



Water Policy Interim Committee

60th Montana Legislature

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Memorandum

To: Water Policy Interim Committee Members

From: Krista Lee Evans, Research Analyst

RE: Permit actions as the result of TU v. DNRC

Date: June 12, 2007

Attached is information pertinent to discussion related to new ground water appropriations in closed basins. On April 11, 2006, the Montana Supreme Court issued a decision and order related to the groundwater exemption in closed basins -- Montana Trout Unlimited v. DNRC, 2006 MT 72.

Closed basins (prior to the 2007 session) limited new appropriations except for certain exemptions which varied from closed basin to closed basin but generally included stock water, domestic wells, municipal use, and ground water that was not immediately or directly connected to surface water. This was a very important issue because there were multiple applicants that were applying for a new appropriation for groundwater when the TU decision was made. The Court essentially said that the Department needed to consider tributary ground water when determining if groundwater was immediately or directly connected to surface water.

The department determined that as a result of the final order all undecided applications located in the Upper Missouri Basin, the Teton River Basin, and the Jefferson/Madison Basin closure areas were subject to the court's ruling no matter what stage of the process unless they had been finally approved.

All pending applications received notice regarding the fact that their application may be affected by the court ruling. Some applicants chose to terminate their applications, others amended their application so that it was under a different exemption other than ground water (municipal for example), and some chose to remain in the process.

With the enactment of HB 831 these pending applications have the opportunity to resubmit their application meeting the more stringent requirements of HB 831. However, if the ground water withdrawal will have an adverse affect on a prior appropriator the applicant can now submit a mitigation plan or aquifer recharge plan to show how the adverse affect will be offset and their application can move the process. These applications that are resubmitted were guaranteed their

initial filing date as a priority date even if they have to resubmit their application by the enactment of HB 831.

A copy of the TU decision is attached as well as a copy of the memo sent to applicants by DNRC and a spreadsheet of the applications that were affected by the TU decision and their status as of the middle of April.

If you have questions or comments don't hesitate to contact me at 444-1640 or kevans@mt.gov. If I am unavailable I will check my messages and respond as quickly as possible.

Memo

WATER RIGHTS BUREAU
NEW APPROPRIATION'S PROGRAM

TO: Water Resources Regional Managers and New Appropriations Staff
FROM: Kim Overcast, New Appropriations Program Manager
SUBJECT: Implementation of Supreme Court Case entitled *Trout Unlimited v. DNRC*
DATE: June 15, 2006

BACKGROUND

In 1993, basin closure statutes were passed in the Upper Missouri, Teton, and Madison-Jefferson drainage basins. The laws allowed DNRC to process water right permit applications if the applications were for stock, domestic, non-consumptive, or municipal purposes or for ground water that was not immediately or directly connected to surface water. The term "immediately or directly connected to surface water" was not defined in statute. The DNRC interpreted immediately or directly connected to mean ground water that was pulling surface water into the "cone-of-depression". If the cone-of-depression created by pumping a well at the flow and volume requested caused surface water to be drawn into the well, then the application could not be processed. If DNRC accepted a ground water application, an objector to the application could disagree with the DNRC's decision and raise the issue at a hearing.

In July of 2003, Trout Unlimited (TU), irrigators, and outfitters filed a lawsuit against DNRC claiming in part that the manner in which DNRC made the determination that an application could be accepted was improper and that DNRC's definition of immediate or direct affect was too narrow. DNRC and TU came to an agreement on how to determine if a ground water application could be accepted. The stipulation required that a DNRC hydrologist determine if an applicant had submitted sufficient data to determine if the cone-of-depression would or would not intercept surface water.

On April 11, 2006 the Montana Supreme Court determined that DNRC's interpretation of "immediately or directly" failed to account for impacts to surface flow caused by the prestream capture of tributary groundwater. The Court stated that DNRC's interpretation recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater.

As a result of the recent Court decision, in addition to the cone-of-depression test data, DNRC must also require a water right applicant provide information that proves that the ground water they seek to use does not at any time capture prestream tributary ground water.

* The application of the Court case only applies to the Upper Missouri Basin, the Teton River Basin, and the Jefferson/Madison Basin closure areas. It does not apply to the Bitterroot and the Upper Clark Fork Basin closures.

RETROACTIVITY

As a result of a final order issued by a Department hearings examiner, all undecided applications located in the Upper Missouri Basin, the Teton River Basin, and the Jefferson/Madison Basin closure areas are subject to the Court's ruling. This includes permit applications in the following processes:

- 1) An application for ground water where the immediate or direct determination and the correct and complete determination have been made, but the application has not been publicly noticed
- 2) An application that has been publicly noticed and the objection deadline has not ended
- 3) An application that has been publicly noticed and objections were not received
- 4) An application that has been publicly noticed and objections were received
- 5) An application that has had a procedural order issued from the hearings unit
- 6) An application that has a hearing date set

- 7) An application where the hearing has been held, but no Proposal for Decision has been issued
- 8) An application where the hearing has been held and a Proposal for Decision has been issued, but no exceptions were filed
- 9) An application where the hearing has been held and a Proposal for Decision has been issued and exceptions have been filed or an oral argument has been requested
- 10) An application where the hearing has been held, the Proposal for Decision has been issued, an oral argument has been held, but no final decision has been issued

For applications on which the DNRC has issued a final decision as of April 11, 2006, such as through a Final Order, the Court decision will not be retroactively applied.

PROCEDURAL ACTION

- 1) The Central Office will provide a list to the Regional Offices of all pending applications located within the applicable basin closure areas. The Regional Office will review the list and let the Central Office know of any corrections.
- 2) For a pending application for ground water, which does not fall under another exception allowed in the statute, the Water Rights Bureau will mail the attached letter "A" to the applicant and will enclose a copy of the TU decision.
- 3) Upon receipt of the information requested in letter "A", the Regional Office will mail the original application with all of the applicant's information to the Department's ground water hydrologist.
- 4) The Department hydrologist will review the application data and provide written documentation stating that the applicant has or has not proven that the ground water they propose to use is not capturing prestream tributary ground water. If it is proven that the ground water is not capturing prestream tributary ground water, then the hydrologist will evaluate whether the applicant has submitted sufficient data to determine if the cone-of-depression would or would not intercept surface water.
- 5) If the applicant meets both tests, the application can move forward and a decision on whether the application is correct and complete can be made.
- 6) If the applicant has not met both tests, attached letter "B" will be sent to the applicant with a copy to the Central Office along with a copy of the hydrologist's report. The application will be terminated.
- 7) If an application is for ground water, but meets one of the other exceptions allowed by statute, the applicant will not be sent letter A. The Department will accept the application and will then determine if the application is correct and complete.

NEW APPLICATIONS

1. The Regional Office will accept the application and transmit the filing fee.
2. The Regional Office will mail Letter A to the applicant and allow 90 days from the date of the letter to submit the required information.
3. Follow the steps from 3) above.

Letter "A"

Date _____

Name _____

Address _____

City State Zip _____

Subject: Water Right Application No. _____
Received _____

Dear _____,

A recent Montana Supreme Court decision affects your water right application that is located in the Upper Missouri, Teton, or Madison-Jefferson basin closure area. Please read the details below.

Background

In 1993, basin closure statutes were passed in the Upper Missouri, Teton, and Madison-Jefferson drainage basins. The laws allowed DNRC to process water right permit applications if the applications were for stock, domestic, non-consumptive, or municipal purposes or for ground water that was not immediately or directly connected to surface water. The term "immediately or directly connected to surface water" was not defined in statute. The DNRC interpreted "immediately or directly connected" to mean ground water that was pulling surface water into the "cone-of-depression". If the cone-of-depression created by pumping a well at the flow and volume requested caused surface water to be drawn into the well, then the application could not be processed. If DNRC accepted a ground water application, an objector to the application could disagree with the DNRC's decision and raise the issue at a hearing.

In July of 2003, Trout Unlimited (TU), irrigators, and outfitters filed a lawsuit against DNRC claiming in part that the manner in which DNRC made the determination that an application could be accepted was improper and that DNRC's definition of immediate or direct affect was too narrow. DNRC and TU came to an agreement on how to determine if a ground water application could be accepted. The stipulation required that a DNRC hydrologist determine if an applicant had submitted sufficient data to determine if the cone-of-depression would or would not intercept surface water.

On April 11, 2006 the Montana Supreme Court determined that DNRC's interpretation of "immediately or directly" failed to account for impacts to surface flow caused by the prestream capture of tributary groundwater. The Court stated that DNRC's interpretation recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater.

What is the Next Step?

As a result of the recent Court decision, in addition to the cone-of-depression test data, DNRC must also require a water right applicant provide information that proves that the ground water they seek to use does not at any time capture prestream tributary ground water that will reach a closed surface water

source. The Court order does not define a time period that should be evaluated. For example, should an applicant evaluate prestream capture of water that may reach a surface water source in months, years, decades, or a further time? Because of the uncertainty, DNRC will reject an application that shows any prestream capture of tributary ground water.

The burden is on you as the applicant to present adequate information proving that your application meets the requirement in the Court order. If you choose to continue your application, you will probably need to contact a professional hydrologist to prepare a ground water analysis and report. In order for the Department to accept your application, the analysis must prove that:

- 1) The ground water you seek to use is not ground water that would at any time enter a surface water stream, thereby causing a reduction in the surface flows; and
- 2) The cone-of-depression created by pumping the well will not induce surface water. (If the cone-of-depression information has already been provided, it does not need to be resubmitted.)

Please review the application you submitted and decide if you want to provide the required information. If you choose to continue your application, the required information must be submitted by **November 1, 2006**. No extensions of time will be granted.

The Department hydrologist will review the data submitted and determine if you have proven that the ground water you propose to use does not, at any time, capture prestream tributary ground water. The DNRC will provide the hydrologist's determination to you. If the determination is that the application does not meet the requirements, your application will be terminated. However, you can submit a new application at any time. The application and objection filing fees will be refunded. If the determination is that the application meets the basin closure requirements, your application will move to the next processing step.

If you have any questions about the Court decision, please contact your local Water Resources Regional Office at _____. At this time, the Department may not be very helpful answering questions about the Court requirement, since it is uncertain what the Court intended.

The Department recognized that ground water and surface water interaction was becoming a hot issue and a focus group, which includes public and private individuals, has been studying the issue for the last several months. It is likely a proposal will be submitted to the 2007 Legislature.

Sincerely,

Kimberly A. Overcast
New Appropriations Program Manager
Phone No. 406-444-6614
Fax No. 406-444-0533
Email - kovercast@state.mt.us

Enclosure: Supreme Court Decision

WITHDRAWAL REQUEST

Water Right Application No. _____

I hereby withdraw my water right application. By acknowledging this, I understand I cannot appropriate the water applied for under this application.

Signature _____ Date: _____

Letter "B"

Date

Name

Address

City State Zip

Subject: Water Right Application No. _____
Received _____

Dear _____,

Your ground water application is located in a basin closure area that requires you meet the following two requirements before your application can be processed.

- 1) The ground water you seek to use is not ground water that would otherwise enter a surface water stream, thereby causing a reduction in the surface flows, and
- 2) The cone-of-depression created by pumping ground water will not induce surface water

A Department hydrologist reviewed the data you submitted and has determined that one or both of the criteria has not been met. The hydrologist's report is attached.

As stated in Mont. Code Ann. § 85-2-343, Mont. Code Ann. § 85-2-330, or Mont. Code Ann. § 85-2-341 the Department cannot process your application. You can however, submit a new application at anytime. You will receive a refund of your application filing fee.

If you have any questions, please contact the Water Resources Regional Office at _____.

Sincerely,

Regional Office

C: Kim Overcast

June 26, 2006

To: Missoula Regional Office, New Appropriations Program

From: Bill Schultz, Regional Manager

Subject: Implementation of Bitterroot and Upper Clark Fork Basin Closures & Surface Water /Ground Water Connection

Background: On June 16, 2006, a conference call was held to discuss the issues and questions raised in Bill Schultz's June 2, 2006 memorandum to Terri McLaughlin and Kim Overcast (copy attached). The memorandum was in regards to **implementation of the Bitterroot and Upper Clark Fork Basin closures** and the issue of surface and groundwater connection as it applies to processing permit applications. In attendance were Tim Hall, Kurt Hafferman, Terri McLaughlin, Kim Overcast, Bill Schultz and Jim Nave.

Tim Hall started discussion by clarifying that the **difference between the Upper Missouri River Basin closures and the Upper Clark Fork and Bitterroot closures** is that in the Upper Missouri River closure the applicant must demonstrate that the groundwater to be appropriated is not immediately or directly connected to any source of surface water prior to DNRC's being able to process the application. In the Upper Clark Fork and Bitterroot Closures, DNRC can accept and process an application prior to determining if there is a groundwater/surface water connection. The main difference between DNRC's processing applications in the Upper Clark Fork and Bitterroot River Basins is that a report addressing the connectivity of groundwater to surface water must be submitted with a groundwater application in the Upper Clark Fork Basin.

Bill Schultz brought up the point that the new appropriation rules regarding Basin Closure Area Exceptions and Compliance found in 36.12.120 ARM may at times conflict with the statutory requirements of the Upper Clark Fork and Bitterroot River Basins. Tim Hall's response was that **if there is a conflict between the new appropriation rules and the statutes, the statute prevails.**

Bill Schultz's June 2, 2006, memorandum raised four questions regarding the issues with groundwater/surface water connectivity as it applies to processing permit applications in the Bitterroot and Upper Clark Fork closure areas. Tim Hall's response to the first and second questions is that DNRC can and should consider whether or not a proposed groundwater appropriation will adversely impact surface water flows when processing an application. **In the Bitterroot River Basin, if it is found that pumping a well reduces surface water flow** then there is a high probability that the applicant cannot meet the criteria for issuance found in Mont. Code Ann. § 85-2-311. This is not to say that DNRC cannot process the permit through public notice. However, **for the application to be issued, the applicant must address impacts to existing senior surface water users.** Therefore, groundwater applications in the Bitterroot River must address groundwater/surface water connectivity to adequately address adverse impact criteria. In the Upper Clark Fork River Basin Closure, the applicant must address groundwater/surface water connectivity per statutory requirements described in 85-2-337. If groundwater is a part of or substantially or directly connected to surface water the DNRC may not issue the permit unless the augmentation requirements of subsection (3) are met.

To answer the third question raised in the June 2, 2006 memorandum, **if an application is shown to adversely impact surface water in the Bitterroot River Basin, the applicant can mitigate the impacts by augmentation.** The amount of augmentation water must mitigate the adverse affect, but not necessarily the total water depletion (but they may often be the same thing). In the Upper Clark Fork River Basin, the applicant must augment the total water depletion. Subsection 2 and 3 of Mont. Code Ann. § 85-2-337 allow for augmentation.

The final question raised in Bill Schultz's June 2, 2006 memorandum was **what is considered a municipal use as it applies to basin closure exceptions**. The "municipal use" definition at 36.12.101(39) has been withdrawn and a new definition has not been adopted. **If the use is solely for homes, with no other uses such as commercial, then the use is to be considered multiple domestic**. For other proposed uses that involve a combination of domestic and commercial or other uses consult the central office on a case-by-case basis to determine if the proposed use and applicant qualifies as municipal.

The memo above is in response to the issues raised in the June 2 memo below:

June 2, 2006

To: Terri McLaughlin, Chief, Water Rights Bureau
Kim Overcast, Manager, New Appropriations Program

From: Bill Schultz, Manager, Missoula Regional Office

Subject: Bitterroot Closure & Surface/Groundwater Connection

During the discussion regarding the Smith River Supreme Court decision at the Regional Managers meeting on May 18 I raised questions regarding the Bitterroot closure. Kim and Tim Hall agreed that the questions warranted further thought and discussion. Kim stated that she would "set something up" (a meeting?). The purpose of this memo is to define the issues and questions, stimulate the discussion, and hopefully get some answers. There are several groundwater applications pending and more major subdivisions with community water systems that will be submitting their water right applications soon.

In Tim Hall's May 4, 2006 memo to Mary Sexton regarding "TU Supreme Court Case Implementation", under relationship to the Bitterroot Closure, the memo states "Cases would continue to be decided as they normally would be on the "311" criteria (adverse effect)." This raises the following questions concerning groundwater applications in the Bitterroot Closure:

- o For a new groundwater application for a municipal supply (an exception in the Bitterroot Closure) where the aquifer test and analysis indicates that the proposed well will **result in induced streambed infiltration** -- will this be considered grounds for not meeting the legal availability and adverse effect criteria? If the aquifer test indicates that the proposed well will **result in prestream capture of tributary groundwater**, will this be considered grounds for not meeting legal availability and adverse impact criteria?
- o For a new groundwater application that is not for a municipal supply, but otherwise the same scenario as above, are the answers the same?
- o **If the response to either of the previous two bullets is yes, is augmentation allowable to mitigate adverse effects, physical, and legal availability criteria in the Bitterroot?**
- o Is a community water system serving a proposed subdivision considered a "municipal use" and therefore meets the exception listed in the Bitterroot Closure? What is the current definition of "municipal" as it is used in closure exceptions?

Your response is appreciated.

Trout Unlimited Case
Affected Applications
Status

RO	BASIN NUMBER	PURPOSE	STATUS 4-12-2007	CUSTOMER	DATE RCD	SOURCE	
PENDING APPLICATIONS IN PROCESS							
BOZEMAN	41F	30013630	COMMERCIAL	Applicant changed application to "municipal" use. Application published 3-28-2007.	TREELINE SPRINGS LLC	2004-12-29	GROUNDWATER
BOZEMAN	41H	30001469	IRRIGATION-Changed to Multiple Domestic with a lawn and garden component.	Applicant will be submitting an aummentation plan so that permit application can move to the next step.	COOK-LEHRKIND INVESTMENTS	2002-03-27	GROUNDWATER
HELENA	41B	30007456	FISHERY	Received Information to Review for prestream capture - Deemed Adequate - Hearing Requested 5-3-2005	JOHNSON, RONALD W	2001-06-14	GROUNDWATER THROUGH DRAIN PIPE
HELENA	41G	30010250	FISH AND WILDLIFE	Received Information to Review for prestream capture - Deemed Adequate - Hearing Requested 1-4-2005	ANTONIOLI, NANCY L & STEPHEN B	2004-04-07	GROUNDWATER
HELENA	41I	30016557	FIRE PROTECTION	Applicant supplied augmentation plan. Permit was granted.	GRUBER, DAN	2006-03-24	GROUNDWATER
LEWISTOWN	41QJ	30017987	IRRIGATION	Applicant removed irrigation use so application is now only for domestic and stock.	COUNTRYHOME COLONY INC	2005-11-28	GROUNDWATER
TERMINATED APPLICATIONS							
BOZEMAN	41B	30018432	IRRIGATION	Terminated 1/17/2007	BAR C INC	2005-11-23	GROUNDWATER
BOZEMAN	41F	30013632	IRRIGATION	Terminated 12/19/2006	TREELINE SPRINGS LLC	2004-12-29	GROUNDWATER THROUGH DRAIN PIPE
BOZEMAN	41F	30013688	IRRIGATION & FIRE PROTECTION	Terminated 12/13/2006	RAMSHORN RANCH LLC	2004-12-30	GROUNDWATER
BOZEMAN	41G	117127-00	IRRIGATION	Terminated 11/20/2006	SCHLABACH, DEVON, DUANE, & VERN	2001-09-26	GROUNDWATER
BOZEMAN	41H	30006853	IRRIGATION	Terminated 2-28-2007 Received Information to Review for prestream capture - Not Adequate	DELANEY, BARBARA S & JOSEPH H	2003-07-17	GROUNDWATER
BOZEMAN	41H	30018695	FISHERY	Terminated 12/14/2006	PULFREY, CORY S & DIANE C	2005-12-07	GROUNDWATER
BOZEMAN	41H	30018906	IRRIGATION	Terminated 07/07/2006	DOKKEN, SUSI & WADE	2006-01-09	GROUNDWATER

Trout Unlimited Case
Affected Applications
Status

RO	BASIN	NUMBER	PURPOSE	STATUS 4-12-2007	CUSTOMER	DATE RCD	SOURCE
BOZEMAN	41H	30018922	FISH AND WILDLIFE	Terminated 12/15/2006	DOKKEN, SUSI & WADE	2006-01-09	GROUNDWATER
BOZEMAN	41H	30019458	IRRIGATION	Terminated 11/20/2006	LOWE'S HOME IMPROVEMENT	2006-02-25	GROUNDWATER
BOZEMAN	41H	30019459	IRRIGATION	Terminated 11/20/2006	LOWE'S HOME IMPROVEMENT	2006-02-25	GROUNDWATER
BOZEMAN	41H	30022075	IRRIGATION	Terminated 07/24/2006	SPECTRUM SITES	2006-05-08	GROUNDWATER
BOZEMAN	41H	30022342	IRRIGATION	Terminated 2-28-2007 Received Information to Review for prestream capture - Not Adequate	BRAINARD, EDWIN D	2006-05-19	GROUNDWATER
HELENA	41B	30001551	FISH AND WILDLIFE	Terminated 09/25/2006	INGE, CLIFTON C	2003-04-23	UNNAMED TRIBUTARY OF SELWAY SLOUGH
HELENA	41B	30006019	IRRIGATION	Terminated 11/13/2006 Holly Franz Requested Hold - Sent DNRC Response 11-10-2006	DALLASERRA, DONALD A	2003-04-22	GROUNDWATER
HELENA	41B	30017022	IRRIGATION	Terminated 2-28-2007 Received Information to Review for prestream capture - Not Adequate	SITZ RANCH MANAGEMENT PARTNERSHIP	2005-10-13	GROUNDWATER
HELENA	41B	30017023	IRRIGATION	Terminated 2-28- 2007Received Information to Review for prestream capture - Not Adequate	SITZ RANCH MANAGEMENT PARTNERSHIP	2005-10-13	GROUNDWATER
HELENA	41E	30020287	IRRIGATION	Terminated 11/13/2006	DUNN CANYON CATTLE CO	2006-03-10	GROUNDWATER
HELENA	41G	30019387	IRRIGATION	Terminated 11/13/2006	JONES, ANN F & BERNARD T	2006-02-16	GROUNDWATER
HELENA	41I	30010118	IRRIGATION	Terminated 11/13/2006 Requested Hold - Sent DNRC Response 9-22-2006	WATSON, EDWIN W	2004-04-01	GROUNDWATER
HELENA	41K	30021709	FISHERY	Terminated 11/13/2006	SUN RIVER RANCH LLC	2006-04-20	GROUNDWATER
LEWISTOWN	41J	117786-00	IRRIGATION	Terminated 11/28/2006	RIVERSIDE RANCH CO	2001-11-09	GROUNDWATER

No. 05-069

IN THE SUPREME COURT OF THE STATE OF MONTANA

2006 MT 72

MONTANA TROUT UNLIMITED; MCGUIRE'S
SOUTH FORK, LLC; FREDRICK C. BUCKINGHAM;
JUANITA POLSTON; BOYD STANLEY; HUGH HASTING;
WILL KURTZ; EDWIN MORGENS; HIGH LONESOME
RANCH, LP; HENRY C. McMICKING; MIKE GEARY
d/b/a SMITH RIVER OUTFITTERS, PRO OUTFITTERS; and
MONTANA RIVER ANGLERS, LLC,

Petitioners and Appellants,

v.

MONTANA DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION; ARTHUR R. CLINCH, as its Director;
and JACK STULTS, as Administrator of its Water Resources
Division,

Respondents and Respondents,

and

RIVERSIDE RANCH, CO.; LOUISE GALT, and
WILLIAM GALT,

Intervenors.

APPEAL FROM: District Court of the First Judicial District,
In and for the County of Lewis and Clark, Cause No. ADV-2003-444
The Honorable Dorothy McCarter, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Peter Michael Meloy, Jennifer S. Hendricks and Robin McGuire, Meloy
Trieweiler, Helena, Montana

For Respondents:

Tim D. Hall, Special Assistant Attorney General, Department of Natural Resources and Conservation, Helena, Montana

For Intervenor Riverside Ranch:

David R. Stewart and John E. Bloomquist, Doney Crowley Bloomquist Payne Uda, P.C., Helena, Montana

For Intervenor Galt:

Russell McElyea and Jennifer L. Farve, Moore, O'Connell & Refling, P.C., Bozeman, Montana

Submitted on Briefs: January 18, 2006

Decided: April 11, 2006

Filed:

Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Montana Trout Unlimited and eleven other petitioners (hereafter collectively “Trout Unlimited”) appeal from the decision of the District Court for the First Judicial District, Lewis and Clark County, granting summary judgment in favor of the Montana Department of Natural Resources and Conservation (DNRC) and Intervenors Riverside Ranch Co., Louise Galt and William Galt. We reverse and remand.

¶2 Trout Unlimited presents the following issues on appeal:

¶3 1. Whether Trout Unlimited was required to exhaust its administrative remedies before seeking judicial relief.

¶4 2. Whether DNRC’s interpretation of “immediately or directly connected to surface water” in the Basin Closure Law is correct as a matter of law.

FACTUAL BACKGROUND

¶5 Montana state law provided two possible ways of perfecting a water right before 1973. A claimant could post a notice at the point of diversion and file a notice with the county clerk pursuant to statute, Mont. Laws 1885, secs. 6 through 10; R.C.M. (1947), 89-810 through -814. The second method required the claimant simply to put the water to use. *See Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723. The adjudication of these rights became increasingly cumbersome and complex as the number of appropriators claiming water rights in Montana increased.

¶6 The 1972 Montana Constitutional Convention sought to remedy Montana’s antiquated appropriation system. The 1972 Constitution contained a directive to the legislature that it “shall provide for the administration, control, and regulation of water

rights and shall establish a system of centralized records, in addition to the present system of local record.” Art. IX, Sec. 3(4), Mont. Const. The legislature promptly responded by passing the 1973 Montana Water Use Act (Act), 1973 Mont. Laws 452; Sections 85-2-212 to -907, MCA.

¶7 The Act mandated that all holders of claims to existing water rights file their claims with the DNRC. The Act charged DNRC with determining the priority dates for each filed claim. The Act further charged DNRC with inspecting conflicts concerning the priority of claims. The legislature established water courts for the adjudication of disputed claims. Once water courts adjudicated existing water rights and DNRC filed water rights according to a priority date, the Act required new claimants to establish their claims through statutory filing procedures. DNRC determined the priority of post-1973 claims based on the date of filing. It became clear as this new system developed that there were significantly more adjudicated and legitimate non-adjudicated claims to water than there was available water.

¶8 The legislature responded to this crisis by enacting a moratorium on new applications in the over-appropriated basins. The legislature included a basin closure for the Upper Missouri River basin, encompassing the drainage area of the Missouri River and its tributaries above Morony Dam. Sections 85-2-342 and -343, MCA. The Smith River is a tributary of the Upper Missouri River and subject to the Upper Missouri River basin moratorium (hereafter Basin Closure Law).

¶9 The Basin Closure Law provides that DNRC may not “process or grant an application for a permit to appropriate water . . . within the upper Missouri River basin

until the final decrees have been issued” Section 85-2-343, MCA. The legislature provided for several exceptions to the general ban on processing or granting applications. New groundwater applications represent one of the exceptions. Section 85-2-343(2)(a), MCA. The legislature recognized, however, that some groundwater bears a close relationship with surface water and that allowing unrestricted appropriations of groundwater would defeat the purpose of the Basin Closure Law. Thus, the Basin Closure Law also forbids the processing of new applications for groundwater that is “immediately or directly connected” to the Upper Missouri River basin’s surface water. Sections 85-2-342 and -343, MCA.

¶10 DNRC recognized the particularly intimate relationship between groundwater and surface water along the Smith River. DNRC prepared a Supplemental Environmental Assessment (Supplemental EA) for the Smith River Basin in February of 2003. Therein DNRC noted that the Smith River and its principal tributaries are hydrologically connected to groundwater. The Supplemental EA further noted two ways that groundwater pumping affects surface stream flows. First, pumping may intercept groundwater that otherwise would have entered the stream thereby causing a reduction in surface flows. This phenomenon is called the prestream capture of tributary groundwater. Second, groundwater pumping may pull surface water from the stream toward the well. The DNRC refers to this pulling as induced infiltration. DNRC’s hydrogeologist reports that a stream takes longer to recover from prestream capture of its tributary groundwater than from depletion through induced infiltration.

¶11 New irrigation developers began turning to groundwater to supplement limited

surface water supplies in closed basins. DNRC, as the agency charged with implementation of the Basin Closure law, reviews groundwater applications. Sections 85-2-112 and -113, MCA. DNRC must determine whether an application for groundwater includes groundwater that is “immediately or directly connected to surface water” for the application to qualify under the groundwater exception to the Basin Closure Law. Sections 85-2-342 and -343, MCA. The legislature did not define “immediately or directly connected to surface water” in the Basin Closure Law. Section 85-2-342, MCA. DNRC interpreted the language to mean that a groundwater well could not pull surface water directly from a stream or other source of surface water. This interpretation makes no mention of the potential influence of the prestream capture of tributary groundwater on surface flow. DNRC processed new applications before making a threshold determination that the applications fell within an exception to the Basin Closure Law. It is against this backdrop that Trout Unlimited initiated its suit against DNRC.

PROCEDURAL BACKGROUND

¶12 Trout Unlimited sought a writ of mandate to require DNRC to refrain from processing groundwater applications on the Upper Missouri River basin until it had made the threshold determination that the groundwater was not “immediately or directly connected to surface water” rather than deferring that determination until it had analyzed other permit criteria. Trout Unlimited further argued that DNRC had adopted an inappropriately narrow interpretation of the “immediately or directly connected to surface water” language in the Basin Closure Law by considering groundwater to have an

immediate or direct connection to surface water only if it induced infiltration.

¶13 The District Court determined that DNRC had a clear legal duty to abide by the Basin Closure Law by making the threshold determination of whether the application qualified under the groundwater exception, but indicated that it needed additional evidence regarding whether DNRC was complying with that duty. Trout Unlimited and DNRC ultimately entered into a stipulation wherein DNRC agreed that it would make a threshold determination of whether an application for a groundwater permit was immediately or directly connected to surface water. DNRC still adhered, however, to its interpretation of “immediately or directly connected to surface water” by only including induced infiltration of surface water.

¶14 The substantive dispute over DNRC’s interpretation of “immediately or directly connected to surface water” remained in the form of Count II of Trout Unlimited’s Amended Petition. Trout Unlimited sought a declaratory judgment that DNRC’s interpretation of the Basin Closure Law conflicted with the clear statutory language of §§ 85-2-342 and -343, MCA. DNRC had embodied its interpretation only in a series of letters written by agency officials at the time that Trout Unlimited filed its Amended Petition. DNRC had not yet established its interpretation of the language in the Basin Closure Law through the Montana Administrative Procedures Act (MAPA).

¶15 DNRC finally went through the administrative rulemaking process while this litigation was pending. DNRC defined “immediately or directly connected to surface water” to mean “ground water which, when pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water

infiltration.” Rule 36.12.101(33), ARM. DNRC’s formal definition again ignored water diverted from streams through prestream capture of tributary groundwater. The substantive issue on appeal remains whether DNRC erred in its interpretation of “immediately or directly connected to surface water” in the Basin Closure Law.

¶16 The District Court granted DNRC’s motion for summary judgment on Count II of Trout Unlimited’s Amended Petition. The court concluded that Trout Unlimited had failed to exhaust its administrative remedies before bringing an action in district court. The court further concluded that the definitions and methods involved in processing water use applications lie within DNRC’s discretion and deferred to DNRC’s administration of the statutory provisions contained in §§ 85-2-342 and -343, MCA. This appeal followed.

STANDARD OF REVIEW

¶17 We review a district court’s decision to grant summary judgment *de novo*, based on the same criteria applied by the district court. *Hardy v. Vision Service Plan*, 2005 MT 232, ¶ 10, 328 Mont. 385, ¶ 10, 120 P.3d 402, ¶ 10. We must determine whether the district court applied the law correctly. *Hardy*, ¶ 10.

DISCUSSION

¶18 1. *Whether Trout Unlimited was required to exhaust its administrative remedies before seeking judicial relief.*

¶19 The District Court concluded that Trout Unlimited was required to exhaust its administrative remedies before pursuing declaratory relief in district court. The District Court ruled that Trout Unlimited should have pursued its available administrative

remedies by objecting to a groundwater application with the DNRC, thereby creating a contested case proceeding. In that way, the District Court reasoned, Trout Unlimited properly could seek judicial review of DNRC's final decision following the contested case proceeding. Trout Unlimited argues that the futility exception excuses the normal exhaustion requirement. Specifically, Trout Unlimited argues that the Basin Closure law prohibits even the processing of applications for groundwater that is "immediately or directly connected to surface water" and that requiring Trout Unlimited to wait for DNRC to process an application and then seek a contested case hearing flouts the legislature's intent.

¶20 If a statute provides for administrative relief, an aggrieved party must seek that relief from the administrative body and exhaust the statutory remedy before seeking judicial relief. *Wiser v. State Dept. of Commerce*, 2006 MT 20, ¶ 30, 331 Mont. 28, ¶ 30, 129 P.3d 133, ¶ 30. We will not require exhaustion of administrative remedies, however, when resort to an administrative remedy would be futile. *DeVoe v. Department of Revenue* (1993), 263 Mont. 100, 115, 866 P.2d 228, 238; § 1-3-223, MCA.

¶21 The Montana Water Use Act provides a statutory remedy for challenges to groundwater applications. Sections 85-2-308 and -309, MCA. Section 85-2-308, MCA, outlines the filing procedures for objections to an application, and § 85-2-309, MCA, provides for contested case hearings on those objections. MAPA affords an aggrieved party the opportunity to file an appeal to the district court once DNRC reaches a final agency decision. Section 2-4-702(1)(a), MCA. MAPA also provides, however, that a "preliminary, procedural, or intermediate agency action or ruling is immediately

reviewable if review of the final agency decision would not provide an adequate remedy.” Section 2-4-701, MCA.

¶22 Trout Unlimited argues that review of a final decision by DNRC on its decision to process a groundwater application would not provide an adequate remedy. Trout Unlimited maintains that the language of the Basin Closure Law providing that the DNRC “may not *process* or grant an application for a permit to appropriate water . . .” prohibits the processing of an application for groundwater that has an immediate or direct connection to surface water. Section 85-2-343(1), MCA (emphasis added). Trout Unlimited argues that allowing DNRC to process an application before Trout Unlimited can seek review defeats the intent of the Basin Closure Law. We agree.

¶23 We must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used. *Mattson v. Montana Power Co.*, 2002 MT 113, ¶ 10, 309 Mont. 506, ¶ 10, 48 P.3d 34, ¶ 10. It is blackletter law that in the construction of a statute, the office of a judge is simply to ascertain and declare what is in terms or in substance contained therein, not to omit what has been inserted or insert what has been omitted. *City of Billings v. Gonzales*, 2006 MT 24, ¶ 8, 331 Mont. 71, ¶ 8, 128 P.3d 1014, ¶ 8.

¶24 The legislature expressly prohibits the processing of applications for groundwater that is immediately or directly connected to surface water in the Upper Missouri River basin. Sections 85-2-342 and -343, MCA. DNRC recognizes this legislative ban on processing applications in its administrative regulations. Rule 36.12.120(1) of the Administrative Rules of Montana provides that in “the numerous basin closure areas in

Montana, the department cannot process an application unless it qualifies as a basin closure exception.” To require exhaustion of administrative remedies before allowing Trout Unlimited to seek judicial relief from DNRC’s decision to process an application for groundwater with an immediate or direct connection to surface water would ignore the plain language of the Basin Closure Law and DNRC’s regulations by effectively omitting the word “process” from § 85-2-343, MCA, and Rule 36.12.120(1), ARM. We cannot ignore the plain statutory language prohibiting DNRC from processing such applications.

¶25 Exhaustion of administrative remedies would require Trout Unlimited to stand by while DNRC processed a groundwater application that did not fall within an exception to the Basin Closure Law. DNRC could process an application for groundwater even though that groundwater is “immediately or directly connected to surface water.” Trout Unlimited eventually could refute DNRC’s determination to process an application. Rule 36.12.120(4), ARM. The regulations do not provide for immediate judicial relief, however, following an objection to DNRC’s decision to process an application. Rather, Trout Unlimited’s objection would create a contested case, triggering the requirement of a contested case hearing. Section 85-2-309, MCA. If Trout Unlimited objected to DNRC’s final decision following the contested case hearing it could then seek judicial relief. Section 2-4-702, MCA. DNRC never would be prevented from processing applications that do not fall within an exception to the Basin Closure Law, and Trout Unlimited would be forced to participate in an agency proceeding that Basin Closure Law expressly prohibits.

¶26 Trout Unlimited's only avenue for relief at the time it initiated this lawsuit was through objections to DNRC's decision to process individual applications. DNRC had failed to codify a rule outlining when groundwater is "immediately or directly connected to surface water" through the MAPA rulemaking process. DNRC's Director, Bud Clinch, outlined the DNRC's interpretation of "immediately or directly connected to surface water" in a letter to the Meagher County Conservation District Administrator in April of 2002.

¶27 This policy statement is not a rule, however, for purposes of MAPA. An agency must give written notice of its intended action prior to the adoption of any rule. Section 2-4-302, MCA. Nothing in the record indicates that DNRC provided written notice in advance of Director Clinch's letter regarding the DNRC's intended action in processing groundwater applications along the Smith River. Trout Unlimited could not seek to challenge DNRC's interpretation under § 2-4-506, MCA. And, as the District Court noted, "waiting for the applications to be issued before challenging them administratively or in district court would be ineffective in preventing immediate harm to the surface water."

¶28 Moreover, Trout Unlimited could object to DNRC's decision to process an application and initiate a contested case hearing only to have that application denied for other reasons. For example, after DNRC determines to process an application for groundwater, it must evaluate the application under § 85-2-311, MCA. This section outlines criteria, often called the "311 criteria," that an applicant must satisfy before DNRC can issue them a permit to appropriate water. One of the 311 criteria requires that

a new appropriation not adversely affect prior appropriators' water rights. Section 85-2-311(1)(b), MCA.

¶29 A new groundwater appropriation that is “immediately or directly connected to surface water” by inducing water out of the stream also would affect senior appropriators' water supply in an over-appropriated basin such as the Upper Missouri River basin. Section 85-2-311(1)(b), MCA, would oblige DNRC to reject such an application due to its effect on the water supply available to senior appropriators. Thus, an application that DNRC never should have processed because of its connection to surface water could be denied because of its affect on senior water rights holders. This denial of a new groundwater application for reasons other than its effect on surface water would preclude Trout Unlimited's ability to appeal DNRC's decision to process the application in the first place.

¶30 The Basin Closure Law serves, in part, to protect senior water rights holders in the Upper Missouri River basin. *See, e.g.*, § 85-2-308(3), MCA (providing standing to object to water use applications to individuals whose property, water rights, or interests are adversely affected by the proposed application). The proscription against processing applications saves appropriators the time and expense of having to defend their water rights every time a new applicant seeks to appropriate water in the basin. For example, defending property interests in contested case hearings generally requires retained counsel, expert witnesses, time, and expenses. The legislature provided interested parties with greater protection than the right to file objections and proceed to contested case hearings by insulating them from the burden and expense of the objection process.

¶31 We therefore conclude that the futility exception to the exhaustion requirement relieves Trout Unlimited from having to exhaust their administrative remedies before seeking judicial relief. *DeVoe*, 263 Mont. at 115, 866 P.2d at 238. We will not require Trout Unlimited or other objectors to participate in agency proceedings that the legislature expressly prohibits. DNRC must adhere to the legislature’s proscription on processing applications that do not fall within an exception to the Basin Closure Law. To require Trout Unlimited or other objectors to wait for DNRC to process applications, the very act prohibited by statute and by DNRC’s own regulations, and then participate in costly administrative proceedings would be futile, especially in light of the 311 criteria and the multiple other factors upon which DNRC ultimately could deny an application. The fact that DNRC’s final decision would not provide Trout Unlimited with an adequate remedy relieves Trout Unlimited of the requirement to exhaust its administrative remedies before seeking a declaratory judgment in district court. Section 2-4-701, MCA; *DeVoe*, 263 Mont. at 115, 866 P.2d at 238.

¶32 The Dissent argues that we misread the relevant statutes. Dissent, ¶¶ 47-50. In particular, the Dissent cites § 85-2-343, MCA, of the Basin Closure Law, that provides, in part, that “subject to the provisions of subsection (2) of this section, the department may not process or grant an application for a permit to appropriate water . . . within the Upper Missouri River basin until the final decrees have been issued” Subsection (2) in turn provides that the “provisions of subsection (1) do not apply to . . . an application for a permit to appropriate ground water.” The Dissent argues that this language compels DNRC to process all groundwater applications, effectively eliminating such applications

from the proscription against processing set forth in the Basin Closure Law. This interpretation ignores the statutory definition of “groundwater” provided in § 85-2-342, MCA.

¶33 The legislature defined groundwater as “water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that *is not immediately or directly connected to surface water.*” Section 85-2-342(2), MCA (emphasis added). Subsection (2) of § 85-2-343, MCA, therefore allows DNRC to process applications for groundwater only where that groundwater has no immediate or direct connection to surface water. DNRC acknowledges that it must make this threshold determination of whether a groundwater application falls within an exception to the Basin Closure Law. Rule 36.12.120(1), ARM. Under the Dissent’s interpretation, however, DNRC must process all groundwater applications regardless of their connection to surface water. This interpretation ignores the legislature’s definition of groundwater in § 85-2-342(2), MCA, contradicts the legislative proscription against processing applications for groundwater with an immediate or direct connection to surface water in the Basin Closure Law, and ignores DNRC’s own regulations in Rule 36.12.120(1), ARM. The Dissent’s interpretation also would deny potential objectors the legislative protection against processing applications for groundwater that do not fall within an exception to the Basin Closure Law.

¶34 2. *Whether DNRC’s interpretation of “immediately or directly connected to surface water” in the Basin Closure Law is correct as a matter of law.*

¶35 The District Court noted that the legislature chose not to define “immediately or

directly connected to surface water” in the Basin Closure Law. The court concluded that “the definitions and methods involved in processing the petitioners’ water use applications are to be determined by, and lie within, the discretion of the DNRC.” The court did not analyze, however, whether DNRC abused its discretion in its interpretation of the Basin Closure Law. Trout Unlimited argues that DNRC abused its discretion by failing to interpret the statutory language in a manner consistent with the legislature’s intent. Specifically, Trout Unlimited argues that by failing to recognize the direct effect of prestream capture of tributary groundwater DNRC fails to give meaning to each word in the Basin Closure Law.

¶36 Whenever a state agency has authority to adopt rules to implement the provisions of a statute, the agency’s rule “is not valid or effective unless it is . . . consistent and not in conflict with the statute; and reasonably necessary to effectuate the purpose of the statute.” Section 2-4-305(6), MCA. We evaluate whether the agency’s interpretation adhered to the statutory language when determining whether the agency met this standard. *See Board of Barbers, Etc. v. Big Sky College, Etc.* (1981), 192 Mont. 159, 162, 626 P.2d 1269, 1271.

¶37 Intervenors assert that we must show deference and respect to the responsible agency’s statutory interpretations. We recently evaluated the origin of the rule granting deference to agencies when administering statutes in *Montana Power Co. v. Montana Public Services Com’n*, 2001 MT 102, 305 Mont. 260, 26 P.3d 91. We traced the rule to its source and determined that deference to agencies is most appropriate when the agency interpretation has stood unchallenged for a considerable length of time, thereby creating

reliance in the public and those having an interest in the interpretation of the law. *Montana Power Co.*, ¶ 24. Even then, however, such administrative interpretations would not necessarily be binding on the courts. *Montana Power Co.*, ¶ 25. Rather, we accord such long-standing administrative interpretations “respectful consideration.” *Montana Power Co.*, ¶ 25, quoting *Doe v. Colburg* (1976), 171 Mont. 97, 100, 555 P.2d 753, 754.

¶38 DNRC promulgated rules interpreting the Basin Closure Law for the Upper Missouri River basin while this lawsuit was pending. The regulations did not go into effect until January 1, 2005. DNRC’s interpretation of the Basin Closure Law and, more specifically, the meaning of “immediately or directly connected to surface water” have therefore not enjoyed a longstanding agency interpretation entitling it to a higher level of deference. *Montana Power Co.*, ¶ 25. We thus focus our inquiry on whether the agency’s interpretation is correct as a matter of law in the absence of such a longstanding agency interpretation. *Montana Power Co.*, ¶ 27.

¶39 The legislature prohibited the processing or granting of applications for permits to appropriate water within the Upper Missouri River basin until the final decrees have been issued, unless the application falls within one of the statutorily prescribed exceptions. Section 85-2-343, MCA. The legislature defined the groundwater exception in the conjunctive as “water that is beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and that is not immediately *or* directly connected to surface water.” Section 85-2-342(2), MCA (emphasis added). The plain language of the statute demonstrates the legislature’s intent to prohibit the processing or

granting of applications for groundwater that either has an immediate connection to surface flows or has a direct connection to surface flows, or both. The legislature did not define “immediately or directly connected to surface water.”

¶40 DNRC’s interpretation of “immediately or directly” indicates that DNRC considers groundwater to have an immediate or direct connection to surface water if groundwater “pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration.” Rule 36.12.101(33), ARM. This formal interpretation comports with the informal interpretation embodied in Director Clinch’s letter. DNRC’s interpretation of “immediately or directly connected” therefore fails to account for impacts to surface flow caused by the prestream capture of tributary groundwater.

¶41 DNRC’s own hydrogeologist recognized the impact to surface flows caused by the prestream capture of tributary groundwater. Bill Uthman (Uthman) of DNRC’s Water Management Bureau drafted a memo to the Water Resources Division outlining the hydrologic interactions that occur between groundwater and surface water and how groundwater development may impact surface water. Uthman explained therein that groundwater pumping produces two separate components that contribute to total streamflow depletion:

The first component, groundwater capture, is interception of groundwater flow tributary to the stream, that ultimately reduces the hydraulic gradient near the stream and baseflow to the stream. *Streamflow depletion from groundwater capture usually continues after pumping ends and may require long periods of time to recover.* The second component, induced streambed infiltration, *usually has less impact on streamflow depletion, and its effects dissipate soon after pumping ends.* [Emphasis added.]

As evidenced by DNRC's own hydrogeologist, not only does the prestream capture of tributary groundwater have an impact on surface flows, it has a more significant and longer lasting impact than does induced infiltration.

¶42 Uthman further concluded that "immediately or directly connected" could be interpreted to mean "an immediate and direct, physical capture and depletion of surface water by a well or infiltration structure, including the interception of groundwater tributary to surface water." DNRC also recognized that the prestream capture of tributary groundwater can reduce surface flows in its February 2003 Supplemental EA. DNRC noted that prestream capture occurs more gradually, and impacts streams, like the Smith River, that are hydrologically connected to an aquifer. DNRC failed to account for the direct connection between surface flows and the prestream capture of tributary groundwater in its implementation of the Basin Closure Law despite possessing a wealth of information supporting the connection.

¶43 The legislature provided an exception to the Basin Closure Law for groundwater, provided it is not "immediately or directly connected to" the Upper Missouri River's surface flow. DNRC's interpretation of the Basin Closure Law conflicts with the statute, and does not provide sufficient protection to reasonably effectuate its purpose. Section 2-4-305(6), MCA. DNRC's interpretation recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater. The Basin Closure Law serves to protect senior water rights holders and surface flows along the Smith River basin. It makes no difference to senior appropriators whether groundwater pumping

reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent.

¶44 We therefore reverse and remand for further proceedings consistent with this opinion.

/S/ BRIAN MORRIS

We Concur:

/S/ W. WILLIAM LEAPHART

/S/ PATRICIA COTTER

/S/ JAMES C. NELSON

Chief Justice Karla M. Gray dissenting.

¶45 I respectfully dissent from the Court's conclusions that Trout Unlimited need not exhaust any administrative remedies before seeking judicial relief and that the District Court erred as a matter of law in concluding otherwise. In my view, the Court's decision rests on a simple misreading of the plain language of the primary statutes at issue here. As a consequence, I also dissent from the Court's resolution of the substantive matter presented in the second issue, which I believe must await another day.

¶46 I agree with the Court that, if a statute provides for administrative relief, an aggrieved party must seek that relief from the administrative body and exhaust the statutory remedy before seeking judicial relief. I also agree with the Court that statutory remedies exist for challenging applications for permits for ground water, and that objections to such applications are subject to contested case proceedings by means of

which the objections can be addressed; ultimately, an aggrieved party--that is, a party who is actually aggrieved because objections have not been successful--may seek judicial review of a final agency decision. I would apply these statutes to the present case. I also would address--and reject--application of the futility doctrine here.

¶47 In the present case, Trout Unlimited argues that it should not be subjected to the rules, statutes and procedures which govern challenges to--and remedies for challenges to--groundwater applications. It maintains that it should prevail, without seeking administrative remedies, by a mere plain language interpretation of the Basin Closure Law (BCL). The Court agrees, based on the language contained in § 85-2-343(1), MCA--part of the BCL--that the DNRC cannot “process . . . an application for a permit to appropriate water” in the Upper Missouri River Basin until a final decree is issued. I most certainly do not agree.

¶48 It is important to start with a clear understanding of the statutes at issue here, which are part of the BCL. In that regard, § 85-2-342(1), MCA, defines the term “[g]round water” as “water that is beneath the land surface or beneath the bed of a . . . body of surface water *and that is not immediately or directly connected to surface water.*” (Emphasis added.)

¶49 Section 85-2-343(1), MCA, the substantive statute regarding the Upper Missouri River Basin closure, provides in pertinent part that “*subject to the provisions of subsection (2) of this section*, the department may not process or grant an application for a permit to appropriate water” within the Basin. Subsection (2)(a) of § 85-2-343, MCA, states that “[t]he provisions of subsection (1) *do not apply to . . . an application for a*

permit to appropriate ground water[.]” (Emphasis added.) The plain and simple language of this statute, therefore, means that the prohibition against processing applications for water permits contained in subsection (1) has no application to an application for a permit to appropriate ground water. In my view, this plain language necessitates a conclusion that the DNRC can “process” an application for a permit to appropriate ground water. Statutes are not always clear, but these are crystal clear.

¶50 The Court’s interpretation of the statutes simply overlooks the language in § 85-2-343(1), MCA, that, notwithstanding the prohibition against DNRC’s processing and granting an application for a permit to appropriate water in the Upper Missouri River Basin, the subsection is “subject to the provisions of subsection (2) of this section[.]” More importantly, the Court totally ignores that portion of § 85-2-343(2)(a), MCA, that the “provisions of subsection (1) *do not apply* to an application for a permit to appropriate ground water[.]” (Emphasis added.)

¶51 Thus, faced with an application for a permit to appropriate ground water, the DNRC is obligated to begin processing it. If there are objections to the application--based on whether the water sought is actually “ground water,” or on any other basis--the DNRC must follow the procedures set forth in §§ 85-2-307, -308 and -309, MCA, the very statutes which the Court concedes provide a statutory remedy for challenges to such an application; respectively, those statutes require notice of the application, acceptance of timely filed objections and, under delineated circumstances, a contested case hearing. Judicial review is available for a party aggrieved by the DNRC’s final decision. *See* § 2-4-702(1)(a), MCA.

¶52 Trout Unlimited seeks to avoid exhausting these procedures on the grounds that resort to an administrative remedy would be futile. The Court agrees, relying on *DeVoe v. Department of Revenue* (1993), 263 Mont. 100, 866 P.2d 228 (*DeVoe II*) only after spinning out several speculative scenarios which might cause an application to be denied for other reasons. I submit that one could always raise specters--via speculation--that would prevent a party in a contested case from prevailing or from having their particular issue fully addressed. I further submit that this kind of rationale--accepted by the Court here--likely will mark the beginning of the end of administrative processes, remedies and judicial review as they have existed in Montana for many years. Thus, I turn to the Court's reliance on *DeVoe II*, which is decidedly misplaced.

¶53 The *DeVoe* litigation actually began with challenges by DeVoe to DOR's assessment of his commercial apartment properties in 1980, 1981, 1982, 1983 and 1984. Unsuccessful at the county tax appeal board in virtually all regards, DeVoe appealed to the state tax appeal board, which consolidated the cases for all years and upheld the county board's decisions. DeVoe sought judicial review in the district court, which upheld the state board with one exception; the court remanded the 1983 tax year to the state board. DeVoe appealed to this Court, which reversed the district court and directed it to remand to the state board. *DeVoe v. Department of Revenue* (1988), 233 Mont. 190, 759 P.2d 991 (*DeVoe I*).

¶54 In the present case, the Court relies on *DeVoe II*. There, the appraised value of DeVoe's two properties more than doubled in 1986 from the 1985 appraisals. DeVoe appealed the changes to the county tax appeal board which, in a one-sentence decision,

denied the appeals based on taxable valuation. The county board did not mention the assessed valuations, which were the subject of DeVoe's appeals. He appealed to the state tax appeal board, which denied his appeal for failure to sustain his burden of establishing error in 1986. DeVoe then sought judicial review in the district court and the court upheld the state board's decision. Shortly thereafter, we issued our decision in *DeVoe I* and, in light thereof, DeVoe moved for an amended judgment; the district court reversed itself and remanded to the state board. The second state board decision was issued in August of 1991 and, again, was adverse to DeVoe who then again sought judicial review. He contended that the state board's decision denying his appeal of the appraised valuations constituted exhaustion of his administrative remedy for all of the years included in the appraisal cycle to which those valuations applied. The district court agreed, since DeVoe had attempted to appeal the assessments for the years after 1986 to the county board and the state board, but those entities would not consider his appeals based on an administrative rule which made the DOR's appraisal binding for the remaining years of the appraisal. On appeal to this Court, and against such a nightmarish backdrop, we determined that DeVoe had attempted to exhaust his administrative appeals but was unable to do so. "To require DeVoe to exhaust more administrative remedies than he has already exhausted would be a useless act, and neither law nor equity require useless acts." *DeVoe II*, 263 Mont. at 115, 866 P.2d at 238.

¶55 It is unnecessary to point out at length that the facts and circumstances in *DeVoe II* bear no resemblance whatsoever to the facts of the present case for purposes of applying, as the Court does, the futility doctrine here. DeVoe had sought administrative remedies

for a decade. Trout Unlimited has sought none. Indeed, the Court does not really contend otherwise. It rests its decision regarding futility on the statement that Trout Unlimited and other objectors should not be required to participate in agency proceedings “that the legislature expressly prohibits.” As discussed above, the Legislature has not expressly prohibited the proceedings at hand. Having pointed out the errors in the Court’s statutory interpretation, it would be futile to do so again here. I cannot understand the Court’s willingness to allow Trout Unlimited to avoid the very statutory proceedings and remedies we all agree exist. If Trout Unlimited can do so, why should anyone--or any entity--have to comply with legislative mandates in the administrative arena or at all?

¶56 There is, in my view, an intermediate position regarding the extent to which Trout Unlimited--and others--must adhere to the generally applicable administrative procedures and remedies enacted by the Legislature. While it has not been raised, I offer it as another basis for avoiding the Court’s overly broad decision that application of the futility doctrine is appropriate here.

¶57 Section 35-2-309(1), MCA, provides that if the DNRC determines that an objection to an application for a permit is a valid objection, the DNRC must hold a contested case hearing. That a hearing must be held upon a determination that an objection is a valid objection necessitates that the converse also must be true; that is, the DNRC may determine that an objection does *not* state a valid objection, thereby--if there is only the one objection--negating the requirement for a contested case. In such a circumstance, the objector has been precluded from further involvement in proceedings

on the application. At that point, waiting for a final agency determination may well be futile and, if a contested case hearing were to go forward on other objections, the “aggrieved” objector would be out of the game. Under such a circumstance, it is my view that § 2-4-701, MCA, would come into play. Section 2-4-701, MCA, states that a “preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” Immediate review under such circumstances would be efficient for all concerned and would provide an adequate remedy within the boundaries of the existing statutory administrative procedures.

¶58 In summary, it is my view that the Court improperly interprets the BCL in the first instance and then bases its application of the futility doctrine on that erroneous interpretation. I cannot agree with this wholesale repudiation of the statutory procedures and remedies provided by the Legislature in the critical arena of water rights. On this record, I would affirm the District Court’s determinations that, where available, administrative remedies must be exhausted prior to bringing a declaratory judgment action and that here, summary judgment against Trout Unlimited is proper. I dissent from the Court’s failure to do so.

/S/ KARLA M. GRAY

Justice Jim Rice joins in the foregoing dissenting Opinion of Chief Justice Gray.

/S/ JIM RICE

Justice John Warner specially concurs.

¶59 I find both the Opinion and the dissent singularly confusing. The Court’s Opinion interchangeably uses the term “ground water”¹ to mean both “water that comes out of the ground” and “water that comes out of the ground and is not connected to surface water.” The second meaning is the particular way ground water is described in § 85-2-342(2), MCA. The dissent refuses to recognize that it would be futile for Trout Unlimited to go back to DNRC for administrative proceedings without a direct statement of why. Thus, I write to briefly state the reasons I concur with the Court.

¶60 Both the Court and the dissent agree that the Upper Missouri River Basin is now closed to new surface water appropriations, and that DNRC may not process or grant an application for such an appropriation. There is an exception to the closure for ground water. Section 85-2-341(2)(a), MCA. Ground water, as noted by the Court’s Opinion, ¶ 33, and the dissent, ¶ 4, is not merely water that comes from under the ground. In order to be ground water within the statutory exception to the closure, the water extracted cannot be immediately or directly connected to surface water. Section 85-2-342(2), MCA. If it is so connected, it is simply not ground water, even though it may be pumped up from a well. It is surface water, and the application for its appropriation may neither be processed nor granted.

¹ As the statutes use two words, “ground water,” I have chosen this form, rather than “groundwater” as used in the Court’s Opinion and in the dissent.

¶61 The dissent is obviously correct that DNRC must, by the very nature of things, process every application for a new appropriation that claims it is for ground water. This processing has to be done to determine if the proposed appropriation is truly for ground water or whether the water proposed to be captured under the ground is actually connected to surface water, either immediately or directly. Some processing by DNRC is obviously required in order to make this initial determination, no matter what Trout Unlimited and the other plaintiffs may claim. If this were not true, the exception would be meaningless because without some initial processing there would be no way to determine if an applicant's proposal really would capture ground water. The Court does not seem to disagree with this obvious truth, but does not say so directly.

¶62 The dissent says that the Court's decision is overly broad and the futility doctrine should not be applied in this case. ¶ 12. With this, I must disagree. I agree with the Court that the record before us indicates that DNRC is wrong in how it has decided to determine whether water that comes up from the ground is immediately or directly connected to surface water. This is because, as noted by the Court at ¶ 37, DNRC, in its formal rules, does not account for impact to surface flow caused by prestream capture of tributary ground water. And, as DNRC can be expected to apply its erroneous rules during administrative proceedings, it would be futile to send the matter back for further DNRC processing without correcting the error. Correcting the error is all that I believe we do.

¶63 In my view, upon remand, the District Court will examine the complete record concerning the application in question, in the context of this Court's correction of DNRC

rules and policy, the Administrative Procedure Act, and the law. Then, the District Court will either remand to DNRC for further hearings or decide the matter itself.

¶64 I concur in the Court's decision to remand for further proceedings.

/S/ JOHN WARNER