

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**FILED**

APR 09 2019

ANGIE SPARKS, Clerk of District Court  
By ~~AMBER M MULLEN~~ Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>CLARK FORK COALITION, ROCK CREEK ALLIANCE, EARTHWORKS, and MONTANA ENVIRONMENTAL CENTER,  Plaintiffs,  v.  MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and RC RESOURCES, INC.,  Defendants.</p>	<p>Cause No. CDV-2018-150  <b>ORDER ON PETITION FOR JUDICIAL REVIEW</b></p>
---	---

**PROCEDURAL HISTORY**

Petitioners Clark Fork Coalition, Rock Creek Alliance and the Montana Environmental Information Center (MEIC) filed a petition for judicial review of a Final Order of the Department of Natural Resources (DNRC)

1 granting a beneficial water use permit in application number 76N-30068837. The  
2 application filed by RC Resources, Inc., is to appropriate groundwater for mining  
3 operations. DNRC determined the application was correct and complete, then  
4 evaluated it to determine whether RC Resources had proven the criteria of  
5 Montana Code Annotated § 85-2-311(1) by a preponderance of the evidence. On  
6 June 22, 2016, the agency issued a preliminary determination to grant the  
7 application. The preliminary determination was publicly noticed pursuant to  
8 Montana Code Annotated § 85-2-307(2)(b). Petitioners filed objections. DNRC  
9 determined five objections to be valid, and therefore held a contested case  
10 hearing under the Montana Administrative Procedure Act, codified at Title 2,  
11 chapter 4. Mont. Code Ann. § 85- 2-309(1). Following an administrative  
12 hearing on January 29, 2018, the hearing examiner issued a Final Order granting  
13 RC Resources a beneficial water use permit and granting its motion to dismiss  
14 objections filed by Petitioners.

15 Petitioners ask this Court to reverse the dismissal of their objections,  
16 to vacate RC Resources' water use permit, and to remand this matter to DNRC.  
17 Petitioners also raise a constitutional challenge to DNRC's interpretation of  
18 Montana Code Annotated § 85-2-311(2), which precludes interested members of  
19 the public from raising a water classification challenge. Petitioners assert the  
20 statute, as applied by the agency, is in violation of the clean and healthful  
21 environment provisions of the Montana Constitution, art. II, § 3 and art. IX, § 1.  
22 The constitutional challenge was not addressed in the Final Order.

### 23 STANDARD OF REVIEW

24 The Montana Administrative Procedure Act (MAPA) directs the  
25 district court to review an administrative decision in a contested case to

1 determine whether the findings of fact are clearly erroneous and whether the  
2 agency correctly interpreted the law. The standard of review of an administrative  
3 decision is provided in Montana Code Annotated § 2-4-704(2):

4 The court may not substitute its judgment for that of the agency  
5 as to the weight of the evidence on questions of fact. The court may  
6 affirm the decision of the agency or remand the case for further  
7 proceedings. The court may reverse or modify the decision if  
8 substantial rights of the appellant have been prejudiced because:

9 (a) the administrative findings, inferences, conclusions, or  
10 decisions are:

11 (i) in violation of constitutional or statutory provisions;

12 (ii) in excess of the statutory authority of the agency;

13 (iii) made upon unlawful procedure;

14 (iv) affected by other error of law;

15 (v) clearly erroneous in view of the reliable, probative, and  
16 substantial evidence on the whole record;

17 (vi) arbitrary or capricious or characterized by abuse of  
18 discretion or clearly unwarranted exercise of discretion; or

19 (b) findings of fact, upon issues essential to the decision, were  
20 not made although requested.

21 “A finding is clearly erroneous if it is not supported by substantial  
22 evidence or, if it is supported by substantial evidence, because the agency  
23 misapprehended the effect of the evidence.” *Mont. Solid Waste Contrs. v. Mont.*  
24 *Dep’t of Pub. Serv. Regulation*, 2007 MT 154, ¶ 17, 338 Mont. 1, 161 P.3d 837.

25 Even if substantial evidence exists and the effect of the evidence has not been  
misapprehended, a court may still conclude that a finding is clearly erroneous  
when “a review of the record leaves the court with the definite and firm  
conviction that a mistake has been committed.” *Weitz v. Dep’t of Natural*  
*Resources & Conservation*, 284 Mont. 130, 134, 943 P.2d 990, 992 (1997)  
(citations omitted).

1 A conclusion of law is reviewed to determine if the agency's  
2 interpretation is correct, without applying an abuse of discretion standard. *Steer,*  
3 *Inc. v. Dep't of Revenue*, 245 Mont. 470, 474-75, 803 P. 2d 601, 603 (1990); see  
4 also *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120,  
5 ¶ 11, 391 Mont. 328, 417 P.3d 1100. Mixed questions of law and fact are  
6 reviewed de novo to determine if they are correct. *City of Missoula v. Mt. Water*  
7 *Co.*, 2018 MT 114, ¶ 11, 391 Mont. 288, 417 P.3d 321.

8 The parties agree that the issues raised in this case are legal issues.

### 9 DISCUSSION

10 At the administrative level, Petitioners raised objections challenging  
11 the issuance of a beneficial water use permit. Petitioners allege error in  
12 dismissing their legal availability objection by misinterpreting the term "legal  
13 demands" as described in Montana Code Annotated § 85-2-311(1)(a)(ii).  
14 Petitioners claim the hearing examiner also erred in precluding their water  
15 classification objection under Montana Code Annotated § 85-2-311(1)(g).

16 Montana Code Annotated § 85-2-311(1)(a), (b) and (g) provides:

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

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

22 (ii) water can reasonably be considered legally available during  
23 the period in which the applicant seeks to appropriate, in the amount  
24 requested, based on the records of the department and other evidence  
25 provided to the department. Legal availability is determined using  
an analysis involving the following factors:

(A) identification of physical water availability;

1 (B) identification of existing legal demands on the source of  
2 supply throughout the area of potential impact by the proposed use;  
and

3 (C) analysis of the evidence on physical water availability and  
4 the existing legal demands, including but not limited to a comparison  
5 of the physical water supply at the proposed point of diversion with  
the existing legal demands on the supply of water.

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

11 (g) the proposed use will be substantially in accordance with  
12 the classification of water set for the source of supply pursuant to 75-  
13 5-301(1);

14 RC Resources suggests that because the Petitioners raise the same  
15 objection under both subsections -311(1)(a)(ii) and -311(1)(g), they are simply  
16 reframing a water quality objection under subsection (1)(g) into a legal  
17 availability objection under subsection (1)(a)(ii). Respondents contend the  
18 hearing examiner correctly dismissed Petitioners' objections as invalid, finding  
19 their position renders § 85-2-311(2) superfluous. Mont. Code Ann. § 85-2-  
20 311(2) states:

21 (2) The applicant is required to prove that the criteria in  
22 subsections (1)(f) through (1)(h) have been met only if a valid  
23 objection is filed. A valid objection must contain substantial  
24 credible information establishing to the satisfaction of the  
25 department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as  
applicable, may not be met. For the criteria set forth in subsection  
(1)(g), only the department of environmental quality or a local water

1 quality district established under Title 7, chapter 13, part 45, may file  
2 a valid objection.

3 **Legal Availability of Water**

4 DNRC’s hearing examiner found that the legal availability analysis of  
5 “existing legal demands on the source of supply throughout the area of potential  
6 impact by the proposed use” required by Montana Code Annotated § 85-2-  
7 311(1)(a)(ii) means an analysis of only existing water rights. Petitioners contend  
8 that “existing legal demands” does not equate to only existing water rights. They  
9 assert “existing legal demands” include existing water rights, but do not exclude  
10 impacted streams in the Cabinet Mountains Wilderness that will be depleted by a  
11 permit for groundwater appropriation and subsequent pumping for mining  
12 operations.

13 As quoted above, an applicant for a beneficial water use permit must  
14 prove by a preponderance of the evidence that specific statutory criteria are met,  
15 including that water is “legally available during the period in which the applicant  
16 seeks to appropriate, in the amount requested.”

17 The hearing examiner affirmed DNRC’s decision that water is legally  
18 available as requested in the application of RC Resources. DNRC explains that  
19 legal availability is determined by reviewing the median of the mean water flow  
20 in a source, compared to senior water rights already appropriated. After a  
21 determination of legal availability, DNRC looks at adverse effects on senior  
22 water rights during times of water shortage. A permit applicant must show  
23 DNRC that during a year with less than average flows, senior water rights will  
24 not be sufficiently adversely affected by an applicant’s groundwater pumping.

25 ////

1 This narrow analysis of “adverse effect” is described in Administrative Rule of  
2 Montana 36.12.1706.

3           Petitioners contend that this interpretation of the term “legal  
4 demands” in Montana Code Annotated § 85-2-311(1)(a)(ii) is erroneous because  
5 it provides no real distinction between the analysis for legal availability and for  
6 adverse effect. Further, Petitioners allege DNRC ignored data in the application  
7 indicating that the planned groundwater pumping will dewater or deplete the  
8 water in Cabinet Mountain Wilderness streams in violation of Montana Code  
9 Annotated § 75-5-315(1), which provides protection for “outstanding resource  
10 waters,” stating:

11           The legislature, understanding the requirements of applicable federal  
12 law and the uniqueness of Montana’s water resource, recognizes that  
13 certain state waters are of such environmental, ecological, or  
14 economic value that the state should, upon a showing of necessity,  
15 prohibit, to the greatest extent practicable, changes to the existing  
16 water quality of those waters. Outstanding resource waters must be  
afforded the greatest protection feasible under state law, after  
thorough examination.

17 Administrative Rule of Montana 17.30.617 provides that “[a]ll state surface  
18 waters located wholly within the boundaries of designated national parks  
19 or wilderness areas as of October 1, 1995, are outstanding resource waters  
20 (ORWs). . . .” The Cabinet Mountain Wilderness was designated by the U.S.  
21 Congress in 1964.

22           DNRC and RC Resources support the finding in the Final Order that  
23 the agency’s interpretation of “legal demands” as meaning “water rights” is  
24 within the discretion of the agency. Respondents assert that, when read  
25 holistically in the context of the relevant statutes, it is clear that “legal demands”

1 means “legal rights.”<sup>1</sup> They argue that such an interpretation is necessary to  
2 prevent statutory construction with absurd results.<sup>2</sup>

3 Petitioners assert that if the legislature intended the phrase “existing  
4 legal demands” as used in Montana Code Annotated § 85-2-311(1)(a)(ii) to mean  
5 existing “water rights of a prior appropriator,” the legislature would have used  
6 the more restrictive language. A reading of the relevant sections supports  
7 Petitioners’ argument. After finding water is legally available by applying the  
8 criteria of § 311(1)(a), DNRC must then determine any adverse effect as required  
9 in § 311(1)(b), which specifies that “the *water rights of a prior appropriator*  
10 under an existing water right, a certificate, a permit, or a state water reservation  
11 will not be adversely affected.” (Emphasis added.) When a different term is  
12 used, a different definition should apply.

13 In interpreting a statute or legislation, this Court must “simply  
14 ascertain and declare what is in terms or in substance contained therein, not to  
15 insert what has been omitted or to omit what has been inserted.” Mont. Code  
16 Ann. § 1-2-101; *Mont. Power Co. v. Mont. Pub. Service Comm’n*, 2001 MT 102,  
17 ¶ 26, 305 Mont. 260, 26 P.3d 91. Here the legislature saw fit to specify in § 85-  
18 2-311(1)(b) that any adverse effect of a proposed appropriation of water does not  
19 impact prior appropriators. The term “legal demands” as used in the analysis of  
20 legal availability in §311(1)(a) is different than “water rights of a prior  
21 appropriator.” “Because the enacting Legislature did not use identical language  
22 in the two provisions, it is proper for us to assume that a different statutory

23 ////

24 \_\_\_\_\_  
25 <sup>1</sup> See *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426.

<sup>2</sup> See *Van der hule v. Mukasey*, 2009 MT 20, ¶ 10, 349 Mont. 88, 217 P.3d 1019.

1 meaning was intended. . . .” *Zinvest, LLC v. Gunnersfield Enters.*, 2017 MT 284,  
2 ¶ 26, 389 Mont. 334, 405 P.3d 1270.

3 Citing *Montana Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336,  
4 340 (1984), DNRC asserts the purpose of the Montana Water Users Act  
5 (MWUA) “is to protect senior water rights holders from encroachment by junior  
6 appropriators adversely affecting those senior rights.” DNRC is correct that  
7 protection of senior water rights is a significant purpose of the MWUA, but the  
8 *Montana Power* decision also sets out the history of the MWUA which stems  
9 from a need to “regulate water uses to accommodate available water flows and  
10 protect existing senior water rights [and] insure that the public interest [is] being  
11 protected.” *Id.* at 97, 685 P.2d at 339. The Supreme Court recited the rationale  
12 for water rights reform as legislated in the 1973 MWUA, quoting *Wyoming*  
13 *Hereford Ranch v. Hammond Packing Co.*, 236 P. 764, 769 (1925):

14 [I]f state ownership is to be anything but a delusion, if it is to be  
15 more than nominal, there must be the same authority and control  
16 over streams and over diversion of water as is now exercised by the  
17 general government over the occupation and settlement of public  
18 lands . . . Such oversight and precaution is necessary for the proper  
19 protection of public interests . . . and in order that controversies  
20 growing out of extravagant and injurious claims may be avoided.

21 The history of the MWUA makes clear that the intent of the Act  
22 includes protection of the “public interest” in water use, not only protection of  
23 senior appropriators rights. “When interpreting a statute, our objective is to  
24 implement the objectives the legislature sought to achieve.” *Westmoreland Res.*  
25 *Inc. v. Dep’t of Revenue*, 2014 MT 212, ¶ 11, 376 Mont. 180, 330 P.3d 1188  
(citation omitted).

////

1 Respondents ask this Court to give deference to DNRC's  
2 interpretation of "legal demands." DNRC showed a practice of not requiring  
3 water use applicants to address any legal demands beyond those of existing water  
4 rights but presented no formal interpretation of the term "legal demands."  
5 Furthermore, when the agency interpretation and practice is inconsistent with  
6 statutory language, it does not establish precedence which must be given  
7 deference by the Court. See *United States v. Mead Corp.*, 533 U.S. 218, 228,  
8 (2001) ("The weight accorded to an administrative judgment 'will depend upon  
9 the thoroughness evident in its consideration, the validity of its reasoning, its  
10 consistency with earlier and later pronouncements, and all those factors which  
11 give it power to persuade, if lacking power to control.'" (citing *Skidmore v. Swift  
12 & Co.*, 323 U.S. 134, 140 (1944)).

13 The MWUA itself states policy considerations beyond protection of  
14 senior water users' rights, including that "[t]he water resources of the state must  
15 be protected and conserved to assure adequate supplies for public recreational  
16 purposes and for the conservation of wildlife and aquatic life." Mont. Code Ann.  
17 § 85-1-101(5). The application submitted to DNRC by RC Resources includes  
18 modeling data indicating that its proposed groundwater pumping could reduce  
19 baseflows in wilderness streams, up to 100 percent reduction of baseflow in at  
20 least one stream. Degradation shown to violate the applicable legal restrictions  
21 must be considered as part of the "legal demands" "within the area of potential  
22 impact."<sup>3</sup>

23 In the context of Montana Code Annotated § 85-2-311 and the  
24 MWUA, when deciding of legal availability, the term "legal demands" requires

25  

---

<sup>3</sup> Admin. R. Mont. 36.12.1705.

1 DNRC to include analysis of relevant data provided in the application of  
2 potentially unlawful dewatering.

3 DNRC argues the Department of Environmental Quality (DEQ) rules  
4 on water quality are not applicable to their analysis of legal availability or water  
5 quantity. While true that DNRC’s responsibilities and authority regarding water  
6 use permitting extend primarily to water quantity, water quantity and quality  
7 inherently overlap as evidenced in the regulations for legal availability and for  
8 water quality, or degradation. The rule regarding degradation of Outstanding  
9 Resource Waters requires DEQ to determine whether activities would “decrease  
10 the mean monthly flow of a surface water by . . . [more] than 10 percent[.]”  
11 Admin. R. Mont. 17.30.715(1)(a). This is a question of water quantity.  
12 Likewise, when analyzing criteria for a water use permit, DNRC is required to  
13 evaluate whether “the water quality of a prior appropriator will not be adversely  
14 affected,” and that “the ability of a discharge permit holder to satisfy effluent  
15 limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will  
16 not be adversely affected.” Mont. Code Ann. §§ 85-2-311(1)(f), (h). This relates  
17 to water quality. Water quality and water quantity are not solely in the province  
18 of either agency. Protecting stream flows in Outstanding Resource Waters from  
19 significant dewatering, is also a matter of water quantity.<sup>4</sup>

20 This Court concludes that dewatering Outstanding Resource Waters is  
21 a known legal demand on the water to be appropriated in this case and must be

22 ////

23 \_\_\_\_\_  
24 <sup>4</sup> Petitioners assert DNRC’s analysis of legal availability must include quantitative restrictions on the depletion of  
25 the affected water required by Administrative Rules of Montana 17.30.705 and .715. Whether the proposed  
pumping would reduce streamflow in excess of restrictions in Administrative Rule of Montana 17.30.715(1)(a) is  
a question of fact, but whether the regulation creates a “legal demand” under Montana Code Annotated § 85-2-  
311(1)(a)(ii) is a question of law.

1 included in the analysis of legal availability of water prior to issuing a permit  
2 granting an appropriation to RC Resources.

3 **Water Classification Objection and Application of Montana Code**  
4 **Annotated § 85-2-311(2)**

5 Montana Code Annotated § 85-2-311(2) states,

6 The applicant is required to prove that the criteria in subsections  
7 (1)(f) through (1)(h) have been met only if a valid objection is filed.  
8 A valid objection must contain substantial credible information  
9 establishing to the satisfaction of the department that the criteria in  
10 subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met.  
11 For the criteria set forth in subsection (1)(g), only the department of  
environmental quality or a local water quality district established  
under Title 7, chapter 13, part 45, may file a valid objection.

12 Petitioners contend the hearing examiner erred in concluding that  
13 Montana Code Annotated § 85-2-311(2) bars their water classification objection  
14 to RC Resources permit application raised pursuant to § 85-2-311(1)(g).<sup>5</sup>  
15 Petitioners argue this interpretation leaves them with no adequate remedy to  
16 protect their interests in preserving public waters in the Cabinet Mountain  
17 Wilderness. They contend that if § 311(2) prohibits them from objecting, it  
18 violates their fundamental right to a clean and healthful environment, violating  
19 Montana’s Constitution, article I, § 3 and Article IX, § 1.

20 The hearing examiner found that no valid objection was submitted by  
21 Petitioners, because only DEQ or a local water quality district may file a valid  
22 objection under Montana Code Annotated § 85-2-311(1)(g). Therefore, RC  
23 Resources was not required to prove whether “the proposed use will be  
24

---

25 <sup>5</sup> “[T]he proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1)[.]”

1 substantially in accordance with the classification of water set for the source of  
2 supply pursuant to § 75-5-301(1)[.]” Mont. Code Ann. § 85-2-311(1)(g).

3           Petitioners assert their objection may be raised under both subsection  
4 85-2-311(1)(a)(ii) and (1)(g), with the first section applying to legal availability  
5 and the second to water classification. The Final Order concluded, and  
6 Respondents argue, that if an objection may be made under either subsection, as  
7 was done by Petitioners, then Montana Code Annotated §§ 85-2-311(1)(f)-(h)  
8 and -311(2) are rendered superfluous.

9           Petitioners counter that there are many potential water classification  
10 objections based on water quality issues that are not related to legal availability.  
11 Water classification is based on present and future beneficial uses to which  
12 specific water is suited. Mont. Code Ann. § 75-5-301. An example given for a  
13 typical objection to water classification is when a proposed appropriation might  
14 affect water quality, thereby compromising source water which may provide  
15 drinking water.<sup>6</sup>

16           The Montana Constitution provides that “[a]ll surface, underground,  
17 flood, and atmospheric waters within the boundaries of the state are the property  
18 of the state for the use of its people . . . and are subject to appropriation as  
19 provided by law.” Mont. Const., art. IX, § 3. The Constitution further provides  
20 that Montanans have a right to a clean and healthful environment,<sup>7</sup> specifically  
21 stating:

---

22  
23 <sup>6</sup> The hearing examiner found that Petitioners’ objection raised pursuant to § 85-2-311(1)(g) was not a water  
24 classification issue, making a distinction that water classification is controlled by the Water Quality Act in Title  
25 75, chapter 5, and this section of law falls under the MWUA, which cannot alter a classification of water.  
Nonetheless, the hearing examiner found Petitioners’ objection invalid because Petitioners did not meet the  
standing requirements of § 85-2-311(2) that only the DEQ or a local water quality district may submit a valid  
objection to § 311(1)(g).

1 (1) The state and each person shall maintain and improve a  
2 clean and healthful environment in Montana for present and future  
generations.

3 (2) The legislature shall provide for the administration and  
4 enforcement of this duty.

5 (3) The legislature shall provide adequate remedies for the  
6 protection of the environmental life support system from degradation  
and provide adequate remedies to prevent unreasonable depletion  
7 and degradation of natural resources.

8 Mont. Const. art IX, § 1.

9 “The right to a clean and healthful environment is a fundamental  
10 right,” and “a statute that impacts that right to the extent it interferes with the  
11 exercise of that right, is subject to strict scrutiny.” *N. Plains Rec. Council v.*  
12 *Mont. Bd. of Land Comm’rs*, 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169  
13 (citing *Mont. Env’tl. Info. Ctr. V. Mont. Dep’t of Env’tl. Quality (MEIC)*, 1999 MT  
14 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236). A statute “can only survive strict  
15 scrutiny if the State established a compelling state interest and that its action is  
16 closely tailored to effectuate that interest and is the least onerous path that can be  
17 taken to achieve the State’s objective.” *MEIC*, ¶ 63.

18 We conclude, based on the eloquent record of the Montana  
19 Constitutional Convention that to give effect to the rights guaranteed  
20 by Article II, Section 3 and Article IX, Section 1 of the Montana  
21 Constitution they must be read together and consideration given to  
22 all of the provisions of Article IX, Section 1 as well as the preamble  
23 to the Montana Constitution. In doing so, we conclude that the  
delegates’ intention was to provide language and protections which  
24 are both anticipatory and preventative.

---

25 <sup>7</sup> Mont. Const., art. II, § 3.

1 *MEIC*, ¶ 77. A statute or administrative rule which excludes “certain ‘activities’  
2 from nondegradation review . . . violates those environmental rights guaranteed  
3 by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.”

4 *MEIC*, ¶ 80.

5 Although the Court in *MEIC* limited its decision to a specific code  
6 section as applied to the facts of that case, it is safe to assume that the drafters of  
7 the Montana Constitution would have considered potential degradation of  
8 wilderness streams to be a covered “activity” under Article II, section 3, and  
9 Article IX, section 1. As applied to this case, however, this Court has already  
10 concluded that Petitioners submitted a valid objection regarding Montana Code  
11 Annotated § 85-2-311(1)(a)(ii), finding that depletion of outstanding resource  
12 waters, as submitted in RC Resources application, must be considered by DNRC  
13 in its analysis of legal availability. Petitioners therefore have redress as to the  
14 objection presented under both §§ 85-2-311(1)(a)(ii) and 311(1)(g).<sup>8</sup> The remedy  
15 for each objection is the same. That is, DNRC must include the relevant data  
16 provided in the application on the depletion of the water in the Cabinet Mountain  
17 Wilderness as a legal demand on the requested appropriation. Consequently, this  
18 Court need not address whether Petitioners’ fundamental constitutional rights are  
19 violated by the statutory limitations and restricted standing to object imposed by  
20 Montana Code Annotated § 85-2-311(2).

21 **ORDER**

22 Based on the foregoing, IT IS ORDERED that the Final Order on  
23 Application for Beneficial Water Use Permit No. 76N-30068837 is REVERSED,  
24

25 <sup>8</sup> Although the same objection was submitted as to different requirements of § 311, the basis for each objection is the modeling data provided by applicant regarding depletion of outstanding resource waters.

1 and this matter is REMANDED to the agency for further consideration consistent  
2 with this decision.

3 DATED this 9 day of April 2019.

4  
5   
6 KATHY SEELEY  
7 District Court Judge

8 pc: Katherin K. O'Brien/Timothy J. Preso/Joshua R. Purtle, 313 East Main  
9 Street, Bozeman MT 59715

10 Laura J. Farkas/Danna R. Jackson, PO Box 201601, Helena MT 59620-2601  
11 Holly Jo Franz/Ryan McLane, PO Box 1155, Helena MT 59624-1155

12 KS//clark fork coalition v dnrc ord pet j review.doc  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 and this matter is REMANDED to the agency for further consideration consistent  
2 with this decision.

3 DATED this \_\_\_\_ day of April 2019.

4  
5 \_\_\_\_\_  
6 KATHY SEELEY  
7 District Court Judge

8 pc: Katherine K. O'Brien/Timothy J. Preso/Joshua R. Purtle, 313 East Main  
9 Street, Bozeman MT 59715  
10 Laura J. Farkas/Danna R. Jackson, PO Box 201601, Helena MT 59620-2601  
11 Holly Jo Franz/Ryan McLane, PO Box 1155, Helena MT 59624-1155

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
KS/t/clark fork coalition v dnrc ord pet j review.doc