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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. 14-0813

THE CLARK FORK COALITION, a non-profit organization, *et al.*,

Appellees,

vs.

JOHN TUBBS, in his official capacity as Director of the Montana Department of Natural Resources and Conservation, *et al.*,

Respondents,

MONTANA WELL DRILLERS ASSOCIATION,

Intervenor-Appellants,

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION,

Intervenors-Appellants,

MOUNTAIN WATER COMPANY,

Intervenors.

On Appeal from the Montana First Judicial District Court, Lewis & Clark County
Cause BDV-2010-874

Judge: Jeffrey Sherlock

MOTION TO DISMISS INTERVENORS' APPEAL FOR LACK OF JURISDICTION

INTRODUCTION

Appellees, the Clark Fork Coalition *et al.*, (Coalition) respectfully move this Court to dismiss the Montana Well Drillers Association's and Montana Association of Realtors *et al.*'s (Intervenors') appeal because there is no "final judgment" in this case.

On October 17, 2014, the district court: (a) declared that the Department of Natural Resources and Conservation's (Department's) "combined appropriation" rule was in conflict with the Montana Water Use Act, MCA, § 85-2-306; (b) remanded this matter to the Department for rulemaking; and (c) pending new rulemaking, reinstated the Department's prior "combined appropriation" rule. *See* Order at 13. The Department is not appealing the district court's order.[1] Accordingly, this matter is currently before the Department awaiting rulemaking. Rulemaking, however, is on hold pending resolution of this appeal. If this motion is granted, the Department will resume rulemaking, the outcome of which may render this appeal unnecessary.

Under these unique circumstances, where a district court remands a matter to an agency and the agency elects not to appeal, there is no "final judgment" to appeal and hence, no jurisdiction. *See Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1184-1186 (9th Cir. 2004).

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[1] The Department and the Coalition signed a stipulated agreement on October 2, 2015, which included, *inter alia,* a provision whereby the Department agreed not to appeal the merits of this case. This agreement was approved by the district court on October 5, 2015.

STANDARD OF REVIEW

This Court reviews whether it has jurisdiction de novo. *Loran v. Fortis Ins. Co.*, 2008 MT 252, ¶ 54, 345 Mont. 12, 192 P.3d 186. Jurisdiction is a threshold matter that must be considered before proceeding with any cause. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). This rule is "inflexible and without exception." *Id.* at 95 (citations omitted).

ARGUMENT

District court remands to agencies are generally not considered appealable "final judgments" or "final decisions." *See* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice & Procedure § 3914.32, at 239 (2008 ed.).

Every federal circuit court embraces this "remand rule." *See Mall Properties, Inc. v. Marsh*, 841 F.2d 440, 441 (1st Cir. 1988); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Dir., Office of Workers' Comp. Programs v. Brodka*, 643 F.2d 159, 161 (3d Cir. 1981); *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 239 (4th Cir. 2009); *Mem'l Hosp. Sys. v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985); *Whitehead v. Califano*, 596 F.2d 1315, 1319 (6th Cir. 1979); *Daviess County Hosp. v. Bowen*, 811 F.2d 338, 341 (7th Cir.1987); *Izaak Walton League v. Kimbell*, 558 F.3d 751, 762 (8th Cir. 2009); *Alsea Valley*, 358 F.3d at 1184 (9th Cir. 2004); *W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013); *World Fuel Corp. v. Geithner*, 568 F.3d 1345, 1348 (11th Cir. 2009); *Sierra Club v. USDA*, 716 F.3d 653 (D.C. Cir. 2013); *Caesar v. W.*, 195 F.3d 1373, 1374 (Fed. Cir. 1999).

In fact, the Coalition is not aware of a single federal case where a private-party intervenor was allowed to appeal after the district court vacated an agency

decision or rule, remanded a matter back to an agency for further proceedings, and the agency elected not to appeal. There are exceptions to the remand rule, as when the agency itself appeals, an injunction is issued, or appeals are taken from orders that are not remanded, but none of these apply here.

Whether this remand rule applies in Montana likely remains a question of first impression. The Coalition respectfully requests this Court join the federal circuit courts and adopt the remand rule because Montana's requirements for appellate jurisdiction track parallel federal requirements. Appellate jurisdiction in Montana only extends over a "final judgment in an action," Mont. R. App. P. 6(1). A final judgment is one that "conclusively determines the rights of the parties and settles all claims in controversy." *Grenz v. Montana DNRC*, 2011 MT 17, ¶ 18, 359 Mont. 154, 248 P.3d 785 (citing Mont. R. App. P. 4(1)(a)). Likewise, appellate jurisdiction in the federal courts only extends to "final decisions of the district courts." 28 U.S.C. § 1291.

The remand rule also comports with this Court's policy of conserving judicial resources by encouraging single (and discouraging piecemeal) appeals. *See In re Marriage of Killpack*, 2004 MT 55, ¶ 10, 320 Mont. 186, 87 P.3d 393. Allowing the Intervenors to appeal now (in the absence of the Department) would require the Parties and this Court to spend more time and limited resources on an appeal that may prove unnecessary.

For example, the Intervenors will have the opportunity to shape the new rule defining "combined appropriation" by participating in the public rulemaking process ordered by the district court. If the Intervenors are satisfied with the result, no further legal challenges may be necessary. As the D.C. Circuit recognized, letting remand play out in these types of cases "leaves open the

possibility that an appeal may prove unnecessary if the remanded proceedings satisfy all parties." *Sierra Club*, 716 F.3d at 656.

If the Intervenors are dissatisfied with the new rule, they will still get their day in court, simply at a later date. All remedies will still be available to Intervenors, if warranted. Now, by contrast, the Intervenors – on their own – are pressing the Department's district court position on appeal (a position the Department did not think worthy of pressing), taking up the Parties' and the Court's valuable time (for a potentially unnecessary appeal), and delaying the Department's important rulemaking process.

In response, the Intervenors will likely argue harm from delay. Delay is a secondary concern that some courts have considered but often found wanting. *See, e.g., W. Energy Alliance v. Salazar*, 709 F.3d 1040, 1051 (10th Cir. 2013). Costs associated with delay are often costs that must be tolerated, *see Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261 (D.C. Cir. 2012), to avoid multiple and precautionary appeals, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984).

Here, the district court record (to which appellate review is limited) reveals the Intervenors are at most temporarily inconvenienced by the district court's remand order. The remand order, while requiring water permits for certain types of appropriations, does not enjoin *any* past, present, or future water development in Montana. The remand order merely declares the Department's rule invalid, sets aside the rule (thereby requiring water permits for "combined appropriations" as defined by the prior rule and the Department's guidance), and orders new rulemaking. To the extent the Intervenors' interests are "harmed" by delay, such harm is self-imposed. The Intervenors' own appeal and their related motion to

stay the district court's order pending appeal have delayed rulemaking.

CONCLUSION

For the forgoing reasons, the Coalition respectfully requests this Court adopt the remand rule and dismiss the Intervenors' appeal. Counsel for the Intervenors were contacted regarding this motion and they oppose it. The Coalition also respectfully requests that: (1) they be given leave to file a reply to the Intervenors' response to this motion; and (2) briefing on the merits of the Intervenors' appeal be stayed pending resolution of this motion. *See U.S. v. Manning*, 755 F.3d 455 (7th Cir. 2014) (early resolution of motion makes "perfectly good sense" because if there is no jurisdiction "briefing on the merits is a waste of time.").

Respectfully submitted this 9th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2015, I sent, via U.S. Mail, a copy of this filing to all of counsel of record in this matter, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 1,248 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 9th day of October, 2015.

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Laura King