tributaries fork to the east—Orr Creek and Engle Creek. South Basin Creek, another ORW in the CMW, flows from Cliff Lake and eventually out of the CMW to where it connects with East Fork Rock Creek. Other ORWs, such as East Fork Bull River and Chicago Creek, begin in the CMW, merge with the Bull River, and flow into the more prominent Clark Fork River.

¶73 On its face, the permitting history of the Rock Creek Mine project

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illuminates the potential for harmful discharge into the multiple CMW source waters identified. The 2001 MPDES permit indicated the treated evaluation adit water—containing arsenic, ammonia, nitrate-nitrogen, and heavy metals and pollutants—would be discharged into the Clark Fork River; the permit was approved and determined not to conflict with nondegradation standards by the First Judicial District Court in 2006. In 2008, RC Resources submitted a revised application for an MMRA exploration license, which required further permitting review by the MDEQ. The revised permit noted the adit discharge would meet nondegradation requirements before discharging into the ground water ponds rather than the Clark Fork River; however, the discharge would eventually enter the basal gravel of the bedrock and flow toward the Clark Fork River alluvium. In 2008, this Court reversed the 2006 District Court holding and warranted further nondegradation review; at which time the MDEQ approved the 2008 revised application. In 2011, the District Court invalidated a MPDES permit that authorized stormwater runoff into Rock Creek during Phase 1 of construction. In 2016, the DNRC approved

RC Resources beneficial water use permit to use up to 857 acre-feet of area groundwater during Phase 2 operations. While the Court fixates on this lengthy history in an effort to demonstrate the statutory scheme of the MMRA and MWQA addressing dewatering, the legal availability of water from an ORW is clearly and plainly addressed through the language of 311 criteria; there is therefore no need to search the record and history of the parties to demonstrate the existence of another remedy available under a different Act.

**Beneficial Water Use Criteria under § 85-2-311, MCA**

¶74 In approving a permit to appropriate water, the DNRC must evaluate whether the applicant has proved, by a preponderance of evidence, that the permit meets the criteria under § 85-2-311, MCA. Section 85-2-311(1)(a) and (b), MCA, provides:

[T]he department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a)(i) there is water **physically available** at the proposed point of diversion in the amount that the applicant seeks to appropriate and

(ii) 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:

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(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 the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), *adverse effect* must be determined based on a consideration of an applicant's plan for the exercise of the

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permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied.

(Emphasis added.)

¶75 The District Court concluded "existing legal demands" includes existing water rights, but does not exclude impacted streams in the CMW that will be depleted by a permit for groundwater appropriation and subsequent pumping for mining operations. The District Court concluded that "existing legal demands" includes more than just the existing water rights of a prior appropriator. Once the DNRC determines water is "legally available" pursuant to § 85-2-311(1)(a)(ii), MCA —after considering "existing legal demands" under § 85-2-311(1)(a)(ii)(B), MCA —it must then determine any adverse effects as required by § 85-2-311(1)(b), MCA, which specifies "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected." The District Court held the water for the Rock Creek Mine project was not available for

appropriation by RC Resources because of the "legal demands" arising from the source waters' designation as ORWs under both federal and State laws. The District Court reasoned that the phrase "water rights of a prior appropriator" in (1)(b), which are undisputedly protected under the statute and prior appropriation doctrine, has a different meaning than "legal demands" and "legal availability" in (1)(a); otherwise, there is no need for both subsections and the legislature would have simply used the same terms when referring to water rights. I agree.

¶76 To begin, the structure of the MWUA provides the DNRC should first make a "legal availability" analysis under § 85-2-311(1)(a)(ii), MCA, and then, in the next subsection, 311(1)(b), assess whether "the

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water rights of a prior appropriator" will be "adversely affected." These adjacent provisions demonstrate that the legislature knew how to specify "water rights," as it did in (1)(b), and that it did not intend "water rights" to be the same as "existing legal demands on the source of supply," as set forth in (1)(a)(ii). "Existing legal demands" is a broader phrase that encompasses all legal constraints on withdrawals from the water source and the phrase may not be narrowly construed by the more limiting definition of a water right identified in (1)(b). There are no canons of construction here that support the Court's conclusion that "existing legal demands" is an exclusive term that only pertains to an "existing water right." *Expressio unius est exclusio alterius*, which has previously informed our decisions, is the principle that the expression or inclusion of one thing implies the exclusion of another. *See Mont. Dep't of Revenue v. Priceline.com, Inc.*, 2015 MT 241, ¶ 19, 380 Mont. 352, 354 P.3d 631. Section 85-2-311(1)(a)(ii)(C), MCA, thus requires that "existing legal demands" *include existing water rights but is not limited* to existing water rights. Because the legislature did not use identical language in the two provisions, it is proper for this Court to assume that a different statutory meaning was intended. *Zinvest, LLC v. Gunnersfield Enters.*, 2017 MT 284, ¶ 26, 389

Mont. 334, 405 P.3d 1270.

¶77 There are other problems with the Court's statutory interpretation of the MWUA. Not only did the legislature use different language in adjacent 311 criteria, but it defined "existing right" or "existing water right" in § 85-2-102(13), MCA, as, "a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." The term includes "federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law." "Water right" is also defined as: "the right to appropriate water pursuant to an existing right, a permit, a certificate of water right, a state water reservation, or compact." Section 85-2-102(32), MCA. Significantly, "legal demands" is not specifically defined under the MWUA because it is meant to encompass *other demands* which are not susceptible to enumeration or definition *except that they are entitled to legal recognition or enforcement*. Moreover, the DNRC's regulatory rules, in Admin. R. M. 36.12.1704 (2012), expressly set forth what the DNRC is to assess when determining existing legal demands in the permit application process. Rule 36.12.1704 provides: "The department will identify the existing legal demands on the source of supply

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and those waters to which it is tributary and which the department determines may be affected by the proposed appropriation." Admin. R.

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M. 36.12.1704(2) (2012). The administrative rules, therefore, require the DNRC to measure the effect of a proposed appropriation, including groundwater appropriations, on the source of the supply—here, the ORWs and their tributaries. The legislature's choice to define both "existing water right" and "water right," but not "legal demands," indicates the legislature chose the terms to mean different things. Thus, "legal demands" includes other things and is broader than the definition given by the legislature to "existing water right" or "water



right." This Court, in *Confederated Salish & Kootenai Tribes v. Clinch*, 1999 MT 342, ¶ 28, 297 Mont. 448, 992 P.2d 244, interpreted "legally available" under 311(1)(a)(ii) "to mean there is water available which, *among other things*, has not been federally reserved for Indian tribes." (Emphasis added.)

¶78 The Court reasons that legal availability requires consideration of both "physical availability" and "existing legal demands" based solely on records of the department. See § 85-2-311(1)(a)(ii), MCA. However, the section, in its entirety, provides the DNRC may also consider other evidence provided to it, i.e., evidence of dewatering of ORWs within the CMW. Section 85-2-311(1)(a)(ii), MCA ("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*") (emphasis added). Here, in fact, RC Resources included modeling data in the application it submitted to the DNRC indicating that its proposed groundwater pumping could reduce baseflows in at least one ORW, up to 100 percent reduction of its baseflow; a complete dewatering of an ORW. It continued, "degradation shown to violate the applicable legal restrictions must be considered as part of the 'legal demands' 'within the area of potential impact.'" RC Resources application was clearly a record of the department or, at a minimum, "other evidence" of the dewatering effect on ORWs of its proposed project.

¶79 Importantly, the legislature's clear mandate that the responsibilities of the MDEQ and the DNRC overlap is found in *both* the MWQA and the MWUA. Section 85-2-311(2), MCA, interjects the MDEQ into the water permitting application process overseen by the DNRC and the MWQA similarly overlaps MDEQ responsibilities by including dewatering of a waterway as a form of degradation, i.e., Admin. R. M. 17.30.705(2)(c) (2006). The legislature has thus reinforced the State's responsibility to preserve wilderness areas, including ORWs, by allowing oversight over quantity and dewatering

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in both statutes. Indeed, the Court also observes the legislature specifically provided that the MDEQ, as the administrator of the MWQA, was responsible for furthering the secondary water quality protection purpose of the MWUA. Opinion, ¶ 44. The Court reasons, however, that "nothing in the clear and unambiguous language of the above-referenced MWUA provisions [ §§ 85-2-101(2), -102(32), -112(3), and -311(1)(a)(ii), MCA ] constitutes or manifests any legislative provision or intent to incorporate compliance with MWQA classification-based nondegradation standards, independently applicable to the subject use under the MWQA ...." Opinion, ¶ 41. The Court maintains that the District Court's use of the MWUA's policy or purpose alone cannot "contradict, circumvent, or even supplement a clear and unambiguous statutory provision or scheme." Opinion, ¶ 43.

¶80 The Court is mistaken when it concludes that issues of quantity and dewatering of a stream are not relevant to the DNRC permitting process because the MDEQ will oversee degradation. This proceeding is not resolved under the reclassification criteria of § 85-2-311(1)(g), MCA ; rather, it involves the legal availability of water sourced from protected ORWs.<sup>2</sup> The purpose of the MWUA is not only to protect water rights and the prior appropriation doctrine, but also "to provide for the wise utilization, development, and

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*conservation of the waters of the state* for maximum benefit of its people with the least possible *degradation of the natural aquatic ecosystems* ." Section 85-2-101(3), MCA (emphasis added). In pursuit of this policy, "the state encourages the development of facilities that store and conserve waters for beneficial use, for the *maximization of the use of those waters in Montana, for the stabilization of streamflows, and for ground water recharge* ." Section 85-2-101(3), MCA (emphasis added). The MWUA does not just preserve the prior appropriation doctrine; it has an environmental purpose as well—to preserve the health of our

aquatic ecosystems and, in particular, protect them from dewatering and degradation. While the Court is correct that the MDEQ is responsible for overseeing the MWQA, the legislature specifically indicated a primary purpose of the MWUA was for the conservation of the waters of the State with the least possible degradation. Section 85-2-101(3), MCA. The legislature's intent was clear that the DNRC, as the overseeing agency of the MWUA, would also be responsible for

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considering the effects of proposed projects, permits, reservations, etc., on the waters within those proposed areas. Moreover, the administrative rules place a duty upon the DNRC to evaluate the adverse effects of a proposed appropriation on the ORWs and its tributaries. See Admin. R. M. 36.12.1704(2) (2012).

¶81 The legislature has mandated that "[o]utstanding resource waters must be afforded the greatest protection feasible under the state law, after thorough examination," and the state should "prohibit to the greatest extent practicable, changes to the existing quality of those waters." Section 75-5-315(1), MCA. Both the DNRC and MDEQ, as overseeing agencies of the MWUA, MWQA, and the MMRA, have the responsibility to enforce and be guided by the purpose of each agency's respective Acts. There is nothing in the MWUA which excludes dewatering of ORWs from DNRC oversight and there is nothing in the MWQA which places oversight exclusively with the MDEQ. Ignoring the effect on the *quantity* of water removed from ORWs when the DNRC issues a permit—essentially passing the DNRC's role to oversee environmental protections to another agency—jeopardizes Montanans' right to clean streams, causes protracted litigation, and defeats the purpose of the MWUA to protect against degradation of our waterways, particularly Montana's most pristine outstanding waters.

¶82 This issue is easily and clearly resolved by applying the plain language of § 85-2-311, MCA, and the provisions of the MWUA. I would

conclude that this outstanding resource water was not legally available for RC Resources to appropriate. I dissent.

Justice Ingrid Gustafson joins in the Dissent of Justice McKinnon.

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Notes:

<sup>1</sup> Depending on context as referenced herein, KNF refers either to Kaniksu National Forest land or the Kootenai National Forest as the administrator thereof.

<sup>2</sup> Hecla acquired RCR, and all RCMP mining claims, property, and related applications for government approval of the project, in its 2015 acquisition of Revett Mining Company.

<sup>3</sup> For further description of the RCMP project history, development, operations plan, and regulatory status, see 2008 Final and Draft Environmental Assessments issued by the Montana Department of Environmental Quality (MDEQ) regarding RCR's 2008 Rock Creek Evaluation Adit Project Revised Application for Exploration License (2008 MDEQ EA); 2001 Final Environmental Impact Statement for the Rock Creek Project, jointly prepared by USFS-KNF and MDEQ (2001 EIS); and 2001 USFS-KNF/MDEQ Record of Decision for the Rock Creek Project (2001 ROD). See also 2018 USFS-KNF Final Supplemental Environmental Impact Statement for the Rock Creek Project (2018 SEIS) and 2018 Final Record of Decision for the Rock Creek Project (2018 ROD) of which we take note pursuant to M. R. Evid. 201(b)-(c) and (f) regarding the history and pertinent regulatory status of the project as necessary for contextual purposes. See <https://www.fs.usda.gov/detail/kootenai/landmanagement/projects/?cid=stelprdb5327758> (USFS-KNF Rock Creek Mine Project) and <https://www.fs.usda.gov/detail/kootenai/landmanagement/projects/?cid=stelprdb5329446> (USFS-KNF Rock Creek Evaluation Adit).

<sup>4</sup> 2001 Environmental Impact Statement (2001 EIS) jointly issued by USFS-KNF and MDEQ, p.

2-98; 2018 SEIS, pp. S-14, 2-78; 2018 ROD, pp. 5 and 2-25; 2008 MDEQ EA, p. 2.

<sup>5</sup> See 2001 EIS, p. 2-98; 2018 SEIS, pp. S-14, 2-17.

<sup>6</sup> "Hydraulically connected" is a technical term defined as "a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer." Admin. R. M. 36.12.101(32) (2019).

<sup>7</sup> RCR holds 99 federally-patented lode claims and at least 189 unpatented load claims in the RCMP vicinity.

<sup>8</sup> For maps illustrating location of proposed Phase 1 and Phase 2 RCMP surface portals, adits, sites, and related facilities, as well as location and paths of Rock Creek, East Fork Rock Creek, West Fork Rock Creek, Cliff Lake, South Basin Creek, Bull River, East Fork Bull River, Chicago Creek, and Copper Gulch creek, see the 2018 USFS-KNF Final Supplemental Environmental Impact Statement (2018 SEIS), Figure 2-1, p. 2-11 and 2001 USFS-KNF/MDEQ Environmental Impact Statement (2001 EIS), Figure 3-11, p. 3-34.

<sup>9</sup> See 16 U.S.C. § 551 and 36 C.F.R. part 228 (2019).

<sup>10</sup> See 16 U.S.C. §§ 1600 and 1604.

<sup>11</sup> See 30 U.S.C. §§ 21 -22 and 28k.

<sup>12</sup> See 30 U.S.C. §§ 21 and 28k.

<sup>13</sup> See 16 U.S.C. § 3210 and 36 C.F.R. § 251.114 (2019).

<sup>14</sup> See 42 U.S.C. §§ 7401, 7409, and 7410.

<sup>15</sup> See 33 U.S.C. §§ 1251 -53, 1311, 1313, 1319, 1341, and 1342.

<sup>16</sup> See 16 U.S.C. §§ 1531, 1533, and 1535 -36.

<sup>17</sup> See 42 U.S.C. § 4321, et seq. ; 7 C.F.R. part 1b (2020); 36 C.F.R. part 220 (2019).

<sup>18</sup> See Title 82, chapter 4, part 3, MCA.

<sup>19</sup> See Title 75, chapter 2, MCA.

<sup>20</sup> See Title 75, chapter 1, parts 1-3, MCA.

<sup>21</sup> See §§ 75-5-103(8), -211, 82-4-303(8), and -321, MCA.

<sup>22</sup> *But see* § 85-20-1401, MCA (United States-Montana Compact in re reserved National Forest System water rights).

<sup>23</sup> See §§ 85-2-102(11) and -112, MCA.

<sup>24</sup> See 2018 ROD, § 1.4.3.

<sup>25</sup> See §§ 82-4-301, -302, -331, -332, -336, and -338, MCA ; Admin. R. M. Title 17, chapter 24, part 1.

<sup>26</sup> See §§ 75-2-202, -203, -211, and -217, MCA.

<sup>27</sup> See §§ 75-5-101, -102, -103(7), (13), (29)-(30), (33), -301(1)-(2), (5)-(6), -303, -317, -401(1), (5), and -605, MCA ; Admin. R. M. Title 17, chapter 30, parts 6-7, 10, and 12-13.

<sup>28</sup> See §§ 75-1-201 and -208(1)(b), MCA. For joint environmental impact statements, environmental assessments, and records of decision in conjunction with federal agencies under NEPA and MEPA, see §§ 75-1-103(1), -201(6)(a)(i), and -208(1)(b), MCA ; Admin. R. M. 17.4.627 and 17.4.629 (1989). See also § 75-5-303(4), MCA (final MDEQ decisions on requested authorization for degradation of high quality waters).

<sup>29</sup> See §§ 82-4-301, -302, -335 through -338, MCA ; Admin. R. M. Title 17, chapter 24, part 1.

<sup>30</sup> See §§ 85-2-101, -102, and -302, MCA ; Admin. R. M. Title 36, chapter 12, part 17.

<sup>31</sup> In accordance with the 2001 EIS and the resulting 2001 ROD, MDEQ issued Sterling an MWQA Montana Pollution Discharge Elimination System (MPDES) permit authorizing, *inter alia* , the proposed Phase 1 surface water discharge of treated evaluation adit water into the Clark Fork River.

<sup>32</sup> Section VII, Part A of the 2001 ROD noted that, based on the 2001 EIS, MDEQ approved *both* phases of the project for issuance of an MMRA exploration license (Phase 1), MMRA operating permit (Phase 2), and related MPDES surface water discharge permits, *inter alia* .

<sup>33</sup> *Clark Fork Coalition v. Montana Dep't of Env'tl. Quality (Clark Fork I)* , 2008 MT 407, ¶¶ 8-32, 347 Mont. 197, 197 P.3d 482.

<sup>34</sup> "Rock Creek is one of only two tributaries, the other being Bull River, that support bull trout populations in the drainage of Cabinet Gorge Reservoir" of the Clark Fork River. *Clark Fork Coalition v. Montana Dep't of Env'tl. Quality (Clark Fork II)* , 2012 MT 240, ¶ 9, 366 Mont. 427, 288 P.3d 183. "Of these two, the Rock Creek stock is 'considered unique (relative to Bull River) ... [and it] is unlikely that bull trout would quickly recolonize Rock Creek if they became extirpated there.' " *Clark Fork II* , ¶ 9 (original punctuation and further noting 2001 EIS recognition of "Rock Creek [a]s an *essential stock* for conservation purposes ... [of] *migratory bull trout* " (original emphasis)).

<sup>35</sup> See *Rock Creek Alliance v. U.S. Fish & Wildlife Serv. (Rock Creek Alliance I)* , 390 F. Supp. 2d 993 (D. Mont. 2005).

<sup>36</sup> *Rock Creek Alliance I* , 390 F. Supp. 2d at 1010-11.

<sup>37</sup> *Rock Creek Alliance v. United States Forest Service (Rock Creek Alliance II)* , 703 F. Supp. 2d 1152, 1181-82 (D. Mont. 2010).

<sup>38</sup> *Clark Fork I* , ¶ 18.

<sup>39</sup> *Rock Creek Alliance II* , 703 F. Supp. 2d at 1163-1211.

<sup>40</sup> For distinction between MEPA-required environmental impact statements, environmental assessments, and reports of decision, see §§ 75-1-102(3)(a), -201(1)(b)(iv), -208(1), and -220(5), MCA, and Admin. R. M. 17.4.603(9)-(10), 17.4.607 through 17.4.609, 17.4.627, and 17.4.629 (1989).

<sup>41</sup> 2008 MDEQ Draft EA, pp. 3 and 9-12.

<sup>42</sup> 2008 MDEQ Draft EA, pp. 6 and 8-12 (*inter alia* referencing an included table comparing the dissolved metal concentrations in "the average ambient ground water quality and the non-significant criteria that would be met at the end of the pipe prior to discharge [into the ponds]").

<sup>43</sup> 2008 MDEQ Draft EA, pp. 9-12.

<sup>44</sup> 2008 MDEQ Draft EA, pp. 12-14 and 2008 MDEQ Response to Public Comments on Draft EA, comment/response D.6, D.7, and L.1, to wit:

Above the bedrock, the basal gravel layer is discontinuous and overlain with [glacial] lake-deposited sand, silt and clay sediment layers. Water discharged to the percolation pond[s] would move down gradient toward the northwest and the Clark Fork River. Some water would likely move into the underlying fractured bedrock and some may rise into the overlying sediments. Eventually, the water would move from the basal layer into the alluvial gravels adjacent to or beneath the river. The point at which the discharged water eventually enters the alluvial gravel is not known and will not be able to be identified because the discharged water will mix with ambient groundwater in the basal gravel unit, and the geology is sufficiently complex that dispersion of the water as it travels toward the alluvial gravels will result in the water following numerous potential flow paths. The zone within which flow in the basal gravel unit may enter the alluvial gravels stretches for at least two miles parallel to the river. Given the variability of the basal gravel unit and the underlying bedrock, potential for leakage into the bedrock, the fact that the discharged water will be similar in quality to the ambient groundwater, and dilution that will occur as the discharged water mixes with groundwater from the basal gravel, bedrock, and



alluvial aquifers, it is expected that the discharged water will be indistinguishable from ambient groundwater before it reaches the river. Thus, the path of the discharged water cannot be traced from the percolation pond to where it eventually enters the Clark Fork River alluvium.

Moreover, the quality of the treated water proposed to be discharged in the percolation pond is consistent with both non-degradation criteria for groundwater and surface water (after mixing, which would occur efficiently via seepage out of the alluvium). Thus[,] the water discharged to groundwater would not have an affect on any surface water.

2008 MDEQ Response to Public Comments on Draft EA, comment/response D.6 and D.7.

<sup>45</sup> 2008 MDEQ Draft EA, p. 12.

<sup>46</sup> See 2008 MDEQ Response to Public Comment on Draft EA, comment/response B.5, C.9, D.6, D.9, P.1, P.2, and P.3, and 2001 EIS, pp. 4-58 to 4-59, 4-64 to 4-67, 4-75, 4-102 to 4-103, and 4-107.

<sup>47</sup> *Clark Fork I*, ¶¶ 21-49.

<sup>48</sup> *Clark Fork I*, ¶ 50.

<sup>49</sup> See 2008 MDEQ EA Cover Letter (Dec. 22, 2008).

<sup>50</sup> See 2008 MDEQ EA Cover Letter (Dec. 22, 2008) and 2008 MDEQ Response to Public Comment on Draft EA, comment/response D.7.

<sup>51</sup> The public comment section of the 2008 EA manifests that it considered and addressed the asserted comments and concerns of the named plaintiffs in this case, *i.e.* Clark Fork Coalition, Rock Creek Alliance, and Earthworks, et al. (including the Cabinet Resource Group, et al.), regarding potential water quality and

dewatering impacts of the new Phase 1 plan to dispose of treated evaluation adit groundwater by infiltration dispersion into area groundwater.

<sup>52</sup> *Rock Creek Alliance II*, 703 F. Supp. 2d at 1163-1211. The court further ruled, *inter alia*, that the plaintiffs' additional claim that the 2003 USFS-KNF ROD was further defective, due to failure to consider Revett-RCR's new 2006 proposal to alternatively discharge treated adit groundwater into area groundwater instead of the Clark Fork River, was premature pending MDEQ consideration and decision on that proposal. *Rock Creek Alliance II*, 703 F. Supp. 2d at 1181-82.

<sup>53</sup> *Clark Fork II*, ¶¶ 3-8 and 14-15 (ruling that MWQA rule barred use of "general" MPDES permits rather than more stringent "individual" permits regarding stormwater discharge into surface waters of "unique ecological significance"). In a 4-2 decision, we affirmed in 2012. *Clark Fork II*, ¶¶ 3 and 15-30. *But see Clark Fork II*, ¶¶ 37-49 (Rice, J, dissenting based on asserted disregard or parsing of contrary 2006/2007 USFWS no-jeopardy biological opinions regarding bull trout impacts and 2001/2003 USFS-KNF/MDEQ RODs sediment mitigation measures).

<sup>54</sup> 2016 Draft SEIS, §§ 2.3.1.16, 3.11, 3.13, 4.7, 4.11, 4.13, and Appendices K & N.

<sup>55</sup> 2016 Draft SEIS, §§ 4.7.3.1 through 4.7.3.3.4 and Appendix K, § 16 (in re surface and ground water quality).

<sup>56</sup> 2018 SEIS, § 1.5.6, p. 1-18.

<sup>57</sup> 2018 SEIS, p. S-11.

<sup>58</sup> See 2018 SEIS, Abstract and S-10. *See also* 2018 ROD, § 1.2.1.4.

<sup>59</sup> 2018 ROD, §§ 1.1, 1.2.1.4, and 1.7, pp. 1, 4, and 58-59.

<sup>60</sup> *Inter alia*, the 2018 USFS-KNF SEIS and 2018 ROD included detailed dewatering/flow impact analysis regarding both phases of the RCMP as a water quality factor considered by MDEQ regarding affected surface and ground water

sources based on the 2014 Hydrometrics Model and other cited geological and hydrological information. See 2018 SEIS Summary (pp. S-19 through S-21 and S-30) and §§ 3.7, 3.11, 4.71 through 4.73, and 4.75; 2018 ROD, §§ 1.4.4.1 and 1.7.1.3. The 2001 USFS-KNF/MDEQ EIS and resulting 2001 ROD included RCMP flow and depletion impact analysis based on earlier Hydrometrics modeling and other sources of information and analysis. See 2001 EIS, chapters 3-4; 2001 ROD, § VII.

<sup>61</sup> RCR's 2016 beneficial use permit application, DNRC's determination thereon, and the resulting 2016 MWUA permit exclusively focused on the projected annual inflow into the evaluation, conveyor, and service adits during Phase 2, without reference to Phase 1 water use (1.5 to 2 year inflow into evaluation adit). *Inter alia*, the 2018 USFS-KNF ROD, and underlying 2018 SEIS, accordingly noted that dewatering of the evaluation adit during Phase 1 did not require an MWUA beneficial use permit. 2018 ROD, § 1.5.1.14. We make no express or implied comment on that threshold issue.

<sup>62</sup> See §§ 85-2-306(1), -310(4), and -311(1)(e), MCA (possessory interest requirement and conditional withdrawal of objections).

<sup>63</sup> See also § 85-2-306, MCA (authorized use of "national forest system lands" exception to "possessory interest" requirement for MWUA beneficial use permits).

<sup>64</sup> Agency findings of fact are clearly erroneous only if not supported by substantial record evidence or a careful review of the record manifests that the agency clearly misapprehended the effect of the evidence or was otherwise mistaken. See § 2-4-704(2)(a)(v), MCA; *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991).

<sup>65</sup> The MWUA requires additional specified evidence for proposed uses in certain "closed basins." Sections 85-2-311(5) and -360, MCA.

<sup>66</sup> In support of the similar proposition that the

"MWUA ... states [environmental protection] policy considerations beyond protection of senior water users' rights," the District Court cited § 85-1-101(5), MCA ("[t]he water resources of the state must be protected and conserved to assure supplies for public recreational purposes and for the conservation of wildlife and aquatic life"). However, § 85-1-101(5), MCA, is a general policy justification underlying the establishment and administration of a "coordinated [local, state, and federal] multiple-use water resource plan" independent of the MWUA and outside the mandate of Montana Constitution Article IX, Section 3. See § 85-1-101(5)-(10) and Title 85, chapter 1, part 2, MCA. Compare § 85-2-101, et seq., MCA (MWUA).

<sup>67</sup> See also Admin R. M. 36.12.1705 (2012) (implementing § 85-2-311(1)(a)(ii), MCA).

<sup>68</sup> The referenced "relevant data" was the 2014 Hydrometrics Model submitted by RCR in support of its MWUA permit application, and Objectors' accompanying cursory assertion that it showed *illegal* flow depletion in violation of MWQA nondegradation standards for "outstanding resource waters," as defined by § 75-5-103(25), MCA ("state surface waters located *wholly* within ... national wilderness areas" or as otherwise designated by the Montana Board of Environmental Review under the MWQA and "approved by the legislature" (emphasis added)). Though beyond the scope of the purely legal questions at issue here, the otherwise extensive DNRC administrative record manifests significant questions of fact as to which MWQA nondegradation standards apply to each of the affected surface waters and whether and to what extent, if any, the 2014 Hydrometrics Model indeed shows a projected groundwater depletion that would be "illegal" thereunder. The raw depletion data indicated in the 2014 Model, provided for the limited purpose of establishing "physical availability" of the subject quantum of water without adverse interference with existing water rights, is patently insufficient alone to support such a conclusory assertion in the manifest absence of qualified expert analysis. Nor is Objectors' blanket assertion or implication that all of the

affected surface waters are "outstanding resource waters," as narrowly defined by the MWQA, supported on the record here.

<sup>69</sup> Though not at issue here, the Legislature similarly chose objection by persons with particular "standing," as narrowly defined by § 85-2-308(3), MCA, as the means to trigger DNRC consideration of other specified water quality impacts, *inter alia*, as a criterion for issuance of a beneficial use permit. Sections 85-2-308(3), (6) and -311(1)(f), (h), and (2), MCA (in re adverse affect on "water quality of a prior appropriator" or ability of MWQA "discharge permitholder" to comply with "effluent limitations of [the] permit").

<sup>70</sup> Even then, the objection is "valid" only if timely and supported by "substantial credible information establishing" the objection. *See* §§ 85-2-102(9), (11), (26), -308(6), -311(1)(g), and (2), MCA. *See also* § 85-2-102(26), MCA (defining "substantial credible information" as "probable, believable facts sufficient to support a reasonable legal theory" as the basis for the objection). Not at issue here, the applicant must similarly prove the contrary upon a "valid objection" that a proposed water use will adversely affect the "water quality of a prior appropriator," or the ability of a "discharge permitholder to satisfy effluent limitations of [an MWQA] permit" issued under Title 75, chapter 5, part 4, MCA. Section 85-2-311(1)(f), (h), and (2), MCA. Such objections are "valid" only if: (1) the objector has certain specified "standing"; (2) the objection is "correct and complete" as specified; and (3) the objection is supported by "substantial credible information establishing" the objection. *See* §§ 85-2-102(9), (11), (26), -308(3), (6), and -311(1)(f), (h), and (2), MCA.

<sup>71</sup> The revised RCMP Phase 1 exploration adit groundwater diversion and disposal plan was subject to additional MWQA nondegradation standards compliance regarding groundwater discharge and depletion incident to MDEQ issuance of the Phase 1 exploration license in 2009. *See* 2008 MDEQ EA.

<sup>72</sup> Whether and to what extent prior environmental review of Phase 2 operations may

suffice in that regard has not been demonstrated here and has not been shown here to alter, diminish, or impair the adequacy of those more specifically-applicable legal remedies for advance environmental review and regulation, at the appropriate time provided thereunder.

<sup>73</sup> The MWQA effectively exempts those uses and activities from the definition of "degradation" by characterizing them as "classes of activities" that cause "nonsignificant" changes in water quality "because of their low potential for [environmental] harm ... and their conformance with the guidance" specified in § 75-5-301(5)(c), MCA. Sections 75-5-103(7), -303(2), and -317(1), MCA. The exclusion of those uses and activities from the definition of "degradation" similarly categorically excludes them from the prohibition of degradation of "outstanding resource waters." Sections 75-5-103(7), -303(2), (7), -316, and -317(1), MCA. However, "notwithstanding the [MPDES and MWGPCS] permit exemptions" provided by § 75-5-401(5)(j), MCA, MDEQ "may" require ground water quality monitoring of the exempt source upon a determination that it "may be causing or is likely to cause violations of ground water quality standards." Section 75-5-401(7), MCA.

<sup>74</sup> In conjunction with § 82-4-351(1), MCA, (expressly stating operations plan noncompliance with MEPA and MWQA as a reason for denial of a hard rock mining operating permit), the MMRA further authorizes MDEQ to require an operating permit applicant to pay additional costs of necessary MEPA review of the application beyond normal MDEQ operating expenses and requires the application to include "ground water and surface water hydrologic data" and plans for monitoring "accidental discharge of objectionable materials" and remediation thereof. Section 82-4-335(4)(a), (5)(k), and (m), MCA.

<sup>75</sup> The extent and manner to which MWQA restrictions may or may not apply to mining exploration-related activities governed by MMRA exploration license requirements, in contrast to MMRA operating permit requirements, is not at issue here and we make no express or implied comment thereon in this case.

<sup>26</sup> We held in *MEIC* that § 75-5-317(2)(j), MCA (1995) (categorically exempting water well/well-monitoring discharges from MWQA nondegradation standards), substantially interfered with the Montana constitutional right of interested environmental groups to a clean and healthful environment by depriving them of an adequate remedy for advance environmental review and protection from potential adverse surface water impacts posed by the proposed discharge of contaminated water to area groundwater. *MEIC*, ¶¶ 28-37, 54, and 77-80. *MEIC* is thus distinguishable here because, as applied, the challenged exemption itself deprived the objectors of any remedy for advance water quality nondegradation review and protection in the apparent absence of any independent remedy for nondegradation review

incident to MDEQ issuance of the MMRA exploration license at issue. *See MEIC*, ¶¶ 28-37, 54, and 77-80.

<sup>1</sup> *See* Admin. R. M. 17.30.705(2)(c) (2006) (stating "For outstanding resource waters, no degradation is allowed and no permanent change in the quality of outstanding resource waters resulting from a new or increased point source discharge is allowed.").

<sup>2</sup> The District Court held that Petitioners submitted a valid objection under § 85-2-311(1)(a)(ii), MCA, finding that depletion of ORWs must be considered by the DNRC in its analysis of legal availability.

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