IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 14-0813

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 right; and JOSEPH MILLER, an individual with senior water rights,

Petitioners/Appellees,

v.

JOHN E. TUBBS, in his capacity as Director of 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 WELLS DRILLERS ASSOCATION,

Intervenors/Appellants

v.

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION,

Intervenors/Appellants,

v.

MOUNTAIN WATER COMPANY,

Intervenor,

On Appeal from Montana First Judicial District Court, Lewis and Clark County
Cause No. BDV-2010-874, Hon. Jeffrey Sherlock, District Judge

OPENING BRIEF OF INTERVENORS/APPELLANTS MONTANA ASSOCIATION OF REALTORS AND MONTANA BUILDING INDUSTRY ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Montana State Cases

Montana Constitution

Montana Statutes

Administrative Rules

Other Authorities

I. STATEMENT OF ISSUES

A. Whether the District Court erred when it reinstated a rule defining "combined appropriation" and, in so doing, circumvented the Montana Administrative Procedures Act (hereinafter referred to as "MAPA"), Mont. Code Ann. § 2-4-101, *et seq.*

B. Whether the District Court erred when it required further rulemaking "as requested by" Appellees and "consistent with" the District Court's order, thereby violating Article II, section 8 of the Montana Constitution.

C. Whether the District Court erred in the amount of deference it granted to Montana Department of Natural Resources and Conservation's (hereinafter referred to as "DNRC") statutory interpretation as implemented in rule.

II. STATEMENT OF CASE

This case began on December 1, 2009, when Appellees the Montana Clark Fork Coalition, Katrin Chandler, Betty J. Lannen, Polly Rex, and Joseph Miller (hereinafter collectively referred to as "Clark Fork Coalition") filed with DNRC a petition for declaratory ruling and request to amend rule. *See*, Admin. R. File 1, Tab 1. The Clark Fork Coalition requested that DNRC both review the agency's administrative rule defining "combined appropriation," (Admin. R. Mont. 36.12.101(13) (1993)) to determine whether the rule was consistent with applicable law and that DNRC conduct rulemaking to adopt a new definition of "combined

appropriation." *See,* Admin. R. File 1, Tab 1 at 35. DNRC granted the Clark Fork Coalition's petition in part, appointing a hearing examiner to determine the question of whether the definition of "combined appropriation" set forth in Admin. R. Mont. 36.12.101(13) (1993) was consistent with applicable law. The question of whether to conduct rulemaking was deferred. *See,* Admin. R. File 1, Tab 25.

Following receipt of briefing from numerous parties, including Appellants Montana Association of REALTORS® and the Montana Building Industry Association (hereinafter referred to as "MAR" and "MBIA," respectively), DNRC issued a declaratory ruling on the Clark Fork Coalition's petition. *See*, Admin. R. File 2, Tab 54.[1] DNRC determined that "the definition of 'combined appropriation' (Rule 36.1.101(13), ARM) is consistent and not in conflict with the plain language and the purpose of the statute and is reasonably necessary to effectuate the purpose of the statute. Section 85-2-306(3), MCA."[2] Admin. R. File 2, Tab 54 at 18. Despite this portion of the declaratory ruling, DNRC also determined that it would, within eight months of the declaratory ruling, "initiate rulemaking to propose repeal of Rule 36.12.101(13), ARM and adoption of a new 'combined appropriation' administrative rule definition and any other necessary

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[1] *See*, App. 2.

[2] In the 2009 version of the code, in effect when this matter began, "combined appropriation" was mentioned in statute at Mont. Code Ann. § 85-2-306(3)(a) (2009). Due to subsequent amendments to the code, "combined appropriation" is now referred to in statute at Mont. Code Ann. § 85-2-306(3)(a)(iii) and (iv) (2013).

rule pursuant to Section 2-4-302, MCA." Admin. R. File 1, Tab 54 at 20. DNRC subsequently denied the Clark Fork Coalition's request to amend the rule. *See,* Admin. R. File 2, Tab 52.

The Clark Fork Coalition instituted the present action in District Court on September 14, 2010 with a petition for declaratory and injunctive relief. In that petition, the Clark Fork Coalition requested that the District Court issue declaratory judgment finding that DNRC's declaratory ruling was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the Montana Water Use Act;" setting aside Admin. R. Mont 36.12.101(13) (1993); and reinstating the 1987 administrative rule defining "combined appropriation." *See,* R. 1 at 23.

Following the filing of the Clark Fork Coalition's petition, the present case took several curious procedural turns. On November 8, 2010, the Clark Fork Coalition and DNRC agreed that DNRC would undertake rulemaking to amend the definition of "combined appropriation" in Admin. R. Mont. 36.12.101(13) (1993), following certain agreed upon "guiding principles." *See,* R. 9 at 2-3. The Clark Fork Coalition and DNRC further agreed that if the 2011 Montana Legislature adopted legislation defining "combined appropriation" or removing the term from statute, DNRC's obligations to undertake rulemaking would expire. *See, id.* at 3.

In 2011, the Montana Legislature passed House Bill (hereinafter referred to as "HB") 602[3] requiring an interim study of so-called "exempt well" laws.[4] HB 602 further precluded DNRC's ability to do any rulemaking pertaining to the provisions of Mont. Code Ann. § 85-2-306(3) (2011) until October 1, 2012. *See*, HB 602, § 3. This limitation was recognized by the Clark Fork Coalition and DNRC in a December 5, 2011 modified stipulation, wherein the Clark Fork Coalition and DNRC agreed that DNRC would complete formal rulemaking to amend Admin. R. 36.12.101(13) (1993) by July 1, 2013. This date was later amended again by agreement of the Clark Fork Coalition and DNRC to complete rulemaking by December 31, 2013. *See,* R. 12 at 3.

DNRC did not accomplish rulemaking during the time provided for in the Second Modified Stipulation (R. 12). Consequently, the Clark Fork Coalition filed

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[3] *See,* App. 3.

[4] "Exempt wells" are small groundwater appropriations outside of controlled groundwater area—35 gallons per minute of less and under 10 acre-feet per year outside of stream depletion zones and 20 gallons per minute or less and under two acre-feet per year within stream depletion zones. A permit is not required before appropriating groundwater by means of such a small well or developed spring. *See*, Mont. Code Ann. § 85-2-306(3)(a)(iii) and (iv) (2013). "Within 60 days of completion of the well or developed spring and appropriation of the ground water for beneficial use, the appropriator shall file a notice of completion with" DNRC. Mont. Code Ann. § 85-2-306(3)(b)(i) (2013). Upon receipt of a correct and complete notice of completion, DNRC shall issue a certificate of water right. The term "exempt well" is somewhat of a misnomer in that such a groundwater appropriation as described in Mont. Code Ann. § 85-2-306(3)(a) (2013) is not exempt from the prior appropriation doctrine and the enforcement of senior water rights thereunder. Rather, such appropriations are merely exempt from aspects of the permitting process.

an unopposed motion to withdraw the stipulation and reopen the case. *See,* R. 13. The District Court swiftly granted the Clark Fork Coalition's motion, issuing an order the same day the motion was filed (R. 14), and proceedings before the District Court quickly resumed, with extensive briefing by the Clark Fork Coalition; DNRC; and intervening parties MAR, MBIA, the Montana Water Well Drillers' Association, and Mountain Water Company.

On October 17, 2014, the District Court issued its Order on the Clark Fork Coalition's Petition for Judicial Review.[5] R. 53. In that Order, the District Court issued three main holdings. First, the District Court held that Admin. R. Mont. "36.12.101(13) conflicts with the general purpose of Montana's Water Use Act and specifically with Montana Code Annotated § 85-2-306 . . ." and, for that reason, invalidated Admin. R. Mont. 36.12.101(13) (1993) as adopted in 1993. R. 53 at 13. Second, the District Court reinstated the definition of "combined appropriation" in place in 1987 "[s]o as not to impose chaos upon DNRC . . .." *Id.* Finally, the District Court "require[d] that further rule making take place as requested by Petitioners . . .[,]" ordering that the "rule making must be consistent with" the District Court's Order. *Id.* It is from this order and the holdings of the District Court that MAR and MBIA appeal.[6]

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[5] *See,* App. 1.

[6] Subsequent proceedings took place before the District Court between the Clark Fork Coalition and DNRC concerning the issue of attorney's fees and costs. MAR

III. STATEMENT OF FACTS

This case involves both a statute and administrative rules defining terms in that statute. The relevant statute is Mont. Code Ann. § 85-2-306, which statute is commonly referred to as the "exempt well" statute. Mont. Code Ann. § 85-2-306(3)(a) (2013) currently allows for the issuance of a certificate of a groundwater right upon the filing of a notice of completion of a well or developed spring under four conditions:

> (i) when the appropriation is made by a local governmental fire agency organized under Title 7, chapter 33, and the appropriation is used only for emergency fire protection, which may include enclosed storage;
>
> (ii) when a maximum appropriation of 350 gallons a minute or less is used in nonconsumptive geothermal heating or cooling exchange applications, all of the water extracted is returned without delay to the same source aquifer, and the distance between the extraction well and both the nearest existing well and the hydraulically connected surface waters is more than twice the distance between the extraction well and the injection well;
>
> (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

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and MBIA did not participate in those proceedings, as attorney's fees and costs were not asserted against MAR and MBIA, and that issue is not on appeal to this Court.

more wells or developed springs exceeding this limitation requires a permit.

Mont. Code Ann. § 85-2-306(3)(a)(i)-(vi) (2013). Of particular concern for the present matter are conditions three and four, and, in those conditions, the definition of what constitutes a "combined appropriation."

In 1987, shortly after the Montana Legislature first adopted into statute the concept of "combined appropriation," DNRC adopted a rule defining the term. That rule read 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 judgement, 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. R. File 1, Tab 7, 1-2 (emphasis omitted). This rule remained in place until 1993 when DNRC, citing difficulties in administering the rule "fairly and consistently" statewide because of ambiguous terms in the definition of "combined appropriation,"[7] adopted the definition of "combined appropriation" that presently appears in the Administrative Rules of Montana, but which was invalidated by the District Court. That rule very simply and clearly reads as follows: "'Combined

[7] *See,* 1993 Mont. Admin. Reg. 1334A (June 24, 1993).

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) (1993).

The concern with the definition of "combined appropriation" as raised by the Clark Fork Coalition is a generalized concern based on anecdote and unsubstantiated belief that multiple individual wells are being utilized for residential development in such a way that other water rights may be adversely affected. *See*, R. 1 at ¶¶ 22, 26, 29, 37-38, 42. These concerns as alleged by the Clark Fork Coalition were and remain unsubstantiated by data.

Following the District Court's reinstitution of the 1987 rule, DNRC issued guidance not just once, but twice, to clarify how the agency would implement the reincarnated rule. Both guidance documents were issued outside the rulemaking process as set forth in MAPA. First, DNRC issued guidance in December 2014[8] stating how it would define a "project or development" and how the agency would determine if, "in the department's judgment," an appropriation completed through the use of multiple wells "could have been accomplished in single appropriation."

Following the adoption of HB 168[9] by the 2015 Montana Legislature, which statute limited the applicability of the District Court's ruling to those projects, developments, or subdivisions for which an application and required fees were

[8] *See,* App. 4.
[9] *See,* App. 5.

received by the Department of Environmental Quality or a local reviewing authority after October 17, 2014, DNRC issued revised guidance on September 18, 2015,[10] taking into account the limitations of HB 168. The September 2015 guidance set out that among the scenarios that constitute a "combined appropriation," are lots greater than 20 acres with wells existing within 1,320 feet of each other on the lot, regardless of the date of lot creation, and a subdivision as defined under Mont. Code Ann. § 76-4-102 (2015) created after October 17, 2014. Again, none of this guidance was promulgated following the procedures laid out in MAPA. It is under the guidance issued in September 2015 and the 1987 rule that Montana currently operates, and it is this situation that is sought to be remedied in the present appeal.

IV. STANDARD OF REVIEW

An agency's "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." Mont. Code Ann. § 2-4-501 (1979). For appeal to a district court of an agency's decision on a contested case, the standard of review is as follows:

> (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:

[10] *See,* App. 6.

(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.

Mont. Code Ann. § 2-4-704(2)(a), (b) (2015). This Court applies the standard of review. *See,* Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conserv. Dist., 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219.

This Court reviews "for correctness a district court's review of an administrative agency's decision." Bostwick Props., Inc. v. Mont. Dep't of Nat. Res. & Conserv., 2013 MT 48, ¶ 15, 369 Mont. 150, 296 P.3d 154 (citing BNSF Ry. Co. v. Cringle, 2010 MT 290, ¶ 11, 359 Mont. 20, 247 P.3d 706). In the present matter, in addition to other areas where the District Court erred, the District Court was incorrect in its reinstitution of the 1987 rule in circumvention of MAPA; in its ordering of rulemaking with a predetermined outcome in violation of Article II, section 8 of the Montana Constitution; and in the amount of deference the District Court granted to DNRC's statutory interpretation as implemented in rule.

V. SUMMARY OF ARGUMENT

The District Court's reinstatement of the 1987 rule defining "combined appropriation" was in error in that in ordering a rule reinstated rather than remanding to the agency for rulemaking, the District Court completely circumvented the MAPA rulemaking process, instead instituting a rule of its own accord outside the process set forth by the Montana Legislature. Second, in pre-determining the outcome of rulemaking, the District Court made a mockery of the public comment process provided for in MAPA and violated Article II, section 8 of the Montana Constitution, which provides for a public right of participation in agency operations. Finally, the District Court erred in the amount of deference, or, rather, lack thereof, that it granted to DNRC in DNRC's interpretation of Mont. Code Ann. § 85-2-306 (2009).

MAR and MBIA also join in the argument of the other Appellant and the *amicus* parties to this matter regarding the error of the District Court in its findings as to the compliance of the 1993 rule with the Montana Water Use Act. However, given limited allowance for briefing and so as to avoid repetition, MAR and MBIA focus on the above-identified issues.

VI. ARGUMENT

The ruling of the District Court invalidating the existing (1993) rule defining "combined appropriation" and reinstating the 1987 rule was in error as it

circumvented MAPA by adopting a rule without public notice or opportunity for comment. The District Court's ruling that further rulemaking take place "consistent with" the District Court's order and "as requested by" the Clark Fork Coalition was a violation of the public's right of participation guaranteed under Article II, section 8 of the Montana Constitution in that the District Court by predetermined the outcome of rulemaking, rendering any public participation in the rulemaking process meaningless. Finally, the District Court erred in the deference it did, or did not, as the case may be, grant to DNRC's statutory interpretation of Mont. Code Ann. § 85-2-306 (2009) as implemented in Admin. R. Mont. 36.12.101(13) (1993). As such, the District Court should be reversed.

A. The District Court Erred in Reinstating the Prior (1987) Rule Defining "Combined Appropriation" in That in Doing So, the District Court Circumvented MAPA.

As set forth in Mont. Code Ann. § 2-4-302 (2011), there is a clear process for implementing administrative rules. First,

> [p]rior to the adoption, amendment, or repeal of any rule, the agency shall give written notice of its proposed action. The proposal notice must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, the reasonable necessity for the proposed action, and the time when, place where, and manner in which interested persons may present their views on the proposed action.

Mont. Code Ann. § 2-4-302(1) (2011). Second, Mont. Code Ann. § 2-4-302(4) (2011) provides that "[p]rior to the adoption, amendment, or repeal of any rule,"

the public shall have the opportunity to submit comments. In the present case, a rule was adopted without any public notice or opportunity for comment. In this way, the District Court's ruling constitutes a violation of MAPA and, for that reason, should be reversed.

The District Court here not only invalidated the existing definition of "combined appropriation" by finding that the long-standing definition adopted by DNRC specifically to remedy ambiguity and difficulty in administering the rule conflicted with the Montana Water Use Act, but "[s]o as not to impose chaos upon DNRC," the District Court also ordered reinstatement of the 1987 rule defining "combined appropriation." R. 53 at 13. The District Court erred in its invalidation of the definition of "combined appropriation" for a number of reasons, as discussed by Montana Well Drillers Association, Montana Association of Counties, and Water Systems Council in this matter, and also because, as discussed below, the District Court erred in the amount of deference it granted to DNRC's interpretation of the agency's governing statute. However, more to the point for the present argument, the District Court erred in mandating reinstatement of the 1987 rule because the District Court implemented a rule of its own accord rather than remanding back to the agency for rulemaking in compliance with MAPA.

While authority in Montana is lacking on situations where a district court has implemented a rule of its own accord, perhaps because no district court has

been so presumptive as to mandate adoption of a specific rule outside of the MAPA process, it is clear from relevant case law that no rule can be valid without being adopted in compliance with MAPA proceedings. In St. v. Vainio, 2001 MT 220, 306 Mont. 439, 35 P.3d 948, this Court simply held, "Unless a rule is adopted in substantial compliance with these procedures [*e.g.* Mont. Code Ann. § 2-4-302 (2011)], the rule is not valid." Vainio, ¶ 27. In Rosebud Co. v. Dep't of Revenue (1993), 257 Mont. 306, 849 P.2d 177, this Court affirmed invalidation of an administrative rule where the Department of Revenue failed to comply with the notice and comment requirements of MAPA, with the agency undertaking a formal rulemaking process "only after establishing the rule by administrative fiat." Rosebud Co., 257 Mont. at 310, 849 P.2d at 180. This Court has been steadfast in its insistence that any administrative rule be adopted in compliance with MAPA, including notice to the public and opportunity for public comment, before an administrative rule is adopted. The District Court disregarded MAPA requirements for rulemaking in this instance, instead adopting a definition of "combined appropriation" of its own accord.

In the present case, the District Court by decree was the one establishing a rule, not the agency, which in some sense makes it even more problematic, given that the Montana Legislature has granted district courts no authority to conduct rulemaking, while agencies at least have rulemaking authority to the extent granted

by statute, so long as the agencies follow the rulemaking process set forth in MAPA. Here, no process was followed except for a District Court edict that a specific rule be put in place, the 1987 definition of "combined appropriation." There was no notice to the public that the definition was being implemented, nor was there any opportunity for the public to provide comment on the rule, in plain violation of Mont. Code Ann. § 2-4-302(1) and (4) (2011). Rather, the District Court simply ordered that it be so.

The District Court justified its implementation of a definition of "combined appropriation" outside of the MAPA process by stating that the District Court did not want "to impose chaos upon DNRC . . .." R. 53 at 13.[11] However, this Court has been clear that it is not the province of the courts to create a compliant regulatory scheme. "It is not our job to redesign the program should we find it lacking in any respect, but merely to determine whether or not the Department acted reasonably and within its delegated authority." Bick v. Dep't of Just., Div. of Motor Vehs. (1986), 224 Mont. 455, 457, 730 P.2d 418, 420. The District Court in this case took it upon itself to redesign the way DNRC administered Mont. Code Ann. § 85-2-306(3)(a) (2013). In doing so, the District Court erred.

[11] As noted in Section III above, in attempting to implement the 1987 rule, DNRC is now faced with the same ambiguity and difficulty in administration that it dealt with the first time it had to operate under the 1987 rule. To attempt to remedy this ambiguity and difficulty in administration, DNRC issued, outside the rulemaking process, not once, but twice, unenforceable guidance. The District Court's attempt to avoid "chaos" actually only brought it about.

MAPA does not make exceptions to the rulemaking process where there may be ambiguity while rulemaking is pending. Yet, the District Court attempted to do exactly that—craft an exception to MAPA with the justification that the District Court was simply trying to avoid agency disarray while a new rule was being created. While this Court and district courts have found plenty of times that an agency rule is invalid for any number of reasons, one is hard-pressed to find an example where a district court of its own accord and outside of MAPA set in place an interim rule while the agency crafted a rule that was valid, and for good reason—MAPA sets out a rulemaking process that must be complied with without exception. This Court should not allow the District Court to create an exception to the MAPA process until rulemaking can be conducted. Public notice and meaningful reasonable opportunity for the public to comment must be provided for. The District Court's adoption of the 1987 rule was done without public notice or the opportunity for comment and, therefore, should be reversed.

B. The District Court's Requirement For Further Rulemaking "Consistent With" the District Court's Order and "As Requested By" the Clark Fork Coalition Was Error in That it Violated Article II, Section 8 of the Montana Constitution.

In its declaration of the rights of Montana citizens, the Montana Constitution mandates, "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Mont. Const. art. II, § 8

(1972). Enacting legislation to implement this declaration, the Montana Legislature provided as follows:

> The legislature finds and declares pursuant to the mandate of Article II, section 8, of the 1972 Montana constitution that legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency.

Mont. Code Ann. § 2-3-101 (1975). "Heeding this constitutional provision [art. II, § 8], the Montana Legislature has enacted laws expressly aimed at securing the public's right to participate in the operations of Montana administrative agencies . . .[.]" Vainio, ¶ 26. Among these laws "expressly aimed at securing the public's right to participate" is Mont. Code Ann. § 2-3-111(1) (1997): " Procedures for assisting public participation must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public."

Not only has this Court been consistent in enforcing the requirement that the public notice and opportunity for comment set forth in MAPA be complied with before a rule can be adopted, this Court has also been consistent that such an opportunity for public comment must be meaningful, not just a hollow act by the agency. *See,* Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2, 2002 MT 264, ¶ 43, 312 Mont. 257, 60 P.3d 381. Unfortunately, in the present case, the District Court violated Montanans' right to meaningful participation in agency operation

by pre-determining the outcome of agency rulemaking, thereby making a mockery of any public comment opportunity.

This Court has declined to "adopt some mechanical formula interpreting 'reasonable opportunity' . . ." for public participation in agency action. Bryan, ¶ 44. However, what this Court has found is that a pre-determined outcome of rulemaking is hardly a "reasonable opportunity" to participate. In Rosebud Co., although rulemaking eventually took place pursuant to the formal rulemaking procedures of MAPA, the outcome of that rulemaking was predetermined. "The rule-making process in this case was, in essence, a sham. The result was that the public, the Legislature, and certain affected agencies were denied their right to participate effectively in the governmental process." Rosebud Co., 257 Mont. at 311, 849 P.2d at 180.

Similar to the situation in Rosebud Co., in the present matter, the public was also denied a reasonable, meaningful opportunity to participate in agency rulemaking. However, in the present case, it was the District Court's order, not the agency action, that denied the public such an opportunity because it was the District Court that predetermined the outcome of agency rulemaking rather than the agency itself. Regardless, the result is the same—the public's right of participation guaranteed by Article II, section 8 of the Montana Constitution was violated.

Unlike the adoption of the 1987 definition of "combined appropriation" without any public notice or opportunity for comment, the District Court did require that DNRC conduct further rulemaking, presumably following MAPA procedure. However, while the public may receive notice of this further rulemaking and be provided with a nominal opportunity to comment on the rulemaking, any such opportunity for comment amounts to mere playacting, as the public's comment will have no bearing on the content of any final rule. Rather, the District Court has already dictated the content of any final rule, holding that the rulemaking be as "requested by" the Clark Fork Coalition and "consistent with" the District Court's Order. *See,* R. 53 at 13. In doing so, the District Court violated Article II, section 8 of the Montana Constitution and, therefore, should be reversed.

C. The District Court Erred in the Amount of Deference it Granted to DNRC's Interpretation of the Agency's Governing Statute.

The District Court mandated a predetermined outcome of rulemaking and incorrectly adopted a definition of "combined appropriation" that had already been found to be ambiguous and difficult to administer, in contrast to the rule in place at the time the present action was initiated, all because the District Court held that DNRC's interpretation of the statutory term "combined appropriation" as set forth in Admin. R. Mont. 36.12.101(13) (1993) "conflicts with the general purpose of the Montana's Water Use Act and specifically with Montana Code Annotated §

85-2-306 . . .." R. 53 at 13. In so holding, the District Court failed to give appropriate deference to DNRC's longstanding administrative interpretation upon which the public had come to rely. Consequently, the District Court's holding should be reversed.

An agency's interpretation of statute is granted deference "when the agency interpretation has stood unchallenged for a considerable length of time, thereby creating reliance in the public and those having an interest in the interpretation of the law." Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conserv., 2006 MT 72, ¶ 37, 331 Mont. 483, 133 P.3d 224 (citing Mont. Power Co. v. Mont. Pub. Serv. Comm'n, 2001 MT 102, ¶ 24, 305 Mont. 260, 26 P.3d 91). *See also*, Core-Mark Int'l v. Mont. Bd. of Livestock, 2014 MT 197, ¶ 45, 376 Mont. 25, 319 P.3d 1278,. It is true that, "the test of time and reliance may nevertheless yield to a judicial determination that construction is nevertheless wrong, based on 'compelling indications.'" Mont. Power Co., ¶ 25 (quoting D'Ewart v. Neibauer (1987), 228 Mont. 335, 340, 742 P.2d 1015, 1018).

In the present case, the District Court had no "compelling indications" that DNRC's interpretation was wrong despite the length of time the agency's statutory interpretation had been in place and the public's reliance on that interpretation. Rather, the District Court relied on uncorroborated and unspecified concern that multiple individual wells are being utilized for residential development in such a

way that other water rights may be adversely affected. *See,* R. 53 at 10. Specifically, the District Court relied on the theoretical impact of a non-existent 1,000-lot subdivision using multiple individual wells to justify the District Court's concern that so-called exempt wells impact other water users. *See, id.* at 9. The District Court did not address DNRC's finding in its declaratory ruling, "Exempt ground water wells typically serve small dispersed uses with low probability of adverse affect to neighboring water rights." Admin. R. File 2, Tab 54 at 11. This absence of "compelling indications" that DNRC's interpretation was incorrect led to the improper invalidation of DNRC's regulatory definition of "combined appropriation;" on this point, the District Court should be reversed.

The District Court read into legislative intent a concern that simply is not there. The District Court interpreted a single statement by a lobbyist, not a legislator, to evidence that the Montana Legislature intended no requirement that two wells be physically connected in order to be considered a "combined appropriation," when the fact is that the Legislature did not consider that idea. Rather, as DNRC found in its declaratory ruling from which the Clark Fork Coalition appealed to the District Court, the Montana Legislature's concern was with the use of so-called exempt wells for extensive agricultural use.

> However, it is clear that the legislature was concerned with appropriators using the exempt well statute to avoid applying for a permit, especially for irrigated agriculture. The testimony at the hearing on House Bill 642 articulated concerns with irrigation. A

> single well or developed spring pumping at 100 gpm without a volume limitation is more than adequate to provide for domestic and stock uses. Irrigated agriculture was really the only common beneficial use of water that would use multiple wells of this size for the same purpose in contravention of legislative intent. By limiting the use of the groundwater well exception to one well or developed spring less than 100 gpm from the same source, the legislature restricted the use of exempt wells for agricultural use. The legislative history and the effect of the legislative amendment show that the legislative intent was to prevent irrigated agriculture on a significant level to avoid permitting process through the use of exempt wells while maintaining the exemption to the permitting statute for small ground water development.

Admin. R. File 2, Tab 54 at 12-13 (footnotes omitted). The District Court did not consider this legislative history in determining whether DNRC's statutory interpretation as implemented in rule aligned with the purposes of the Montana Water Use Act.

DNRC's interpretation of the statutory term "combined appropriation" has stood for over 20 years, engendering reliance on that term by a number of water users, not just the residential users that the District Court and the Clark Fork Coalition are so concerned with, but industrial and agricultural users. Although this Court has held that reliance on a long-standing agency interpretation can acquiesce to "compelling indications" that an agency's construction of a governing statute is wrong, there are no such "compelling indications" in the present case. Rather, the District Court based its finding on unsubstantiated concern of potential adverse impact and disregarded DNRC's findings as to legislative intent evidenced

by the actual actions of legislators rather than a single statement by a lobbyist. For this lack of appropriate deference to the agency, the District Court should be reversed.

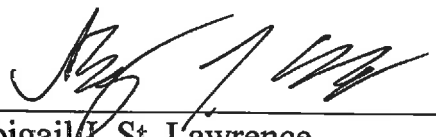
VII. CONCLUSION

In implementing a rule without public notice and opportunity for public comment, the District Court erred by circumventing MAPA. The District Court further erred in that it violated the public's right of participation provided for under Article II, section 8 of the Montana Constitution by predetermining the outcome of rulemaking, thereby rendering any opportunity for public comment meaningless. Allowing the District Court's order to stand would set a dangerous precedent of district courts stepping into the shoes of administrative agencies and conducting rulemaking outside the MAPA process. This Court should not allow such a pattern to be established.

Additionally, as set forth in detail above, the District Court erred in the amount of deference it granted to DNRC in the agency's interpretation of the agency's own governing statutes. The District Court disregarded legislative intent and instead based its findings that DNRC's interpretation of the agency's own governing statute was incorrect on unsubstantiated concerns with the possible impact of the rule in question. The District Court made no finding of "compelling indications" that DNRC's construction of statute was wrong.

For all these reasons, as well as the arguments set forth by the additional Appellant and *amicus* parties in the present matter, the District Court's Order on Petition for Judicial Review should be reversed, leaving in place the 1993 rule defining "combined appropriation."

RESPECTFULLY submitted this 17th day of November, 2015.



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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(d), I certify that the *Opening Brief of Intervenors/Appellants Montana Association of REALTORS® and Montana Building Industry Association* is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2010, is not more than 10,000 words, excluding Certificate of Compliance and Certificate of Service.

DATED this 17th day of November, 2015.

Abigail J. St. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2015, a true and correct copy of the foregoing *Opening Brief of Intervenors/Appellants Montana Association of Realtors® and MBIA Opening Brief* was duly served, via First Class U.S. Mail, postage prepaid, on the attorneys of record addressed as follows:

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