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MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

THE CLARK FORK COALITION, a non-profit organization, *et al.*,	)	CIV No. BDV-2010-874
Petitioners	)	REPLY BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW
vs.	)	
JOHN TUBBS, in his official capacity as Director of the Montana Department of National Resources and Conservation, *et al.*,	)	
State-Respondents,	)	
The MONTANA WELL DRILLERS, *et al.*,	)	
Intervenors.	)	

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INTRODUCTION

The Petitioners, the Clark Fork Coalition *et al*., (the Coalition), hereby submit this reply in support of their petition for judicial review. The parties in this case, including the State-Respondents (the Department) and the three Intervenors (the Well Drillers, the Realtors, and Mountain Water Co.) agree this case involves a straightforward question of statutory interpretation. The question for this Court is whether the Department's current rule, 36.12.101(13), ARM, which defines a "combined appropriation" solely as an appropriation of water from two or more wells that are "physically manifold" together, is consistent with the Montana Water Use Act, § 85-2-306(3)(a)(iii) and (iv), MCA.

ARGUMENT

A. The Department is not entitled to deference.

The Department maintains its interpretation of the Water Use Act should be regarded with "great importance" and this Court should "presume" the Department properly interpreted the law. According to the Department (Br. at 7-8), its interpretation should be upheld unless it is "plainly and palpably" inconsistent with the Water Use Act. The Department is mistaken.[1]

The Department's declaratory ruling at issue in this case was not based on any findings of fact, only conclusions of law. *See* AR 2-54. Courts review "agency conclusions of law de novo, to determine if the agency correctly interpreted and applied the law." *Molnar v. Fox*, 2013 MT

[1] For support, the Department relies on *Moe v. Wesen*, 172 F. Supp. 259, 263 (D. Mont. 1959). In 55 years, this language from the U.S. District Court for the District of Montana has never been cited, much less adopted, by the Montana Supreme Court. Instead, the Montana Supreme Court adheres to the standard of § 2-4-305(6) that a rule is not valid unless it is "consistent and not in conflict with the statute" and "reasonably necessary to effectuate the purpose of the statute." *City of Great Falls v. Montana Dep't of Pub. Serv. Regulation*, 2011 MT 144, ¶ 22, 361 Mont. 69, 254 P.3d 595.

132, ¶ 17, 370 Mont. 238, 301 P.3d 824. "In reviewing conclusions of law under § 2-4-704, MCA, we determine whether the agency's interpretation of the law is correct." *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219. Accordingly, this Court must determine whether the Department's current rule defining "combined appropriation" is "consistent and not in conflict with [the Water Use Act] and reasonably necessary to effectuate the purpose of the statute." § 2-4-305(6), MCA. Because it is reviewed de novo for correctness, the Department's conclusion on this legal question receives no deference. Deference is not appropriate where "a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law." *Bitterroot River Protective.*, ¶ 18.

Where the meaning of a statute is in doubt, courts have, in some circumstances, afforded "respectful consideration" to an agency's interpretation of statute "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." *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. Here, however, "respectful consideration" is not warranted because the Department has not demonstrated a continued course of consistent interpretation.

In 1987, and in accordance with legislative intent, the Department published a rule explicitly contemplating that "combined appropriations" include both connected and unconnected groundwater developments. AR 1-7 at 1. Six years later, however, in 1993, the Department did an about-face and amended the rule to restrict "combined appropriations" to two or more wells or developed springs that are "physically manifold" together. AR 1-7 at 2, 3. The Department gave no justification for this consequential reversal. *See* AR 1-7 at 4. Where an

agency has not charted a reasoned, thoughtful, or consistent course in its interpretation of a statute, its interpretation holds little persuasive force. *See State By & Through Dep't of Highways v. Midland Materials Co.* (1983), 204 Mont. 65, 71, 662 P.2d 1322, 1325 ("The persuasiveness of an administrative interpretation of a statute depends upon the thoroughness evident in its consideration, the validity of its reasoning and its consistency with earlier and later pronouncements of the same agency.").[2]

Moreover, even if one assumes, *arguendo*, the Department can demonstrate a "long and continued course of consistent interpretation," no "identifiable reliance" exists in this case. The Montana Supreme Court has analogized the deference due to an agency's interpretation of a statute to estoppel. *Montana Power Co.*, ¶ 24. The doctrine of estoppel exists to prevent a party from "suffering a gross injustice at the hands of the other party who brought about the situation or condition." *Avanta Fed. Credit Union v. Shupak*, 2009 MT 458, ¶ 41, 354 Mont. 372, 223 P.3d 863. In this case, if this Court declares the Department's current rule invalid and vacates the rule, no "gross injustice" will occur. No current projects, developments, or subdivisions utilizing the exempt well loophole will be dismantled, and no well that is currently exempt need go through permitting. The only effect will be prospective in nature.

Finally, even if this Court is satisfied that the Department has demonstrated a "continued course of consistent interpretation, resulting in an identifiable reliance," the Department's interpretation of the Water Use Act would still not be binding on this court. *Montana Power*

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[2] The Well Drillers (Br. at 14) maintain the Department's current rule is "easy for the public to understand and for the Department to administer consistently," but this is irrelevant. A rule's ease of administration provides no insight into its consistency with the Water Use Act, which is the key question before this court. Indeed, a rule that effectively guts the "combined appropriation" language would be even easier to administer.

Co., ¶ 25. The "respectful consideration" test "may yield to a judicial determination that construction is nevertheless wrong." *Id*.

B. The Department's definition of "combined appropriation" conflicts with legislative intent.

Review of the Department's and Intervenors' response briefs reveals there is little disagreement between the parties on the central issues of statutory interpretation, including the plain language, legislative history, and overall purpose of the Water Use Act's exempt well provision. The disputes, rather, are largely peripheral to the central issue, irrelevant, or pertain to broader issues of water policy (that can and should be resolved via rulemaking).

1. The plain language.

The Department leaves untouched almost all of the Coalition's plain language arguments. For example, the Coalition argued in its opening brief (Br. at 10) that the Department's 1987-1993 definition of "combined appropriation" reflects the legislature's 1987 intent. The Department does not rebut this point, and the Well Drillers expressly concede it, noting that "[a]t the time [the Department's initial rule] was consistent with legislative purpose." Br. at 16.

This is an important concession, since it is the legislature's intent at the time of enactment that matters to this Court's review: "In the construction of a statute, the primary duty of the court is to give effect to the intention of the Legislature in enacting it." *State v. Hays* (1929), 86 Mont. 58, 282 P. 32, 34. If the Department's 1987 definition carried out original legislative intent, as the Coalition argues and the Well Drillers concede, the corollary is that the current, narrow definition does not and is invalid. The two definitions cannot both be consistent with the legislature's intent because they are diametrically opposed. The 1987 definition says that groundwater developments need not be physically connected in order to be deemed a "combined appropriation" and the 1993 definition says they must be.

The Department also does not refute, and thus impliedly concedes, the Coalition's main arguments construing the plain language of the statute: (1) that the word "combined" modifies "appropriation," not "wells," and thus refers to the amount of water that is combined for one appropriation, not to the physical joining of wells; and (2) that the phrase "two or more wells or developed springs" suggests two or more distinct groundwater developments, both because the phrase "two or more" is ordinarily used to refer to distinct, unconnected things, and because "well" and "developed spring" are both defined by statute as distinct, single things.

The Department does object to the Coalition's definition of "combine," but the objection does not disturb the Coalition's position. Specifically, the Department suggests an alternative definition for "combine": "to join (two or more substances) to make a single substance, such as a chemical compound." Br. at 9 (quoting *State v. Booth*, 2012 MT 40, ¶¶ 12-14, 364 Mont. 190, 272 P.3d 89). This definition, however, is not directly applicable to the statute here, and thus the court need not consider it.[3] But even assuming this definition applies, it is in fact closer to the Coalition's reading than to the Department's. The definition supports the Coalition's argument that "combine" is more commonly used to refer to the mixing, blending, or "joining" of substances, like water that is combined for an appropriation, than of solid physical items, like wells. Wells cannot be "join[ed] . . . to make a single substance," and thus this definition does little to further the Department's position. Moreover, even if the word "combine" could refer to the physical joining of solid objects, as the Department suggests, the Department fails to overcome the more fundamental obstacle that "combined" does not modify "wells" or

[3] The statute in *State v. Booth* involved the precise situation contemplated by the definition—the "combination" of precursor chemicals to form dangerous drugs.

"developed springs" but instead modifies "appropriation." *See* § 85-2-306(3)(a)(iii) and (iv), MCA.

The Well Drillers recognize this obstacle and attempt a creative, but unsuccessful, detour around it by arguing that the word "appropriation" is simply a surrogate for the words "wells" or "developed springs." Br. at 11. They reason that the words "appropriation" and "wells" or "developed springs" are interchangeable because one of the elements of an "appropriation" is a diversion, and wells and developed springs are diversion mechanisms. For this reason, the Well Drillers argue (Br. at 11) that the legislature's reference to "two or more wells or developed springs" is unnecessary and redundant. This strained logic flies in the face of common sense and several canons of construction.

An "appropriation" is a right to a quantity of water needed to fulfill a beneficial use, *see* § 85-2-102(1), MCA, and "wells" or "developed springs" are manmade excavations used to withdraw groundwater, *see* §§ 85-2-102(11), (31), MCA. To conclude that the legislature meant "well" when it said "appropriation" goes against the presumption that the legislature knew what it was doing. The legislature certainly knows the meaning of the words used and cannot be presumed to have used unnecessary or superfluous words in the statutory provision. *See Petroliam Nasional Berhad v. GoDaddy.com, Inc.*, 737 F.3d 546, 550 (9th Cir. 2013) ("The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there."). It is a court's job to give effect to all the words used. *See State v. Booth*, ¶ 11; *Montana Trout Unlimited v. Montana Dep't of Natural Res. & Conservation*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224. Courts should "not . . . insert what has been omitted or . . . omit what has been inserted." § 1-2-101, MCA.

2. The legislative history.

The Department does not refute or otherwise address the Coalition's legislative history arguments, which center on the statements of Rep. Spaeth, the sponsor of the exempt well provision, and Mr. Ted Doney, a lobbyist. Among the Coalition's points, unrebutted by the Department, is that Mr. Doney understood "combined" in the bill to mean "two wells that were irrigating the same tract but not physically connected." AR 1-27 at 32 (emphasis added). Rep. Spaeth agreed with Mr. Doney's understanding and later adopted Mr. Doney's proposed amendment to the bill. *Id.* at 33, 44.[4]

Instead of addressing the legislative history behind the "combined appropriation" language, which was added to the Water Use Act in 1987 pursuant to HB 642, *see* AR 1-27, the Department and Intervenors seek to draw this Court's attention to four examples of post-enactment history, none of which are insightful, helpful, or otherwise pertain to how "combined appropriation" was understood by the 1987 legislature.

First, the Department argues (Br. at 12) that its current definition of "combined appropriation" is consistent with the intent of the legislature in 1991. But in 1991, the legislature

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[4] The Realtors' argument that because Mr. Ted Doney was a lobbyist, his statements are not helpful to an understanding of the legislature's intent, is misplaced. Mr. Doney's statements—including his construction of "combined" as "two wells that were irrigating the same tract but not physically connected"—is useful both because Mr. Doney was the initiator of the "combined appropriation" language and because his statements served as the backdrop against which the legislators voted. Mr. Doney was more than a lobbyist. He presented the "combined appropriation" amendment and recommended changes to it that the legislators adopted. It is precisely "initiators" of key language like Mr. Doney whose statements the courts look to when the meaning of words used in a statute is in doubt. *Church of Scientology of California v. U.S. Dep't of Justice*, 612 F.2d 417, 424 (9th Cir. 1979). Moreover, even if Mr. Doney was not the "initiator" of the key language, his statements are relevant because they shed light on the context in which the legislators adopted the key language. As the U.S. Supreme Court explained, statements of legislative history are "considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding." *D.C. v. Heller*, 554 U.S. 570, 605 (2008).

did not amend or otherwise change the term "combined appropriation." In fact, the legislature left the Department's broad, 1987 definition of "combined appropriation " unchanged and simply lowered the threshold on the amount of water that could be appropriated without a permit, from 100 gpm to 35 gpm, not to exceed 10 acre-feet per year.

What matters for this Court's review is the intent of the legislature that enacted the "combined appropriation" language—in this case, the 1987 legislature. A legislature's intent is to be evaluated as of the time of enactment and amendments to neighboring provisions or language do not disturb this original intent. *State v. Dawson County* (1930), 87 Mont. 122, 286 P.125, 131. This court may appropriately evaluate the Department's rule for consistency with the lowered threshold in the 1991 amendment, but it must still give effect to the 1987 legislature's original intent in enacting portions unaffected by the 1991 amendment, including the "combined appropriation" language. *Id*.

Notably, contrary to the Department's assertions, the current rule defining "combined appropriation" is not consistent with the 1991 lowered threshold. As the Department acknowledges (Br. at 12), the 1991 amendment addressed the legislature's concern with impacts to the water resource from large consumptive uses. A rule that facilitates such large uses by creating a massive loophole for exempt wells, like the Department's current rule, undermines that purpose. The Department posits that the 1991 amendment was enacted solely in response to the legislature's concern about large amounts of water being used for irrigated agriculture, but no citations or support is provided for this belief. Whether or not the legislature only had irrigated agriculture in view in 1991, it opted for broader language that would encompass all "combined appropriations" with the potential for significant impact to the water resource. Surely, if the

legislature had intended to limit the reach of "combined appropriations" to irrigated agriculture, it would have said so.

Second, the Department makes the bold suggestion (Br. at 10) that recent opposition by the Water Policy Interim Committee (WPIC) and an objection by the EQC to the Department's recent attempts at rulemaking are probative of legislative intent. The Department is mistaken. The legislature only speaks through enacted language. Although these bodies are "legislative" they are not the "legislature," and their opinions and recent actions do not shed light on the legislature's intent—certainly not on the intent of the 1987 legislature.

Third, the Department and Intervenors (Well Drillers and Realtors) rely on a failed bill from the 2013 legislative session—Senate Bill 19—to determine legislative intent. This is a mistake. For starters, the failed bill—which was inappropriately attached to the Well Drillers' response brief—occurred after the Department's declaratory ruling, is outside the record, and should not be considered by this Court. *See* § 2-4-704(1) (judicial review confined to record). But even if the failed bill is considered, it provides no probative value to the underlying issue.

As mentioned earlier, the salient inquiry for this court is the intent of the 1987 legislature that drafted the "combined appropriation" language. *See State v. Hays*, 282 P. at 34 ("In the construction of a statute, the primary duty of the court is to give effect to the intention of the Legislature in enacting it."). A failed bill from 2013 provides no insight into legislative intent from 1987. In addition, the failed bill never became law, so this Court has no latitude to speculate about what the legislature intended or not. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 382, n. 11 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent."); *Allen v. State ex rel. Bd. of Trustees of Oklahoma Unif. Ret. Sys. for Justices & Judges*, 1988 OK 99, 769 P.2d 1302, 1306 ("A legislature's failure to express its will through

enacted law constitutes its official silence. No intent may be divined from a lawmaking body's silence.").[5]

Finally, the Department and Intervenors rely on the silence of the legislature over the life of the Department's current rule, from 1993 to present, to imply that the legislature acquiesced to the Department's interpretation. This approach cuts both ways (the legislature, for instance, retained the Department's 1987 interpretation of "combined appropriation" when it amended the statute in 1991) and is misplaced. Although courts "have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169 (2001); *see also Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1081 (9th Cir. 2011), *rev'd on other grounds*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (U.S. 2013).

The Department cites *Lohmeier v. State* for the proposition that "[w]here the Legislature acquiesces in long-standing agency interpretation of a statute and takes no action to inform that interpretation, the court will presume that the Department has properly interpreted the law." 2008 MT 307, ¶ 28, 346 Mont. 23, 192 P.3d 1137; Br. at 6. But *Lohmeier* is a very different case. *Lohmeier* concerned the re-enactment doctrine, where the legislature re-enacts a statute but fails to revise or repeal the agency's interpretation and thereby "acquiesces" in that interpretation. The basis of this doctrine is that the legislature only "speaks" through its enacted laws. The re-

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[5] Since 1987, the legislature has seen both ways on the "combined appropriation" language. Just as the Department can point to SB19, the Coalition can point to a 2005 bill that defined "combined appropriation" as "[a]ny ground water development consisting of two or more wells or developed springs, regardless of whether their diversion works are physically connected or not, that are developed in connection with a major or minor subdivision." H.B. 403 (Mont. 2005) (emphasis added). Nothing can be deduced from the tea leaves of these and other failed bills, and it is not the court's role to attempt such an exercise. This Court's sole inquiry must be the intent of the 1987 legislature, which enacted the "combined appropriation" language.

enactment doctrine has no bearing on this case because the Water Use Act has never been re-enacted. *State ex rel. Lewis & Clark Cnty. v. State Bd. of Pub. Welfare* (1962), 141 Mont. 209, 212, 376 P.2d 1002, 1003-04.

3. The overall purpose.

The Coalition and the Department agree on the legislature's overall purpose in enacting the exempt well provision and, in particular, the "combined appropriation" language. As explained by the Department (Br. at 11), "Montana is a rural state and small wells are often located in remote areas. Exempt ground water wells typically serve small dispersed uses with low probability of adverse effect to neighboring water rights. It is apparent that the legislature intended to allow small ground water appropriations for discrete purposes, especially to provide for domestic and stock uses, without the burden and expense of going through the permitting process." By contrast, the Department states, "[t]he legislature intended that larger water consumptive uses . . . go through the permitting process." Br. at 13. The Coalition agrees.

The legislature's intent in enacting the "combined appropriation" language was to prevent large consumptive water users from using the exempt well provision and thereby causing harm to neighboring water rights. As stipulated to by the Department, "it was never the intent of the Montana Water Use Act to allow a single large consumptive water user (i.e., those exceeding the 35 gpm or 10 acre-feet-year) utilizing one large ground water system or multiple wells or developed springs to qualify for an exemption from the Act's permitting requirements." *Second Modified Stipulation* at 2 (May 15, 2013). This, however, is precisely what the Department's narrow rule defining "combined appropriation" does: it allows a large consumptive water user to drill as many wells as he or she likes, thereby circumventing the clear intention of the statute.

The Department counters that impacts from multiple wells could be addressed by establishing controlled groundwater areas, where no exempt wells are allowed, but this fact is unhelpful and irrelevant. Only a small percentage of the areas impacted by exempt wells are designated controlled groundwater areas and, more importantly, whether or not other legal mechanisms can be called upon to rein in the exempt well problem is irrelevant to the legal issue presented in this case, i.e., whether the Department's definition of "combined appropriation" is consistent with legislative intent.[6]

Moreover, using controlled groundwater areas as a reactive tool to bandage over local problems at significant expense does not fulfill the legislature's intention to use the Water Use Act's permitting process as a proactive tool to prevent problems from occurring in the first instance. Nor does the controlled groundwater area process place the burden where the legislature intended. Under the Water Use Act, the permitting process places the burden on new appropriators, not injured senior rights holders. New appropriators must prove that they will not adversely affect existing rights. *See* § 85-2-311, MCA. In order to petition for a controlled groundwater area, however, injured rights holders must band together with one-third of the other rights holders in the area, and must include in their petition expensive and time-consuming analysis by a hydrogeologist, scientist, or engineer. *See* § 85-2-506, MCA.[7]

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[6] The Department's suggestion (Br. at 3 n.3) that the "specific interests" of Katrin R. Chandler, Betty J. Lannen, and Polly Rex are moot since the establishment of the Horse Creek Controlled Groundwater Area in 2012, *see* ARM 36.12.905, is misleading and incorrect. The Department's rule creating the controlled groundwater area grandfathered in all exempt wells drilled prior to 2012 and wells drilled after 2012 fall under the controlled groundwater area's guideline of 35 gpm up to 1 acre-foot-per year. Exempt wells in the area have impacted, and continue to impact, the Coalition's interests. *See* AR 1-17, 1-18, 1-19, 1020, 1-21, and 1-22.

[7] The Realtors assert that the Coalition is seeking sweeping change to subdivision problems that only exist during periods of high growth in small areas of the state. But the harm caused by

Finally, the Department argues that exempt well provisions are commonplace in Western states. This is certainly true. But, in so arguing, the Department momentarily loses sight of the issue in this case, which is the massive exempt well loophole created by the Department's "physically manifold" rule. This case is not about exempt wells, which the Coalition agrees are necessary for small water users, provided for by the Water Use Act, and appropriate for Montana as a matter of public policy.

C. The Department's and Intervenors' policy concerns should be dealt with via future rulemaking.

In their response briefs, the Department and Intervenors (Well Drillers and Realtors) raise various policy concerns about how resorting back to the 1987 rule defining "combined appropriation" or making any changes to the existing, narrow rule defining "combined appropriation" may affect water policy in Montana. These concerns are irrelevant to the legal question presented, without merit, and should be dealt with in future rulemaking.

For example, the Department and Intervenors assert that under the Coalition's reasoning all wells appropriating water from the same source aquifer would qualify as a "combined appropriation." This is incorrect. The Coalition has never advocated for such an approach. Nor

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exempt wells is not caused solely by subdivisions. Developers of oil and gas and coalbed methane also exploit the exempt well loophole. Indeed, any large consumptive user can use the loophole. Moreover, the problem posed by subdivisions is not limited to periods of high growth in small areas of the state. Residential growth—if not boom—continues throughout Montana, and senior rightsholders typically suffer wherever and whenever subdivisions are built with exempt wells. The Realtors' suggestion (Br. at 8) that harm to the Coalition would be alleviated by better recordkeeping on exempt wells is also misplaced. Even if all exempt wells were accompanied by notices of completion, combined appropriations would still cause all the same problems that a permitting system would address, including quantity and quality impacts. These impacts are well established and based on much more than "anecdotes." *See* AR 1-17, 1-14.

does such an approach comport with legislative intent or how the Department originally defined "combined appropriation" in the 1987 rule. *See* AR 1-7 at 1.

Under the Department's 1987 rule, multiple unconnected wells or developed springs would only qualify as a "combined appropriation" if they: (1) access the same source aquifer; and (2) are part of one project or development that could be accomplished by a single appropriation. AR 1-7 at 1. These are different requirements, both important, and both reflective of the legislature's intention to require permitting for large uses that will have an impact on the water resource. The requirement that the wells be used for one project or development whose purpose could have been accomplished by a "single appropriation" is a key limit to the "combined appropriation" provision.

Thus, pursuant to the Water Use Act and in accordance with the Department's 1987 rule, a "combined appropriation" would only exist if two or more wells (connected or not) were pumping water from the same source aquifer for the same project or development. A farmer, therefore, would not be limited to one exemption for 35 gpm up to 10 acre feet a year "irrespective of whether stock is watered, garden is watered, or household is supplied," as the Department and Realtors contend. A farmer might have one appropriation for stock watering, one appropriation for irrigating a crop, and one appropriation for domestic use. Pursuant to the Water Use Act and the Department's 1987 rule, he could drill three wells for these three different appropriations without seeking a permit.

The same inquiry would also be applied in the subdivision context. Under the Department's 1987 rule, a "'combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, the purpose of which, in the Department's judgment, could have been accomplished by a single appropriation . . . The amount

of water appropriated for the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'" AR 1-7 at 1 (emphasis added). As such, if the purpose of the project or development (the subdivision) could have been accomplished by a single appropriation, multiple wells appropriating water from the same source and for the same purpose qualify as a "combined appropriation." *Id*.

The Well Drillers maintain (Br. at 18) that this poses equal protection concerns because the homeowners within a subdivision would not be able to use exempt wells, whereas other homeowners would. However, no equal protections are implicated because homeowners in a subdivision are in fact differently situated than homeowners outside a subdivision. An individual homeowner provisions his own water. By contrast, in the subdivision context, much of the work of provisioning water must—by law—be undertaken by the developer. It is the developer who is required to submit an application for subdivision review, *see* § 76-4-125, MCA, 17.36.102, ARM, and it is the developer who must indicate the locations of proposed groundwater sources, 17.36.330, ARM, and demonstrate specific minimum flows for each single family water system (if the subdivision proposes individual on-site wells), 17.36.332, ARM.

Indeed, contrary to the Well Drillers' suggestion (Br. at 12) that only the "end-user" or individual home owner is the appropriator of water, it is often the developer who files the application for a beneficial water use permit to appropriate water for the subdivision. *See, e.g., Bostwick Properties, Inc. v. DNRC*, 2009 MT 181, 351 Mont. 26, 208 P.3d 868 (case involving developers' application for a water use permit for a subdivision); AR 1-13 at 12 (describing water permitting process for subdivisions). The Well Drillers point out that only a "person" may be an appropriator, but the word "person" as used in the Water Use Act is defined broadly to include "an individual, association, partnership, corporation, state agency, political subdivision,

the United States or any agency of the United States, or any other entity." § 85-2-102 (18), MCA. This definition encompasses not only individual owners of property but also individuals, partnerships, and/or corporations that develop a piece of property for a single subdivision. *See id*.

Review of water use at the subdivision—as opposed to the individual well—level is sensible and provided for throughout Montana law. For example, under Montana's Subdivision and Platting Act, developers are required to carefully assess how the proposed subdivision—as a whole—may impact local services and the environment, including wildlife habitat, water resources (including the physical availability of groundwater), and overall public health and safety. The analysis is at the subdivision—not the individual lot—level. Developers must take into account the overall cumulative or aggregate impacts of the entire development. *See* §§ 76-3-603, 608 MCA; *Aspen Trails Ranch LLC v. Simmons*, 2010 WL 1463226, 2010 MT 79 (2010) (must take hard look at how entire 300+ lot subdivision would impact groundwater and Prickly Pear Creek).

That said, even if one assumes, *arguendo*, that some of the Department's and Intervenors' policy concerns are valid, as mentioned earlier, they technically have no bearing on the issue presented, i.e., whether the current rule defining "combined appropriation" solely as two or more wells that are "physically manifold" together is too narrow and in conflict with legislative intent. Rather, these policy concerns are more appropriately addressed through future rulemaking. If, as the Well Drillers suggest, the Department's 1987 rule defining "combined appropriation" is too broad, too difficult to administer, or needs to be clarified, updated, or changed in response to changing circumstances, this can and should be accomplished through future rulemaking. The Department, for instance, may need to clarify and define what "project and development" means

or adopt an entirely new definition of "combined appropriation" that is neither too narrow (like the current rule) or too broad.

In August, 2013, for example, the Department proposed (but refused to finalize) a new rule defining "combined appropriation" as "two or more wells or developed springs from the same source aquifer that are physically connected into a single system, located within 1,320 feet of one another and are on the same tract of record, or within a subdivision as defined in § 76-3-103, MCA or land that is divided under §76-3-201, MCA, and § 76-3-207, MCA." *See Montana Administrative Register Notice* 36-22-175, No. 16 (August 22, 2013).[8] A subsequent and similar definition of "combined appropriation" was proposed (but also never finalized) later that year, in December, 2013. *See Montana Administrative Register Notice* 36-22-176, No. 24 (December 26, 2013).

How the Department ultimately decides to define "combined appropriation" in accordance with legislative intent in the future is an important issue and one that the Coalition, Realtors, Well Drillers, and other interested parties will surely be involved in. But the scope and content of a future rule—whatever it may be—does not change the fact that the current rule defining "combined appropriation" solely as two or more wells that are "physically manifold" together is too narrow, in conflict with legislative intent, and needs to be changed.

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[8] The Department's proposed rules are available online at: http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5289 and http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=5013 (last visited on June 19, 2014).

D. This Court should declare the Department's current rule invalid and either vacate the current rule or order new rulemaking.

For all the foregoing reasons, the Coalition respectfully requests this Court: (1) issue an order declaring the Department's current rule defining "combined appropriation," ARM 36.12.101(13), invalid and in conflict with the Water Use Act; and (2) either vacate the Department's current rule defining "combined appropriation" and reinstate the original, 1987 rule, *see Paulson v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005), or immediately order the Department to initiate and complete rulemaking consistent with legislative intent and this Court's order, by a date certain (not to exceed six months from the date of this Court's order).

Pursuant to § 2-4-704(2), MCA, this Court may "reverse or modify" the Department's declaratory ruling if it is in violation of statutory provisions, in excess of statutory authority, or clearly erroneous." This Court may also issue other forms of relief provided by statute. *See* § 2-4-702(1)(a), MCA ("This section does not limit the use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute."). Pursuant to § 2-4-506(2), MCA, this Court may declare the Department's rule invalid if "the rule was adopted with an arbitrary and capricious disregard for the purpose of the authorizing statute as evidenced by documented legislative intent." *See also* § 2-4-305(6), MCA (rule not valid unless consistent and not in conflict with statute); § 27-8-101 *et seq*., MCA (declaratory judgments). In addition, this Court retains broad equitable discretion to grant the relief requested by the Coalition, or indeed, to fashion any relief it deems necessary and appropriate. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010).

CONCLUSION

Wherefore, the Coalition requests this Court grant this petition for judicial review and issue the relief requested.

Respectfully submitted this 20th day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2014, I served a copy of this filing on all counsel of record by mail.

Laura King