IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0071

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, an agency of the State of Montana,

Respondent and Appellant,

v.

DANIEL G. DEBUFF; SANDRA L. DEBUFF,

Petitioners and Appellees.

ANSWER BRIEF OF APPELLEES

On Appeal from the Montana Water Court,
Case No. WC-MAPA-2019-01
the Honorable Stephen R. Brown, Associate Water Judge, Presiding

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I. ISSUES PRESENTED

A. Whether the Water Court's Order on Judicial Review reversing DNRC's Final Order properly apply the standard under Mont. Code Ann. § 2-4-704(2)(a)?

II. STATEMENT OF THE CASE

Petitioners/Appellees Daniel G. DeBuff and Sandra L. Debuff (DeBuff) concur with the Statement of the Case as presented by the Respondent/Appellant Montana Department of Natural Resources and Conservation ("DNRC") in its opening brief with one exception. That exception is the November 1, 2018 hearing conducted by the DNRC Hearing Examiner was not a contested case hearing, but rather a show cause hearing under M.C.A. § 2-4-604, as provided to permit applicants under M.C.A. § 85-2-310(1).

III. STATEMENT OF FACTS

On February 11, 2016, DeBuff submitted a beneficial water use permit application to DNRC's Lewistown Regional Office. As initially filed, DeBuff requested authorization to develop groundwater for up to 3.63 cfs (1,630 gallons per minute or "gpm") and up to 552.69 acre-feet per year for irrigation of 267.00 acres on DeBuff's property in Section 35, Township 10 North, Range 17 East, Wheatland County.

Prior to filing the application, DeBuff's Engineer and Hydrogeologist, Dr. Willis D. Weight, conducted extensive testing and assessment of the groundwater

aquifer system. In November 2013, a preliminary aquifer test was conducted to evaluate the yield potential of the aquifer situated within DeBuff's property. AR[1] 16. From the initial test, the stratigraphy and estimates of aquifer properties were assessed. After 74 hours of pumping at 160 gpm the cone of depression extended a maximum of about 1,800 feet to the northeast and about 700 feet to the southwest. *Id.* at 143.

In September 2014, another 74-hour aquifer test was conducted. After 15 minutes of pumping, the rate of pumping was settled at 425 gpm for the duration of the test. AR 14 at 124. The extent of the cone of depression was about 2,000 feet to the north and full recovery took place in less than 4 hours. *Id*. at 132. During this test, access to a spring known as "Glennie Spring" was provided by a neighbor of DeBuff. Glennie Spring is located approximately 2 miles south of the DeBuff's well development.[2] During the 2014 test, a staff gage was installed at Glennie Spring to assess any response of the spring during or after pumping. No response or impact was observed. AR 43 at 274.

In 2015, additional wells were drilled and a pumping pit was established as part of DeBuff's project. In the fall of 2015, another test was conducted to

[1] All documents contained in DNRC's administrative record will be referred to as "AR" with the file number given by DNRC under its Certificate of Record. Op. Br., App. 1.

[2] As discussed later, Glennie Spring is one of the "Southern Springs" at issue in these proceedings.

demonstrate physical availability of groundwater and further assess any adverse effect to neighboring springs and wells. AR 43 at 274. Given the success of the tests conducted, DeBuff engaged staff of the DNRC Lewistown Field Office in a pre-application meeting to discuss aquifer test plans, and to discuss any pre-application issues. AR 23. An on-site meeting was held between DeBuff, their consultants, and DNRC staff to review the project and pumping test plans. At the on-site meeting, DeBuff and their consultants were informed that if the testing demonstrated the DeBuff's well would not affect other groundwater users, the application should proceed smoothly. Transcript of Show Cause Hearing (November 1, 2018) ("Tr."), 154:4-10; AR 43 at 274-275.

In October 2015, DeBuff submitted a proposed aquifer test plan to DNRC for approval. AR 12. Under the plan, DeBuff proposed to monitor four wells surrounding the "pit well" which would be the production well under DeBuff's project. It was also determined that the September 2014 aquifer test would be used to assess aquifer properties, and the November 2015 test would be used to further assess impacts from pumping. DNRC approved the plan. AR 22.

In November 2015 a pumping test took place over 88 hours (spanning 3 ½ times the required period) with the monitoring sites observed. AR 11 at 89. Under the distance drawdown report, the cone of depression extended less than 2,700 feet from the pumping center after 88 hours even with pumping rates peaking at 1,895

gpm. AR 43 at 276. The test demonstrated the cone of depression remained well within the DeBuff's property. Based on the assessments of the aquifer and the results from the pumping tests and monitoring, in February 2016, DeBuff submitted the application and supporting materials to the DNRC. AR 5.

On August 8, 2016, DNRC issued a deficiency letter. AR 44. Specific to the issues related to this appeal, DNRC first disclosed to the DeBuff concerns related to alleged "depletions" to "Unnamed Tributaries of Timber Creek". *Id.* at 296. The "tributary" sources identified by DNRC were known as "Elk Creek" a/k/a "Cold Spring Creek". The regulation DNRC cited was A.R.M. 36.12.1705 concerning "legal availability" of surface water. DNRC's deficiency letter further raised issues concerning potential adverse effect to certain water right claims on these sources from depletion, citing to A.R.M. 36.12.1706. The deficiency letter also cited to an "Aquifer Testing" and "Depletion Report" enclosed with the letter. The reports were prepared by DNRC Groundwater Hydrologist Attila Folnagy.

On October 24, 2016, Dr. Weight submitted responses to DNRC's deficiency letter. AR 43. In the response, Dr. Weight evaluated the prior testing data which indicated that impacts of pumping would be confined to the DeBuff property. *Id.* at 271-277. Dr. Weight also informed DNRC of the lack of surface water present on the DeBuff property, and that DNRC had not previously raised any issues or concerns over surface water impacts. *Id.* at 275. Dr. Weight again

provided information to DNRC that no drawdown from the November 2015 pumping test was observed at the "Warner north" well, north of the DeBuff pumping well, or to the "Quonset well" to the south. Both the Warner north and the Quonset well are situated on the DeBuff's property within close proximity to DeBuff's pumping well. *Id.* at 276, Fig. 7. As Dr. Weight informed DNRC, given the lack of response in these wells, and the lack of response previously observed at Glennie Spring, DNRC's concern over impacts to surface water was contradicted by numerous on-site data sources. *Id.* at 278-280.

Dr. Weight's response also indicated that "Timber Creek," the drainage identified by DNRC as one where "stream capture" may occur, is totally dry near the DeBuff's property as an upstream neighbor diverts all water from the source about ½ mile north of DeBuff. AR 43 at 278. Dr. Weight also demonstrated the drainages related to Elk Creek, to the south, do not have water flowing in them except as a direct result of spring snow melt or precipitation events. *Id.* at 279. In other words, the drainages and Elk Creek are "ephemeral."

Dr. Weight further identified errors in DNRC's Depletion Report ("DR") concerning the assumptions made regarding the source aquifer and its characteristics. AR 43 at 278-280. As. Dr. Weight explained, the aquifer tests and an analysis of the stratigraphy indicated the aquifer pinches out to the south of DeBuff's proposed well. Based upon these facts, effects from pumping at the well

will not be observed in either groundwater or any surface sources more than 1,000 feet south of the Quonset well on DeBuff's property. *Id.* at 280. In a further effort to address DNRC's concerns over surface water impacts, Dr. Weight proposed monitoring and mitigation conditions for the application. *Id.* at 281.

Pat Riley also provided responses to the deficiency letter concerning the water right claims identified by DNRC as being potentially affected by DeBuff's application. AR 42. Mr. Riley is a former DNRC water resource specialist working in both the adjudication and permitting programs during his extended tenure at DNRC. Tr. 151:20-152:7. Mr. Riley reviewed the existing water right claims on Timber Creek and Elk Creek identified in the deficiency letter.

Mr. Riley informed DNRC Timber Creek is dry as water is completely diverted ½ mile above the DeBuff's property. AR 42 at 245. As for Elk Creek to the south, based on Mr. Riley's assessment of aerial photographs, review of the claim files, site visits, and interviews with downstream landowners, it is apparent the water rights along Elk Creek are, at best, related to "water spreading" during spring runoff or precipitation events, and are not properly characterized as "full service" irrigation claims. *Id.* at 246. Mr. Riley concluded given the ephemeral nature of Elk Creek below the DeBuff's property, the project would not adversely affect any surface water rights. *Id.*

On January 13, 2017, Mr. Folnagy provided the Lewistown office his review

of the additional information provided by Dr. Weight. Mr. Folnagy stated, "Living Springs is the depleted surface water source if it is fed by groundwater discharge from the source aquifer for the proposed use." AR 39 at 225. On March 23, 2017, Doug Mann, (DNRC Lewistown Field Office), informed DeBuff that the application was deemed correct and complete on January 18, 2017 and included an initial Technical Report ("TR") of DNRC's analysis of the application. AR 63 and 64.

Under the 1st TR, groundwater was determined to be physically and legally available, and no existing groundwater uses would be adversely affected by the application. AR 64 at 409. According to the TR, DNRC interpreted Living Springs to be hydraulically connected to the source aquifer. *Id.* at 407. Living Springs is located wholly on the DeBuff property near the production well. In spite of only identifying Living Springs as the hydraulically connected surface water, the TR also identified certain surface water rights on Elk Creek as requiring review for the criteria of "legal availability." *Id.* at 408. Under DNRC's rules, the analysis of legal availability involves a comparison of physical availability of water to existing legal demands. A.R.M. 36.12.1705. In order to assess physical availability of surface water in Elk Creek, DNRC referenced a March 22, 2017, memo from Mr. Mann which estimated the watershed yield of Elk Creek. *Id.* at 408; AR 65.

DeBuff responded to the 1st TR by requesting a meeting with DNRC to discuss the issue of surface water depletions. On April 3, 2017, DeBuff's executed a waiver of the statutory deadline for issuance of a preliminary determination, in order to provide DNRC with additional analysis. AR 62.

On April 17, 2017, Dr. Weight provided additional assessment and analysis of the source aquifer and additional analysis of DNRC's aquifer test reports and depletion reports. AR 60. In response, on August 30, 2017, Mr. Folnagy issued a revised DR (2nd report). AR 59. In the revised depletion analysis, Mr. Folnagy recognized Living Springs would only discharge surface water to a "tributary" of Elk Creek, and not the main stream of Elk Creek as originally reported by DNRC (DR dated December 30, 2016). *Id.* at 388. In the second report, Mr. Folnagy stated that monthly depletions would only be evaluated for Living Springs, and not the "ephemeral" tributary of Elk Creek. *Id.* at 389. In the revised DR, Mr. Folnagy calculated the depletions to Living Springs. *Id.* at 390.

In November 2017, Doug Mann issued his second TR. AR 58. In this report, DNRC recognized Living Springs was hydraulically connected to the source aquifer and that the drainage below Living Springs was ephemeral. *Id.* at 380-381. However, in the second TR, DNRC now considered the area known as "Southern Springs," approximately 10,000 feet south of the DeBuff's wells to be fed by the source aquifer. *Id.* DNRC's interpretation of this "connection" to

Southern Springs was based on an analysis of "shade contrasts" from aerial photos. *Id.* at 381. Based on this assertion of connection to the Southern Springs area, and downgradient to Elk Creek, the second TR again found surface water to be affected. *Id.*

After receipt of the second TR, DeBuff and their consultants again met with DNRC to discuss DNRC's continued assertion of impacts to surface water. At a December 2017 meeting it was agreed DeBuff's consultants would prepare a water balance analysis to account for water entering and leaving the Living Springs area.

On December 22, 2017, Dr. Weight provided additional information on the characteristics of the source aquifer, including data from a geophysical survey conducted on the DeBuff's property. AR 55. In addition, a water budget analysis utilizing evapotranspiration ("ET") was provided, as Mr. Folnagy had previously recognized that capture of ET in ephemeral drainages may be "significant," and would be evaluated on an application by application basis to assess any impact of "net depletion." AR 55 at 371-372. Dr. Weight's analysis of DeBuff's application (as originally filed) indicated approximately one-half of the total depletion reported by DNRC (368.3 A.F.) would be attributed to ET. *Id.* at 372-373.

On January 23, 2018, Mr. Mann prepared a memorandum in response to Dr. Weight's ET analysis. AR 54. According to DNRC's memo, 137.5 A.F. of consumption from the DeBuff's project required mitigation. *Id.* at 365. This

amount was the difference between 368.3 A.F. of consumption from the proposed project, versus 230.8 A.F. associated with existing ET of the Living Springs area on the DeBuff's property. *Id.* DNRC's memo also reviewed DeBuff's proposed mitigation plan submitted by Dr. Weight, and determined the plan was still short 64.5 A.F. to achieve a water balance of "zero net depletion." *Id.* at 366.

In response to DNRC's ET analysis, and to fully address DNRC's concerns regarding net depletion to surface water downgradient of the proposed well, on February 23, 2018, DeBuff amended the application to reduce flow rate from 3.63 cfs to 2.38 cfs, and reduced the volume requested from 552.70 A.F. to 216.40 A.F. The acres proposed for irrigation was also reduced to a total of 173.1 acres. AR 52. The reductions under the amended application were designed to reduce any surface water depletion to zero from that which exists under natural conditions. AR 53 at 358.

On April 18, 2018, DNRC issued another revised TR which incorporated yet another revised DR. AR 49; AR 51. In spite of the amendments made by DeBuff to zero out any depletions to surface water, the reports still found depletions to Southern Springs and downgradient to Elk Creek. AR 49 at 331-332. Having exhausted all efforts to address DNRC's view of depletions to surface water, on May 17, 2018, Dr. Weight submitted his final response to DNRC's assessments. AR 47.

On August 14, 2018, DNRC issued a Preliminary Determination to Deny Permit ("PDD"). AR 4. Within the PDD, DNRC determined that DeBuff had failed to meet the M.C.A. § 85-2-311 criteria of legal availability of surface water in Elk Creek, and had failed to demonstrate lack of adverse effect on certain surface water rights in the source. AR 4 at COL 59. DNRC found all other section 85-2-311 criteria to have been established.

Pursuant to M.C.A. § 85-2-310, on November 1, 2018, a Show Cause Hearing was conducted by DNRC Hearing Examiner David A. Vogler. DeBuff appeared and provided testimony and exhibits on the errors made under the PDD. On January 28, 2019, DNRC issued its Final Order, ("FO") which denied DeBuff's application and upheld the PDD's findings and conclusions. AR 1. On February 27, 2019, pursuant to M.C.A. § 2-4-702, DeBuffs filed their Petition for Judicial Review with the Water Court.

On November 21, 2019, the Water Court entered its Order on Petition for Judicial Review ("Order"). DNRC Op. Br. Appx. 4. Under the Order, the Water Court detailed the record evidence concerning the physical setting of the DeBuff application as well as the extensive procedural background of information and analysis provided by DeBuff's under the application, and DNRC's review and denial. Order, pp. 2-7.

The Water Court reviewed DeBuff's arguments concerning DNRC's denial

of the application under the § 85-2-311 criteria of "legal availability" of surface water and adverse effect to area surface water rights. After review of the briefing, oral argument, and upon review of the entire record, the Water Court held:

> 1. DNRC incorrectly determined the source aquifer under the DeBuff application was hydrologically "connected" to "Southern Springs." Order, pp. 11-14;
>
> 2. DNRC erred by not disclosing to DeBuff its reliance on facts from a prior 1987 application would factor significantly in DNRC's analysis, resulting in a procedurally flawed decision. Order, pp. 14-15;
>
> 3. DNRC's determination that DeBuff did not prove that water was legally available at Southern Springs was arbitrary and capricious. Order, pp. 15-17;
>
> 4. That DNRC improperly failed to consider the evidence and analysis of ET in making its determination of legal availability, and its failure to do so was arbitrary and capricious. Order, pp. 18-19;
>
> 5. That DNRC's conclusions concerning lack of adverse effect to surface water rights in Elk Creek did not properly apprehend the evidence presented by DeBuff, and was arbitrary and

capricious, and an abuse of discretion. Order, pp. 19-22.

Based on the Order, the Water Court reversed and remanded with instructions to issue a preliminary determination to grant the application and to provide public notice of the application pursuant to M.C.A. § 85-2-307(b). Id. p. 23. DNRC's appeal followed.

IV. STANDARD OF REVIEW

Judicial Review is governed by the Montana Administrative Procedure Act ("MAPA"). Mont. Code Ann. § 2-4-701 et seq. The court may reverse or modify an agency's decision if substantial rights of the appellant have been prejudiced because:

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

(i) in violation of constitutional or statutory provisions;

(ii) In excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

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

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

Mont. Code Ann. § 2-4-704(2)(a). This standard applies to both the district court's review of an agency decision and this Court's review of the district court's decision. *Blaine Cty., v. Stricker*, 2017 MT 80, ¶ 16, 387 Mont. 202, 394 P.3d 159.

While technical and scientific expertise may warrant deference, the judiciary nonetheless has "an inherent power to review administrative decisions and to interpret the law." *Mont. Environ. Info. Ctr. v. Mont. Dept. of Evtl. Quality*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493. "To balance these constitutional concepts and to ensure that agency decision-making is scientifically driven and well-reasoned, this Court affords 'great deference' to agency decisions implicating substantial agency expertise." *Id.* (quoting *Winchell v. Mont. Dep't of Nat. Res. And Conserv.*, 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132).

However, the Court's deference is not to be confused with absolute deference. It will defer to "consistent, rational, and well-supported agency decision-making," but will not "automatically defer to the agency 'without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision,'" *MEIC*, ¶ 26 (citing, *Clark Fork Coal. v. Dept. of Envtl. Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 481), and cogently explaining why it exercised its discretion in a given manner. *MEIC*, ¶ 97.

MAPA requires this Court to determine whether the agency's "decision was arbitrary, capricious, unlawful, or not supported by substantial law," which

requires a consideration of whether the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Clark Fork*, ¶ 20, quoting *N. Fork Preservation Ass'n v. Dep't of State lands*, 238 Mont. 451, 456, 778 P.2d 862, 871 (1989) (citations omitted).

Under M.C.A. § 85-2-311, an applicant is required to demonstrate the beneficial use permit criteria by a "preponderance" of the evidence. The standard is "relatively modest." *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. If met, DNRC is obligated to issue the permit. M.C.A. § 85-2-311(1).

V. SUMMARY OF ARGUMENT

The Water Court's Order correctly reviewed DNRC's FO which denied DeBuff's beneficial water use permit application. After review of the entire record, the Water Court correctly reversed DNRC, and properly remanded the matter to the agency to issue a Preliminary Determination to Grant the application. After almost three (3) years and nine (9) months since submission, the DeBuff application was finally going to be publicly noticed for other water users to review and object if necessary, under the terms of the Water Use Act.

The Water Court's Order correctly recognized the numerous errors apparent in DNRC's review of the DeBuff application. As should be apparent to this Court after review, in processing the DeBuff groundwater application, the DNRC was wholly committed to finding that DeBuff's groundwater well was hydrologically

connected to surface water, and that somehow DeBuff's well would result in depletions to area surface water sources. As was clearly demonstrated to the Water Court, DNRC's attempt to "connect" the groundwater underlying the DeBuff property to area springs and surface water drainages was unfounded and contrary to the site-specific data provided by DeBuff. As was also demonstrated to the Water Court, DNRC's review of the application resulted in the agency itself issuing conflicting determinations concerning water availability, inconsistent assertions and review of potentially impacted area water resources, and instances where the agency wholly ignored information and data designed to address any concerns DNRC had expressed concerning the impacts of the application.

After review of the entire record, this Court should be left with a definitive and firm conviction that DNRC was mistaken in denying the DeBuff application. In fact, after review, this Court should be at a loss as to why the DeBuff application was denied.

The Water Court properly reviewed DNRC's Final Order under MAPA and properly provided DeBuff relief from DNRC's erroneous denial. The Water Court's Order should be affirmed.

VI. ARGUMENT

A. The Water Court Correctly Reviewed DNRC's Characterization of the Source Aquifer as Connected to Southern Springs and Downgradient to Elk Creek, and Properly Determined DNRC's Rejection of DeBuff's Evidence Was Abuse of Discretion.

At the core of DNRC's denial of the DeBuff application was the agency's belief that the source aquifer under the DeBuff property was hydrologically connected to "Southern Springs," and downgradient from Southern Springs, "Elk Creek." As the Water Court correctly determined, DNRC's analysis of the issue of "connection" of the source aquifer shifted during the review of the application, imposed new burdens on DeBuff during review by the agency, and failed to explain why DNRC rejected on-site data and evidence which demonstrated the source aquifer was not connected to either Southern Springs, or downgradient to Elk Creek. Order, pp. 11-14. The Water Court's determination is supported by the record evidence which demonstrated DNRC's findings on connectivity were contrary to the site-specific data provided by DeBuff.

DNRC's PDD and FO determined that the source aquifer for DeBuff's proposed well is "continuous" and "hydraulically connected" to Southern Springs approximately two miles from DeBuff's proposed well. AR 4 at FOF No. 22. Based on this characterization, DNRC determined pumping from the well would deplete Southern Springs and by connection, downgradient to Elk Creek. *Id.* at FOF No. 25. DNRC's findings in this regard are wholly based on the

interpretations of the aquifer system made by Mr. Folnagy. The record, when viewed as a whole, does not support Mr. Folnagy's conclusions, and in fact his conclusions contradict analysis in the depletion reports he prepared and admissions made at the Show Cause Hearing.

Mr. Folnagy's opinion was based upon his review of the pumping test data and a single geologic map of the area by Porter, et al. (1996). Tr. 57:15. He has never been to the site and has conducted no field work in the area. *Id.* at 57:10. According to Mr. Folnagy's interpretation of the geologic mapping by Porter et al., the Qtab (source aquifer), is "continuous" between the point of diversion on DeBuff's property and the Southern Springs area. AR 4, FOF No. 22. Mr. Folnagy admitted, his first DR (dated December 30, 2016) assumed the aquifer is "infinite." Tr. 61:18. At the Show Cause Hearing, he recognized Dr. Weight provided evidence that this assumption was incorrect. *Id.* at 62:2, 12-14. Mr. Folnagy also acknowledged Dr. Weight provided evidence that the aquifer thins or pinches out on the DeBuff's property south of Living Springs. Tr. 84:13. In spite of recognizing his assumptions were incorrect, Mr. Folnagy testified that DNRC's depletion standards look at impacts on a "regional scale," rather than site specific. *Id.* at 66:14-15.

Contrary to Mr. Folnagy's opinion that the source aquifer is "continuous," DeBuff presented Dr. Weight's site specific analysis of the source aquifer and the

nature and character of the system. Dr. Weight concluded the aquifer associated with the DeBuff well is "discontinuous" and "confined" on the DeBuff's property. Tr. 110:7-10. Dr. Weight provided numerous reasons for his conclusions.

Dr. Weight has been to the site multiple times since 2013. Tr. 89:11. He oversaw three (3) separate pumping tests conducted on the application. From the pumping tests, Dr. Weight concluded that zero drawdown occurred at the end of the cone of depression which extended only about 1,700 feet from the pumping well. *Id.* at 92:6-8.

During the 2014 pumping test, which was used to determine aquifer properties, DeBuff had access to monitor one of the Southern Springs which DNRC believed was connected to the source aquifer. The spring, known as "Glennie Spring," was monitored with a staff gage. *See* AR 75, Fig. 5.A. As Dr. Weight testified, no impact or response at Glennie Spring occurred during or after the pumping. Tr. 99:8-14. In addition to monitoring Glennie Spring, four wells were also monitored during the 88 hour pumping test conducted in November 2015. *Id.*, Fig. 6. The Quonset well to the south, and the Warner well to the north, showed no response from pumping (no impact). Tr. 106:13-20. As Dr. Weight stated, drawdown from pumping the well remained within the DeBuff's property. *Id.*; Tr. 110:2-5. From the pumping test data and a review of area well logs, Dr. Weight concluded the aquifer was discontinuous and encapsulated by clay layers.

Id. at 110:7-13.

Dr. Weight also assessed water level data in the numerous wells surrounding the DeBuff's pumping well. AR 75, Fig. 17 and 18. As he testified, the water level data indicates the behavior of the gravel aquifer on the DeBuff's property is very different that the rest of the Qtab mapped by Porter, et al. and relied upon by Mr. Folnagy. Tr. 112:2-4.

Dr. Weight further reviewed mapping of the "Living Springs" area which was included in Mr. Folnagy's third DR (dated April 16, 2018). AR 75, Fig. 13. Dr. Weight testified the green patches and ribbons within this area would not exist if the aquifer were continuous as Mr. Folnagy concluded. Tr. 113:1-10; 114:6-9.

Importantly, Dr. Weight also assessed geophysical data specific to the DeBuff's property within the area of the pumping well. AR 75, Fig. 15 and 16. The data had been previously submitted to DNRC for review. Tr. 115:13-15. Dr. Weight testified the data demonstrated the presence of clay layers and confirmed the variability of the aquifer as corroborated by the water level data. *Id.* 115:15-23. The data also explained the lack of response in the observation wells and Glennie Spring during the pumping tests and further corroborated Dr. Weight's opinion that the aquifer was discontinuous. Tr. 115:25-116:5.

Dr. Weight testified in spite of all the data indicating otherwise, DNRC continued to describe the aquifer as continuous. Tr. 117:5-10. Dr. Weight was

further confounded by DNRC's interpretation by the fact that when you are on the DeBuff's property the surface water "streams" which DNRC was concerned with are all ephemeral. *Id.* at 10-11. As he explained, the drainages surrounding the Living Springs on the DeBuff's property are dry, with water levels in area wells all rising above the gravel aquifer. *Id.* at 117:18-23. This further evidences the confined nature of the aquifer from the confining clays, as corroborated by the well logs and the geophysical data. To solidify the fact that the source aquifer is not continuous as DNRC had found, Dr. Weight explained because the drainages below Living Springs are ephemeral, this means they are not connected to ground water and would only flow during spring snowmelt or precipitation events. Tr. 117:13-124:9. Dr. Weight concluded the actual field data does not support DNRC's view that the aquifer was hydraulically connected to any surface water. *Id.* at 124:17-20.

At the Show Cause Hearing, Mr. Folnagy acknowledged that above the Southern Springs (and below Living Springs on DeBuff's property) any surface water channel is ephemeral. Tr. 59:8-16. Mr. Folnagy further acknowledged that if a surface water source is ephemeral, groundwater from the aquifer does <u>not</u> contribute to surface water. *Id.* at 61:6-7. Mr. Folnagy also recognized that Living Springs is a surface expression of groundwater on the DeBuff's property (Tr. 68:13), meaning the groundwater encounters an impermeable layer such as clay.

Id. at 68:17. Mr. Folnagy also acknowledged that Porter, et al. did not map all the gravels in the Qtab, yet he applied the aquifer properties in his aquifer test report throughout the whole Qtab. *Id.* at 69:10 and 69:20. Importantly, Mr. Folnagy acknowledged that the source aquifer is connected to Living Springs (located wholly on the DeBuff's property), and that Living Springs does not contribute surface water or groundwater water to the ephemeral drainage to the south of Living Springs and above Southern Springs. Tr. 70:20-25; 71:8-12.

As evident to the Water Court, DNRC's determination that the source aquifer on DeBuff's property was connected to Southern Springs, and downgradient to Elk Creek, is unsupported by the scientific data and analysis provided by DeBuffs. As the Water Court noted, the Court did not need to reweigh the evidence to conclude DNRC's rejection of DeBuff's chacterization of the source aquifer was clearly erroneous. Order, p. 13. Mr. Folnagy admitted, Living Springs does not contribute to surface water to the south as the drainage is admittedly ephemeral. As an ephemeral drainage, groundwater from the source aquifer on the DeBuff's property does *not* contribute to surface water below Living Springs. As such, groundwater on the DeBuff's property cannot contribute to either Southern Springs to the south via an ephemeral drainage, or further south to Elk Creek. Tr. 135:21-136:1.

The issue of whether the source aquifer is "continuous" or discontinuous" is further informed by Mr. Folnagy's and Dr. Weight's opinions on where depletions from pumping would occur. In this instance both agreed the depletions would occur at Living Springs which is situated solely on DeBuffs' property.

In addition, both Dr. Weight and Mr. Folnagy ultimately agreed that the surface water drainage below (downgradient) Living Springs is ephemeral and is not connected to the source aquifer. Tr. 59:8-16; 61:6-7. This evidence, as Dr. Weight explained, further confirms the source aquifer is confined or discontinuous. Tr. 117:10-11.

In spite of these agreed upon conditions, DNRC reestablished a "connection" to Southern Springs, and further downgradient to Elk Creek. This "connection" is only explained in the record by DNRC analyzing "shade contrasts" from various aerial photographs "to determine the estimated terminus of downgradient base flows." AR 58 at 381. Dr. Weight testified DNRC's methodology to "connect" the source aquifer to Southern Springs, or further downgradient to Elk Creek, is not "scientifically repeatable." Tr. 141:17-21.

The effort of DNRC to re-connect the source aquifer to "surface" water sources below Living Springs should raise inquiry from the Court. Dr. Weight testified he was "confused" in how DNRC could insist the source aquifer is

connected to Southern Springs, or further downgradient to Elk Creek, when all the field data leads to a different conclusion. Tr. 124:17-20.

If nothing else, the rationale DNRC used to "connect" the source aquifer below Living Springs, through an admittedly dry or ephemeral channel, to Southern Springs and below to Elk Creek should leave the Court scratching its head. The scratching should become more intense when it is admitted by Mr. Folnagy that groundwater from the source aquifer is not hydraulically connected to the ephemeral channel below Living Springs and above Southern Springs. The scratching should begin to become more disturbing when the Court considers the method by which DNRC reestablished the connection (i.e. an examination of shade contrasts in aerial photographs). As Dr. Weight testified, such a methodology is wholly subjective and not scientifically repeatable. Tr. 141:11, 20.

Before the Water Court, DNRC argued that its determination that the source aquifer is connected to Southern Springs, and downgradient to Elk Creek, is entitled to deference. In this appeal, DNRC repeats the argument. Op. Br. at 29.

The Water Court recognized it must pay deference to DNRC's determinations and must not reweigh the evidence. Order, p. 14. However, the Water Court also recognized the deference afforded is not absolute and that the Court on judicial review is required to review the entire record to ensure DNRC made a meaningful review of the data and that the agency cogently explain why it

exercised its discretion in a given manner. Id. The Water Court properly determined in this matter the DNRC failed to do so with regard to the aquifer evidence. Id. The Water Court's reasoning was sound based on its review of the entire record and should be affirmed.

B. The Water Court Properly Determined DNRC Erred by Not Disclosing to DeBuff the 1987 Permit Decision Would Factor Significantly in DNRC's Analysis.

In 1984 Daniel DeBuff applied for a well permit on his property. In 1987 his application was denied "without prejudice so that the Applicant may re-apply at such time as he may have sufficient evidence on the question of adverse effect." Order, p. 14, citing, AR 80:565.

The 1987 permit proceeding first appeared in the record of this matter in the PDD. In fact, the PDD relied heavily on the 1987 proceeding in findings made by the regional office to deny DeBuff's application in this matter. AR 4, FOF 41-44.

At the Show Cause Hearing DeBuff argued to the Hearing Examiner that at no time during review of DeBuff's 2016 application was the 1987 decision presented to DeBuff or their consultants to review. As DeBuff noted, the 1987 proceedings were not even within the administrative record provided to the Hearing Examiner, or DeBuff, for the Show Cause proceedings. AR 67.

In briefing before the Water Court, DNRC continued to rely on the 1987 permit as further justification for the denial of DeBuff's 2016 application. In

response DeBuff provided the Water Court the extensive evidence and analysis described in Section VI.A above, all of which was developed since the 1987 permit application which demonstrated the source aquifer was discontinuous below Living Springs.

In reviewing this issue, the Water Court recognized both the PDD and the FO denying DeBuffs' 2016 application relied heavily on "facts" gleaned from the 1987 proceeding to determine DeBuff failed to prove the source aquifer is discontinuous from the Southern Springs. Order, p. 14, citing, AR 1:10, ¶ 14. As DeBuff contended, DNRC erred by not giving proper notice that it would rely on facts from the 1987 proceeding, and that use in the PPD and FO was procedurally improper. Id.

The Water Court's review of this issue determined that DNRC's failure to disclose to DeBuff that facts drawn from the 1987 application would factor heavily in DNRC's analysis, was error, as DNRC did not follow its own official notice procedures, and DNRC clearly relied on facts never properly or timely made a part of the record. Order, p. 15. As the Water Court held, DeBuff was correct that DNRC's decision was procedurally flawed, and therefore the final decision was abuse of discretion and unenforceable. Id.

In its opening brief, DNRC argues the Water Court was wrong as a matter of law and fact, and that DNRC properly considered the 1987 decision. Op. Br., p. 30. DNRC's legal and "factual" argument is misplaced.

First, DNRC's citation to M.C.A. § 2-4-612(6) related to administrative notice of certain facts, reports, memoranda or data, is wholly misplaced. In this matter, there has been no contested case proceeding under which § 2-4-612(6) would apply. As provided by law, the hearing conducted under M.C.A. § 85-2-310(1)(a) is a hearing pursuant to M.C.A. § 2-4-604, not 2-4-612. M.C.A. § 2-4-604 concerns informal proceedings related to the show cause hearing provided for by statute when DNRC issues a preliminary determination to deny an application. The statute which DNRC asserts results in error of the Water Court's Order is inapplicable.

Second, DNRC argues that Doug Mann of the DNRC Lewistown Field Office "referred" the decision in a technical memorandum, and that a draft PD cited to the findings of the 1987 decision somehow put DeBuffs on "notice" that DNRC would consider the decision. However, as the record demonstrates, the 1987 decision was not included in the administrative record supplied to the Hearing Examiner for the Show Cause Hearing. AR 67 at 427. In fact, the 1987 decision itself and information related to the decision was only included in the record by DeBuff as an exhibit to the Show Cause proceeding. AR 80. As such,

DNRC's arguments that DeBuff somehow had notice of DNRC's reliance on the 1987 permit proceedings prior to the PDD is entirely at odds with the agency's own record.

The Water Court was entirely correct to determine DNRC's decision was procedurally flawed by relying on facts never properly or timely made a part of the record. The Water Court's citation to such evidence being "ambush" appears directly on point. Order, p. 15.

DNRC's factual and legal arguments that the Water Court erred in determining the DNRC decision was procedurally flawed are incorrect. The Water Court's decision should be affirmed.

C. The Water Court Correctly Determined the DNRC Final Order Was Arbitrary and Capricious by Failing to Apply Evidence of Water Availability in Elk Creek.

DNRC argues the Water Court erred in its determination that DNRC's failure to apply evidence of water availability at Southern Springs, or downgradient in Elk Creek, was arbitrary and capricious. *See,* Order, pp. 16-17; DNRC Op. Br., p. 38. Instead, DNRC asserts its findings that DeBuff did not establish water physically available in either source was supported by "substantial evidence." Id., p. 35.

The Water Court reviewed the FO wherein DNRC found, the "record is devoid of information regarding the physical availability of surface water in Elk

Creek below Southern Springs and as such no finding of legal availability or lack of adverse effect can be made." Order, p. 16, citing, AR 1:16, ¶ 30. The Water Court then reviewed the record which included a memorandum prepared by DNRC itself which demonstrated more water was available in Elk Creek even when accounting for downstream Elk Creek water rights and DNRC's own calculations of "depletion." Id.

As the Water Court determined, DNRC's change in position as to why its own methodology to estimate water physically available in Elk Creek was ignored, was never actually explained by the agency and was arbitrary and capricious. Id., p. 17. The Water Court's determination in this regard is well supported by the record.

As both the PDD and FO found and concluded, DNRC denied the DeBuff application because, according to DNRC, DeBuff did not establish that surface water was "legally available" in Elk Creek downgradient of DeBuff's proposed well development. AR 4 at FOF 31. The analysis of legal availability of surface water in Elk Creek was deemed necessary by DNRC as it determined depletions from DeBuff's well would "ultimately manifest" to the Southern Springs and downstream to Elk Creek. AR 4 at FOF No. 25. As provided above, both the PDD and FO erroneously found and concluded depletions of surface water would result from DeBuff's well pumping at either Southern Springs or Elk Creek. As such,

DNRC's determination that legal availability of surface water was a criteria which needed to be established is clearly erroneous and mistaken.

However, even if depletion could somehow move from Living Springs (situated wholly on DeBuff's property) downstream through an admitted ephemeral drainage to Southern Springs, and then somehow downgradient to Elk Creek, another ephemeral drainage, as the record supports, information presented by DNRC itself established that water is "legally available" in Elk Creek. The PDD wholly ignored or refused to assess the information on drainage yield analysis which if applied would establish legal availability, and the FO erroneously concluded the analysis was "not applicable." AR 1 at FOF 10.

Under the PDD, DNRC faulted DeBuff for not providing information related to "flows issuing from Southern Springs and their downstream channels." AR 4 at FOF No. 26. According to the PDD, to determine if the physical supply exceeds legal demands, the amount of water flowing from Southern Springs and into Elk Creek must be known. *Id.* at FOF No. 30. According to the PDD, because data does not exist on the water "discharging from these springs and flowing in Elk Creek," DNRC cannot make a comparison for purposes of legal availability of surface water. *Id*. at FOF No. 31. As the record reveals, evidence did in fact exist to support the finding of legal availability for both Southern Springs and downgradient in Elk Creek, even if DNRC's calculated depletion to surface water

was confirmed. DNRC simply chose to ignore it.

As to Southern Springs, the PDD expressly found that groundwater was both physically and legally available. AR 4 at FOF Nos. 18-19. According to DNRC, groundwater flux (volume) through the area was predicted as 39,642 A.F./year with legal demands, including those at Southern Springs of 612.3 A.F. *Id.* As such, even if the source aquifer is "hydraulically connected" to Southern Springs, DNRC's own analysis confirmed water is legally available at Southern Springs.

As to Elk Creek, it is true that DeBuff did not collect flow data in the drainage. The reason is because the drainage is generally dry. AR 78 at 543-547. In addition, in assessing the irrigation water right claims for Elk Creek, Mr. Riley concluded the rights are more property characterized as related to water spreading systems which are generally associated with ephemeral drainages which only receive water during spring snowmelt or in response to precipitation events. Tr. 160:9-19, 161:14-19; AR 77 at 514-516. Mr. Riley confirmed the ephemeral nature of Elk Creek on his site visits to the Holmes' property (Claim No. 40A-110228) and observations of the Wilks' property adjacent to the Holmes' property (Claim No. 40A-110133). Tr. 159:15-22; AR 78.

Regardless of the fact that Elk Creek flows were not measured by DeBuff, the record does reflect DNRC itself estimated flows for the drainage. On March 22, 2017, Mr. Mann prepared a memorandum entitled "Monthly Watershed Yield

of Elk Creek, tributary to Roberts Creek in Wheatland County." AR 79; AR 65. As the memo states, it provides an estimate of monthly watershed yield from Elk Creek in the area of the DeBuff permit application. AR 65 at 410. DNRC used the watershed yield estimation technique as Elk Creek has no gage sites and is an unmeasured drainage. According to DNRC's own regulations, estimation techniques are an acceptable methodology to determine surface water availability in unmeasured drainages to estimate water discharge. *See* A.R.M. § 36.12.1702.

Under DNRC's watershed yield analysis for the months of April through October (the period of use related to the DeBuff's application) water physically available in Elk Creek below the DeBuff's property was estimated as 906.2 A.F. AR 65 at 412. According to DNRC, legal demands on Elk Creek in the area below the DeBuff's property, including the two irrigation claims assessed by Mr. Riley, total 459.5 A.F. AR 4, FOF No. 28, Table 2. Based on the analysis of drainage yield, physical availability of water exceeds existing legal demands by 446.7 A.F. during the proposed period of use under DeBuff's amended application. Even if all 216.4 A.F. of consumptive volume sought under DeBuff's application would result in depletions manifesting in Elk Creek, under DNRC's own analysis, surface water would be considered legally available. A.R.M. § 36.12.1705(2).

Mr. Mann testified the March 2017 analysis was a method to estimate whether water would be physically available in Elk Creek. Tr. 15-18. Yet the

PDD wholly failed to discuss the results of DNRC's watershed yield analysis. The FO discussed the results of the analysis which was premised on the initial determination that Elk Creek is an unmeasured, "intermittent" drainage. AR 1 at FOF No. 10. The FO then cites to the second and third TR reasoning that Elk Creek and its tributaries are ephemeral prior to reaching Southing Springs and therefore the technique was "not appropriate" for comparing legal availability of surface water. *Id*.

Dr. Weight testified drainage yield estimation techniques are commonly used in the world of hydrology when gage information is not available regardless of whether the drainage is characterized as ephemeral or intermittent. Tr. 134:4-6. Mr. Riley testified the analysis was information, which if reviewed, would demonstrate water may be considered fully legally available in Elk Creek despite any asserted depletions related to pumping the DeBuff's well. *Id.* at 174:19-175:25.

At the Show Cause Hearing, Mr. Mann could not provide an objective basis for his characterization that Elk Creek was "intermittent." Tr. 15:20-16:6. According to Mr. Folnagy, he simply agreed with Mr. Mann's characterization. Tr. 60:3-6. However, as Mr. Folnagy recognized, the Montana Heritage mapping that DNRC in part relied upon to show "shade contrasts" below Southern Springs did *not* identify Elk Creek as an intermittent stream, but rather as a wetland area. Tr.

75:3-11. At a minimum, DNRC's characterization of Elk Creek as "intermittent" appears arbitrary.

Regardless, as Mr. Folnagy testified, if the aquifer was "continuous," as he had concluded, groundwater flow would be expected to flow through the aquifer in a southerly direction and discharge to surface water. Tr. 63:15-22. When asked how the depletion reports he prepared determined that net depletions would occur in Elk Creek he stated as follows:

> "The determination was made based on water expressing itself at the surface in Living Springs, and then also to Southern Springs to the south. The groundwater, based on the information that we had at the time, has to discharge to some source equal to the depletion, which is equal to consumption."

Tr. 65:9-17.

As noted above, in assessing groundwater physically available in the source aquifer related to DeBuffs' application, DNRC estimated groundwater flux (volume) through the aquifer is 39,642 A.F./year. AR 4, FOF No. 15. Mr. Folnagy testified although this is an estimate, it's a best estimate from the available information. Tr. 65:3-4.

If the source aquifer is continuous and hydraulically connected to Elk Creek as DNRC insists, the approximate 39,000 acre-feet of groundwater available in the source aquifer calculated by DNRC must discharge to Southern Springs and Elk Creek. Assuming this is the case, the 39,000 acre-feet would be available in either

source or a combination of the two. When comparing physical availability to existing legal demands in either Southern Springs or Elk Creek, even if all 216.4 A.F./year sought by DeBuffs would manifest as depletions to Southern Springs, and then downgradient to Elk Creek as determined by DNRC, water should be determined to be legally available, and no existing water rights could be adversely effected.

DNRC cannot have it both ways. The agency cannot simultaneously find that groundwater is legally available in an amount approximately 39,000 acre-feet above existing legal demands (including Southern Springs) from an aquifer DNRC insists discharges to both surface water sources, and then insist DeBuffs failed to prove either legal availability or lack of adverse effect in Southern Springs or Elk Creek. In other words, DNRC cannot on one hand find approximately 39,000 acre-feet of groundwater is legally available from the source aquifer and insist that groundwater is connected to surface water below Living Springs without giving credit to the 39,000 acre-feet as discharging to Southern Springs and Elk Creek. Applying DNRC's own analysis should have led to findings and conclusions that water was legally available in both Southern Springs and Elk Creek and that existing water rights in both sources would not be affected.

The Water Court recognized DNRC's own rules allow for estimation techniques to be used to determine surface water availability in drainages where

stream gage records do not exist. Order, p. 16, citing, ARM 36.12.1702. The Water Court recognized nothing in the FO or the administrative record explained why DNRC changed its position regarding estimation techniques even though it had fundamentally shifted the legal availability conclusion by eliminating the estimates of water available in Elk Creek. Id. p. 17.

The Water Court determined DNRC's change of position was arbitrary as the DNRC's rules allowing estimation techniques do not differentiate between ephemeral or intermittent drainage, nor did DNRC cite to any rule to require DeBuff to measure flows in Southern Springs or Elk Creek when the rule allows estimation techniques to be used. Id. The Water Court held DNRC's change of position, without supplying any reasoned analysis, was arbitrary. Id. The Water Court's Order is correct and should be affirmed.

D. The Water Court Correctly Determined DNRC's Failure to Consider Evidence About ET Depletion was Error and Arbitrary and Capricious.

DNRC argues its failure to consider the evapotranspiration ("ET") analysis and the resulting amendment to the application which reduced the flow rate, acres irrigated, and volume sought under the application to zero out any asserted net depletion to surface water sources, was "harmless error because the result would have been the same." Op. Br. p. 40. DNRC further argues it did not analyze the

information as it was "not included" in the March, 2018 amendment. Id., p. 39. DNRC's arguments are puzzling.

In reviewing the record, the Water Court considered the DeBuff's March, 2018 amendment to the application which reduced the flow rate, volume and acres irrigated sought under the application. The amendment was based on an analysis of ET provided by Dr. Weight to DNRC, and DNRC's analysis of the information. The Water Court properly recognized neither the PDD or FO discussed the analysis even though the information would have established DNRC's concerns with "net depletion" were unfounded. Order, p. 19. The Water Court's determination that DNRC's failure to provide any meaningful explanation on the ET analysis was error, and arbitrary and capricious, is well-supported.

As the record confirms, after review of DNRC's second TR, and second DR, DeBuff and their consultants were confused. Tr. 120:21-121:5. As already discussed, Dr. Weight was perplexed at how DNRC could view the aquifer as hydraulically connected to Southern Springs, or to Elk Creek, given the data clearly suggested otherwise. Tr. 124:17-20. As Pat Riley testified, DNRC's concerns with downstream water right claims on Elk Creek mischaracterized the nature and extent of the claims, which when assessed would certainly confirm the rights were more properly associated with an ephemeral source. Tr. 161:14-19. In addition, how either the DR or TR could connect depletions occurring at Living

Springs downgradient through an admitted ephemeral drainage to Southern Springs and further beyond Elk Creek was wholly unexplained in either document.

However, because DNRC apparently recognized depletions would occur at Living Springs, and because the agency also recognized downgradient of Living Springs the "surface" water drainage was ephemeral, DeBuff and their consultants suggested assessing "depletion" on the basis of ET analysis. As Mr. Folnagy's second DR acknowledged, ET analysis in ephemeral drainages was "significant." AR 51 at 348. As such, in order to resolve the issues related to surface water "depletions," DeBuff proposed to assess the impacts of the application using the ET methodology. Tr. 125:2-25; AR 24, 55.

Dr. Weight conducted an analysis of ET designed to assign a portion of DNRC's calculated consumed volume to natural losses associated with ET in the Living Springs area. AR 55 at 371-372. As not all "consumption" could be accounted for by the depletions from natural ET occurring at Living Springs, Dr. Weight and DeBuff proposed a mitigation and monitoring plan to DNRC to assure no neighboring water rights would be affected. *Id.* at 372-373; Tr. 129:18-25.

Accompanying Dr. Weight's ET analysis was a water balance assessment to account for water into and out of the Living Springs area. The analysis utilized estimates of ET losses from the Living Springs area and evaporation from a reservoir (unrelated water right held by DeBuff). AR 55 at 372. Existing

depletion related to Living Springs and DeBuff's reservoir was calculated as 188.4 A.F., or approximately one-half of the 368.3 A.F. of consumption calculated by DNRC under the application.

On January 23, 2018, DNRC provided a memo which responded to Dr. Weight's water balance and proposed mitigation plan. AR 54. Under the memo DNRC utilized ET calculations using a different methodology than Dr. Weight and slightly different acreage calculations for the Living Springs area. DNRC calculated ET for the Living Springs area as 230.8 A.F./year which meant 137.5 A.F. would need to be mitigated by DeBuff to arrive at "no net depletion" to surface water as assessed under the second DR and second TR. *Id.* at 365. DNRC assessed DeBuff's proposed mitigation plan and calculated 64.5 A.F./year of depletion remained "unmitigated." *Id.* at 366.

Since both Mr. Folnagy and Mr. Mann had recognized ET analysis was an appropriate methodology to assess "depletions" from DeBuff's application, and because DNRC had made calculations of ET at the Living Springs area which would result in no net depletions, it was decided by DeBuff to amend the application to reduce flow rate, volume and proposed acres irrigated to match DNRC's calculations of ET associated with natural conditions.

On February 23, 2018, DeBuff amended the application to reduce the flow rate, volume and acres irrigated to match DNRC's ET calculations. AR 52. In

other words, DeBuff modified the application to result in zero net depletions to area surface water from that already occurring naturally at the Living Springs area. At this juncture DeBuff believed any issues concerning surface water depletions had been addressed. Tr. 130:2-18.

On April 16, 2018, Mr. Folnagy issued a third DR. AR 51. In spite of previously recognizing ET analysis in ephemeral drainages was significant and appropriate, Mr. Folnagy's third DR ignored both Dr. Weight and DNRC's ET analysis. The third DR continued to assess depletions at Living Springs but now assigned depletion to the 216.4 A.F. associated with DeBuff's reduced and modified application. Mr. Folnagy's third DR again utilized the Montana Heritage Program Mapping to evaluate the downstream extent of "Elk Creek' based on shade contrasts. Again, Mr. Folnagy concluded all depletions would occur at Living Springs. *Id.* at 352.

On April 18, 2018, Mr. Mann issued his third TR. AR 49. Under the third TR, Mr. Mann ignored the previous assessment of ET. Under the third TR, surface water impacts to Elk Creek were again assessed with the TR concluding all depletions would cumulate in Southern Springs and downgradient to Elk Creek. *Id.* at 333. The third TR again stated legal availability in Elk Creek could not be determined as no flow or volume data on Southern Springs or Elk Creek had been provided to DNRC under the application. *Id.*

Not surprisingly, DNRC's PDD and FO found that pumping of DeBuff's wells would result in depletions of surface water which would manifest or cumulate at Southern Springs and then downgradient to Elk Creek. What should be surprising is neither the PDD or FO make any mention of the ET analysis which if applied would have shown no net depletion from DeBuff's amended application. By ignoring the ET analysis (which was conducted by not only Dr. Weight, but also by DNRC itself), the PDD and FO ignored the fact that by reducing the volume sought under the application to zero out any net depletion other than at Living Springs itself, there can be no issues with depletion below DeBuff's property. Tr. 129:18-25.

At the Show Cause Hearing Mr. Folnagy was asked:

Q: And didn't the applicant then modify the application and reduce volume to, in effect zero out consumption?

A. Yes.

Despite having acknowledged the application would zero out consumption from that naturally occurring at Living Springs, Mr. Folnagy stated he did not carry the ET analysis through because he did not believe the information showed the wetland would be disconnected from the source aquifer. Tr. 78:4-6.

As the Water Court recognized, DeBuff structured their amended application using DNRC's own technical analysis of ET to eliminate all calculated depletion at

Southern Springs regardless of any factual disputes about the nature of the aquifer. Order, p. 19. By not analyzing ET in either the PDD or the FO, DNRC failed to provide any explanation why DeBuff had not demonstrated the amended application had eliminated any concerns with net depletion. Id. Without doing so, the Water Court found DNRC lacked any basis to conclude DeBuff failed to meet the legal availability criteria. Id. DNRC's failure to do so was error of law and arbitrary and capricious. Id. The Water Court's Order is entirely correct on the failure of the PDD and FO to discuss, let alone assess, the ET evidence. The Order should be affirmed.

E. The Water Court Properly Determined DNRC Incorrectly Concluded DeBuff Had Failed to Demonstrate Lack of Adverse Effect.

Proof of lack of adverse effect is an independent obligation of DeBuff's to demonstrate under M.C.A. § 85-2-311(1)(b). As the Water Court held, the burden on DeBuff's is to prove the criteria by a preponderance, meaning it is "more likely than not" that the proposed new use will not adversely affect other water users. Order, p. 20. If DeBuff's demonstrated the criteria by a preponderance, denying the application is arbitrary and constitutes an abuse of discretion. Id., citing, M.C.A. § 2-4-704(a)(iv); *Hohenlohe*, ¶ 65.

In reviewing the record, the Water Court recognized DeBuff had focused their adverse effect proof on demonstrating how downstream water rights were

actually used, and what such use indicates about the nature or character of Elk Creek. Id. As the Water Court's review of the record determined, DeBuff's evidence demonstrated the water rights actually used on Elk Creek were "water spreading" rights which further demonstrates Elk Creek was likely ephemeral in nature. Id., at 21.

Once DeBuff's demonstrated the Elk Creek rights were actually water spreading rights, DNRC had the obligation to review this evidence independently before rejecting it. Order, p. 21. Instead, DNRC's PDD and FO simply stated the agency was obligated to take the claims at face value without addressing or evaluating DeBuff's evidence. AR 1, FOF 21.

As the Water Court correctly determined, the terms of the Water Use Act require DNRC to have considered DeBuff's evidence to consider the nature of Elk Creek and whether DeBuff's demonstrated the new use could be accommodated without injury to other users. As the Water Court determined DNRC's failure to acknowledge DeBuff's offered evidence was arbitrary and capricious and constituted an abuse of discretion under the circumstances. Id. at 22. As the Water Court reasoned DNRC's arguments that it must apply a standard under which "any doubt" must be resolved in favor of existing rights is inconsistent with the § 85-2-311 criteria which only requires proof by a preponderance. Id. pp. 21-22, ft. 11.

The Water Court's determination that DNRC's failure to apply or review DeBuff's evidence was arbitrary, and an abuse of discretion, is correct. DNRC was obligated to consider DeBuff's evidence which if reviewed would have further demonstrated Elk Creek is likely ephemeral and that appropriating groundwater could have no effect on Elk Creek water rights. The Water Court's adverse effect determinations should be affirmed.

VII. CONCLUSION

The Water Court's Order reversing and remanding the DNRC's Final Order denying the DeBuff application properly applied the MAPA standards of judicial review of agency action. The Water Court's Order should be affirmed.

Respectfully submitted this 19th day of August, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,973, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ John E. Bloomquist
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CERTIFICATE OF SERVICE

I, John E. Bloomquist, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-19-2020:

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