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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0268

MONTANA TROUT UNLIMITED, TROUT UNLIMITED, MONTANA ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS, and AMERICAN RIVERS,

Petitioners and Appellants,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and TINTINA MONTANA, INC.,

Respondents and Appellees.

REPLY BRIEF OF THE APPELLANTS

On Appeal from the Montana Fourteenth Judicial District Court
Meagher County, Hon. Michael Hayworth
Cause No. DV-2022-09

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INTRODUCTION

This case presents this Court with a consequential question. At issue, of course, is Tintina's unlawful plan to pump and impound millions of gallons of groundwater within Montana's Upper Missouri River Basin—the already "over-appropriated" home of the Smith River—without a permit or any enforceable mitigation measures. *See Montana Trout Unlimited v. DNRC*, 2006 MT 72, ¶ 8, 331 Mont. 483, 133 P.3d 224. The impacts of the Court's decision, however, will not be limited to a single mine or a single basin. As the appellant organizations emphasized in their opening brief, an opinion affirming DNRC's challenged "dewatering" loophole would allow mines across the state to "pump unlimited amounts of water from the ground—even in closed basins—so long as they avoid putting the water to 'further beneficial use' once it's above the soil." Opening Br. at 42 (quoting MCA § 85-2-505(1)(c)). "Indeed, nothing would stop mining companies from simply impounding their diverted water and allowing it to evaporate, ensuring it will never be returned to the ground." *Id.*

In their efforts to defend the Department's "dewatering policy," neither the agency nor Tintina have even attempted to argue that it is

anything more (or less) than an unlimited loophole—one that threatens significant harm to Montana's waters and senior rights holders. Instead, both the appellees and their amici urge this Court to look the other way. As they tell it, the only real question in this case is whether Tintina wants the protection of a water right for all of the groundwater it will have to divert and impound at the Black Butte Mine. In the absence of such a desire, the appellees contend, the Department is simply without "jurisdiction" to protect Montana's waters under the Water Use Act. *See, e.g.*, DNRC at 24–30; Tintina at 29–31.

The appellees' arguments should be rejected by this Court. As the appellant organizations have already demonstrated, Tintina's unpermitted diversion and impoundment promises to deplete surface-water flows in a basin that is already suffering from a "crisis" of over-appropriation. *See Montana Trout Unlimited*, ¶¶ 7–10. In the light of such impacts, the Department's decision to allow for unlimited groundwater pumping at every mine in the state can be seen for what it is: a harmful policy that defies the clear commands of Montana law. It cannot be allowed to stand.

ARGUMENT

As this Court has long recognized, the "core purpose" of the Water Use Act is "the protection of senior water rights"—including those that secure instream flows for the benefit of wildlife and the public. *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 24, 384 Mont. 503, 380 P.3d 771; MCA §§ 85-2-102(1)(c)–(d). With a few narrow and clearly stated exceptions, the statute accordingly prohibits anyone from either "divert[ing], impound[ing], or withdraw[ing] … water for a beneficial use" or "commenc[ing] construction of diversion, impoundment, withdrawal, or related distribution works" without first "appl[ying] for and receiv[ing] a permit[.]" MCA §§ 85-2-102(1)(a), 85-2-302(1), 85-2-306. And it further requires every permit applicant to demonstrate that "the water rights of a prior appropriator under an existing water right … w[ould] not be adversely affected" by their proposed action. *Id.* § 85-2-311(1)(b). The Department's challenged decision—which will allow Tintina to divert and impound large volumes of groundwater without mitigating the resulting effects—is directly at odds with these provisions. In arguing otherwise, Tintina and the agency simply

disregard the design of both the Black Butte Mine and Montana's Water Use Act.[1]

I. Tintina's unpermitted pumping and storage of large volumes of groundwater would adversely affect Montana's waters and the rights of senior appropriators.

The appellees' desire to avoid discussing the impacts of Tintina's unpermitted diversion isn't surprising. *See, e.g.*, Tintina at 35–36 (arguing that "any surface water depletion caused by Tintina's mine drainage that is not appropriated for beneficial use" should be ignored). Unlike the modest "manipulations of water" the appellees and their amici choose to dwell on in their briefs, the groundwater system at the Black Butte Mine would significantly affect the hydrology of the surrounding region—at the expense of Montana's waters and senior appropriators. *See, e.g.*, DNRC at 20–21, 29; Amici at 10–16.

As previously explained, Tintina's proposal would require both pumping and storing large volumes of groundwater during each year of the mine's operation. Opening Br. at 13–21. According to the company's own calculations, up to 807 acre-feet of groundwater—or more than

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[1] Opposing briefs are referenced by way of their filer—"DNRC," "Tintina," or "Amici."

250,000,000 gallons—would have to be diverted from the mine each year in order for mining to occur. *See* AR:502 (DNRC Tech. Rep.). When Tintina evaluated the fraction of this water that it hopes to utilize for "industrial purposes"—up to 350 acre-feet per year—it concluded that such a diversion would alone be enough to "deplete surface water in Black Butte Creek, Coon Creek, and Sheep Creek" without the mandatory mitigation measures the Department's decision has required. *See* AR:14, 26 (Prelim. Determination). The rest of Tintina's appropriation—which could amount to nearly 150,000,000 gallons a year—promises to have an even greater effect on the region's waters. Opening Br. at 18–21.

Rather than returning the unpermitted portion of its diversion to the ground immediately, as the appellees repeatedly suggest in their briefs, Tintina plans on impounding it in a treatment pond from July through September of each year—at the height of irrigation season. *See, e.g.*, AR:1700–01 (FEIS); AR:28–31 (Prelim. Determination); DNRC at 1–2, 9–30 (addressing Tintina's "removal and disposal" of groundwater, while ignoring its impoundment); Tintina at 26 (asserting, falsely, that its unpermitted groundwater would be "simply discharged to the

alluvial aquifer”). Substantial amounts of this impounded water would inevitably evaporate, meaning that a portion of the company’s unpermitted diversion would never be returned to the ground. *See* ARM 36.12.101(14) (defining “[c]onsumptive use” to include evaporation). And given the location of the mine’s infiltration galleries, none of the water that was ultimately returned to the ground would be able to offset losses in Black Butte Creek or portions of Coon Creek. AR:1700–01 (FEIS).

In light of the clear and substantial impacts that would result from Tintina’s unpermitted diversion—impacts that are conspicuously ignored in the briefs of the appellees and their amici—the Department could not approve the company’s proposal under the Water Use Act without first requiring the development of equally substantial mitigation measures. Opening Br. at 27–46. Tintina and the agency’s assertions to the contrary are wrong.

II. In attempting to defend Tintina’s unmitigated diversion of groundwater in a highly appropriated basin, the appellees defy the language and purpose of the Water Use Act.

As Tintina and the Department tell it, the appellants’ challenge in this case is at odds with the words of the Water Use Act. This has it

backward, however. In contending that mine dewatering is somehow exempt from the statute's protections, the appellees attempt to rely on a sprawling loophole the Legislature never enacted.

A. The protections of the Water Use Act are not subject to a limitless loophole for mine dewatering.

While both the appellees and their amici protest the appellant organizations' "binary" reading of the Water Use Act, the language and purpose of the statute leave no room for a third category of limitless diversions that are "'wholly beyond the scope of the … [Act's] regulatory scheme[.]'" Tintina at 22, 28, 39 (quoting AR:1874 (summary-judgment order)). Under the statute, again, "[a] person may appropriate water *only* for a beneficial use"—and the "application of water to *anything* but a beneficial use" is an impermissible "[w]aste." MCA §§ 85-2-102(27), 85-2-301(1) (emphasis added); *see also, e.g.*, *id.* § 85-2-505(1) (affirming that "[n]o ground water may be wasted").

As the facts of this case confirm, the Water Use Act's dichotomous system of regulated "beneficial uses" and prohibited "wastes" is an essential feature of the statute's design. If the Legislature had allowed unlimited groundwater pumping and storage under some third category of unregulated diversions, the Water Use Act would have failed in its

fundamental purpose of establishing adequate protections for Montana's waters and senior appropriators. *See, e.g.*, *Montana Power Co. v. Carey*, 211 Mont. 91, 98, 685 P.2d 336, 340 (1984) (noting that the statute was enacted "to protect senior water rights holders from encroachment by junior appropriators"); MCA § 85-2-101(6) (declaring the Legislature's "intent … that the state, to fulfill its constitutional duties … , comprehensively adjudicate existing water rights and regulate water use"). As this Court is obligated to "read … [the Act] holistically so as to avoid an absurd result and to give effect to the [statute's] purpose[,]" it must reject the limitless loophole urged by the appellees and their amici. *State v. Triplett*, 2008 MT 360, ¶ 30, 346 Mont. 383, 195 P.3d 819.[2]

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[2] In attempting to find a different rule within *Bostwick Properties, Inc. v. DNRC*, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154, the Department mischaracterizes the case. DNRC at 20–21. In *Bostwick*, the Court emphasized that the applicant had failed to obtain a water right for the "runoff water" at issue—not that it couldn't obtain a right for such water. *Bostwick*, ¶ 26. And the Court even noted that the "capture of [runoff] … could cause a depletion in … surface … or groundwater"—a concern under a statutory "system that recognizes the hydrological cycle[.]" *Id.* ¶ 30.

B. The Water Use Act's "beneficial use" provisions place needed limits on would-be diverters—not the Department's statutory authority.

In attempting to locate a dewatering exemption within the Water Use Act, the Department and Tintina largely disregard the statute's structure and purpose, preferring to focus, instead, on more abstract notions of "beneficial use." According to the appellees, the Department's authority to regulate water use under the statute is somehow limited to situations in which the person or company doing the diverting or impounding actually wants the water they've secured. *See, e.g.*, DNRC at 12–24; Tintina at 19–26. Since Tintina doesn't want any of its unpermitted diversion, the argument goes, the Department was powerless to evaluate or restrict it. *See id.*

Like so many of the appellees' arguments, this contention turns the Water Use Act on its head. As this Court has long emphasized, even Montana's common-law "beneficial use" requirement was intended to place restrictions on would-be diverters—to ensure that the state's valuable and limited water resources could only be diverted for useful purposes. *See* Opening Br. at 4–11; *Power v. Switzer*, 21 Mont. 523, 55 P. 32, 35 (1898) (noting that as "the great value of the use of water …

[became] more and more apparent[,]" appropriations were increasingly restricted "to spheres of usefulness and beneficial purposes"). The requirement was decidedly not designed, in other words, to limit Montana's ability to protect its own waters and the rights of senior appropriators. Because the appellees' arguments cast the Water Use Act's "beneficial use" provision as a means of evading the statute's requirements—rather than a source of critical protections—they should be rejected. *See, e.g.*, *Howell v. State*, 263 Mont. 275, 286–87, 868 P.2d 568 (1994) (noting that "a statute will not be interpreted to defeat its evident object or purpose").[3]

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[3] To be sure, while a "beneficial use" requirement was part of Montana law prior to the Water Use Act's adoption, this case ultimately has to be resolved on the basis of the statute alone. As this Court has noted, the enactment of the Water Use Act "abolish[ed] the doctrine of prior appropriation and creat[ed] a new system of adjudicating water rights." *Axtell v. M.S. Consulting*, 1998 MT 64, ¶ 23, 288 Mont. 150, 955 P.2d 1362. In other words, although "pre-1973 law is still applicable in determining the existence and validity of water rights acquired before 1973[,]" *id.* ¶ 25, courts may not "revert to pre-1973 law" when considering new diversions like the one Tintina's proposed, *Matter of Musselshell River Drainage Area*, 255 Mont. 43, 46–55, 840 P.2d 577 (1992). The appellees' efforts to emphasize prior-appropriation cases in place of the Water Use Act's requirements should accordingly be disregarded by this Court. *See, e.g.*, DNRC at 12–21.

C. Tintina's unpermitted diversion would be a "beneficial use" subject to the permitting and mitigation requirements of the Water Use Act.

The appellees' "beneficial use" arguments fail for a second reason, as well: As previously demonstrated, Tintina's entire diversion amounts to a "beneficial use" of groundwater that is subject to the Water Use Act's requirements.[4]

1. As all of the challenged diversion is essential to Tintina's mining operation, it falls squarely within the definition of "beneficial use."

The legal status of Tintina's unpermitted diversion and impoundment is settled by the fact that it would be essential to the

[4] In their attempts to avoid this conclusion, the appellees' amici simply misrepresent the appellant organizations' arguments. Contrary to the amici's assertions, for instance, the groups' "central thesis" is not "that Tintina should be required to obtain a water right for 'diversions' of water that will not be put to beneficial use"—or that the Water Use Act "prohibits the [company's] mine[,]" instead. Amici at 3, 4. (All of the groundwater pumping and storage at Tintina's operation would constitute a beneficial use that DNRC could permit with mitigations—as demonstrated, again, below.) The appellants have also never "contend[ed] that if a person 'benefits from' water then the person's interaction with water must be interpreted as a 'use[.]'" *Id.* at 16–17. (The questions of "use" and "benefit" are distinct—as explained, again, below.) And in noting that "appropriation[s]" are regulated under the Water Use Act, the appellants by no means "introduce[d] a wholly new concept of 'regulated appropriations[.]'" *Id.* at 19. Given that most of the amici's arguments rest on mischaracterizations of this sort, they should be disregarded by the Court.

company's operations at the Black Butte Mine. The Water Use Act, again, defines "beneficial use" to include—"very broad[ly]"—any "*use of water* for the *benefit of the appropriator*, other persons, or the public, *including but not limited to* agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, *mining*, municipal, power, and recreational uses[.]" MCA § 85-2-102(5)(a) (emphasis added); *In re Adjudication of the Existing Rts.*, 2002 MT 216, ¶ 33, 311 Mont. 327, 55 P.3d 396. In this case, every acre-foot of water that Tintina would have to pump from the ground—and sometimes store—in order to "permit mining operations" would be "use[d]" for mining operations. MCA § 85-2-505(1)(c) (providing that any groundwater "that must be removed from a mine to permit mining operations" can be legally disposed of "without further beneficial use"). And as Tintina itself admits that it would be "benefitted by draining water from the mine," the challenged diversion and impoundment would undoubtedly be "beneficial," too. Tintina at 26; MCA § 85-2-102(5)(a).[5]

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[5] In their briefs, the appellees attempt to cast Tintina as a rather passive victim of the water it plans to divert. The Department, for example, insists that the company's pumps would deal with "flood

In arguing that its unpermitted diversion of groundwater should not be viewed as a "beneficial use," Tintina declares that the requirement can only be satisfied "when there is an actual intent to control and affirmatively use the water" at issue. Tintina at 22. According to the company, because it doesn't have any desire to "'employ[]'" its unpermitted diversion "'for a purpose[,]'" there would have been no basis for the Department to declare the diversion a "beneficial use." *Id.* at 24–26 (citing dictionaries). This argument simply disregards the facts.

As previously explained, Tintina's proposed operation would require pumping, treating, and storing large volumes of groundwater—water that would become unavailable, either temporarily or permanently, to both senior and prospective appropriators. *See* Section

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water"—a remarkably dismissive term for the protected groundwater resources of a highly appropriated basin. DNRC at 1–6, 18–19. And Tintina repeatedly asserts that its very unnatural mine would merely have a problem with natural infiltration. Tintina at 4–5, 26 (declaring that groundwater would "naturally infiltrate" the mine "unbidden"). All of this language obscures the essential fact of this case: Tintina wants to pump and impound large volumes of Montana's groundwater so it can operate a copper mine. For the reasons explained above, this activity—this intentional and exclusive use of the state's limited water resources—is subject to the requirements of the Water Use Act.

I, *supra*. All of this water, again, would be under Tintina's complete "control" while it is being intentionally impounded—for up to three months—at the mine site. *See, e.g.*, AR:74 (Tintina's application) (illustrating the company's closed system for diverting and impounding groundwater). And the full measure of the company's diversion would be "'employ[ed]'" for mining purposes—and accordingly unavailable for other potential users' purposes—while under the company's control. *See id.*; *Employ*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/employ (defining "employ" to include both "devot[ing] to or direct[ing] toward a particular activity"). In short, Tintina's effort to disclaim any "beneficial use" for the majority of its proposed diversion cannot be sustained.[6]

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[6] The tenuousness of the appellants' "beneficial use" theory is betrayed by its internal inconsistencies. In some places, for example, Tintina asserts that its unpermitted diversion would "not [be] a use at all." Tintina at 26. In others, the company seems to concede the diversion would be a "use"—just not a "beneficial" one. *Id.* at 22 (quoting the hearing examiner's unfounded assertion that "'there are certain uses of water that neither rise to the level of beneficial use nor constitute waste'"). Whatever the argument, it's incorrect. As demonstrated above, Tintina's large-scale diversion and impoundment would be a use of Montana's groundwater that benefits the company.

2. The Water Use Act's dewatering provision confirms that Tintina's entire diversion would be a "beneficial use."

The Department and Tintina get no further in arguing that the Water Use Act's dewatering provision somehow supports the agency's challenged decision. *See* DNRC at 22–24; Tintina at 26–28. To the contrary, and as the appellant organizations have already shown, Section 505 of the statute confirms that Tintina's groundwater pumping and storage would be a "beneficial use" subject to the statute's requirements.

Section 505 reiterates one of the fundamental prohibitions of the Water Use Act: that "[n]o ground water may be wasted" in Montana. MCA § 85-2-505(1). The provision also makes clear that mine dewatering does not involve a prohibited waste of groundwater, given that it instead constitutes a "beneficial use" for which a permit may (and must) be obtained. *Id.* § 85-2-505(1)(c). In the words of Section 505(1)(c), "the withdrawal or use of ground water may not be construed as waste" if it is "removed from a mine to permit mining operations"—even when the water is ultimately disposed of "without further beneficial use[.]" *Id.* In emphasizing that "further" beneficial use is not

required before disposing of dewatering water, Section 505 confirms that dewatering is itself a "beneficial use" under the Water Use Act. *Id.*

While the appellees challenge this reading of Section 505, their arguments cannot be squared with the provision's text. According to the Department, Section 505(1)(c) would be "meaningless" if it no more than declared dewatering a "beneficial use" that can be permitted under the Water Use Act. DNRC at 23. In the agency's words, "[i]f the act of removing water from a mine is per se a beneficial use … , there would be no need for the statutory waste exemption because the use would already be considered a beneficial use." *Id.* This argument ignores the fact that there is nothing "meaningless" about clarifying the proper status of mine dewatering under Montana law. As a result of Section 505(1)(c), it is clear dewatering is a "beneficial use" that "may not be construed as [a prohibited] waste[.]" MCA § 85-2-505(1)(c).

The clarifying purpose of Section 505(1)(c) is confirmed by the provision that follows it. With Section 505(1)(d), Montana's Legislature noted that "the disposal of ground water used in connection with producing, reducing, smelting, and milling metallic ores" also may "not be construed as waste[.]" *Id.* § 85-2-505(1)(d). In light of the "beneficial

use" permit that has been granted to Tintina for the water it plans to "use[] in … producing … and milling metallic ores[,]" *id.*, neither the Department nor the company could argue that the activities referenced in Section 505(1)(d) were in "need … [of a] statutory waste exemption[.]" DNRC at 23; AR:14 (Prelim. Determination) (noting that Tintina's permit would cover "water use in the … mining operation … and … mill"). This also doesn't render the provision "meaningless[,]" however, as the Department would seem to suggest. DNRC at 23. By clarifying when mines can lawfully dispose of groundwater that has already been "beneficially used," both Sections 505(1)(c) and 505(1)(d) serve an important statutory purpose. The Department's arguments to the contrary should be rejected.

Like the agency's hearing examiner, finally, both the Department and Tintina contend that the "verbiage 'without further beneficial use'" in Section 505(1)(c) "does not transform … [mine-dewatering] practices into beneficial use[.]" DNRC at 23–24; Tintina at 27–28; AR:1874 (summary-judgment order). According to the agency, "[r]ather than referring to or modifying any disposals of groundwaters, that language merely serves to highlight a legislative intention that waters withdrawn

and subsequently used for beneficial purposes should be treated as traditional appropriations[.]" DNRC at 23–24 (largely quoting *Kenyon-Noble*); *see also* Tintina at 27–28. As the appellants noted in their opening brief, however, such an interpretation improperly "reads the word 'further' out of the statute." Opening Br. at 35–36 (citing cases); *see also* DNRC at 23 (striking the word "further" in declaring that dewatering-water disposal "*without beneficial use* is not waste") (emphasis added). And it also disregards the basic structure of the Water Use Act, which establishes a small set of narrowly limited permit exceptions in Section 306—and nowhere allows for unlimited groundwater pumping at mines (or any other kind of operation). Opening Br. at 35–36; MCA § 85-2-306(3)(a)(iii) (authorizing, for instance, unpermitted wells that "do[] not exceed 10 acre-feet a year"). The appellees' arguments, in short, are at odds with the statutory text.

3. Tintina's unpermitted diversion will be put to further "beneficial use" due to the company's planned aquifer-recharging activities.

In attempting to skirt the requirements of the Water Use Act, the appellees also argue that Tintina's plan to recharge the Sheep Creek aquifer with its unpermitted diversion does not amount to a "beneficial

use," despite the statute's statements to the contrary. *See* MCA § 85-2-102(5)(e) (deeming "beneficial" any "use of water for aquifer recharge or mitigation"). According to Tintina, because the statute's definition of "aquifer recharge" appears to reference the requirement that "new ground water appropriations for a beneficial use in closed basins include an aquifer recharge or mitigation plan[,]" it should only apply to the company's actions under the inadequate mitigation plan it has already prepared. Tintina at 35. As previously explained, however, the company's entire diversion would be drawn from an aquifer in a closed basin—the Upper Missouri. Because all of Tintina's aquifer-recharging efforts would contribute to offsetting this diversion, they are rightly recognized as a "beneficial use" under the statute's broad definition of the term. MCA §§ 85-2-102(5)(a), (5)(e).

Tintina's aquifer arguments also disregard the facts. As recognized in the environmental analysis for the Black Butte Mine, the company's groundwater model "predict[ed] a 160 [gallon per minute] decrease in groundwater discharge to Sheep Creek" in the absence of the mine's infiltration galleries. AR:1701. Given that Tintina's recharging system would "partially compensate for the loss of base flow

in Sheep Creek caused by mine dewatering[,]" it constitutes a beneficial use of the mine's diverted water—whether the company wishes to acknowledge it or not. *Id.*

D. This Court should not—and cannot—defer to the Department's declarations that dewatering is exempt from the Water Use Act.

All told, both the language of the Water Use Act and the facts of this case make clear that Tintina's entire diversion of groundwater would be a "beneficial use" subject to Montana's permitting and mitigation requirements. In urging this Court to hold otherwise, the appellees argue—at some length—that deference should be given to the Department's longstanding conviction, never formalized in a rule, that mine dewatering is a "'use[] of water that neither rise[s] to the level of beneficial use nor constitute[s] waste but rather fall[s] into a category that is wholly beyond the scope of the [Water Use Act's] regulatory scheme[.]'" Tintina at 22 (quoting AR:1874 (summary-judgment order)); *see also* DNRC at 24–30 (same). Again, however, deference is not allowed—much less required—in this case. Opening Br. at 46–49.[7]

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[7] Rather than arguing that DNRC's decision rested on a legal interpretation that should be given deference, the amici insist that

While the appellees repeatedly assert that the Department's nonregulatory dewatering policy is "entitled to deference" by this Court, the cases they cite say the opposite. *See* Tintina at 32–34; DNRC at 8–9. Under *Montana Power*, for example, even "where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance[,]" that reading of the statute is "not binding on the courts[.]" *Montana Power Co. v. Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. Instead, and as the appellants have already explained, such an interpretation is merely "entitled to 'respectful consideration'"—which isn't deference at all. *Id.* If a reviewing court makes a "determination that [an agency's longstanding] construction is … wrong," both "time and reliance" must "yield" to the correct

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"beneficial use is a factual question[.]" Amici at 9–11. As the amici's own cases demonstrate, however, this isn't right. While "'[t]he *amount of water* necessary for beneficial use is a question of fact in each particular case[,]'" the *legal status* of a proposed use is a legal issue. *United States v. Montana*, No. 39E 60874-00, 2015 WL 5478234, at *3 (Mont. Water Ct. Aug. 14, 2015) (emphasis added); Amici at 9–11 (discussing case). In the words of the Department, "the question of beneficial use" in this case is accordingly "purely legal[.]" DNRC at 1, 7, 12.

interpretation of the law. *Id.*; *see also, e.g.*, *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81, ¶ 13, 395 Mont. 263, 438 P.3d 792 (cited in Tintina at 33) (noting that "neither this Court nor the district court[s] must defer to an incorrect agency decision"); *U.S. West, Inc. v. Dep't of Revenue*, 2008 MT 125, ¶ 19, 343 Mont. 1, 183 P.3d 16 (cited in DNRC at 9) (rejecting an agency "interpretation [that] d[id] not comport with the … principles of statutory construction"). DNRC's dewatering policy, in other words, should be rejected by this Court.[8]

The Department gets no further in arguing that deference is somehow appropriate because "[t]he legislature knew about DNRC's interpretation and has chosen not to amend the statute." DNRC at 29. As this Court affirmed in *Baitis v. Department of Revenue*, on which the Department attempts to rely, "[t]he duty of a judge is to look at the

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[8] As the appellants noted in their opening brief, the Department's dewatering policy does not even qualify as a "longstanding" statutory interpretation, given that the agency has never elected to formalize it in a regulation. Opening Br. at 38–39, 47–48. While DNRC protests that its "case-by-case interpretation of the Act" was a proper exercise of "quasi-judicial" authority, this is beside the point. DNRC at 27. If the agency hoped to earn its unlawful policy even respectful consideration, it should have exercised its "quasi-legislative rulemaking authority[,]" instead. *Id.*; Opening Br. at 47–48.

words of the statute and ascribe to them their plain meaning"—not to disregard the statute's language based on actions the Legislature didn't take. 2004 MT 17, ¶ 25, 319 Mont. 292, 83 P.3d 1278. And a statute must also be interpreted, again, "in a way that is best able to effectuate its purpose, rather than in a way which would weaken that purpose." *Id.* ¶ 22. As demonstrated above, the plain meaning and purpose of the Water Use Act leave no room for the Department's dewatering policy.

Finally, the 2005 legislation referenced in the Department's brief—a set of "modest clarifications" to Montana's "existing water law"—did nothing to change the Water Use Act's fundamental scheme of regulated diversions and prohibited wastes. *See* Statement of Jack Stults, Hearing on H.B. 178 before the Comm. on Nat. Res., 59th Leg. (Mar. 2, 2005), at 2; DNRC at 29 (discussing same). According to the agency's own testimony at the time, while the statute then provided—as it does now—that "'[a] person may appropriate water only for a beneficial use[,]'" the existing "definition of 'appropriate' d[id] not include the reference to beneficial use." Stults Statement at 1 (quoting MCA § 85-2-301(1)). In the mind of the Department, at least, this omission created the potential for confusion, as "[m]any folks looking

through [a] statute to find out requirements start by looking at the definitions." *Id.* By adding a reference to "beneficial use" within the definition of "appropriate," in other words, the 2005 amendment no more than reiterated the Water Use Act's existing requirements. *Id.* For all of the reasons explained above, those requirements are not subject to a limitless loophole for mine dewatering—whatever the agency might have believed at the time.

E. The Water Use Act's comprehensive water-quantity protections are not limited by other laws that protect water quality.

In a final bid to avoid the Water Use Act's requirements, both the Department and Tintina contend that the statute wasn't actually intended to "comprehensively … regulate water use within the state[,]" as the Legislature declared, MCA § 85-2-101(6), given that the "Legislature further enacted MEPA, MWQA, and MMRA to fulfill [its separate] constitutional duty"—under Article IX, Section 1—"to 'provide … for the protection of the environmental life support system from

degradation[.]'" Tintina at 15 (quoting Mont. Const. art. IX, § 1(3)); *see also* DNRC at 17. This argument is hollow.[9]

While the other laws referenced by the appellees undoubtedly establish vital protections for *water quality*, among other things, they are irrelevant to the issues in this case. The Montana Legislature adopted the (aptly named) Water Use Act for the distinct purpose of fulfilling its constitutional duty to "comprehensively … regulate" the use and availability of water—*water quantity*—under Article IX, Section 3. MCA §§ 85-2-101(2), (6); *see also, e.g.*, 1997 Montana Laws Ch. 497 (describing the Water Use Act as "comprehensive legislation … to implement Article IX, section 3(4)"). No other law serves this vital function—a fact confirmed by Tintina's ability to divert groundwater

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[9] In addition to getting the law wrong, the Department and Tintina's lengthy arguments about the Water Use Act's comprehensiveness repeatedly mischaracterize the appellants' actual contentions in this case. Like Montana's Legislature, the appellant organizations have emphasized that the statute was designed to comprehensively regulate "water use" in the state. MCA § 85-2-101(6); Opening Br. at 1, 7–11, 50–51. They have not asserted—nor would they claim—that the Water Use Act is "the *sole* regulatory mechanism for comprehensively managing and protecting the state's waters[,]" Tintina at 18 (emphasis in original), or that it "regulate[s] everything to do with water in Montana[,]" DNRC at 17. In insisting otherwise, the Department and Tintina assail a strawman.

without limitation once the requirements of the Water Use Act were unlawfully pushed aside by DNRC. Indeed, in evaluating the potential effects of the Black Butte Mine, the Department of Environmental Quality itself made clear that the project's stream-flow impacts were DNRC's responsibility under the statute. *See* AR:1697 (FEIS) (noting that the mine's streamflow impacts were supposed to be addressed by the "Water Right Application Package [Tintina submitted] to the DNRC"). In order to uphold the purposes and protections of the Water Use Act, in other words, the challenged decision must be set aside by this Court.

Clark Fork Coalition is not to the contrary. *See Clark Fork Coal. v. DNRC*, 2021 MT 44, 403 Mont. 225, 481 P.3d 198; DNRC at 17 (citing case); Tintina at 15–18 (same). There, in Tintina's words, this "Court was asked to determine if the [Water Use Act] violated Article IX, Section 1 of the Montana Constitution"—the right to a "clean and healthful environment[.]" Tintina at 16. In concluding that "the Legislature did not enact the [statute] for the primary purpose of implementing … its environmental protection duty under … Article IX, *Section 1*[,]" *Clark Fork Coal.*, ¶ 50 (emphasis added), this Court in no

way denied that the Water Use Act was designed to implement *Section 3* by "comprehensively … regulat[ing] water use within the state[.]" MCA § 85-2-101(6). Indeed, the Court explicitly acknowledged that "[t]he Legislature enacted the [statute] for the specific purpose of implementing and fulfilling its separate duty under Article IX, Section 3[.]" *Clark Fork Coal.*, ¶ 50.[10] It should do the same here—by rejecting the Department's unlawful effort to undermine the Water Use Act with an unlimited loophole the Legislature never enacted.

III. A decision upholding the Department's dewatering loophole would also be at odds with Montana's Constitution.

In light of the Water Use Act's purpose of fully implementing Article IX, Section 3, a decision affirming the Department's unlawful dewatering loophole would also defy this Court's "duty … to construe statutes in a manner that avoids an unconstitutional interpretation" whenever possible. *Montana Indep. Living Proj. v. Dep't of Trans.*, 2019 MT 298, ¶ 14, 398 Mont. 204, 454 P.3d 1216. In short, and as the

[10] Contrary to the Department's assertions, the appellants have not relied on—or even cited—the water-planning provision distinguished by this Court in *Clark Fork Coalition*. *See Clark Fork Coal.*, ¶ 42 n.66 (discussing MCA § 85-1-101(5)); DNRC at 17.

appellants have already explained, the Constitution's water-rights provisions compel an interpretation of the Water Use Act that ensures "water use within the state" is regulated "comprehensively"—and DNRC's challenged dewatering policy does the opposite. MCA § 85-2-101(6) (noting that comprehensive regulation is required to "fulfill [the state's] constitutional duties"); *see also, e.g.*, Mont. Const. art. IX, § 3(3) (declaring "[a]ll … waters within … the state … the property of the state for the use of its people"); *id.* art. IX, § 3(4) (directing "[t]he legislature … [to] provide for the administration, control, and regulation of water rights" without limitation).[11]

Rather than contending with the constitutional problems raised by the Department's interpretation of the Water Use Act, the appellees insist that the issue is not even "properly before this Court." Tintina at 36. According to the agency and Tintina, the appellant organizations have "failed to articulate a cognizable constitutional challenge" because they haven't managed to prove that a statutory dewatering exemption

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[11] Contrary to the Department's assertions, again, the appellants have not raised an unreasonable-degradation argument under "Article IX, Section 1." DNRC at 30–32.

would be "unconstitutional beyond a reasonable doubt." Tintina at 37–38; *see also* DNRC at 30–33. This, however, is little more than a conclusory assertion about the merits of the appellants' contentions. And tellingly, neither the Department nor Tintina make any attempt to argue that the Legislature could have fulfilled its constitutional obligations by exempting large-scale mine dewatering from the state's "administration, control, and regulation[.]" *See* Mont. Const. art. IX, § 3(4). The Department's unconstitutional interpretation of the Water Use Act should accordingly be rejected by this Court.

IV. A decision directing the Department to regulate mine dewatering, as the Water Use Act requires, would not cause calamity.

In addition to mischaracterizing most of the appellants' arguments in this case, *see* note 4, *supra*, the appellees' amici attempt to convince this Court that a decision requiring the Water Use Act's full implementation would have dire and unavoidable consequences. *See, e.g.*, Amici at 10–17. According to the amici, the statute's "binary, 'beneficial use' or 'waste'" scheme could compel almost anyone who encounters water anywhere to obtain a beneficial-use permit. *Id.* at 10, 16–17. A farmer, they declare, would need a water right for the "rain

which falls on his fields[.]" *Id.* at 17. A recreationist would need a permit for fishing or rafting on the state's rivers. *Id*. And a "business owner" with a "stormwater grate outside her stor[e]front" would somehow have to get a permit, too. *Id.* These arguments are as hyperbolic as they sound.

First, unlike those of the appellants, the amici's arguments ignore the limited reach of the Water Use Act's permit requirement, which specifically targets diversions, impoundments, and withdrawals. Under Section 302 of the statute, again, individuals are generally prohibited from "divert[ing], impound[ing], or withdraw[ing] … water for a beneficial use"—or even "commenc[ing] construction of diversion, impoundment, withdrawal, or related distribution works"—"unless [they] appl[y] for and receive[] a permit[.]" MCA § 85-2-302(1) (requiring permits to construct diversions and "appropriate water," unless a statutory exception applies); *id.* § 85-2-102(1)(a) (defining "appropriate"). In the absence of such an activity, the Water Use Act's permitting provisions generally cannot be triggered by members of the public. *Id.* The amici's farmer, recreationist, and business owner, in

other words, would have no reason to contact DNRC before watching it rain, heading out on a river, or unlocking their store.[12]

Second, in contending that Tintina's unpermitted diversion could not be subjected to the Water Use Act's requirements without sweeping in "thousands of benign and otherwise legal actions[,]" the amici simply disregard the design of the company's proposed operation. Amici at 10. According to the amici, the unregulated "dewatering" challenged in this case amounts to nothing more than the "mere removal" of groundwater from Tintina's mine. *Id.* at 17. As a result, they contend, a decision to fully regulate Tintina's groundwater system would inevitably reach anything else that merely removes or redirects water—such as a drainage ditch, a stormwater system, or a stream-restoration project. *Id.* at 11–16. While the Department and Tintina have told this Court a similar story, it isn't true. *See* DNRC at 1–2, 5–6, 9–30 (refusing to acknowledge Tintina's impoundment); Tintina at 26 (asserting, falsely,

[12] Indeed, with respect to recreationists in particular, this Court has noted that "[u]nder the Montana Constitution and the public trust doctrine, the public owns an instream, non-diversionary right to the recreational use of the State's navigable surface waters." *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 29, 361 Mont. 77, 255 P.3d 179.

that its excess groundwater would be “simply discharged to the alluvial aquifer”). As the appellants have repeatedly explained, much of the water Tintina plans to remove from the ground without a permit would also have to be impounded—for up to three months—at the company’s mine site, resulting in significant and adverse effects to streams and senior appropriators within the closed Upper Missouri River Basin. *See* Section I, *supra*. By requiring Tintina to acknowledge and mitigate the impacts of its unpermitted impoundment, this Court would uphold the plain language and purpose of the Water Use Act—not cause the sky to fall. *See* Section II, *supra*.

Finally, in arguing that this Court should bless a sprawling and unwritten exception to the Water Use Act’s permit requirements, the amici ignore the exceptions—and the exception process—that were actually written into the statute. With Section 306, again, the Legislature acknowledged that not every “diversion, impoundment, [or] withdrawal” of water is significant enough to require a permit. MCA § 85-2-302(1) (providing that permits are required “[e]xcept as provided in 85-2-306”); *id.* § 85-2-306 (establishing limited “[e]xceptions to permit requirements”). The provision accordingly provides, for example, that “a

permit is not required before appropriating ground water by means of a well … when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed *10 acre-feet a year*"—an amount vastly smaller than the 457 acre-foot appropriation that's at issue here. *Id.* § 85-2-306(3)(a)(iii) (emphasis added). And Section 306 also allows the Department to establish similar exemptions—so long as it does so through "rules adopted … under 85-2-113[,]" which authorizes all regulations "necessary to implement and carry out the purposes and provisions" of the Water Use Act. *Id.* §§ 85-2-306(8), 85-2-113(2). The Legislature, in short, anticipated the need for limited exceptions to the Water Use Act's permit requirements—but it left no room for the limitless loophole at issue in this case. Both the loophole and the Department's challenged decision should accordingly be set aside by this Court.

V. Tintina's standing arguments are both meritless and untimely.

During proceedings before the Department and the district court, neither the agency nor Tintina even attempted to question the appellant organizations' standing to bring this case. Indeed, the Department itself confirmed that the organizations' objections to

Tintina's application had adequately "explain[ed] how [the groups] ha[d] standing to object." AR:660, 671, 682, 693 (citing ARM 36.12.117(9)); MCA § 85-2-308(3), (5). In its arguments to this Court, however, Tintina has decided to open with a lengthy standing challenge—declaring that the organizations cannot pursue their claims under the Water Use Act because they "do not own water rights in the Smith River watershed, nor do they represent interests of private water rights holders[.]" Tintina at 9–14. As this Court's precedents make clear, Tintina's argument is both wrong and untimely.

In the objections the Department accepted—objections Tintina has chosen to ignore—the appellant organizations noted how the company's proposed operation threatens both their interests and those of their members. Opening Br. at 24 n.3 (citing objections as proof of standing); DNRC at 6 (noting that the "Appellants filed valid objections"). In the words of the groups:

> each possess[es] particularized interests in the health, well-being, and water management of the Smith River basin. [They] have each contributed to advancing these interests … [by] participating … [in] public reviews of Tintina's mine proposal pursuant to [multiple statutes]. Staff, affiliates, and members of each … organization recreate on

> the Smith River and rely on the clean, cold water supplied by the Sheep Creek watershed to sustain the river and its fisheries. Furthermore, [the organizations] have litigated against previous threats to the waters of the Smith River and its tributaries[.]

AR:664–65. The organizations went on to identify a long list of the "publicly-owned water rights, held in trust by state and federal agencies," that are threatened as a result of Tintina's proposal. *Id.* (listing 51 claims for instream flows and the like). As the groups explained, "[t]hese publicly-owned water rights are the core of the long-term health of the Smith River basin," and "[a]llowing further depletions to the waters of the Smith River and its tributaries will adversely affect the rights and resources on which the health of the basin's aquatic life depends." *Id.*

In light of these statements and the prior decisions of this Court, it cannot be seriously contended that the appellant organizations lack standing to bring this case. The groups' objections clearly demonstrated that their "interests … would be adversely affected" if Tintina is allowed to move forward with its unpermitted diversion. MCA § 85-2-308(3) (acknowledging "interests" other than "water rights" and

"property"); *see also, e.g.*, *Beaverhead Water*, ¶¶ 33–45 (recognizing conservation-group standing under the Water Use Act). And regardless, Tintina's opportunity to challenge the organizations' standing passed long ago, given that "standing … claims cannot be raised for the first time on judicial review of an … agency decision unless … there was good cause for the party's failure to raise the question before the agency." *Hilands Golf Club v. Ashmore*, 2002 MT 8, ¶ 21, 308 Mont. 111, 39 P.3d 697. As the company has made no attempt to explain away its silence before the Department, the Court must reject its standing arguments here. *See* Tintina at 6 (declaring, wrongly, that standing never has to be "properly preserved for appeal").

VI. In order to ensure that the protections of the Water Use Act are fully implemented, Tintina's permit should be vacated and remanded by the Court.

Given that the Department violated the Water Use Act in granting Tintina a permit without first evaluating all of the company's planned appropriation, the agency's unlawful decision—and the permit it approved—should be vacated. *See* MCA § 2-4-704(2) (providing that a reviewing court "may reverse or modify" an unlawful decision). In arguing otherwise, the Department asserts that Tintina should be

allowed to retain the permit that was issued for the 350 acre-feet of water the agency did evaluate, as "[t]he findings and conclusions regarding … the 350 acre-feet … are not disputed on appeal." DNRC at 33. This is incorrect.

While the Department's flawed decision attempted to divide Tintina's water into two distinct portions, the diversion itself would not be severable. All of the groundwater withdrawn by the company would be pumped through the same system. *See* AR:47 (Prelim. Determination). And for the Black Butte Mine to be built, all of the water at issue in this case—up to 807 acre-feet a year—would have to be removed from the ground. *See* AR:502 (DNRC Tech. Rep.); *see also* AR:1276 (DNRC Staff-Expert Rev.) (noting that "Tintina is proposing to pump water … at the same rate it anticipates [water] to naturally infiltrate"). There is, in short, no 350 acre-foot diversion to be made by Tintina; it's 807 acre-feet or nothing. *See id.* In order for the protections of the Water Use Act to be fully implemented, the company's 807 acre-foot diversion must accordingly be analyzed as a whole—so as to ensure that the diversion's adverse effects on prior appropriators can actually

be offset with an adequate mitigation plan. *See* MCA § 85-2-360(3)(b). This requires vacating the company's current—and unlawful—permit.

CONCLUSION

The Department's challenged decision and dewatering loophole defy the language and purpose of both the Water Use Act and Montana's Constitution. In order to ensure that the state's waters and senior appropriators are adequately protected, as the law requires, this Court should vacate the Department's decision and the unlawful permit it issued for the Black Butte Mine.

Respectfully submitted this 6th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that the foregoing brief is double-spaced and printed with a 14-point, proportionately spaced typeface, Century Schoolbook. I further certify that the brief contains 7,714 words, within the limit allowed by this Court's December 1, 2023 order granting the appellants leave to file an overlength reply brief of no more than 7,750 words.

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CERTIFICATE OF SERVICE

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