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.

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

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The Association of Gallatin Agricultural Irrigators, Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana League of Cities and Towns, Montana Stockgrowers Association, and Montana Water Resources Association (collectively hereinafter "Joint Amici") hereby file this amicus curiae brief as permitted by the Montana Supreme Court's September 7, 2023 *Order Granting Leave to File Amicus Brief*.

The Joint Amici are organizations that individually represent Montana farmers, ranchers, business owners, cities, counties, and local governments, business owners, irrigation districts and ditch companies. Their members are among the largest and oldest water rights holders and water users in the state. Joint Amici adopt by reference their September 7, 2023 *Unopposed Motion for Leave [of Joint Amici] to File an Amicus Curiea Brief in Support of Appellees*, which sets forth the interests of each Joint Amici in this case.

STATEMENT OF THE ISSUES

1. Whether every person who manipulates or interacts with water should be required to obtain a beneficial water use permit pursuant to Sections 85-2-301(1), and -311(1) of the Montana Water Use Act, even when there is no beneficial use of water.

2. Whether Section 85-2-102(27) of the Montana Water Use Act, as a matter of law, prohibits every manipulation or interaction with water as an illegal

"waste," unless such manipulation or interaction is authorized through a water right.

STATEMENT OF THE CASE, STATEMENT OF FACTS, and STANDARD OF REVIEW

Joint Amici adopt the Statement of the Case, Statement of Facts, and Standard of Review set forth by Appellees Montana Department of Natural Resources and Conservation ("DNRC") and Tintina Montana, Inc. ("Tintina").

SUMMARY OF THE ARGUMENT

Trout Unlimited, Montana Trout Unlimited, Montana Environmental Information Center, Earthworks, and American Rivers (collectively hereinafter "Conservation Objectors") ask this court to fundamentally reinterpret the foundational basis of every water right in Montana: "beneficial use."

While Conservation Objectors are concerned with the Tintina Mine, they have constructed an absolutist legal argument in which the Montana Water Use Act ("WUA") broadly requires a water right for every 'diversion' or 'manipulation' of water, even when there is no "beneficial use" of water involved. Because the Montana Constitution mandates that only "beneficial uses" of water may obtain a water right, Conservation Objectors further ask this court to construe the statutory definition of "beneficial use" such that any manipulation or interaction with water is a 'use' and any 'benefit' derived renders the interaction a 'beneficial use.' Conservation Objectors alternatively suggest that if such 'diversions' or

'manipulations' of water are not "beneficial uses," they must be prohibited under the WUA as illegal "waste." Accordingly, Conservation Objectors construct a Catch-22, in which the WUA simply prohibits the mine.

Because Conservation Objectors' "beneficial use" or "waste" argument is constructed to result in non-compliance with the WUA, it will broadly impact thousands of other legal manipulations of water. Joint Amici are not filing this brief to support Tintina's mine, but rather to oppose a fundamental re-write of the WUA. Meddling with the statutory definition of "beneficial use" – the basis for every water right in Montana – will have profound unintended consequences.

The purpose of the WUA is to regulate water rights, not to convert all interactions with water into a water right, nor to stop otherwise legal and permitted activities that a particular group does not like. While the WUA provides broad authority for the DNRC to regulate manipulations of water for which there is not a water right, that authority is exercised through an enforcement action brought in district court, and not through the water rights permitting process.

Accordingly, the Montana Supreme Court should reject Conservation Objector's contention that every 'manipulation' of water is categorically regulated as a "beneficial use" necessitating a water right, or as prohibited "waste."

ARGUMENT

I. CONSERVATION OBJECTORS ATTEMPT TO CHANGE THE FOUNDATIONAL BASIS FOR A WATER RIGHT IN MONTANA FROM "BENEFICIAL USE" OF WATER TO 'DIVERSION' OR 'MANIPULATION' OF WATER.

Conservation Objectors ask this court to fundamentally re-define what a water right is in Montana. Their central thesis is that Tintina should be required to obtain a water right for 'diversions' of water that will not be put to beneficial use. In so doing, they would change the basis for appropriating a water right in Montana from the long-standing "beneficial use" basis, to a new 'diversion' or manipulation basis.

The foundational doctrine of Montana water law has long been that: "[T]he amount actually needed for beneficial use within the appropriation will be the ***basis, the measure and the limit of all water rights in Montana*** as between appropriators, and as between appropriators and others." *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶24 (emphasis added)(*quoting McDonald v. State*, 220 Mont. 519, 532 (1986)). "The controlling principle of Montana water law is the right to beneficially use water—***without beneficial use the right ceases***." (emphasis added)(*citing Curry v. Pondera Cnty. Canal & Reservoir Co.*, 2016 MT 77, ¶25; *Power v. Switzer*, 21 Mont. 523, 529 (1898); *Quigley v. McIntosh*, 110 Mont. 495, 505 (1940)).

This beneficial use doctrine has been codified into the fabric of Montana Water Use Act ("WUA"). §85-2-101(1), MCA("Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people ***and are subject to appropriation for beneficial uses*** as provided in this chapter." (emphasis added).

This case concerns the portion of groundwater Tintina will encounter in its underground mine tunnels which it will ***not*** use, but instead re-infiltrate into the nearby groundwater aquifer. Because there is no "beneficial use" of this water it is not regulated through the issuance of a water right. Indeed, Tintina is rightly prohibited from obtaining a legally protectible water right for water that it will not put to "beneficial use." § 85-2-311(1), MCA.

However, Conservation Objectors want to force Tintina into the water rights permitting process for this un-used water. Contrary to the long-standing beneficial use doctrine, Conservation Objectors argue the WUA and the term "beneficial use" as necessarily regulating every 'diversion' or manipulation of water through the issuance of a water right (even when there is no use of water).

The consequences of re-defining "beneficial use" – the foundational basis of every water right in Montana – go far beyond the proposed Tintina mine. The Joint Amici file this brief because the WUA regulates "appropriations" of water, a

protectible property right for the beneficial use of water. The Conservation Objectors' construction would require thousands of otherwise legal manipulations of water to obtain a water right, even when there is no use of water. "Beneficial use," as defined by the WUA, is clear on its face, and its meaning should not be disturbed or expanded by this court.

A. The Montana Water Use Act does not regulate all 'diversions' of water by categorizing them, as a matter of law, into either "beneficial uses" or "wastes," but instead regulates the "appropriation" of water through a fact-based analysis.

Conservation Objectors' *Opening Brief* has nowhere quoted the full, pertinent statutory provisions, and instead cobble-together disparate phrases and single words. Conservation Objectors' central argument, which falls apart under any careful reading of the WUA, is that:

> "The Department's decision was wrong as a matter of law. The Water Use Act divides diversions into two categories: "beneficial uses," which are subject to the statute's permitting and mitigation requirements, and "waste," which is prohibited. *See, e.g.*, MCA §§ 85-2-102(27), 85-2-301, 85-2-302, 85-2-505. The statute does not recognize a third category of unlimited groundwater pumping for mine dewatering or any other purpose. *See id."*

Opening Brief of Conservation Objectors, p.3 (hereinafter "*Opening Br.*")

To the contrary, the WUA does not categorically divide diversions into a binary system of "beneficial uses" or "wastes." Nor does the WUA attempt to regulate every 'diversion' of water through the issuance of a water right. In fact,

the WUA makes no attempt to even define what a 'diversion' is. *See* § 85-2-102, MCA.

Instead, the WUA regulates an "appropriation" of water, which is statutorily defined to mean "to divert, impound, or withdraw, including by stock for stock water, a quantity of water ***for a beneficial use***…" § 85-2-102(1)(a), MCA (emphasis added). Thus, while Section 85-2-301 provides that "a person may not appropriate water except as provided in this chapter," and that "[a] person may appropriate water only for a beneficial use," definitionally, that only regulates the diversions of water ***for*** a beneficial use. § 85-2-301(1), MCA. Similarly, while Section 85-2-302 provides that "a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works unless the person applies for and receives a permit," that again only prohibits the diversion ***for*** a beneficial use, or the construction of diversion works "related" to the diversion of water ***for*** a beneficial use. § 85-2-302(1), MCA. In sum, the WUA permit process strictly regulates "appropriations," which are definitionally limited to diversions for a "beneficial use."

Similarly, the term "waste" is also focused on "appropriations," and is defined to mean "the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use." § 85-2-102(27), MCA. This definition is

not a prohibition in and of itself, and instead the DNRC is called upon to regulate "waste" through enforcement actions:

> "If the department ascertains, by a means reasonably considered sufficient by it, that a person is wasting water, using water unlawfully, preventing water from moving to another person having a prior right to use the water, or violating a provision of this chapter, it may petition the district court supervising the distribution of water among appropriators from the source."

§85-2-114(1), MCA

If the statutory definition of "waste" were a self-executing legal prohibition against 'the diversion of water without a water right,' then the statutory criteria for enforcement actions under Section 85-2-114 would be unnecessary, as would identifying other prohibited actions. Instead, Section 85-2-114 authorizes DNRC to regulate a wide swath of conduct that unreasonably wastes water or interferes with another's water rights.

Thus, contrary to Conservation Objector's arguments, the DNRC already has comprehensive authority to regulate diversions of water that are not "appropriations," but that authority is through enforcement actions and not a

mandate that every manipulation of water obtain a DNRC-issued water right. *See* §§ 85-2-114; -122, MCA.[1]

Conservation Objectors also incorrectly assert that questions of "beneficial use" and "waste" are "matters of law." *Opening Br.* p.3. Instead, Section 85-2-311 of the WUA sets forth the criteria to appropriate water and provides: "[T]he department shall issue a permit if the applicant proves ***by a preponderance of evidence*** that the following criteria are met: … (d) the proposed use of water is a beneficial use." §85-2-311(1)(d), MCA(emphasis added).

That beneficial use is a factual question is well illustrated in *United States of America v. Montana*, Montana Water Court, Claims 39E 60874-00, *et al* (Aug. 14, 2015), in which the United States sought to adjudicate its practice of diverting water at several of its dams for "flood control" purposes. *Order Rejecting Master's Report and Order Setting Scheduling Conference*, *United States of America v. Montana*, No. 39E 60874-00, 2015 WL 5478234, at *1 (Mont. Water Ct. Aug. 14, 2015). The Water Court ruled against the United States rejecting the argument that mere diversion of flood water was a beneficial use, as a matter of law. *Id*., 2015 WL 5478234, at *3-4. Instead, the Water Court held that the United States was

[1] Similarly, injured water rights holders may initiate their own cause of action, albeit under different statutory and common law authority. *See e.g. Lyman Creek, LLC v. City of Bozeman*, 2019 MT 243, ¶13 (*citing* §85-2-406, MCA); §85-2-114(9),MCA.

required to prove facts, on a case-by-case basis, establishing actual application of the diverted flood water to a beneficial use. *Id.*, 2015 WL 5478234, at *5.

In sum, and contrary to Conservation Objector's construction, the WUA does not regulate every diversion of water through the water rights permitting process, nor curtail every activity that does not have a water right.

B. There are thousands of 'diversions' or 'manipulations' of water, which are not "appropriations" under the WUA, do not require a water right, and do not constitute "waste."

The Joint Amici's reason for filing this brief is that the Conservation Objectors' binary, "beneficial use" or "waste" argument would convert thousands of benign and otherwise legal actions into illegal 'wastes' of water.

For example, many dams across Montana are flood control dams, that divert and store flood waters to protect citizens and property. "Hungry Horse Reservoir has 2,982,000 acre feet of capacity assigned to flood control… [and] has provided an accumulated $136,473,000 in flood control benefits from 1950 to 1998." U.S. Bureau of Reclamation, *Hungry Horse Project*, https://www.usbr.gov/projects/index.php?id=337(click on "Construction" tab)(*last accessed* Oct. 23, 2023). Hungry Horse has no flood control water right. Clark Canyon Reservoir is used for multiple purposes, but has an exclusive flood control pool of 77,136 acre-feet. U.S. Bureau of Reclamation, *Clark Canyon Reservoir Allocations* (*available at* https://www.usbr.gov/gp/aop/resaloc/clark_canyon.pdf.) Clark Canyon Reservoir

also has no flood control water right. In addition, to name only a handful, are Tiber Dam, Canyon Ferry Reservoir, Fort Peck Reservoir, and Libby Dam; among the largest reservoirs in the western U.S. The sheer magnitude of flood control water diverted by these structures is staggering, and none have a flood control water right. As previously cited herein, the Montana Water Court has held that mere diversion of flood control water is not, as a matter of law, a "beneficial use." *Order Rejecting Master's Report and Order Setting Scheduling Conference*, *United States of America v. Montana*, No. 39E 60874-00, 2015 WL 5478234, at *5 (Mont.Water Ct. Aug. 14, 2015). Thus, while these dams divert, they are not "appropriations" and cannot receive a water right because the water is not diverted for a beneficial use.

In another example, cities and towns are required under the Montana Water Quality Act, 75-5-401, MCA, and Sections 402 and 303 of the Clean Water Act, to obtain state permits for stormwater discharge into state waters. In turn, cities and towns are required to enact local ordinances to ensure their citizens and businesses comply with the stormwater discharge permits and best management practices to protect water quality in Montana. The result of these laws is seen everywhere around cities and towns: miles of curb and gutter on streets, thousands of stormwater inlet grates located on almost every city block, miles of storm pipe; Stormwater retention ponds inconspicuously located along the parking lots of

businesses and box stores; and extensive gutters, French drains, and retaining walls diverting water into infiltration galleries and permeable areas. And the amount of water dealt with is very large. For example, a ½" rainstorm event in the City of Missoula's permitted municipal separate storm sewer system results in 931 acre-feet of water falling over the area. All of these activities would likely be construed as 'diversions,' which are temporary and necessary to create suitable construction environments or safe and habitable structures, but do not require a water right because there is no "beneficial use" of the water.

From an agricultural perspective, a binary "beneficial use" or "waste" distinction is problematic on multiple fronts. Farmers and ranchers could be construed as regularly 'diverting' water on their property without a water right. This can be seen in the thousands of drain ditches across the state, which provide an outlet for tailwater and wastewater that would otherwise artificially collect at the end of their fields and kill crops. Alternatively, hundreds of miles of levees or "rip-rap" are located along streams and rivers, protecting lands from flooding and erosion. Many water users have diversion structures in the streams, which back up water so that it can flow into their ditch – often backing up more water than is actually "diverted" into the ditch. Each of these activities could constitute a 'diversion,' or 'manipulation,' but none need a water right because the water is not put to a beneficial use.

As previously explained, current Montana law recognizes that "waste" is the "unreasonable" or "negligent" use of water. §85-2-102(27), MCA. But what is "unreasonable" or "negligent" is a necessarily fact-dependent question. For example, in northwest Montana it is not uncommon for ranchers to divert 5 cubic feet per second ("cfs") of water into a ditch system for cows to drink, and lose 1 cfs of water that infiltrates into the ground as ditch loss. But in eastern Montana where streams regularly dry up in May, it is not uncommon for a small diversion of water to be conveyed through 5 or 10 miles of pipe to a single 100 gallon stock tank, so as to avoid any ditch loss. Both of these diversions have a water right, and both are currently recognized as operating reasonably efficient systems for their circumstances (e.g. not wasting water), but they operate on substantially different efficiencies. Conservation Objectors' black-and-white "beneficial use" or "waste" argument immediately implicates whether ditch loss is a "beneficial use" or "waste." If ditch loss a "beneficial use," is the farmer entitled to put the water in a pipe and consume the full measure through more intensive irrigation? Alternatively, if it is "waste," is any ditch loss acceptable, and must every farmer pipe their water? Such absolutist questions only exist under the Conservation Objectors' binary absolutist construction of the WUA.

Instead, Montana water law already regulates the concepts of "beneficial use" and "waste" flexibly, on a factual basis, and not through a binary legal

classification. Statute and rule facially recognize that reasonable diversions will lose a certain amount of water to ditch loss, thereby requiring the DNRC to analyze the difference between "beneficial use" and "consumptive use." For example, Section 85-2-408, Montana Code Annotated provides the statutory mechanism to change an existing water right to the purpose of instream flow for fishery benefit. It provides that the historically diverted amount (including ditch loss) can be protected instream down to historical point of diversion. § 85-2-408(8), MCA. However, only the historically consumed portion (e.g. excluding ditch loss) can be protected further downstream. § 85-2-408(8), MCA. Thus, while reasonable ditch loss is a fundamental part of the historical water right and can be protected at the historical point of diversion, because such ditch loss was infiltrated into the ground and returned to the source, it cannot be protected beyond the headgate. This distinction is applied in all DNRC change applications. See ARM 36.12.1902(3), and (12). If "beneficial use" were simply a black-and-white category, there would be no need to analyze the extent of 'historical consumptive use' at all.

Tintina's briefing to the district court correctly identified a substantial number of other diversions for which no water right is required, and Joint Amici agree with that non-exhaustive list. *See Tintina Montana Inc.'s Brief in Opposition to Objectors' Petition for Judicial Review*, Montana 14th Judicial Dist. Ct., Case DV-2022-9, p.25-26 (Mar. 17, 2023).

Notable among that list are "stream restoration" projects. Trout Unlimited is a partner in, or directs, substantial stream restoration projects across the state. Their efforts to clean-up and improve waterways in the state are extensive, important, and can have broad impacts on both the human and natural environment. Montana TU's website documents multiple projects that: installed and diverted water through a new stream channel, fish screens, or fish ladders; piped water from one source to another; used heavy machinery to re-channel a stream, or create pools, riffles, 'natural' woody debris dams, 'beaver dam analogs,' or 'bank stabilization' projects. *See* e.g. Montana Trout Unlimited website, *Our Work*, https://montanatu.org/our-work/ (select "On the Ground Projects")(last accessed Oct. 23, 2023); Montana Trout Unlimited, *Trout Line* (Fall 2022) p.6-7 (available at https://montanatu.org/fall-2022-trout-line/); Montana Trout Unlimited, *Trout Line* (Summer 2023), p.3,7 (available at https://montanatu.org/summer-2023-trout-line-newsletter/). While these projects are laudable, TU does not appear to be obtaining water rights for these extensive "diversions" of water. Even when TU would assumedly characterize these projects as beneficial, there is not a true "beneficial use" of the water, and thus no water right is needed (as evident by their lack of an application for one). Joint Amici, are not interested in good work being stymied under an inflexible and unneeded interpretation of the WUA that requires a water right for every manipulation of water.

Montanans 'divert' or manipulate water all the time, and often when there is no "appropriation." That is because while 'diversions' may benefit the diverter, or public at-large, there is no application of water to a "beneficial use." Accordingly, such manipulations of water should not be entitled to the legal protection of a water right. The WUA is working as intended, and should not be construed as broadly regulating every interaction with water through the issuance of legally protectible water rights..

C. Receiving a "benefit" from water is not the same as a "beneficial use" of water, nor is "use" so broad as to encompass every interaction with water.

Conservation Objectors further contend that if a person 'benefits from' water then the person's interaction with water must be interpreted as a "use," which *ipso facto* means it is a "beneficial use" requiring a water right. This is seen when they argue:

> [E]very acre-foot of groundwater that Tintina would have to remove from the ground in order to permit mining operations would, in fact, be used for mining. And because this use of groundwater would benefit Tintina—by allowing the company to secure more than 14 million tons of copper-enriched rock—it checks the statute's beneficial box, as well.

Opening Br., p. 28 (quotation and citations omitted).

This construction swallows the statutory definition of "beneficial use" and renders it meaningless. *Opening Br.,* p.28-30. Under this construction, any

interaction with water is a 'use,' even its mere removal. And, according to Conservation Objectors, every "use" must be a "beneficial use," because a person would not manipulate the water if there was no benefit. There is no reasonable end to Conservation Objectors construction:

- A business owner 'benefits from' the city stormwater grate outside her stormfront, which is 'used' to keep her property from flooding.
- A fisherman 'benefits from' a river, which he 'uses' for recreation and enjoyment.
- A local rancher 'benefits from' a levee put along the stream, which is 'used' during a flood to keep his property intact.
- A farmer 'benefits from' rain which falls on his fields, which is 'used' to grow his crop.
- A rafting guide 'benefits from' the river, which he 'uses' to guide his clients and generate business profits.

None of these interactions with water have ever required a water right, but no reasonable person would argue that there is no 'benefiting from' the water. The Conservation Objectors' exceptionally broad construction of the word "use" dictates that all these interactions are 'beneficial uses' requiring a water right.

D. Conservation Objectors construction of the term "beneficial use" has no principled limit, and would sweep nearly any interaction with water into the ambit of the WUA.

Conservation Objectors construction of the term "beneficial use" is exceptionally broad and without nuance. The apparent intent is to create a statutory construction of the WUA that prohibits Tintina from any interaction with the groundwater it will encounter in its underground mine, unless and until it obtains a water right for every drop of water it encounters, regardless of whether the water will actually be used.

While Conservation Objectors may strongly oppose the mine, it appears to the Joint Amici that the big loser could be thousands of Montanans who suddenly need a water right, even when there is no beneficial use of water. The point of the WUA is to regulate water rights, not to convert all interactions with water into a water right.

At the district court, Tintina raised exactly this argument, and Conservation Objectors responded by calling it "hyperbole." *Petitioners' Reply Brief*, Montana 14th Judicial Dist. Ct., Case DV-2022-9, p.25 (Mar. 31, 2023). Conservation Objectors' district court reply brief never addresses the substance this issue, but instead sets-up a strawman argument. They contend these other activities that would get swept into the ambit of the WUA are different from Tintina because they:

> "involve, at most, only modest and temporary manipulations of the state's water resources that would not deprive senior appropriators of their rights. . . . As a result, the Department would rightly conclude that many of the activities fall short of a regulated "appropriation." See MCA § 85-2-102(1)(a) (defining "appropriation" as requiring a "diver[sion], impound[ment], or withdraw[al] … of water")."

Id. But, the term "manipulation" is nowhere defined or used in the WUA (*See* § 85-2-102, MCA), and aside from knocking down their strawman, Conservation Objectors wholly fail to explain what distinguishes a 'manipulation' of water from a 'regulated appropriation.' In actuality, these situations are not "appropriations" under the WUA because "appropriation" is defined as "to divert, impound, or withdraw, including by stock for stock water, a quantity of water ***for a beneficial use***," and there are no beneficial uses in these examples. § 85-2-102(1)(a), MCA(emphasis added).

Most concerning, is Conservation Objectors' creation of 'regulated appropriations,' as that the WUA strictly ***requires*** a DNRC-issued beneficial use permit for ***every*** "appropriation" of water; there is no 'unregulated appropriation' under the WUA. §§ 85-2-102(1)(a); -301, MCA. In other words, the Conservation Objectors have construed the term "beneficial use" so broadly as to require a water right even when there is no use of water – but then introduces a wholly new concept of 'regulated appropriations' to mitigate against the broad sweep of that construction. Under this theory Conservation Objectors contend that the DNRC

"would only be obligated to evaluate [the] potential impacts and issue the requisite permits" for activities that rise to the level of "regulated appropriations," which Conservation Objectors define to be "modest and temporary manipulations of the state's water resources…." *Petitioners' Reply Brief*, Montana 14th Judicial Dist. Ct., Case DV-2022-9, p.25 (Mar. 31, 2023).

Thus, Conservation Objectors invite a construction of the WUA which renders the statutory definition of "beneficial use" meaningless, creates a whole new concept of 'regulated appropriations' nowhere contained in the WUA, and ultimately depends on the DNRC ignoring its statutory duties. Such a construction of the WUA cannot be what the Montana legislature intended. Conservation Objectors construction provides less clarity, and would likely result in years of litigation. The WUA should not be gutted simply to address Conservation Objectors concerns in a single matter.

E. "Aquifer recharge" is a statutorily defined term, and is not a catch-all 'beneficial use' for any water which infiltrates into the ground.

Conservation Objectors' brief to this court has also invited this court to misconstrue "aquifer recharge," contending that "any use of water for aquifer recharge or mitigation is also considered beneficial under the Water Use Act." *Opening Br.*, p.31. While, strictly speaking, this quote is accurate, Conservation Objectors gloss over the fact that "aquifer recharge" is statutorily defined to mean:

"either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer ***to offset adverse effects*** resulting from net depletion of surface water." § 85-2-102(3), MCA(emphasis added); see also §§ 85-2-360(1)(c); -362(1)-(4); -420(1), MCA. Conservation Objectors effectively ask this Court to strike the critical phrase "to offset adverse effects" from the definition of "aquifer recharge."

The phrase "…***to offset adverse effects*** resulting from net depletion of surface water" is critically important, and was carefully crafted by the Montana Legislature to bridge the gap between an applicant's duty to satisfy the "adverse effect" criteria for a new appropriation of water under Section 85-2-311(1)(b), through DNRC approved 'mitigation plans' under Sections 85-2-360(1)(c); and -362(1)-(4) that must offset the adverse effects which would otherwise harm existing water rights. Under the WUA, "aquifer recharge" and "mitigation" are statutorily defined mechanisms by which new water developments are authorized while insuring that any injury to senior water rights is actually 'mitigated.' .

Joint Amici oppose the profound uncertainty of re-defining "aquifer recharge" or "mitigation." Joint Amici represent some of the most senior water rights holders in the state, who rely on a properly functioning system whereby "aquifer recharge" and "mitigation" ***actually*** offset adverse impacts. If this court

were to accept Conservation Objectors' argument that any project which 'replenishes the aquifer' is "aquifer recharge," even when it does not offset adverse effect, then it appears that the DNRC might be required to grant appropriations of groundwater which facially includes an 'aquifer recharge' project that does not actually prevent injury to other water rights. *See* §§ 85-2-102(3); -362, MCA. Put another way, it opens the door to sham aquifer recharge projects. Such a construction would turn the entire permitting system on its ear, and result in exactly the opposite of what it was intended to accomplish.

CONCLUSION

For the foregoing reasons, the Montana Supreme Court should: (A) reject Conservation Objector's statutory construction that that every 'diversion' or 'manipulation' of water is categorically regulated by the WUA as either a "beneficial use" or a "waste," (B) reject Conservation Objector's statutory construction the term "beneficial use" as encompassing every interaction with water from which a benefit is derived, and (C) reject Conservation Objector's statutory construction the term "aquifer recharge" as encompassing every infiltration of water into the ground. With those issues resolved the Montana Supreme Court should affirm the DNRC's determination concerning Tintina's application for a beneficial water use permit.

Dated this 23rd day of October, 2023.

FRANZ & DRISCOLL, PLLP

Ryan McLane

Attorney for Association of Gallatin Agricultural Irrigators, Montana Chamber of Commerce, Montana Farm Bureau Federation, Montana League of Cities and Towns, Inc., Montana Stockgrowers Association, and Montana Water Resources Association.

CERTIFICATE OF COMPLIANCE

In compliance with Rule 11(4)(a), M. R. App. P., counsel for Amicus Curiae certifies that the foregoing Amicus Curiae Brief is printed with a proportionately spaced Times New Roman font of 14 points; is double-spaced (excluding captions and quotes); and the word count calculated by Microsoft Word, is no more than 5,000 words (excluding this certificate of compliance and the following certificate of service).

FRANZ & DRISCOLL, PLLP

Ryan McLane

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Amicus Curiae Brief in Support of Appellees* was served upon the following parties via U.S. mail first-class postage prepaid, or by email through the Supreme Court's file and serve platform, as indicated below on the automatically generated service list, on this 23rd day of October 2023.

Galen Brewer