IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellant,

and

WESTERN ENERGY COMPANY,

Defendant and Appellants.

TROUT UNLIMITED'S AMICUS CURIAE BRIEF

On Appeal from Montana First Judicial District Court, Lewis & Clark County, Cause No. CDV 2012-1075, Hon. Kathy Seeley, Presiding

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Comes now Trout Unlimited, Inc. ("Trout Unlimited") respectfully submitting this *amicus curiae* brief in support of Plaintiff-Appellees', Montana Environmental Information Center and the Sierra Club (together, MEIC), position that the District Court was correct in ruling that the Department of Environmental Quality (DEQ) must follow regulations in issuing and renewing water quality permits. Specifically, DEQ cannot unilaterally change the classification of a creek subject to a water quality permit from intermittent to ephemeral without first performing a use attainability analysis required by the Montana Water Quality Act (WQA), Admin. R. Mont. §17.30.615 and the federal Clean Water Act (CWA), 40 C.F.R. § 131.10(g) (criteria for analysis), and without the action of the Board of Environmental Review, Admin. R. Mont. §17.30.606.

Statement of the Issue

Did the District Court correctly find that the DEQ must follow regulations promulgated by the Board of Environmental Review that require the DEQ to perform a use attainability analysis before the Board of Environmental Review can change a creek's classification?

Statement of the Facts

Trout Unlimited, Inc. adopts the statement of facts as presented by MEIC.

Summary of the Argument

Trout Unlimited's significant interest in maintaining Montana's clean waters and vibrant fisheries requires us to defend Montana's water classification rules. As the district court found, these rules require the DEQ to first perform a use attainability analysis on East Fork Armell's Creek before any consideration of changing its status as a C-3 class water. Then, only the Board of Environmental Review has the authority to re-classify East Fork Armell's Creek to an E-1 or E-2 ephemeral class water. DEQ's permitting process must apply the water quality standards for C-3 waters to East Fork Armell's Creek unless DEQ has performed a use attainability analysis and the Board of Environmental Review has issued a rule changing the classification of East Fork Armell's Creek from C-3. This clear and undisputed process for reclassifying state waters is key to preventing water quality impairments in Montana's headwater streams, and the district court's ruling should be affirmed.

Argument

I. The District Court correctly found that the DEQ must first perform a use attainability analysis before the Board of Environmental Review can change a stream's classification.

A. Interests of *Amicus* Trout Unlimited.

Trout Unlimited is a conservation organization founded more than a decade before the Clean Water Act was passed. Since 1959, Trout Unlimited's members have volunteered thousands of hours each year to restore streams, educate youth and the broader community about the benefits of healthy rivers and streams, and work to protect river and streamflows. Our 4,000 Montana members enjoy angling on rivers and streams across the state. They fear that a reversal to the District Court's decision could give DEQ unfettered authority to change the classification of streams where perennial or intermittent streamflow might be interrupted by drought or diversions, leading to increased pollution into streams across Montana, such as the toxic heavy metals now impairing East Fork Armell's Creek in this case, that harms aquatic life and public water supplies.

Identifying and ensuring protection of our nations' waters is of critical importance to Trout Unlimited. Healthy waters support healthy fish and wildlife and help to support and sustain water-based businesses, including

hunting, fishing, outdoor recreation and the recreational economy. Across the country, anglers contribute $63.5 billion to the nation's gross domestic product, and their expenditures support 802,000 jobs nationwide. Congressional Sportsmen, *America's Sporting Heritage; Fueling the American Economy*, 2018, found at: http://congressionalsportsmen.org/uploads/home/CSF_Sportsmens_Economic_Impact_Infographic.pdf. The Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251 *et seq*., has been a critical tool to maintain and restore the water quality of the habitats on which fish and wildlife rely.

B. The DEQ must perform a use attainability analysis before the Board of Environmental Review can change a stream classification.

Trout Unlimited supports the District Court's determination of the DEQ's obligations under the Clean Water Act. The District Court's ruling provides much needed clarity, which will improve consistency and certainty for regulated entities while ensuring continued protections for fish, wildlife and communities that rely on healthy watersheds. The District Court's determination is not an expansion of agency permitting requirements.

Rather, the District Court laid out the existing regulatory requirements in a straight-forward manner.

Waters classified as "C-3" waters, such as East Fork Armell's Creek, include both intermittent and perennial streams. Under Admin. R. Mont. §17.30.629(1), "Waters classified C-3 are to be maintained suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers. The quality of these waters is naturally marginal for drinking, culinary, and food processing purposes, agriculture, and industrial water supply." If a stream is classified as a "C-3" water, as East Fork Armell's Creek is, then the DEQ must first perform a use attainability analysis before the stream's classification can be changed by the Board of Environmental Review. *District Court Memorandum and Order on Judicial Review*, at 18; *quoting*, Admin. Rule of Mont. 17.30.615 ("Prior to reclassifying a specific water body classified in ARM 17.30.607 through 17.30.614 . . . a use attainability analysis must be conducted in accordance with 40 C.F.R. 131.10(g)(h), and (j)."). This regulatory requirement promulgated by the Board of Environmental Review prevents the DEQ from removing important protections from state waters, such a numeric limits for toxic heavy metals,

without first conducting the required scientific and field-level analysis.

Authority to re-classify waterbodies resides with the Board of Environmental Review, not the DEQ. Admin. R. Mont. §17.30.606. A decision by the Board to re-classify a C-3 water is subject to public rule-making procedures and review by the Environmental Protection Agency. Admin. R. Mont. §§ 17.30.606; 17.30.615(2).

East Fork Armell's Creek is classified as "C-3" in the ARM's, at Admin. Rule of Mont. 17.30.611(1)(c), "*Water-Use Classification—Yellowstone River Drainage.*" The DEQ likewise affirms that East Fork Armell's Creek is a C-3 water. DEQ Brief at 13, *citing* Admin. R. pages 80 and 930.

Ephemeral streams have their own use classification, separate from C-3 waters. Admin. R. Mont. §§ 17.30.615(c),(d) define ephemeral use classifications E-1 and E-2. Admin. R. Mont. § 17.30.652 elaborates on the requirements for waters in "E-1 CLASSIFICATION STANDARDS." Admin. R. Mont. § 17.30.653 likewise elaborates on the requirements for waters in "E-2 CLASSIFICATION STANDARDS." There is no dispute that DEQ is authorized to apply lesser protections for water quality on ephemeral streams pursuant to Admin. R. Mont. § 17.30.637(4) (specifying lower water

quality standards applicable to ephemeral streams). The DEQ, however, argues that the agency can simply declare ephemeral-like hydrologic characteristics of a C-3 class water, and thereby treat it as an E-1 or E-2 class water in water quality permitting actions without actually changing its classification to E-1 or E-2. *See*, DEQ Brief at 16. This has the effect of removing important water quality standards applicable to C-3 waters, as DEQ did in this case by removing numeric metal standards for aluminum, iron, and selenium on East Fork Armell's Creek in the mine's discharge permit.

There is no regulatory authority for the DEQ's actions to unilaterally downgrade some C-3 class waters showing some "ephemeral-like" characteristics. Nor does the DEQ offer any regulatory or statutory support for its permitting actions. DEQ's side-stepping the requirement to re-classify C-3 waters in effect removes the water quality protections of C-3 waters, without actually changing the water's classification from C-3 to E-1 or E-2, the ephemeral classifications.

DEQ's *Montana's 2016 Integrated Report on Water Quality* also classifies East Fork Armell's Creek as C-3. DEQ, *Montana's 2016 Integrated Report on Water Quality*, found at:

http://deq.mt.gov/Portals/112/Water/wqpb/cwaic/Reports/IRs/2016/Final201

6IR.pdf. In the *Integrated Report's* Appendix A of Impaired Waters, at A-164 of 235, East Fork Armell's Creek is classified as C-3, from the headwaters to Colstrip, and C-3 from Colstrip to the mouth. The creek's sources of impairment listed in the report include coal mining, transfer of water from an outside watershed, and agriculture. There is no mention of a E-1 or E-2 ephemeral classification for any reach of East Fork Armell's Creek. As DEQ Director Mr. Tom Livers writes in his introduction to the report, the *Integrated Report* is a major, science-based endeavor of the Department:

> As a headwaters state on top of three continental watershed divides, Montana realizes both the benefits and responsibilities of high quality water. It's vital to aquatic life, public drinking water systems, recreation, agriculture and other industries. One of our jobs here at the Department of Environmental Quality is to ensure human activities are conducted in a manner that protects these beneficial uses. Monitoring and assessing the condition of waterbodies under state jurisdiction is a key component of assessing our effectiveness in this endeavor. This protection is the result of lots of work by lots of different people – landowners, local watershed groups, regulated industries and municipalities, advocacy groups, and other stakeholders and interested parties. By working together and **using solid, peer-reviewed data such as that contained in this report**, we can continue to work together successfully for the protection of this vital resource.

DEQ, *Montana's 2016 Integrated Report on Water Quality*, at i.

The DEQ must first perform a use attainability analysis on East Fork Armell's Creek before any consideration of changing its status as a C-3 water. Then, only the Board of Environmental Review has the authority to re-classify East Fork Armell's Creek. DEQ's permitting process must apply the water quality standards for C-3 waters to East Fork Armell's Creek unless DEQ has performed a use attainability analysis and the Board of Environmental Review has issued a rule changing the classification of East Fork Armell's Creek from C-3.

II. There is state-wide significance from DEQ's permit action on East Fork Armell's Creek.

On East Fork Armell's Creek, the creek may have been dewatered in reaches from groundwater pumping associated with the Colstrip mine, which almost entirely surrounds the creek. *See, e.g.,* Admin. R. at 915 (describing extensive groundwater pumping associated with the mine); and at 1540 (" . . . at least one observed part of the stream was once obliterated by the mine"). The DEQ apparently relied in part on this changed character of East Fork Armell's Creek to ignore regulations promulgated by the Board of Environmental Review; ignore the limits of DEQ's jurisdiction; and, ignore the C-3 water quality standards that it should have applied to the water

quality permit on the East Fork Armell's Creek. If the district court is reversed and DEQ is allowed to ignore regulations, improperly usurp the Board's authority to change stream classifications, and permit unlimited heavy metal pollution into East Fork Armell's Creek without proper analysis, then headwater streams across the state could be at risk.

If intermittent or perennial streams are dewatered by drought, diversions, or groundwater pumping, and DEQ unilaterally treats them as ephemeral streams with lower water quality standards in permitting as the agency did on East Fork Armell's Creek, then Montana's headwater streams are at risk of pollution. Those headwater streams flow to perennial streams highly valued by our membership for their ecological and economic importance.

A. Ephemeral and intermittent streams are connected to perennial streams in watersheds.

A watershed comprises an area of land bounded by a drainage divide that drains all the streams and rainfall to a common outlet. *See,* USGS https://water.usgs.gov/edu/watershed.html). Pollution injected into the watershed will inevitably find its way to the watershed outlet, whether the

pollution is discharged in an ephemeral, intermittent, or perennial stream. The capacity of a stream to buffer pollution depends upon the amount and duration of streamflow. A perennial stream flows year-round; whereas an intermittent stream flows most of the year, but certain reaches may cease flowing for a portion of the year, typically in late summer. In contrast, an ephemeral stream flows only for short periods in response to precipitation events, like rainstorms or snowmelt. *See, e.g.*, Admin R. Mont. §§ 17.30.602(10), (13) ("an ephemeral stream is a stream or part of a stream which flows only in direct response to precipitation . . .."); (an "intermittent stream means a stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface run-off and ground water discharge.").

Montana DEQ is charged with ensuring that pollution discharged into a watershed does not harm beneficial uses of the water in a given stream. Mont. Code Ann. § 75-5-301(1). To minimize degradation of a receiving stream, DEQ must analyze the characteristics and capacity of the receiving water to buffer pollution and to protect the beneficial uses it supports. *Id.* There is no dispute that DEQ is authorized to impart lesser protections of water quality for ephemeral streams. DEQ Brief at 16; *see also* Admin. R.

Mont. § 17.30.637(4) (specifying lower water quality standards applicable to ephemeral streams).

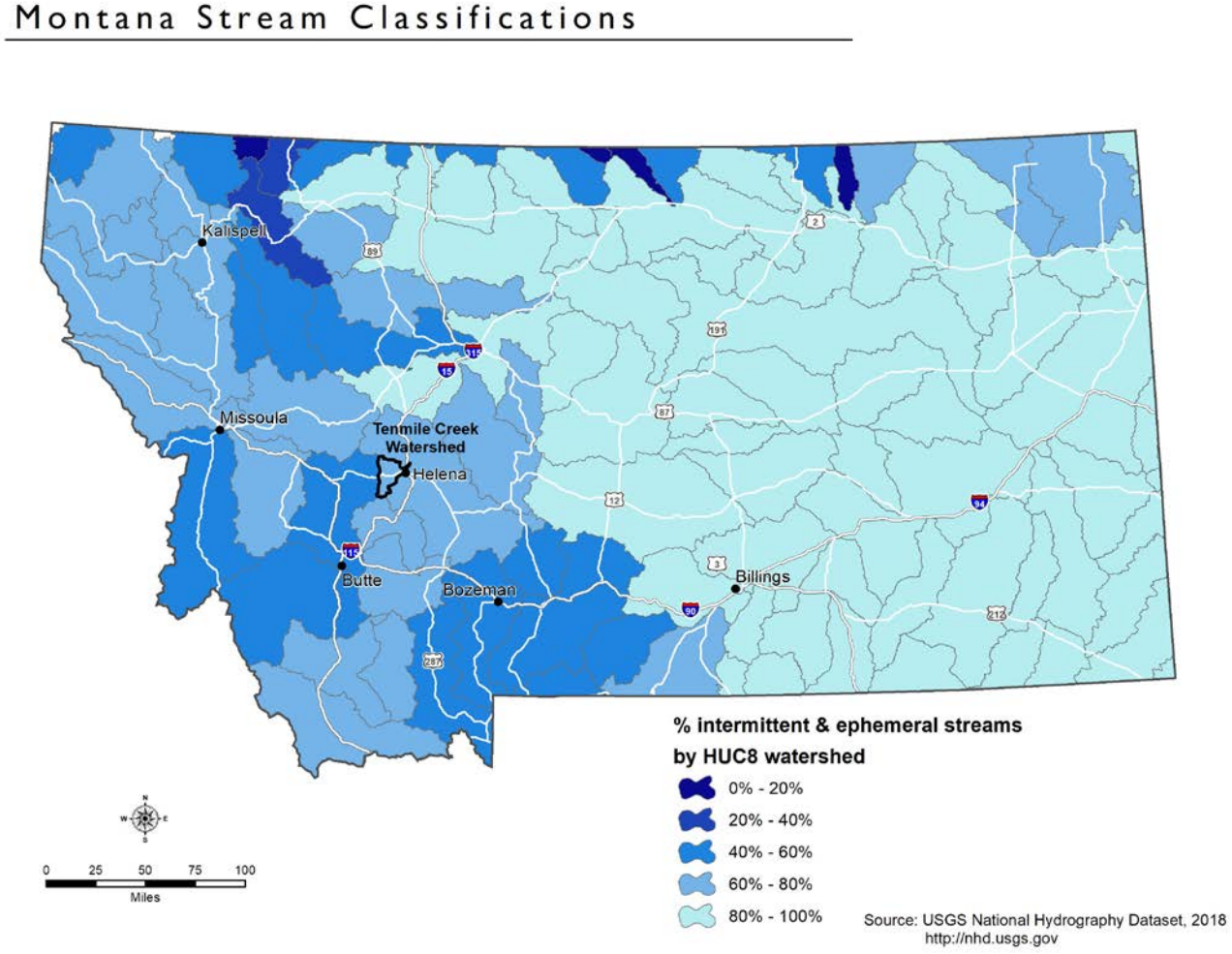
What DEQ cannot do is unilaterally treat a C-3 class water during permitting as E-1 or E-2 class water, without following the procedures and analysis for re-classification, just because it is suffering from impaired water quality or failure to support all beneficial uses. Furthermore, even ephemeral streams connect to intermittent and perennial streams further downstream in the watershed, risking beneficial uses such as drinking water and fish and wildlife habitat. In failing to adequately analyze the status of a given reach of stream, DEQ could jeopardize water quality across the watershed.

Pollution discharged into ephemeral and intermittent streams during heavy rains or snowmelt inevitably discharges into perennial streams. Maintaining water quality in headwater systems—which include intermittent and ephemeral streams—is key to maintaining clean drinking water for communities and healthy habitat for blue-ribbon fisheries across the State of Montana. Trout Unlimited recognizes that the small tributaries and perennial reaches of the East Fork of Armell's Creek do not support blue-ribbon trout fisheries. However, if the district court were to be reversed and DEQ could then change stream classifications during water quality permitting, headwater

streams across the state could be at risk of pollution. In this case, DEQ's reclassification of East Fork Armell's Creek during permitting—without following reclassification procedures—allowed unlimited loading of toxic heavy metals. According to the U.S. Geological Survey's National Hydrography Dataset, about 48% of stream miles within the native historic range of trout are classified as intermittent or ephemeral, of which 59% are headwater streams.

The National Hydrography Dataset (NHD) is a nationwide, state-of-the-art representation of virtually all streams across the United States, available at: https://nhd.usgs.gov/ The NHD stream layer was created based on U.S. Geological Survey topographical maps at the 1:24,000 scale, from which streams were then field-verified by crews working across the country. Not all ephemeral and intermittent streams appear in the NHD, especially where perennial and intermittent streams are abundant in topographically complex terrain, such as the Eastern United States or in Montana's headwaters. The true density of ephemeral streams is difficult to capture on a map set like the NHD and would have to be field-verified, but the NHD still illustrates the abundance and importance of ephemeral and intermittent streams to our watersheds.

https://nhd.usgs.gov/Frequently+Asked+Questions+about+the+NHD+&+WBD.pdf. Across Montana, 83% of all stream miles are intermittent streams.



Ephemeral and intermittent stream reaches play a vital role in the ecology of a watershed. Prairie fishes often wait for months in isolated pools for precipitation events. In the wake of a rain storm, sudden freshets between pools in ephemeral streams allow these prairie fish to migrate to other

habitats. Kurt D. Fausch and Robert G. Bramblett, *Disturbance and Fish Communities in Intermittent Tributaries of a Western Great Plains River*, 1991 Copeia 3, 659-674 (Aug. 1, 1991). Prairie fish in Eastern Montana live on the edge because water quantity and water quality are naturally close to ecological tolerance limits. Streams and riparian areas provide critical "green lines" of habitat in a sea of arid prairie land for both aquatic and terrestrial wildlife. In Montana, prairie streams are a stronghold of native fish biodiversity, supporting 25 native fish species—a higher level of fish biodiversity than Western Montana's mountain streams. Robert G. Bramblett, *Synthesis of Montana Prairie Stream Fish Surveys, 1999-2007*. Unpublished Report submitted to Montana Fish, Wildlife, and Parks, Helena (2009). Although most Montana prairie streams are intermittent or ephemeral, these streams have permanent or semi-permanent pools that serve as critical refugia for a plethora of aquatic life, including native fish species. Robert G. Bramblett and A. V. Zale, *The Ichthyofauna of a Small Stream on the Charles M. Russell National Wildlife Refuge, Montana.* Intermountain Journal of Science 6(2) (2000); J. A. Mullen, *et al.*, *Determinants of Fish Assemblage Structure in Northwestern Great Plains Streams,* Transactions of the American Fisheries Society, 140 at 271-281 (2011). Moreover, fish

communities in prairie streams have a high degree of connectivity with large rivers such as the Yellowstone and Missouri rivers thereby helping to support important recreational fisheries. *Id.*

Westslope Cutthroat Trout have been documented traveling through intermittent streams during runoff to access spawning and rearing habitats. Ron Pierce, Craig Podner, and Kellie Carim, *Response of Wild Trout to Stream Restoration over Two Decades in the Blackfoot River Basin, Montana*, Transactions of the American Fisheries Society, 142:1, 68-81 (2013). At various times of the year, an ephemeral stream will support fish, and ephemeral streams play an important role in supporting aquatic life in a watershed.

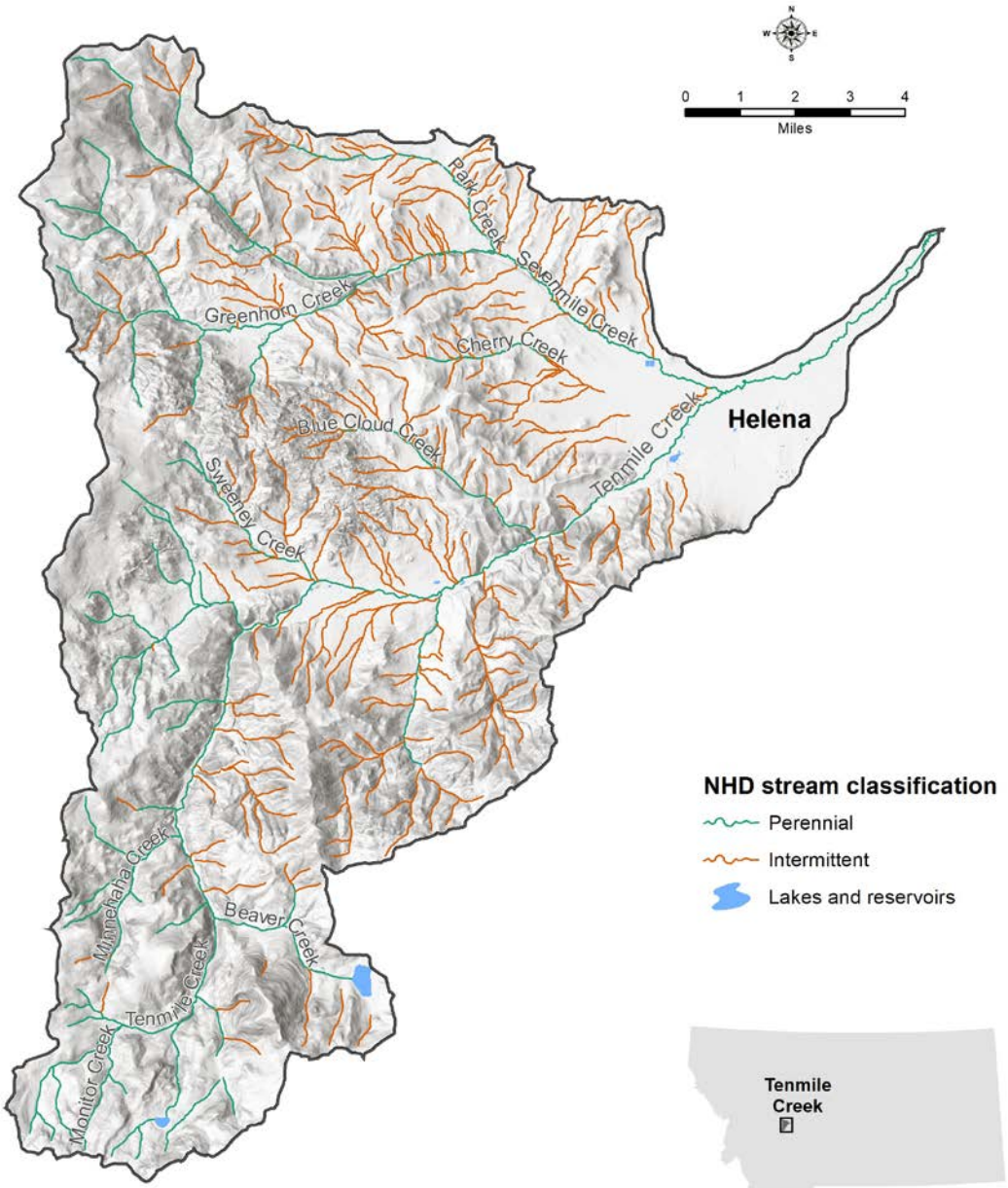
B. Protection from unilaterally down-grading stream classifications in DEQ permitting is important to protecting drinking water supplies.

Trout Unlimited members care a lot about fishing for trout, but they are also deeply committed to their communities. TU members spend thousands of hours each year working with veterans, cancer survivors, and teaching young people to fish. TU members help educate people on the importance of water quality and stream health through classroom projects such as "Trout in

the Classroom" and "Adopt-a-Trout" programs. Found at: www.tu.org/TIC. TU members care about the quality of the drinking water supplies for their communities. Protecting drinking water supplies means ensuring protection from DEQ arbitrarily down-grading stream classifications in DEQ water quality permitting.

For example, Ten-Mile Creek is an important component of the city of Helena's drinking water supply. Ephemeral and intermittent streams feed the tributaries to Ten-Mile Creek.

Tenmile Creek Stream Classifications



Source: USGS National Hydrography Dataset, 2018
http://nhd.usgs.gov

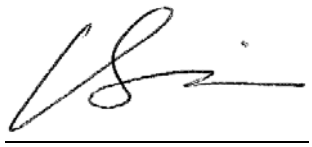
If the DEQ were to decide without study and field-verification that drought or other dewatering warranted down-grading the intermittent stream reaches of Blue Cloud Creek or Greenhorn Creek, for example, into ephemeral streams, they would be subject to lower water quality standards under a water quality permit. Any activities in the watershed requiring a water quality permit would be allowed to discharge unlimited amounts of toxic heavy metal pollution, for example, into these stream reaches deemed by DEQ to be ephemeral. This is precisely the kind of harm that the regulations implementing the Clean Water Act and Montana's Water Quality Act are intended to prevent. The DEQ must abide by the Act's regulations in order to faithfully implement its permitting obligations, and to protect Montana's watersheds, fisheries, and drinking water supplies.

Conclusion

As DEQ Director Livers wrote to introduce the Department's 2016 *Integrated Report, supra* page 7, Montana is blessed with high-quality water that benefits communities, aquatic life, recreation, and agriculture. Director Livers also wrote of the responsibilities for Montana as a headwaters state to protect and preserve Montana's high-quality waters. For its part, Trout

Unlimited is cleaning up abandoned mines that are polluting Montana's headwater streams with toxic heavy metals, and restoring streams to prevent pollution from sediment, nutrients, high temperatures, and low flows. A responsibility of the DEQ is to ensure that mines and other human activities requiring a discharge permit comply with the Montana Water Quality Act to prevent on-going, unlimited discharges of toxic heavy metals and other pollutants into Montana's watersheds. Pollutants run downhill, whether through ephemeral, intermittent or perennial streams and DEQ must follow the law to prevent degradation. For these reasons, the District Court should be affirmed and the appeal of the DEQ and Western Energy Company should be denied.

Dated this 7th day of September, 2018.

By: 

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Certificate of Compliance

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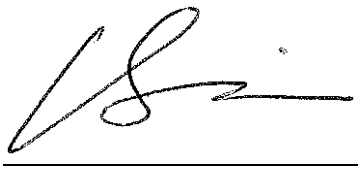
Dated this 7th day of September, 2018.

By: 

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