IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 21-0535

FLATHEAD LAKERS INC., a Montana non-profit public benefit corporation, AMY J. WALLER, STEVEN F. MOORE, CYNTHIA S. EDSTROM, ADELE ZIMMERMAN, MARTIN FULSAAS and GAIL A. WATSON-FULSAAS, LAUREL FULLERTON, ALAN and DEIRDRE COIT, and FRANK M. WOODS,
Petitioners/Appellees,

WATER FOR FLATHEAD'S FUTURE,
Intervenor/Appellee,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,
Respondent/Appellant,

and MONTANA ARTESIAN WATER COMPANY,
Respondent/Appellant.

On Appeal from the Montana First Judicial District Court, Lewis and Clark County,
Honorable Kathy Seeley Presiding
Cause No. CDV-2018-135

APPELLANT MONTANA ARTESIAN WATER COMPANY'S OPENING BRIEF

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ISSUES PRESENTED

1. Did the Montana DNRC Hearing Examiner err when he determined that the omission of certain aquifer testing information from the beneficial water use application along with the evidence presented during the contested case proceedings was sufficient to determine that the statutory criteria for issuance of the permit was met by a preponderance of the evidence?

2. Does MAPA allow a reviewing court to reverse an agency decision on a technicality where no prejudice has occurred and the only potential prejudice is speculative and unsubstantiated?

STATEMENT OF THE CASE

This appeal involves an application for a beneficial water use permit filed by the Montana Artesian Water Company ("MAWC"). MAWC proposed to pump 1 cubic feet per second "CFS" (450 gallons per minute "GPM") up to 710.53 acre feet annually from a well for commercial and geothermal use in a water bottling plant. The beneficial water use permit was designated as Permit No. 76LJ 30102978. The well is located in the Flathead Valley and is completed in a deep alluvial aquifer commonly referred to by the Montana Bureau of Mines and Geology as the "Deep Aquifer."

On June 24, 2015, MAWC submitted the application to the Kalispell Water

Resources Office of the Department of Natural Resources and Conservation ("Department" or "DNRC"). AR, 1.3 at 1[1], Preliminary Determination to Grant Permit of Application for Beneficial Water Use Permit No. 76LJ 30102978 by MAWC ("PDG"). On August 28, 2015, the Department sent MAWC a deficiency letter under Mont. Code Ann. § 85-2-302. AR 1.16. MAWC responded with additional information on September 25, 2015. AR 1.14. The Department determined the application was correct and complete as of December 30, 2015. AR 1.8.

On January 14, 2016, the Department issued the PDG pursuant to Mont. Code Ann. § 85-2-307(2)(a)(ii). AR 1.1 ¶ 6, Final Order from David A. Vogler, DNRC Hearing Examiner ("Final Order"), Attached as Appendix B. The Department found and concluded that MAWC proved by a preponderance of the evidence that each of the applicable Mont. Code Ann. § 85-2-311(1)(a-e) ("§-311") criteria were satisfied. Final Order at 32.

The Department published notice of the PDG on January 27, 2016 in a Kalispell news publication, and also served notice on individuals and entities known by the Department to be interested parties on January 26, 2016. Final Order ¶ 7. Due to extensive public interest, the Department re-noticed the public

[1] Citations to the Department's record are listed as "AR" followed by the file number and tab number as listed in the Department's Certificate of Record Attached as Appendix A.

by individual service and publication in the same newspaper in March 2016 and extended the objection deadline by 60 days. Final Order ¶ 7.

The application received 39 valid objections. Final Order ¶ 8. As a result, the Department was required to conduct a contested case hearing on the objections. Final Order ¶ 11. The Objectors singularly or collectively objected to each of the Mont. Code Ann. § 85-2-311 permit criteria including: physical availability, legal availability, adverse effect, adequate means of diversion, beneficial use, possessory interest, and effect on water quality of a prior appropriator. Final Order ¶ 11.

Prior to the hearing, the parties agreed to brief preliminary issues related to the burden of proof required under this application. Final Order ¶ 13. These issues were fully briefed and on October 28, 2016, the Department Hearing Examiner issued his Order on Preliminary Issues concluding that the fact that bottled water may subsequently be sold out of state does not trigger the requirements of Mont. Code Ann. § 85-2-311(4), and thus the burden of proof is the preponderance of the evidence. AR 6.94 at 3, Order on Preliminary Issues.

Objector Flathead Lakers[2] notified the Department that it would not participate in the submission of evidence, calling of witnesses, argument or briefing any of the issues to be presented at the contested case hearing. AR 7.101,

[2] The Objectors are identified by either "Objectors" which includes the Flathead Lakers, or by "Objector group" which includes the individual persons identified.

Flathead Lakers' Notice. However, Flathead Lakers notified the Department that it disagreed with the Department's ruling made on the evidentiary standard, and preserved that issue for appeal should the Hearing Examiner approve the application over the other objections. AR 7.101 at 2.

The Department issued a scheduling order and extensive discovery was conducted by the parties. The Department set a hearing for September 19, 2017. AR File 7.110, Notice of Hearing Location.

The hearing on objections to the PDG was conducted in Kalispell, Montana, on September 19-21, 2017. Objectors at the hearing included the Objector group, Richard and Glenda Billman, Doris Carroll, and the United States Fish and Wildlife Service ("USFWS"). Final Order at 1-2. The Applicant appeared and Department employees Kathy Olsen, Nate Ward, Attila Folnagy, and Russell Levens were examined by and provided testimony for all parties. Final Order at 2. At the close of the hearing, the Department established a briefing schedule for submission of closing briefs. AR 9.148, Minute Order; Notice for Filing Closing Briefs. The Applicant, Objector USFWS, and Objector group each filed closing briefs.

On January 26, 2018, the Department issued its Final Order, granting the permit as provided for in the PDG issued by the Kalispell Water Resources Office. On February 23, 2018, Objector group petitioned the Montana First Judicial

District Court, Lewis and Clark County for judicial review of the DNRC's Final Order. DR 1, Petition for Judicial Review[3]. The Objector group sought reversal on five grounds: 1) The Department erred by relying on a scientifically deficient and legally noncompliant aquifer test to conclude that MAWC met its burden under Mont. Code Ann. § 85-2-311(1)(a)-(b); 2) The Department erred in concluding that MAWC met its burden to prove water is legally available in all sources which could be impacted by the permit; 3) The Department's limited adverse effect analysis conflicts with the plain language of Mont. Code Ann. § 85-2-311, and the primary purpose of the Water Use Act: protecting senior rights; 4) The Department's conclusions of law regarding water quality are clearly erroneous in light of the Hearing Examiner's pre-trial order and evidentiary rulings at trial which restricted the admission of evidence regarding Montana Department of Environmental Quality ("DEQ") permits; and 5) The Department was incorrect to conclude that MAWC met its burden of proving a beneficial use of water because its proposed use is speculative. *See generally*, DR 34, Objector Group's Opening Brief in Support of Petition for Judicial Review.

Also on February 23, 2018, Objector Flathead Lakers Petitioned the Montana First Judicial District Court, Lewis and Clark County for judicial review

[3] Citations to the District Court record are listed as "DR" followed by the Doc. number as listed on the Court's Case Register Report.

of the DNRC's Final Order. DR 2 at 1. Objector Flathead Lakers sought reversal for the contention that the Department applied an incorrect standard of review where the proceedings failed to apply the heightened burden of proof applicable under Mont. Code Ann. § 85-2-311(4).

On March 16, 2018, Applicant MAWC answered and acknowledged Objector Group and Objector Flathead Laker's petitions for judicial review. *See* DR 6. On March 19, 2018, the Department similarly acknowledged Petitioner's briefs. Briefing was completed and the Court set an oral argument on November 20, 2018.

On March 26, 2019, the District Court reversed and remanded the Department's Final Order. DR 66, Order on Petition for Judicial Review-Reversed and Remanded. The District Court determined that reversal was proper under one issue: Failure to Require the Mandatory Components of Aquifer Tests Required by Mont. Code Ann. § 85-2-311. DR 66 at 4-5.

On May 28, 2019 MAWC and the Department both filed appeals of the District Court's Order. No cross-appeals were filed by any other party.

On May 26, 2020 this Court reversed and remanded the decision of the District Court finding the MAWC permit application Form 633 missing information was not necessary information required for the application to become

correct and complete, and after 180 days without notification of defects the application was correct and complete as a matter of law. DR 83 ¶ 18.

On November 30, 2020, Objectors again petitioned the District Court for judicial review of the DNRC's Final Order. DR 104 at 1. Objectors sought reversal on four grounds: 1) The Department's consideration and approval of MAWC's application in spite of its scientific and legal deficiencies was arbitrary and capricious; 2) The Department's conclusion that MAWC met it's burden of proving water was legally available in all sources which could be depleted was incorrect as a matter of law and based on arbitrary and capricious findings; 3) The Department erred in concluding MAWC met it's burden of proving §-311(1)(b) by affirming DNRC's use of pre-determined and unreasonable adverse effects analysis; and 4) The Department's findings related to water quality were arbitrary, capricious and clearly erroneous in light of the Hearing Examiner's pre-trial order and evidentiary rulings at trial unlawfully and unequally restricting the admission of relevant evidence.

On September 30, 2021, the District Court again reversed and remanded the Department's Final Order. DR 123, Order on Remand ("Order on Remand"), Attached as Appendix C. The District Court determined that reversal was proper under four issues: the Hearing Examiner's arbitrary and capricious findings or clearly erroneous conclusions regarding §-311 criteria for physical availability,

legal availability, adverse effect; and adverse effect to water quality. *Id*. at 13, 16, 22, 23, 25.

On October 29, 2021, MAWC filed its appeal of the District Court's Order on Remand. DR 141. On February 9, 2022, DNRC filed its appeal of the District Court's Order on Remand. DR 157. On February 24, 2022, Objectors filed a cross appeal on the District Court's denial of Objector's Motion for Attorney's Fees.

STATEMENT OF THE FACTS

The MAWC facility is located in the Kalispell Valley just north of Flathead Lake and west of Flathead River. The geology of the vicinity where the MAWC facility and well is located is comprised of two divisions of aquifers: various shallow aquifers that are regionally discontinuous and the Deep Aquifer, present across the entire Kalispell Valley, an area of approximately 300 square miles. AR 8.121 at 3, Pre-filed Testimony of Roger Noble; Final Order ¶ 22. In the Kalispell Valley, the Deep Aquifer is the primary source of water for high-yield municipal, irrigation, commercial, and industrial wells. AR 8.121 at 4.

The Deep Aquifer receives recharge primarily from snowmelt infiltration from the surrounding mountain ranges with groundwater flow from the valley margins toward the center. AR 8.121 at 5. Then, the groundwater primarily flows to the south. AR 8.121 at 6. The Montana Bureau of Mines and Geology estimated the annual recharge of the Deep Aquifer was approximately 213,000

acre-feet per year, the volume of groundwater pumped from the Deep Aquifer was approximately 23,500 ac-ft/year with the remaining 190,000 ac-ft/year continuing to flow through the aquifer. Final Order ¶ 23.

The MAWC well is completed to a total depth of approximately 222 feet below ground surface into the Deep Aquifer. Final Order ¶ 24. The water level in the MAWC well is artesian, naturally flowing above the ground surface and has a static water level of approximately 28.8 feet above ground surface. Final Order ¶ 25.

Beginning on March 6, 2015, and continuing until March 15, 2015, hydrogeologists working for MAWC conducted a 72-hour pump test of the MAWC well including background water level monitoring prior to the test and recovery monitoring after the pumping has ceased. Final Order ¶ 26. This pump test was captured on the DNRC Form 633 and submitted to the DNRC along with an aquifer test report and certification from the applicant as MAWC's Application for Beneficial Use Permit, filed June 24, 2015. AR 1.7; AR 1.4.

On August 28, 2015, the DNRC sent MAWC a deficiency letter for Permit Application 76LJ 30102978 requesting additional information for the application to be determined correct and complete. AR 1.16 at 1. Therein the deficiencies identified by the Department requiring additional information were: 1) A detailed

description of the adequate means of diversion to the place of use under Mont. Admin. R. 36.12.1904; 2) A detailed description and diagram of the diversion and conveyance facilities and equipment used to put the water to beneficial use; 3) An explanation of the purpose for the flow rate and volume requested – such as calculations for annual bottle washing requirements; and 4) Information to support the authority of the application signatory as having said authority. On September 24, 2015, MAWC supplemented with an addendum addressing each of these information requests by the DNRC. AR 1.15.

The MAWC application technical analysis consisting of the Aquifer Test Report and Depletion Report was conducted by Department Hydrologist Attila Folnagy. AR 1.10; AR 13.235. The application was then determined to be correct and complete by the Department on December 30, 2015. AR 13.242. After public notice, consolidation of valid objections, and establishment of hearing schedule including discovery deadlines, the information exchange and depositions of party experts began in earnest. All told, expert reports and testimony were submitted by two experts from MAWC; five experts from the Objector group, one expert from the USFWS, and two experts for the Department who conducted and reviewed the aquifer test report and depletion report as well as each of the party's expert pre-filed testimony and reports. *See generally* AR 8.121-133; AR 9.141.

At the contested case hearing, these same ten experts testified as to their opinions on the validity of the pump test, the data that was collected for analysis and satisfaction of the permit criteria, and the potential for adverse effect to other water users. Specifically, significant testimony and evidence was presented regarding the completion of the MAWC well and observation wells used during the pump test, and the materiality of the missing Form 633 data as it pertained to the aquifer test. Final Order ¶¶ 16-19, 21-26.

Testimony at hearing by the DNRC hydrologists Attila Folnagy, who conducted the aquifer test analysis, and Russell Levens, who reviewed the aquifer test analysis, confirmed that the test was performed adequately and met the DNRC requirement for adequate information. Final Order ¶ 18 (citing Hr'g Tr. 306:6-307:9; 758:23-25; 762:25-763:12). DNRC's hydrologists agreed the aquifer test was a "very average test"; the pump test data was sufficient for analysis by DNRC; and the aquifer test analysis was valid and consistent with the level of analysis and evidence DNRC usually relies upon for its decisions regarding beneficial use applications. Final Order ¶ 18 (citing Hr'g Tr. 273:18-20; 304:23-25, 306:6-16, 23-25, 307:1-9, 758:23-25, 762:25, 763:1-12).

Significant testimony at the hearing considered the effect of missing Form 633 information on the pump test analysis including missing discharge measurements and well completion information for the observation wells. As

explained by the MAWC hydrologist who oversaw the pump test as to whether large fluctuations in the discharge measurement were observed during the pump test, Roger Noble testified,

> A. No, we did not. We - - on this test we used what's called a variable frequency drive for the submersible pump that's in the well, and you can fine-tune that drive to the tenth of an amp. And so instead of having a gate valve that controls it, you have this VSD, and it's a lot more consistent to use too. So those measurements – so those flows were – I guess, sometimes we just didn't write down flows if they're the same. We write down when there's a change, and if you looked at that, that's what we did. We wrote down when there was a change, it says something – "Flow adjustment" is what it says.
> Q: And those changes were on the order of one to two GPM?
> A: Exactly.
> Q: for a 455-gallon-per-minute test?
> A. Yes.

Final Order ¶ 18 (citing Hr'g Tr. 636:6-23).

Mr. Bennett, MAWC's second expert hydrologist conducting the pump test testified "once the water level has stabilized, we generally check on it, not necessarily record a flow rate." Final Order ¶ 19 (citing Hr'g Tr. 686:22-24). This discharge rate, even when not recorded, was confirmed by a flow totalizing meter that indicated an average discharge rate of 454.87 gallons per minute ("gpm") over the course of the 72-hour pump test, "corroborating the assertion that the pump test was a continual test at close to 455 gpm for 72 hours [with] no aberrations in the flow rate[.]." Final Order ¶ 19.

Significant testimony also concerned the completion depths of the observation wells. USFWS' expert Jaron Andrews stated the observation wells were completed in the Deep Alluvial Aquifer. AR 8.126 at 4; Hr'g Tr. 364:4-17. Objector's experts Willis Weight and Tom Meyers similarly concluded the Koch and MAWC wells were completed in the Deep Aquifer. Hr'g Tr. 494:19-25, 495:3-24; 415:9-24. Finally, DNRC's Folnagy testified the Koch, Nikol, and MAWC wells had similar hydraulic head elevations and the lithology of nearby wells were evidence they were completed in the same water bearing zone. Hr'g Tr. 304:2-10. Mr. Folnagy also identified that Mr. Koch's understanding of his price paid per foot of drilling corroborated the Koch well depth as understood by the DNRC and Applicant. Hr'g Tr. 271:16-272:1.

Regarding potentially affected surface water sources, Mr. Folnagy concluded that DNRC does not ignore surface water sources, "[w]e identify potentially connected surface waters, and that's the ones that we evaluate. That's the ones I evaluate." Hr'g Tr. 290:4-6.

Specifically, Folnagy testified that all other surface water sources in this reach of the Flathead are tributary to the Flathead River and Flathead Lake. Hr'g Tr. 301:16-19. This finding was confirmed by testimony of Roger Noble that Egan Slough is directly connected to the Flathead River and the water level is controlled via a headgate on the Flathead River. Hr'g Tr. 288:18-25; 289:1-7; 301:16-19;

614:22-24; 639:24-641:18. Mr. Folnagy testified other surface water bodies were identified by the DNRC within the MAWC well cone of depression (depletion zone); however, given the confining unit thickness between 200 to 300 feet thick near the MAWC well and Egan Slough, "the likelihood of the drawdown propagating through the confining unit and impacting Egan slough – it takes a lot longer for the drawdown to propagate through that thick of a confining unit. So we usually consider surface water bodies disconnected if there's a confining unit with that thickness beneath them." Hr'g Tr. 288:18-289:7.

Roger Noble corroborated DNRC's decision regarding DNRC's analysis of nearby surface water bodies stating,

> Because the upward vertical head in this area of the aquifer is so much above the shallow water table that even it's been shown – for instance, like the Nickol and Koch and MAWC wells, the head is about 30 feet above the ground surface. The water level in the shallow aquifer is about 12 feet below the ground surface. So there's 45 feet of head differential there, and DNRC's analysis shows that there would be about 17 feet at the worst in the immediate area of drawdown. So there's still a considerable vertical upward head that's discharging to those shallow zones.

Hr'g Tr. 604:25-605:11. Finally, Mr. Noble testified that both Egan Slough and Church Slough are in direct hydraulic communication with the Flathead River. Hr'g Tr. 614:16-24.

Petitioners appealed the DNCR's Final Order to the Montana First Judicial District arguing multiple grounds for reversal. DR 1. The District Court's Order on Petition to Review analyzed only two issues and found only one issue

dispositive: the failure to require the mandatory components of aquifer tests required by Mont. Code Ann. § 85-2-311. DR 66 at 5.

This Court reversed the District Court on the narrow issue of whether the permit was correct and complete as a matter of law. DR 83 ¶¶ 18-19.

The case was remanded to the District Court and Petitioners again appealed the DNRC's Final Order arguing the §-311 criteria were not satisfied. DR 104. On September 30, 2021, the District Court issued its Order on Remand finding the Hearing Examiner was arbitrary and capricious in determining the §-311 criteria for physical availability, legal availability, and adverse effect were satisfied by a preponderance of the evidence, and reversing the Hearing Examiner's conclusion on one evidentiary issue with respect to water quality finding the exclusion of evidence arbitrary and capricious. Order on Remand at 16, 22, 23, 25. The District Court vacated the DNRC Final Order and remanded the matter to the DNRC for further consideration. *Id*. at 26.

The District Court found the Hearing Examiner's decision arbitrary and capricious based on the following: for physical availability, the Final Order was arbitrary and capricious where it was based on a presumption that aquifer discharge measurements remained constant despite a lack of data for this finding. *Id*. at 12. Additionally, while the Court agreed the evidence established one or more observations wells were in the same aquifer with the MAWC well, the

missing well depth, dimensions, and perforated intervals for each observation well was important information that without, could have significant implications. *Id*. at 15. As such, the Hearing Examiner's conclusion that water was physically available was arbitrary and unmotivated based on the record. *Id*. at 16. Regarding legal availability, the Court found the Hearing Examiner's conclusion was clearly erroneous based on the Court's determination that substantial evidence supported the opposite conclusion that MAWC's application failed to meet the legal availability criteria. *Id*. at 19.

The District Court did not substantively analyze the Hearing Examiner's adverse effect conclusions except to note that given the Court's ruling on physical and legal availability, the Hearing Examiner's conclusion regarding adverse effect was not supported by substantial evidence and thus clearly erroneous. *Id*. at 23. Finally, the District Court reversed the Hearing Examiner's findings on water quality holding the conclusion was based *in part* on MAWC having or obtaining the necessary water quality and wastewater treatment permits. Order on Remand at 24. The Court concluded that given the Eleventh District Court's ruling that the DEQ issued MAWC a Montana Pollutant Discharge Elimination System ("MPDES") permit without taking a "hard look at the environmental impacts raised by sister agencies as required by the Montana Environmental Policy Act ("MEPA"), to the extent the Hearing Examiner and DNRC found the DEQ's

permits, including the MPDES permit, ensured that water quality would not be adversely affected, the Court reversed the Hearing Examiner's conclusion on that issue. Finally, the District Court found that beneficial use was correctly found by the Hearing Examiner and did not disturb that ruling. *Id*. at 26.

STANDARD OF REVIEW

The Montana Administrative Procedure Act ("MAPA") governs judicial review of final agency decisions. A reviewing court may reverse or modify an agency decision if substantial rights of the appellant have been prejudiced because the administrative decision is, among other reasons: affected by an error of law; clearly erroneous in view of the whole record; or arbitrary or capricious. Mont. Code Ann. § 2-4-704(2)(a)(iv)-(vi). A district court reviews an administrative agency's conclusions of law for correctness. *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 11, 391 Mont. 328, 417 P.3d 1100 (citing *Molnar v. Fox*, 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824). The same standard of review applies to this Court's review of the District Court's decision. *Molnar*, ¶ 17.

Interpretations of administrative rules are questions of law. *St. Personnel Div. v. Child Support Investigators*, 2002 MT 46, ¶ 62, 308 Mont. 365, 43 P.3d 305. This Court reviews questions of law for correctness. *Id*. at ¶ 20. An agency's interpretation of an administrative rule must be afforded great weight, and must be

sustained "so long as it lies within the range of reasonable interpretation permitted by the wording" and is not "plainly inconsistent with the spirit of the rule." *Clark Fork Coalition v. Dep't of Environmental Quality*, 2012 MT 240, ¶ 19, 366 Mont. 427, 288 P.3d 183 (citing *Clark Fork Coalition v. Dep't of Environmental Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482). Agency decisions are afforded "great deference," "especially where it implicates substantial agency expertise." *Winchell v. Mont. Dep't of Nat. Resources & Conserv*., 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132.

A district court reviews an administrative agency's findings of fact to determine whether they "are clearly erroneous in view of the reliable, probative and substantial evidence in the whole record." *Langager v. Crazy Creek Products, Inc.,* 1998 MT 44, ¶ 13, 287 Mont. 445, 954 P.2d 1169, quoting *State Personnel Div. of Dep't of Admin. v. Bd. of Personnel Appeals, Div. of Dep't of Labor and Industry*, 255 Mont. 507, 511, 844 P.2d 68, 71 (1992) (citations omitted); *see also* Mont. Code Ann. § 2-4-704. An agency's conclusion of law will be upheld by a district court "if the agency's interpretation of the law is correct." *Langager,* ¶ 13, quoting *Dep't of Admin.,* 255 Mont. at 511. This Court, "in turn employ[s] the same standards when reviewing the district court's decision, and must accordingly determine whether an agency's findings of fact are clearly erroneous and whether its conclusions of law were correct." *Langager,* ¶ 13.

The district court applies the following three-part test to determine whether an agency decision is clearly erroneous: 1) The record will be reviewed to see if the findings are supported by substantial evidence; 2) If the findings are supported by substantial evidence, it will be determined whether the trial court misapprehended the effect of [the] evidence; and 3) If substantial evidence exists and the effect of [the] evidence has not been misapprehended, the Supreme Court may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. *Fauque v. Montana Pub. Employees' Ret. Bd.*, 2014 MT 184, ¶ 17, 375 Mont. 443, 329 P.3d 593, (citing *Weitz v. Mont. Dept. of Natural Res. & Conserv.,* 284 Mont. 130, 133–34, 943 P.2d 990, 992 (1997)).

Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Fauque*, ¶ 18 (citing S*imms v. State Comp. Ins. Fund,* 2005 MT 175, ¶ 11, 327 Mont. 511, 116 P.3d 773). The test is not whether the evidence might support a different conclusion, but whether there is substantial evidence in the record to support the conclusion reached by the agency. *Fauque*, ¶ 18 (citing *Knowles v. State ex rel. Lindeen,* 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595).

An agency decision is "arbitrary and capricious" only where it appears to be "random, unreasonable or seemingly unmotivated, based on the existing record" not simply a difference of opinion. *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993).

SUMMARY OF THE ARGUMENT

MAWC appeals the District Court's reversal and remand of the Hearing Examiner's Final Order regarding beneficial water use permit No. 76LJ 30102978. The Final Order granted MAWC's Application for a Beneficial Use Permit on the basis that MAWC has proved all applicable criteria by a preponderance of the evidence. Final Order at 32. The District Court reversed on the following bases: the Hearing Examiner was arbitrary and capricious in finding water physically available given the missing discharge data and well completion information the District Court found material to the physical availability determination; the Hearing Examiner erroneously circumvented the requirements of Mont. Admin. R. 36.12.1704 and Mont. Admin. R. 36.12.1705 by failing to analyze all possible surface water sources that could be reduced by MAWC's application and thus did not demonstrate by a preponderance of the evidence that water was legally available for MAWC's appropriation; the Hearing Examiner's determination of no adverse effect was clearly erroneous and not supported by substantial record evidence given the Court's determinations regarding both physical and legal

analyses; and the Hearing Examiner's conclusion on adverse effect to water quality was erroneous, in part, based on inclusion of the DEQ MPDES permit as evidence supporting water quality standards where the Eleventh District Court determined MAWC's MPDES permit was unlawfully granted for failure of the DEQ to "take a 'hard look' at the environmental impacts raised by sister agencies as required by MEPA." *See* Order on Remand at 16, 22-24.

The Hearing Examiner's decision to grant MAWC's Application for a Beneficial Water Use Permit was correct and consistent with law. The Hearing Examiner reviewed the Department's PDG and, after a contested case hearing, determined that the Department's procedure was correct and the evidence submitted by MAWC and the process followed by the Department was sufficient to meet the preponderance of the evidence standard necessary for a permit application.

The District Court reversed the Final Order based on errors of law. The District Court wrongly determined that the missing Form 633 information was material, was not substantiated by other evidence on the record, and incorrectly substituted its judgment for that of the Department in weighing the evidence. The District Court similarly erred by reversing the Final Order without any evidence of prejudice to the Objectors. The only prejudice identified was speculative and is

not sufficient to warrant reversal. Consequently, the District Court's Order on Remand should be reversed.

ARGUMENT

The Hearing Examiner's decision to grant MAWC's Application for a Beneficial Water Use Permit conforms with law, is supported by substantial evidence, and is entitled to deference. The Department must issue a permit for beneficial water use "if the applicant proves by a preponderance of the evidence that [certain] criteria are met." Mont. Code Ann. § 85-2-311(1). The criteria, listed in the same statute, include physical availability of water, legal availability of water, no adverse effect to prior appropriator's rights, adequate means of diversion, beneficial use, possessory interest, and no adverse effect to water quality. *Id.* The rules and procedures for evaluating the criteria, weighing the evidence, and determining whether the statutory requirements have been met are developed by the responsible agency. *See* Mont. Code Ann. § 85-2-311(1), (7).

The Department complied with statutory law and its own rules and procedures in finding that substantial evidence supported satisfaction of the Mont. Code Ann. § 85-2-311 criteria and thus granting the beneficial water use permit. An agency's interpretation of its own rules, procedures, and policies is "afforded great weight," and a court must "defer to that interpretation unless it is plainly

inconsistent with the spirit of the rule." *Knowles*, ¶ 22. Similarly, a court must defer to an agency's statutory interpretations where the agency is interpreting statutes "it has been authorized by the legislature to administer." *Lewis v. B & B Pawnbrokers Inc.*, 1998 MT 302, ¶ 43, 292 Mont. 82, 968 P.2d 1145.

The District Court in this matter erred by substituting its judgment for the Hearing Examiner as to questions of fact that lie squarely within the agency's area of expertise and erred by imposing an improper standard of review on the Hearing Examiner's findings and conclusions. The District Court failed to afford the Hearing Examiner any deference on questions of fact or in its interpretation of procedures, rules, regulations, and statutes that the agency is authorized to administer and failed to recognize the substantial evidence relied upon by the Hearing Examiner in finding the §-311 criteria satisfied.

I. The District Court improperly excluded evidence relied upon in reversing the Hearing Examiner's findings on physical availability.

The Hearing Examiner's determination that water is physically available at the proposed point of diversion in the amount sought by MAWC was appropriately established by the record and is entitled to deference by this Court. *See* Final Order ¶ 32. The District Court erred by both interpreting and disregarding evidence on the record, and thus substituted its own judgment on the weight of the evidence for that of the Department. In doing so, the District Court committed an

error of law. *See* Mont. Code Ann. § 2-4-704(2). "The court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact.").

The District Court made two errors in reversing the Hearing Examiner's determination on physical availability; first holding that DNRC's physical availability conclusion was based on a presumption that aquifer discharge measurements remained constant despite a lack of data for this finding; and second agreeing with the Hearing Examiner that substantial evidence supported the finding that observation wells were completed within the same water-bearing zone or aquifer, but then disagreeing with the Hearing Examiner that the omitted well depths, dimensions and perforated intervals were immaterial, and holding the Hearing Examiner's conclusion was arbitrary and capricious.

The Hearing Examiner weighed the testimony and exhibits at the contested case hearing regarding the missing Form 633 information, including the discharge measurements, the well completion depths, perforated intervals, and well diameters and concluded that the missing information would not change his determination. Final Order ¶¶ 17-21 (explaining why the omissions were immaterial and concluding that the evidence submitted was sufficient to justify granting the application). The District Court did not identify any flaw in the Hearing Examiner's reasoning but instead found that the missing information was material

and "may have created an inaccurate picture of water availability and may have also caused inaccuracies throughout the entire -311 criteria review process." Order on Remand at 13.

Not only did the District Court disregard the data relied up by the Hearing Examiner as corroborating the discharge measurements, the District Court also cited to arguments of counsel and speculative and generic concerns from USFWS' expert to conclude that the missing well diameters and perforated intervals was material and the Hearing Examiner's determination in lieu of that necessary information was arbitrary and capricious. *Id*. at 15-16. The District Court's findings are not supported by the record identifying a discharge flow totalizer that corroborated the instantaneous flow measurements and lack of large fluctuations in discharge rate throughout the pump test. Final Order ¶¶ 18-19. The District Court's findings are also internally contradictory where the court found substantial evidence supported the Hearing Examiner's findings that the observation wells were completed in the same aquifer or water bearing zone but then found the lack of perforation intervals suggests the wells could be drawing water from multiple aquifers. *See* Order on Remand at 12, 15-16. This contradiction concerning the perforation intervals is not supported by any evidence, directly conflicts with the Court's own determination that substantial evidence supports that the wells are completed in the same aquifer and is an incorrect and unlawful substitution of

judgment of the evidence for that of the agency. *See* Mont. Code Ann. § 2-4-704(2).

The Hearing Examiner did not commit an error of law in concluding that substantial evidence supported the physical availability criteria. Even if the Hearing Examiner had committed an error of law, however, the District Court could not reverse the Hearing Examiner's Order unless the Objectors' substantial rights were prejudiced. Mont. Code Ann. § 2-4-704(2) (prohibiting a court from reversing an agency decision unless the decision prejudiced substantial rights of the appellant). In this case the District Court was unable to identify any prejudice – and in fact none has occurred – as a result of the Hearing Examiner's Order, so reversal was improper.

II. The District Court's reversal was improper where the substantial rights of the objectors have not been prejudiced.

The District Court erred by reversing the Hearing Examiner's Order based on speculation that missing discharge and well completion information could impact the §-311 criteria review process. *See* Order on Remand at 13. Under the Montana Administrative Procedure Act (MAPA), a court may reverse an agency decision only when the "substantial rights of the appellant *have been* prejudiced" by an agency error. Mont. Code Ann. § 2-4-704(2) (emphasis added). In particular, a court may reverse an agency action if an appellant is prejudiced by "administrative findings, inferences, conclusions, or decisions [that] are . . . clearly

erroneous in view of the reliable, probative, and substantial evidence on the whole record [or] . . . arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion[.]" Mont. Code Ann. § 2-4-704(2)(a)(v)-(vi). Any error committed by the agency that did not prejudice substantial rights of the Objectors was harmless and did not warrant reversal. *See Newbauer v. Hinebauch*, 1998 MT 115, ¶ 20, 288 Mont. 482, 958 P.2d 705 ("[N]o civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless.")

Potential prejudice and hypothetical harm are not grounds for reversal, under MAPA the prejudice must have actually occurred. Mont. Code Ann. § 2-4-704(2) (allowing a court to reverse an agency action if "substantial rights of the appellant have been prejudiced"). To warrant reversal, the prejudice must be concrete, not merely speculative. *Mont. Power Co. v. Mont. Public Serv. Comm'n*, 2001 MT 102, ¶ 32, 305 Mont. 260, 26 P.3d 91 ("[A] court will not act when the legal issue raised is only hypothetical or the existence of controversy is merely speculative."). The prejudice feared by the District Court in this case is purely speculative. *See* Order on Remand at 12, 15-16 (opining that "omission of this evidence *may have* created an inaccurate picture of water availability and *may also have* caused inaccuracies throughout the entire -311 criteria review process" and citing favorably to Objectors arguments that "the well *may* be drawing more or less water

from both above and below a confining unit" and "*[i]f* the observation wells have defects . . .the calculated aquifer properties are *likely* wrong." (emphasis added)).

Neither the District Court nor the Objectors identified any actual harm resulting from the Department's acceptance of an incomplete Form 633. The District Court erred by reversing the Hearing Examiner's Order without finding actual prejudice. MAWC and the Department each acknowledge that the Form 633 attached to the permit application lacked certain information; however, the Hearing Examiner did not, as the District Court suggests, merely gloss over this fact to determine the physical availability criteria was satisfied. To the contrary, the Hearing Examiner addressed the missing discharge data, determined that corroborating information substantiated the discharge rate, and concluded that the remaining missing information was not necessary to evaluate the application and physical availability criteria. Final Order ¶¶ 19-21.

The District Court erred by reversing the agency's decision on physical availability based on improperly weighing the evidence and substituting its own judgment on the evidence for that of the Department. The District Court erred as a matter of law and this Court should reverse and reinstate the Department's Final Order finding MAWC established physical availability by a preponderance of the evidence.

III. Substantial evidence supported the Hearing Examiner's conclusion that water is legally available and all potentially affected surface water sources were analyzed.

The District Court erred by reversing the Hearing Examiner's Order based on its determination that substantial evidence supported the Court's conclusion that not all potentially affected surface water sources were analyzed by the DNRC. *See* Order on Remand at 22. The District Court concluded "the testimony at the contested case hearing demonstrates that MAWC's application and DNRC's review of that application did not demonstrate by a preponderance of the evidence that water was legally available for MAWC's appropriation. If other water sources such as several sloughs and artesian springs could be reduced by MAWC's operation, further legal availability analysis is required." *Id*.

The District Court's conclusion is predicated on testimony largely from DNRC's *reviewing* expert, Russ Levens who did not complete any of the application analyses and was brought in only after the valid objections were received to review the expert opinions and application materials. Hr'g Tr. 705:16-18, 700:1-4. Missing from the District Court's examination of testimony is any reference to DNRC's Hydrologist Folnagy who processed the application, conducted the technical analyses and testified extensively on the thickness of the local confining unit, the proximity to the Flathead River, and the direct hydrologic connection of the Flathead River to Egan and Church Slough. *See Supra* at 13-15.

The Hearing Examiner correctly concluded that the DNRC identified those surface water sources that could be depleted by MAWC's pumping from the Deep Aquifer. Even Objectors' experts identified only Egan Slough as potentially impacted, and that source was definitively identified as both protected from depletion by a 200-300 feet confining layer between the Deep Aquifer and the slough, and was directly connected to the Flathead River via a headgate. *See* Hr'g Tr. 399:1-25, 416:1-20, 419:12-14, 569:11-24. The Hearing Examiner's interpretation, not the District Court's is correct, *see* Mont. Admin. R. 36.12.1704 (stating the department will identify the existing legal demands on the source of supply and those waters to which it is tributary and which the department determines *may be* affected by the proposed appropriation") and that interpretation is entitled to deference. *See Knowles*, ¶ 12.

The District Court erred by disregarding this evidence relied upon by the Hearing Examiner, and substituting its own decision on the weight of the evidence and the conclusion that the Hearing Examiner *should have* reached based thereon. Order on Remand at 22. "The test is not whether the evidence might support a different conclusion, but whether there is substantial evidence in the record to support the conclusion reached by the agency." *Knowles*, ¶ 21. The District Court substituted its judgment of the evidence for that of the Hearing Examiner, but entirely disregarded the testimony of the DNRC's Hydrologist Folnagy and

MAWC's Roger Noble supporting the DNRC's conclusion regarding connected surface water sources where both experts testified to the thick confining unit in the vicinity of the MAWC well, the proximity of the deeply-incised Flathead River, and the direct hydraulic connection to the surface water bodies in the vicinity. *Supra* at 13-15.

While the District Court disregarded that testimony to reach a different conclusion, the Hearing Examiner's Order held the Department identified those potentially-impacted surface water sources pursuant to Mont. Admin. R. 36.12.1704 and any oversight by the Department in omitting Egan Slough from its depletion table in the PDG was inconsequential given the direct connection between Egan Slough and the Flathead River.

The Hearing Examiner's determination as to the sufficiency and weight of the evidence submitted to support a finding of legal availability is entitled to deference. The District Court unlawfully substituted its judgment of the evidence for that of the agency, so reversal was improper. *See* Mont. Code Ann. § 2-4-704(2) ("The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.").

Finally, the District Court's reversal of the Hearing Examiner's conclusion regarding Adverse Effect, pursuant to § 85-2-311(1)(b), was erroneously predicated entirely upon the District Court's reversal of both physical and legal

availability determinations by the Hearing Examiner. *See* Order on Remand at 22, (concluding that without additional information by the Department necessary to conclude that water in the Deep Aquifer is legally and physically available, the Hearing Examiner's conclusion regarding adverse effect is not supported by the substantial record evidence and is therefore clearly erroneous). As previously discussed, the Hearing Examiner correctly determined, based on the weight of the evidence, that both physical and legal availability criteria were satisfied. As such, the District Court's non-substantive reversal of the Hearing Examiner's conclusion as to adverse effect should be reversed.

IV. The Hearing Examiner found by a preponderance of the evidence the water quality of prior appropriators would not be affected and that ruling should not be disturbed.

The Hearing Examiner held a preponderance of the evidence established no adverse effect to the water quality of senior appropriators. *See* Final Order ¶ 100. This conclusion was supported by substantial evidence, is correct and entitled to deference. *Knowles*, ¶ 21. The District Court reversed the Hearing Examiner's findings and conclusion on adverse effect to water quality only as to one piece of evidence: recognition of the DEQ MPDES permit. *See* Order on Remand at 25 (stating the Eleventh Judicial District ruled DEQ issued MAWC the permit without taking a "hard look" at the environmental impacts under MEPA and thus, while this ruling related to MEPA rather than the §-311 criteria, was germane to the issue

of MAWC's adverse effect on prior appropriator's water quality). The District Court did not address or disturb any other finding on adverse effect to water quality by the Hearing Examiner and it is unclear whether the intent of the District Court was to call into question whether substantial evidence supported the Hearing Examiner's conclusion. *Id*. at 24-25.

The Hearing Examiner correctly identified that the applicant must prove, by a preponderance of the evidence that "the water quality of a prior appropriator will not be adversely affected" only if a valid objection is filed. Final Order ¶ 97 (citing Mont. Code Ann. § 85-2-311(1)(f), 85-2-311(2)). The Hearing Examiner correctly identified the Objectors failed to introduce any evidence supporting their claim of adverse effect to water quality in two ways: 1) Objectors initial objection contained mere allegations that surface or underground water discharges from the project *could* adversely affect the water quality of a prior appropriator without substantive evidence in support; and 2) Assertions that drawdown results in turbidity *affecting* water quality of senior water users – but not alleging *adverse effect* from increased turbidity. *See* Final Order ¶ 92. Likewise, the Hearing Examiner held the Objectors produced no evidence to clarify or support the water quality objection. *Id*. ¶¶ 96, 98.

In support of the Hearing Examiner's conclusion of no adverse effect, multiple lines of evidence were introduced at the contested case hearing and relied

upon as establishing a preponderance of evidence that water quality of a prior appropriator would not be adversely affected by the MAWC application. *Id*. at ¶¶ 93-95, 99. The District Court does not disturb these other lines of evidence or even identify the respective weight of each. The District Court's Order holding the MPDES permit should not be relied upon as proof sufficient to satisfy §-311(1)(f) is not, in and of itself, sufficient for this Court to alter or reverse the Hearing Examiner's ultimate conclusion that water quality of prior appropriators will not be adversely affected. Objectors offered no evidence either at the objection phase or during the contested case hearing to support their objection, whereas the Hearing Examiner identified multiple findings specifically supporting no such adverse effect offered by MAWC. See Final Order ¶¶ 91-96. As such, the Hearing Examiner's order finding no adverse effect to the water quality of a prior appropriator was supported by a preponderance of the evidence and should be affirmed by this Court.

V. Award of attorney's fees is proper to applicant upon reversal of the District Court's Order on Remand.

The Hearing Examiner correctly found that the §-311 criteria were satisfied and the MAWC Application for a Beneficial Water Use Permit 76LJ 30102978 was granted thereupon. Since that Final Order was issued on January 26, 2018, the Objectors have doggedly pursued reversal at the District Court, forcing MAWC to

defend the Department's decision through Objectors' Petition for Judicial Review by the District Court, the subsequent appeal of that order to this Court, remand to the District Court -whereupon Objectors again petitioned for judicial review of the outstanding questions to the District Court, and finally this second appeal to this Court of the District Court's Order on Remand. *See Supra* at 5-8. Mont. Code Ann. § 85-2-125 provides for the recovery of costs and attorney fees by the prevailing party on appeal to the District Court. *See* Mont. Code Ann. § 85-2-125. On February 14, 2022, the District Court issued its Order on Motion for Attorney Fees agreeing that fees were appropriately awarded to the Objectors as the prevailing party in this action pursuant to Mont. Code Ann. § 85-2-125 and *Kenyon-Noble Lumber Co. v. Dependent Founds., Inc.* 2018 MT 308, ¶ 24, 393 Mont. 518, 432 P. 3d 133 (citations omitted). *See*, Order on Motion for Attorney Fees at 3[4].

MAWC recognizes that the District Court was without jurisdiction to issue that Order on Motion for Attorney Fees; given this Court's January 25, 2022, Order on Motion to Dismiss stating "the District Court had 60 days from the filing of the motion-not from the date of the Notice of Submittal-in which to rule upon the motion or to issue an order extending the time for ruling. Since the District Court did not do so, the motion for attorney fees was deemed denied by operation

[4] See DA 21-0535 Appellee's Notice Exhibit A filed with this Court on 2-23-2022.

of Rule 59 and the District Court lost jurisdiction." Order DA 21-0535 Jan. 25, 2022. However, the District Court's subsequent ruling on fees can be persuasive guidance to this Court that an award of costs and fees is appropriate given the resources and hardship foisted upon MAWC in defending the Department's determination and the resulting permit to appropriate water that has been unceasingly attacked since its inception. Where this Court reverses the District Court's Order on Remand and reinstates the Department's Final Order, MAWC asks that it's fees and costs be similarly awarded.

CONCLUSION

The District Court's Order on Remand should be reversed and vacated. Upon reversal, this case should be remanded with instructions to reinstate the Department's Final Order granting the Beneficial Water Use Permit and determining the reasonable costs and attorney fees to be recovered by MAWC under Mont. Code Ann. § 85-2-125.

Respectfully submitted this 13th day of May, 2022.

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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 8,276, EXCLUDING TABLE OF CONTENTS, TABLE OF AUTHORITIES, CERTIFICATE OF SERVICE, CERTIFICATE OF COMPLIANCE, AND APPENDICES.

/s/ Rick C. Tappan
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CERTIFICATE OF SERVICE

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