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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

THE CLARK FORK COALITION, a non-profit organization, KATRIN CHANDLER, an individual, BETTY J. LANNEN, an individual, POLLY REX, an individual, and JOSEPH MILLER, an individual,

Petitioners,

v.

JOHN TUBBS, in his capacity as Director on the Montana Department of Natural Resources and Conservation and THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, an executive branch agency of the State of Montana,

Respondents.

v.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors

Cause No. bdv-2010-874
Hon. Jeffery M. Sherlock

RESPONSE TO OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Petitioner-Intervenor Mountain Water Co. ("Mountain Water") files this brief in response to Clark Fork Coalition et al.'s ("Clark Fork") opening brief in support of their petition for judicial review.[1]

I. INTRODUCTION

Mountain Water supports Clark Fork's position that the Department of Natural Resources and Conservation ("DNRC") erred by not accepting the petition to invalidate its rules for exempt wells. Mountain Water agrees that DNRC's current rule defining the term "combined appropriation" is inconsistent with the exempt well provisions of the Montana Water Use Act in Montana Code Annotated § 85-2-306(3)(a), and should be invalidated.

The other parties' briefs provide a thorough report of the lay of the land, so Mountain Water will discuss several issues to provide additional context for concerns that were not fully raised in the other briefing.

II. BACKGROUND OF MOUNTAIN WATER'S INTEREST IN THIS ISSUE

As the owner and operator of a large municipal water system, Mountain Water is situated differently from the other petitioners, respondents and intervenors in this matter and so can provide context for the propriety of DNRC's regulation. Mountain Water provides municipal water to the Missoula community. Mountain Water's system

[1] Mountain Water's motion to intervene was granted on May 28, 2014 and received by Mountain Water on May 30, 2014. The deadline for response briefs was May 30, 2014. Mountain Water is filing this brief as soon as practicable, with the consent of the other parties.

includes groundwater rights from 36 production wells, storage in eight high mountain lakes, and seven Rattlesnake Creek surface water rights.

The Missoula aquifer is the primary water source for Mountain Water's system of groundwater wells. In 1988, the United States Environmental Protection Agency ("EPA") designated the aquifer as a "sole source aquifer" under Section 1424(e) of the Safe Drinking Water Act. 42 U.S.C. § 300h-3(e). 53 Fed. Reg. 20895-01 (June 7, 1988). In making the designation, EPA found that there "is no existing alternative drinking water source or combination of sources which provides fifty percent or more of the drinking water to the designated area." 53 Fed. Reg. 20895-01. The designation also identified a number of threats to the aquifer. The Missoula aquifer is the only designated sole source aquifer in Montana, and one of only a handful in EPA Region 8.

Mountain Water's reliance on groundwater makes it particularly sensitive to DNRC's regulation of exempt wells. Mountain Water provides municipal water service to new developments within the greater Missoula area by extending any water mains from its existing wells and distribution system. Before water mains are extended, Mountain Water must obtain regulatory authorizations. *See* Mont. Admin R. 38.5.2503(6) (requiring regulatory approval of engineering plans before water mains are extended). It also must determine whether its existing water rights are satisfactory, or whether new water rights must be obtained.

Another relevant fact to Mountain Water's particular situation is the location of its service area relative to various closed basins and controlled ground water areas. In a closed basin, groundwater is only available under strict conditions requiring extensive

study to determine that water is available and adverse effects to senior surface water users will not occur. Mont. Code Ann. § 85-2-360 (2013). Mountain Water's service area is surrounded by designated closed basins. The Upper Clark Fork Basin technically begins at the confluence of the Blackfoot and Clark Fork Rivers, which is immediately east of Mountain Water's service area. Mont. Code Ann. § 85-2-335 (2013). The closed Bitterroot Basin ends at the confluence of the Bitterroot and Clark Fork Rivers, just skirting the service area and within the confines of the Missoula aquifer. Mont. Code Ann. § 85-2-344(1)(b) (2013). These closed basins either prohibit further water development or require various heightened standards for obtaining water, including mitigation. Mont. Code Ann. §§ 85-2-336 (2013) (Upper Clark Fork Basin); 85-2-244(2) (2013); see generally, *Bostwick Props., Inc. v. Montana Dep't. of Natural Res. & Conservation*, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154 (upholding denial of permit and mitigation plan in closed basin).

Estimates for complying with the various procedures and studies required to obtain a permit for a non-exempt well range from $40,000 to well over $100,000, plus whatever additional costs are attributed to any required mitigation plan and purchase of mitigation water. In highly appropriated closed drainages such as the Clark Fork and Bitterroot drainages, additional water rights for mitigation may not be available at any cost. Yet, given the hydrologic connections between these sources and the Missoula aquifer, the arbitrary distinction of allowing unregulated water development using exempt wells versus expensive water development using permitted wells skews development towards exempt wells, even in areas susceptible to adverse effect. The

result for Mountain Water is that any development of a new well or movement of a Mountain Water well entails considerable time and great expense, while the aquifer can be punctured innumerable times by exempt wells without any DNRC oversight.

Developers of new subdivisions in Missoula and other metropolitan areas have three choices to provide water service. First, if they are proximate to the existing Mountain Water system, they can connect the public system through the main extension process. The cost of connecting to the current system depends on the location of the subdivision, but connecting to municipal water avoids many of the concerns raised in the briefs submitted here associated with applying for and receiving a permit to obtain a water supply source because the cost of the connection, depending on the size of the subdivision, can be passed on to landowners.

Second, if a development is too distant from the Mountain Water system, or if a developer desires to avoid the cost of tying into the Mountain Water system, the developer can obtain water service by obtaining a permit for a new well. Procuring new water right permits for such developments is extremely expensive, time-consuming, and uncertain because of the difficulty in complying with the exceptions to the basin closure statutes for the Bitterroot and Upper Clark Fork.

The final option for obtaining new water service is to rely on exempt wells. Exempt wells are free of permit costs, immediately available upon drilling and filing, and 100% certain. Therefore, new developments are driven towards using exempt wells. Many of these developments that rely on exempt wells tap the same Missoula aquifer that is the ground water source for the Mountain Water municipal system. In addition, the

surface flows of the Bitterroot and Clark Fork Rivers are augmented by the aquifer. Therefore, in many situations, these exempt wells not only share a hydrologic connection with Mountain Water's wells, but are also hydrologically connected to the Bitterroot and Clark Fork Rivers.

The basic unfairness of this situation to Mountain Water, and, in turn, the Mountain Water customers who eventually pay these extra costs, is only one result of this scenario. Mountain Water, or any other municipal supplier, faces some unique impacts due to exempt wells that are not necessarily faced by the other petitioners in this matter. These include:

A. Special Planning Obligations of a Municipal Water Supplier

One of the biggest problems of the exemption as currently defined is that there is no oversight of the completion of exempt wells or their use. DNRC has no reliable way to monitor how much water exempt wells consume each year. Mountain Water, as the primary municipal supplier of the Missoula area, faces special challenges and obligations in planning for the future. Mountain Water must plan for the future, to make sure that it has the capacity to provide sufficient water for the city of Missoula, without any way of monitoring the consumption of the exempt wells that draw from the same water source as Mountain Water does. As exempt wells continue to proliferate, Mountain Water's task of adequately planning for Missoula's growth becomes a hazardous guessing game. Amendment of the rule in a way that discourages uncontrolled, unenforceable, and unmonitored development of exempt wells would improve Mountain Water's ability to serve the Missoula community into the future, protect Mountain Water's senior rights,

and help shift future domestic development back towards public water supplies and away from unregulated private exempt wells.

B. Safe Drinking Water

As a municipal supplier, unlike agricultural surface users, Mountain Water has an obligation regarding the safety of its water supply. One of the dangers of the exempt well provision is the potential for contamination of Missoula's aquifer, its sole drinking water source, both through inadequate, unmonitored drilling and well maintenance, through the location of private individual sewer facilities in proximity to the exempt wells, and through potential cross connection of unregulated wells with the Mountain Water system. DEQ has identified threats to the Missoula aquifer and provides oversight for maintaining its quality. Water quality issues are one factor that must be considered when a new permit is issued by DNRC, but this factor is eliminated when the exempt well statute is used. Mont. Code Ann. § 85-2-311(1)(f) (2013) (requiring an applicant for a permit to demonstrate that "the water quality of a prior appropriator will not be adversely affected").

C. Mountain Water is Not Primarily a Surface Water User

The cause of source depletion may be more difficult to identify for a ground water user than a surface water user. For instance, a surface water user who irrigates out of Rattlesnake Creek can presume that any deficiency in supply is caused by a surface water use somewhere upstream in the Rattlesnake drainage. On the other hand, pumping deficiencies identified by Mountain Water in its ground water could be coming from almost anywhere in the aquifer, and, with the recent proliferation of exempt wells, would

likely come from numerous unpermitted users spread throughout the valley, making Mountain Water at risk of great harm from many, many unidentified small users. Calling for water on a permitted ground water user is difficult enough, but making call on innumerable, and perhaps unidentifiable, exempt wells is impossible.

D. Exempt Well Development Undermines Water As a Public Resource Owned Bv Montana.

Water is a public resource owned by the State of Montana for use by Montanans. Mont. Const. art. IX, § 3 (3). Water developments that go through the water right permitting process honor the spirit of this constitutional provision, and the importance placed on it when the Legislature passed the Water Use Act. However, exempt well developments essentially privatize water, as there are no permitting requirements or restrictions, no effective means for senior users to make call on the water, no monitoring of use, and essentially no accountability. Therefore, existing and prospective water right holders are not treated equally to exempt well developers with respect to water use. In summary, Montana water right holders are not afforded the protections of the state Constitution, or its laws, when exempt wells are allowed to proliferate without restraint.

III. ARGUMENT

This practical background on the particular challenges exempt wells pose to Mountain Water and other municipal water utilities provides a context for the legal issues that have been raised in the other parties' briefing. Mountain Water will address a few of the issues raised by the other parties while retreading as little ground as possible.

E. Proper Standard of Review

The parties' briefing expends several pages discussing standard of review, proper statute citation, and this Court's obligation in reviewing the DNRC declaratory ruling. Fundamentally, however, the parties agree that an agency's rule must be "consistent and not in conflict with the statute" and "reasonably necessary to effectuate the purpose of the statute." Mont. Code Ann. § 2-4-305(6)(a),(b) (2013). *See also Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation,* 2006 MT 72, 331 Mont. 483, 133 P.3d 224. This Court's job is to determine whether the DNRC declaratory ruling is legally correct. "Under MAPA, we will reverse an agency decision if it is based on an incorrect conclusion of law that prejudices the substantial rights of an appellant." *Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583. The court may reverse or modify the agency's decision if substantial rights of the appellant have been prejudiced because of any of the particular factors found in Montana Code Annotated § 2-4-704(2). However, DNRC's criticism of Clark Fork's decision not to specifically match its contentions to the statute elevates form over substance. The parties agree on the true nature of this Court's review. If the agency's rule is unlawful, it would be folly to allow it to remain because Clark Fork had not mentioned a particular section of the statue in its petition.

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F. How Much Deference to DNRC Is Required

1. DNRC and Well Drillers Overstate the Deference Described in Case Law

The briefs give rise to some confusion over whether deference is owed to the agency, and if so, how much. The parties' briefing contains some citations to cases in which the agency is due deference because it is interpreting *its own rules*, such as in *Powell County v. Country Village, LLC*, 2009 MT 297, 352 Mont. 291, 217 P.3d 508 (2009) (cited by DNRC in its May 30, 2014 answer Brief at page 8). An agency is entitled to deference in interpreting what it meant when it drafted rules, but the court does not defer to an agency in interpreting the law, which is, of course, the court's job.

The Court's role here, without deference, is to determine whether the agency's interpretation and application of law are correct. *Knowles v. State ex rel. Lindeen*, ¶ 22 , 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595. MAPA was passed "with the clear purpose to preserve legislative intent and to curb "the undisciplined growth of administrative powers . . . . " Mont. Sen. Admin. P. Subcomm. Rpt. No. 33, 7, 42d Legis., Reg. Sess. (December, 1970) (quoting the Revised Model State Administrative Procedure Act)." *Gold Creek Cellular of Mont. Ltd. P'ship. v. St., Dep't. of Revenue*, 2013 MT 273, ¶ 11, 372 Mont. 71, 310 P.3d 533. This Court should not be misled into undoing that legislative intent by giving more deference to the agency's legal interpretation than is properly due.

DNRC also, in its declaratory ruling and in its brief, engrafts additional language to the standard of review by claiming that its interpretation of the law must "plainly and

palpably be inconsistent with the statue." DNRC & John Tubbs' Answer Br., 8 (May 30, 2014). DNRC gets this language from a 1959 federal case that interpreted a federal statute regarding wheat production. DNRC Answer Br. 8-9 (citing *Moe v. Wesen*, 171 F. Supp. 259, 263 (D. Mont. 1959)). The case predates MAPA and has nothing to do with MAPA, water use, or the Montana Code. The adverbs are compelling but they do not come from MAPA's terms and, therefore, should not elaborate this Court's obligation to interpret the rule's legal correctness.

2. Whether the Age of the Rule Matters

The Well Drillers contend DNRC's rule is due special deference for having been in place for 23 years. The Well Drillers' brief alludes to the Montana Supreme Court's tempered discussion of whether age alone merits deference. In the end, the Supreme Court likens

> this "deference" to an agency or officer's interpretation of a statute to estoppel, due to the reliance by the "public and those having an interest in the interpretation of the law." *Bartels,* 145 Mont. at 122, 399 P.2d at 771.
>
> Thus, the foregoing rule of deference applies, generally speaking, where the particular meaning of a statute has been placed in doubt, and where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance. Even then, such administrative interpretations are not binding on the courts; rather, they are entitled to "respectful consideration." *Doe v. Colburg* (1976), 171 Mont. 97, 100, 555 P.2d 753, 754. Accordingly, the test of time and reliance may nevertheless yield to a judicial determination that construction is nevertheless wrong, based on "compelling indications." *D'Ewart,* 228 Mont. at 340, 742 P.2d at 1018.

Mont. Power Co. v. Mont. Pub. Serv. Comm'n., 2001 MT 102, ¶¶ 24-25, 305 Mont. 260, 26 P.3d 91.

In the factual scenario here, estoppel concerns are minimal. If people have installed exempt wells under the current rule, they likely will be unaffected by any future change in rule. Any further development going forward would be subject to any new rule. This Court can give the "respectful consideration" due to the agency's interpretation without being bound by estoppel. Moreover, even though the combined appropriation rule may have been in effect for 23 years, that does not mean the circumstances under the rule have remained static. As basins have closed and as groundwater permitting became more difficult following the Montana Supreme Court's decision in *Montana Trout Unlimited* the incentive has grown to creatively use the exempt well statute to get around permit requirements. While the language of the rule may be unchanged, the landscape on which it is applied has changed.

3. Legislative Intent

"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." *Mont. Trout Unlimited,* ¶ 23. The parties agreed, in their stipulation that stayed this petition originally, that "the intent of the Montana Water Use Act's exception to the permit requirement under § 85-2-306 (3)(a), MCA, is to give small ground water users (i.e., those appropriating less than 35 gallons per minute, not to exceed 10 acre-feet/ year) the ability to appropriate small amounts of water without having to obtain a permit[. . .]" Stipulation & Order Dismissal

2 (Nov. 8, 2010). In the light of this agreed purpose to allow only small users to circumvent the permit requirement, DNRC's interpretation inserts what has been omitted. The legislation as written allows an appropriator who uses a small amount of water to forego the permit process. The DNRC rule allows a small appropriator to have as many small wells under the limit as he or she likes, circumventing the clear intention of the statute.

4. The Meaning of "Combine"

The duel of dictionary definitions of the word "combined" is not very productive. The underlying point, however, of the Legislature's language was to restrict the total volume of water being removed by one user without a permit. This language must be viewed in the context of what the Water Use Act was intended to accomplish. Prior to the adoption of the Act in 1973, no permits were required to obtain water rights in Montana. The 1973 Water Use Act was intended to remedy the chaos of unpermitted water development by systematically requiring permits for new water users. In this context, allowing an overly broad interpretation of the exemption would put categories of water use back into the situation that the Act was supposed to remedy. Thus, to be consistent with the goals of the Act, the exemption should be read narrowly, not broadly. A permit is required *except* in the case of very small users. It makes no sense to allow only certain amounts of combined appropriation, with specified small volume, and then eviscerate the effect of that limitation by allowing an unregulated proliferation of exempt wells. From Mountain Water's perspective, a rule that was consistent with the intent of the statute would disallow a user to drill numerous exempt wells in order to avoid the

permitting process. An irrigator who needs high volume for agriculture could, of course, use an exempt well for domestic water. But the rule should capture the legislative policy considerations in the Water Use Act, including conservation, water resource development, and protection of the State's water resources. Mont. Code Ann. § 85-1-101 (2013). Allowing more development to occur outside of the oversight of DNRC does not comport with the express designation of DNRC to "coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." Mont. Code Ann. § 85-1-101(3).

IV. CONCLUSION

Mountain Water faces the particular challenges of planning for a safe, reliable, and sufficient water supply into the future for the Missoula community. Its planning, in compliance with the various statutes and regulations that stem from the Water Use Act, is undermined and threatened by the proliferation of exempt wells, which will only increase as pressure on Montana's water resources grows. DNRC's definition of combined appropriation goes beyond the intent and plain meaning of the statute as drafted by the Legislature and DNRC's declaratory ruling should be reversed.

DATED this 11 day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, a copy of the foregoing document was served on the following persons by the following means:

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