MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

Petitioners,

v.

JOHN E. TUBBS, in his official capacity as Director of the Montana Department of Natural Resources and Conservation; and the MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION (DNRC), an agency of the State of Montana,

Respondents,

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors,

Cause No. BDV-2010-874

ORDER ON PETITION FOR JUDICIAL REVIEW

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING ASSOCIATION,

Intervenors,

and

MOUNTAIN WATER COMPANY,

Proposed Intervenors.

PROCEDURAL BACKGROUND

This matter is before the Court on a petition for judicial review. Petitioners filed a request for a declaratory ruling from the Montana Department of Natural Resources and Conservation (DNRC). Petitioners requested that DNRC declare an administrative rule invalid and to conduct rulemaking to bring the rule into conformance with Montana's Water Use Act – Montana Code Annotated § 85-2-101, et seq. Petitioners' request was supported by the Montana Department of Fish, Wildlife, and Parks (FWP), various ranchers, Trout Unlimited, the Tongue River Water Users Association, Missoula County, Mountain Water Company of Missoula, and the Northern Plains Resource Council. On August 17, 2010, DNRC issued a ruling denying the petition for declaratory ruling. This petition followed.

STANDARD OF REVIEW

Pursuant to Montana Code Annotated § 2-4-501, "[a] declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases." The standard of review for contested cases is contained in Montana Code Annotated § 2-4-704:

> **Standards of review.** (1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the

record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) findings of fact, upon issues essential to the decision, were not made although requested.

An agency's decision will be reversed if it is based upon an incorrect conclusion of law that prejudices the substantial rights of an appellant. No discretion is involved when a tribunal arrives at a conclusion of law – the tribunal either correctly or incorrectly applies the law. *Citizens Awareness Network v. Mont. Bd. of Envt'l Review*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583.

DISCUSSION

The statute in question in this case is Montana Code Annotated § 85-2-306(3)(a) (hereinafter exempt well statute), which provides:

(3) (a) Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water by means of a well or developed spring:

. . .

(iii) when the appropriation is outside a stream depletion zone, is 35 gallons a minute or less, and does not exceed 10 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding 10 acre-feet, regardless of the flow rate, requires a permit; or

(iv) when the appropriation is within a stream depletion zone, is 20 gallons a minute or less, and does not exceed 2 acre-feet a year, except that a combined appropriation from the same source by two or more wells or developed springs exceeding this limitation requires a permit.

Under the exempt well statute, a permit is not required for the appropriation of relatively small amounts of water. However, a combined appropriation by two or more wells from the same source that exceed the minimum requirements does require a permit. The legislature did not define the term "combined appropriation."

In 1987, just months after the legislature inserted the concept of combined appropriation into the Water Use Act, DNRC's original rule was enacted as follows:

> [A]n 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. Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."

(Admin. Rec. 1-7, at 1-2 (emphasis added).) This rule was in effect until 1993, when the current rule was enacted. The rule now provides: "[c]ombined appropriation" means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system." Admin. R. Mont. 36.12.101(13) (emphasis added). Petitioners feel the current rule conflicts with the exempt well statute.

This Court rules that the current definition of "combined appropriation" violates not only the spirit and legislative intent behind the Water Use Act, but that it also violates the legislative intent in the enactment of the exempt well statute. The rules of statutory construction which guide this Court's review have been set out by the Montana Supreme Court:

> We are mindful of the rules of statutory construction that guide our review of the 1999 revisions. "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *S.L.H. v. State Compensation Mutual Insurance Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, ¶ 16, 15 P.3d 948, ¶ 16 (citing *United States Nat'l Bank v. Independent Ins. Agents of Am.* (1993), 508 U.S. 439, 455, 113 S. Ct. 2173, 2182, 124 L. Ed. 2d 402, 418). "Our purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will. Section 1-2-102, MCA." *S.L.H.*, ¶ 16.

State v. Heath, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426.

Purpose of the Water Use Act

Article IX, section 3(4), of the Montana Constitution provides: "[t]he legislature 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 records." In enacting the Constitution, the Water Use Act declares its purpose to be:

> [T]o implement [Article IX, section 3(4)] of the Montana Constitution which requires that the legislature provide for the administration, control and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan.

Mont. Code Ann. § 85-2-101(2). The general rule in Montana, under the Water Use Act, is that, except for certain exceptions, a person cannot appropriate water unless the person applies for and receives a permit or an authorization from the DNRC. Mont. Code Ann. § 85-2-302(1).

In obtaining a permit, an applicant or DNRC is required to provide notice of the application for permit, Montana Code Annotated § 85-2-307, and allow senior appropriators the opportunity to comment and take action to protect their established water rights. In addition, the general scheme requires that an applicant for a

groundwater well permit in a closed basin must show that his proposed well would not adversely affect existing surface users. Mont. Code Ann. § 85-2-360. Under the general system, a permit cannot be issued until the applicant proves by a preponderance of the evidence that the water rights of existing senior appropriators will not be adversely affected. Mont. Code. Ann. § 85-2-311. However, under the exempt well regulation currently in effect, all of these salutatory purposes of the Water Use Act are avoided. For example, an exempt well could even be drilled in a closed basin without any need for a permit. With the current regulation, the burden is placed on a senior water appropriator to protect his rights from encroachment by exempt wells. This becomes especially difficult when there is no metering, reporting, or a verification of the use of all of the exempt wells that might be installed. Under DNRC's current regulation, if one qualifies for an exempt well, all that individual needs to do is drill the well, create a well log report, and put the well to use within 60 days. Notice of completion is then sent to DNRC, and once that is done, DNRC automatically issues a certificate of right to user. There is no requirement under the current administrative regulation that requires any determination of how the exempt well might affect existing water rights, even in a closed basin. After the certificate is issued, there is no further review of the exempt well – "no metering, no reporting, and no verification of use of the well." Michelle Peterson-Cook, *Water's for Fightin', Whiskey's for Drinkin': How Water Law Affects Growth in Montana*, 28 J. Envt'l L. & Litig. 79, 88 (2013).

In explaining the need for a permit system as envisioned by the Water Use Act, Professor Albert Stone of the University of Montana penned his 1973 law review article shortly before passage of the Act. Professor Stone wrote:

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> In addition to providing for a final determination and adjudication of existing and past vested rights, newly acquired rights should be equally definite, certain, and public in record. Montana's present loose law, by which a water right may be acquired simply by making use of the water, inherently results in uncertainly, ignorance of what rights are in a stream, disputes, and litigation. And the statutory method of appropriation, under which a person files with the count clerk a statement of what he hopes to put to beneficial use, has exactly the same deficiencies.
>
> The third paragraph of Art. IX, § 3 of the new constitution provides:
>
> > All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> The law should provide for considering all public interests each time a prospective water user seeks to have a part of this property of the state committed to his use. And so the Department of Natural Resources and Conservation, or an agency under that Department, should review the benefit to the public, as well as the effect on other water users, of granting an additional franchise to use this public property. That is one reason why a person should be required to secure a permit, in effect a license, to make a new use of Montana's water.

Albert W. Stone, *Montana Water Rights – A New Opportunity*, 34 Mont. L. Rev. 57, 72 (1973). Most importantly, Professor Stone referenced the law existing prior to the passage of the Water Use Act which allowed a water right to be acquired by merely making use of the water. As noted by Professor Stone, this results in uncertainty and litigation — the new permit system, as envisioned by the Water Use Act, would eliminate that confusion and uncertainty.

In the view of this Court, any exemption provided by DNRC, such as in its current definition of "combined appropriation," should be read narrowly so as not to defeat the overall purpose of the Water Use Act. The potential of the current definition of "combined appropriation" is not theoretical. As noted by DNRC's Water Management Bureau in February 2008:

> This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins.
>
> Exempt wells are not reviewed by DNRC and are not subject to public notice. In contrast, permitted wells are reviewed by DNRC, and water users and the public are noticed and given an opportunity to object. Impacts caused by permitted wells are required to be identified and, if these impacts cause adverse affect to water users, must be offset through mitigation plans or aquifer recharge plans. Impacts caused by exempt wells are often offset during times of water shortages by curtailment of junior surface water right users. Even if administration or enforcement of exempt wells in priority existed, curtailment of exempt wells could be ineffective because of the delayed effect on stream flows and, therefore a call may not benefit senior water users.
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> . . . At current rates of development, approximately 30,000 new exempt wells could be added in closed basins during the next 20 years resulting in an additional 20,000 acre-feet per year of water consumed.

(Admin. Rec. 1-14, at 1.)

In addition, FWP, in its April 30, 2010 statement of position, noted that the administrative rule is not consistent with applicable law because an appropriator could comply with the rule and not comply with the statute. (Admin. Rec. 1- 37, at 3.) FWP gave an example illustrating its point:

> Under the current rule, an individual who wishes to irrigate 20 acres of hay may do so with exempt wells that are not manifold into the same irrigation system; i.e., there are no pipes connecting one well to another. However, assuming an irrigation demand of 2 [acre-foot per acre], the total demand will be 40 [acre-foot]. The appropriator is the same, and the beneficial use is the same. Though the appropriator would not be in violation of the definition of combined appropriation, his action would not be consistent with the Water Use Act which states that a combined appropriation from the same source that exceeds 10 acre-feet a year requires a permit. It not only defies logic to conclude otherwise, but is inconsistent with the plain meaning of the statute.

(Id.) FWP went on to note the example of a subdivision near Manhattan, Montana. There, over 127 lots would be served by exempt wells. The total volume of water involved obviously would be over 10 acre feet. Clearly, noted FWP, the wells would draw from the same source. Except for the current administrative rule, the developer could not appropriate this water under the Water Use Act without a permit. However,

because of the current administrative rule's exemption a major subdivision will be built without permitted water rights. No protections are provided for existing water users.

Another example was provided by the Montana Smart Growth Coalition:

> The current definition of "combined appropriation" allows 1,000 new wells as part of a 1,000 lot subdivision to escape review under DNRC permitting, but that same rule requires a developer putting in just five homes on the same well to go through full DNRC permitting. . . . In other words, the current rules would allow up to 10,000 acre feet a year of water to be potentially diverted from senior water rights holders neighboring or near the new 1,000 lot subdivision without any review.

(Admin. Rec. 1-12, at 4.)

Another commentator has noted that nothing in the exempt well rule requires an examination of how the new water allocation will affect existing water rights:

> For example, subdivisions act like one combined draw on an aquifer because the water they draw from the aquifer is from one concentrated area, but each lot is treated as a separate draw because the homes are not physically plumbed together.
>
> The allowance of exempt wells creates many negative implications. First, the amount of water withdrawn by these exempt wells is unknown because they are not metered, personally checked, or reported to anyone. Second, the number of exempt wells is quite high; as of 2008, there were over 100,000 exempt wells in Montana. DNRC estimates that by 2020 there will be between 32,000 and 78,000 additional exempt wells in Montana. How much water does each of these exempt wells draw from the aquifer? DNRC estimates each 2.5 person household consumes on average about 3,400 gallons of water per year in house uses alone (not including any outside irrigation or lawn watering). Multiplying this estimated increase in exempt wells with the estimated amount of water used per household produces a significant amount of unregulated water that will place a growing strain on Montana's water resources. Exempt wells can be found all over the state; and their presence is not only placing an expounding strain on existing water resources but is also changing how Montana's growth is occurring.

Peterson-Cook, 28 J. Envt'l L. & Litig. at 88-89 (footnotes omitted).

DNRC notes that the purpose of the exempt well statute is "to provide for small uses of water with limited potential for impact to the water resource, . . .

without the burden and expense of the permit process." (DNRC & John Tubbs' Ans. Br., at 13 (May 30, 2014).) Also, the "legislature intended that larger water consumptive uses, especially irrigated agriculture, go through the permitting process." (Id.)

However, as noted by the above examples, the exempt well rule as currently administered by DNRC allows large consumptive water uses to be established without going through the permitting process. DNRC, itself, noted:

> There is concern among senior water rights holders that the cumulative effects of many small groundwater developments can have significant impacts in terms of reducing groundwater levels and surface water flows over the long term, and may be creating the same types of adverse effects that the permitting system was intended to protect them against. This concern is justified not just based on the absence of regulatory review of new development, but also because there is no effective or efficient mechanism for enforcing their senior priority dates against these junior ground water uses.

(Admin. Rec. 1-13, at 1; *see also* Admin. Rec. 1-14.)

In summary, the Water Use Act envisions a system whereby new users of water are required to obtain a permit providing notice to senior water users. Senior water users, under this notification process, are able to protect their senior water rights and are provided an efficient method of enforcing their senior water rights, even if the permit should be issued. Certainly the legislature's intent in the Water Use Act exempt well statute was to allow small users of groundwater to proceed without a permit. However, as the current administrative rule is written, large consumptive uses of groundwater will be allowed without any notification to senior water users and without the requirement of a permit. This will also deny the senior water users an effective way to enforce their priority dates.

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Legislative History

The term "combined appropriation" was added to the Water Use Act's exempt well provision in 1987 via House Bill 642 (HB 462) introduced by Representative Speath. (Admin. Rec. 1-27, at 31.) On third reading of HB 642, the following language was added: "[E]xcept that a combined appropriation from two or more wells or developed springs exceeding this limitation requires a permit." (Id., at 28–29.)

At the bill's hearing in front of the Senate Natural Resource Committee, the late Ted Doney, a well-known water law attorney, raised concerns about the word "combined" because of ambiguity surrounding its meaning. (Id., at 32.) Doney indicated that it was his understanding that reference to "combined" meant that "two wells that were irrigating the same tract but not physically connected." (Id.) In order to clear up the ambiguity, Doney recommended inserting the phrase "from the same source" following the word "appropriation." (Id., at 32, 36.) The committee moved to adopt Doney's amendment. (Id., at 36.) The proposed amendment to HB 642 passed with a unanimous vote. (Id., at 45.)

Just month's later, the Department engaged in rule making and defined the term "combined appropriation" in accordance with the above-noted legislative intent. "Combined appropriation means an appropriation of water from the same source aquifer by two or more ground water developments . . . [that] need not be physically connected or have a common distribution system to be considered a 'combined appropriation.'" (Admin. Rec. 1-7, at 1, 2.) This rule was adopted by the Department on August 31, 1987 without any objection. It should here be noted that at the time of the 1987 amendment, 100 gallons-per-minute was the statutory limit on the

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flow rate for exempt wells. This rate was later reduced to 35 gallons-per-minute, not to exceed 10 acre feet, in the 1991 legislative session pursuant to Senate Bill 266.

In 1993, the Department adopted the current administrative rule to require that two or more wells or developed springs be physically connected together in order to be deemed a "combined appropriation."

Clearly, when the legislature inserted the term "combined appropriation" into the exempt well statute, the legislature was under the impression that the reference to "combined" did not require two wells to be physically connected. This legislative intent is clearly shown from the dialog set forth above. Such being the case, the current administrative rule violates the legislative intent of the drafters of the exempt well statute.

Deference Owed to Agency

The Court acknowledges that it owes respectful deference to the interpretation of the DNRC of a statute which it is directed to administer. However, that deference does not overcome the Court's firm conclusion that the exempt well regulation violates not only the legislative history of the statute but also the purpose behind the Water Use Act. Further, this deference is lessened when it is considered that the DNRC itself has recognized the conflict between the rule and the statute. (*See* Admin. Rec. 1-13 and 1-14.) Furthermore, the rule originally adopted by DNRC, which existed until 1993, is also entitled to deference. Thus, although the Court is respectfully deferential and appreciative of DNRC's expertise, such deference cannot withstand the Court's conclusion that the current exempt well regulation is inconsistent with the intent of the legislature in enacting the exempt well statute and the entire Water Use Act.

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CONCLUSION

This Court concludes that DNRC's administrative rule 36.12.101(13) conflicts with the general purpose of Montana's Water Use Act and specifically with Montana Code Annotated § 85-2-306, which allows for certain exemptions. Such being the case, the Court hereby INVALIDATES that rule. So as not to impose chaos upon DNRC, the Court will order, pending further action of DNRC, the reinstatement of DNRC's prior rule defining "combined appropriation" as set forth at page 4 of this Order and in the Administrative Record 1-7 and 1-2.

The Court also acknowledges that the matter before it is complex and uncertain – especially when dealing with groundwater. The Court also acknowledges that DNRC has valuable expertise in this area. Therefore, the Court will require that further rule making take place as requested by Petitioners so that these various intricacies and complexities of Montana's groundwater system can be addressed. However, any such rule making must be consistent with this Order.

DATED this 17 day of October 2014.

JEFFREY M. SHERLOCK
District Court Judge

pcs: Matthew K. Bishop/Laura King
Kevin Peterson/Anne W. Yates
Ryan K. Mattick
Stephen R. Brown
Abigail J. St. Lawrence

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