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 rights; POLLY REX, an individual with senior water rights; 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 WELL DRILLERS ASSOCIATION,
Intervenor/Appellant,

v.

MONTANA ASSOCIATION OF REALTORS® and MONTANA BUILDING INDUSTRY ASSOCIATION,
Intervenors/Appellants,

v.

MOUNTAIN WATER COMPANY,
Intervenor/Appellee.

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

REPLY BRIEF OF INTERVENORS/APPELLANTS MONTANA ASSOCIATION OF REALTORS® AND MONTANA BUILDING INDUSTRY ASSOCIATION

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I. INTRODUCTION

The District Court in the present matter plainly erred in two ways that have broad implications in Montana well beyond water rights. First, the District Court's re-instatement of the so-called 1987 rule was in error, as it circumvented the Montana Administrative Procedures Act (hereinafter referred to as "MAPA") rulemaking procedures[1] by adopting a rule without public notice or opportunity for comment. Additionally, the District Court's order dictating not only that rulemaking take place, but what the substantive outcome of that rulemaking should be, was error in that it violated a fundamental right enumerated in the Declaration of Rights, Article II of the Montana Constitution. Infringement on a right provided for in Article II of the Montana Constitution is not to be done lightly, and any intrusion on that right should be narrow. Because the District Court violated MAPA and broadly infringed on the public's right of participation, on that basis alone, the District Court should be reversed.

The District Court also erred in the deference the District Court granted, or, rather, failed to grant, to the Montana Department of Natural Resources and Conservation's (hereinafter referred to as "DNRC") prior regulatory interpretation of the statutory term "combined appropriation." The District Court had no "compelling indications" that DNRC's interpretation was wrong despite the length

[1] *See*, Mont. Code Ann. § 2-4-301, *et seq.*

of time the agency's 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 were being utilized for residential development in such a way that other water rights may be adversely affected to justify the District Court's rulemaking from the bench. This Court should now reject Appellees Clark Fork Coalition, Katrin Chandler, Betty J. Lannen, Polly Rex, and Joseph Miller's (hereinafter collectively referred to as "CFC"), Appellee Mountain Water Company's, and *amicus* parties' invitation to perpetuate unsubstantiated fears based on information far outside the administrative record on review in this case and should instead reverse the District Court's finding that Admin. R. Mont. 36.12.101(13) (1993) did not properly implement Mont. Code Ann. § 85-2-306 (2009).

Appellants Montana Association of REALTORS® (hereinafter referred to as "MAR") and the Montana Building Industry Association (hereinafter referred to as "MBIA") are compelled to respond to the argument disseminated by *amicus* parties Bitterrooters for Planning, Bitterroot River Protective Association, Citizens for a Better Flathead, Future West, Montana Audubon, Montana Environmental Information Center, Montana Smart Growth Coalition, Northern Plains Resource Council, and Stillwater Protective Association (hereinafter collectively referred to as "Environmental Groups") that this Court should rely on the public trust doctrine

to invalidate Admin. R. Mont. 36.12.101(13) (1993). Environmental Groups' argument is flawed for two reasons. First, Article IX, section 3 of the Montana Constitution is a self-executing provision. The use of a judicially-created doctrine to implement Article IX, section 3 of the Montana Constitution is unnecessary. Second, Environmental Groups' argument disregards that part of Article IX, section 3(3) of the Montana Constitution that states that waters of the state "are subject to appropriation for beneficial uses as provided by law." Environmental Groups' urging to apply the public trust doctrine would have this Court stop Article IX, section 3(3) of the Montana Constitution at the statement that the public owns the waters. The waters are subject to appropriation and, in fact, the policy of the Montana Water Use Act is to promote the appropriation of water for beneficial use. *See*, Mont. Code Ann § 85-2-101(1), (3). This Court should reject the attempt to disregard a portion of the Montana Constitution and the policy behind the Montana Water Use Act.

Finally, MAR and MBIA address the argument put forth by *amicus* party Montana League of Cities and Towns (hereinafter referred to as "League"), among others, that the wells authorized by Admin. R. Mont. 36.12.101(13) (1993) are beyond the reach of enforcement and, for that reason, are a violation of the Montana Water Use Act. That another existing appropriator must prove material injury from the use of an individual well does not preclude enforcement. In fact,

the material injury rule is a key part of the enforcement scheme. The material injury rule and the corresponding futile call doctrine cannot be disregarded just because they pose a potential hurdle for enforcement.

MAR and MBIA also join in the argument of the other Appellant to this matter, Montana Water Well Drillers Association, regarding the error of the District Court in its findings as to the compliance of the Admin. R. Mont. 36.12.101(13) (1993) 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.

II. ARGUMENT

A. The District Court's Remedy was Improper, as it Violated Both MAPA Rulemaking Procedure and the Public's Right to Participation Guaranteed Under Article II, Section 8 of the Montana Constitution.

The District Court in the present matter erred because the District Court exceeded its authority to grant relief. Setting aside for a moment the fact that the District Court's initial finding that Admin. R. Mont. 36.12.101(13) (1993) did not comply with statute was in error, the District Court's remedy was also in error. The District Court in this matter did more than simply remand to the agency. The District Court usurped the rulemaking process and Montana's unique and fundamental right of public participation by re-instituting a previous rule

completely outside the rulemaking process and pre-determining the outcome of further rulemaking.

"Reasonable opportunity" to participate is more than just the public's ability to submit views. *See*, Bryan v. Yellowstone Co. Elem. Sch. Dist. No. 2 , 2002 MT 264, ¶ 44, 312 Mont. 257, 272-73, 60 P. 3d 381, 392. The District Court in the present matter short-circuited the public's ability to have any meaningful input by pre-empting rulemaking through re-implementation of a rule and by pre-determining the outcome of subsequent rulemaking. When the public's "right to participate" is relegated to merely submitting views that will have no substantive impact on the final outcome of rulemaking, that is not a "reasonable opportunity" to exercise a constitutionally-declared right.

Infringement on fundamental rights needs to be interpreted narrowly. *See,* Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986), *superseded on other grounds*, Zemplel v. Uninsured Employers Fund, 282 Mont. 424, 938 P.2d 658 (1997). *See also*, Wadsworth v. St., 275 Mont. 287, 298-99, 911 P.2d 165, 1171-72 (1996); Kloss v. Edward D. Jones & Co., 2002 MT 129, ¶ 52, 310 Mont. 123, 139, 54 P.3d 1, 12. The District Court infringed on a fundamental right with little justification. As discussed below, the invalidation of Admin. R. Mont. 36.12.101(13) (1993) was without "compelling indications," so

corresponding denial of the public opportunity to participate as a result of the District Court's ordered remedy was likewise improper.

CFC argues that the District Court properly reinstated the 1987 rule. This argument is flawed in two respects. First, the argument relies on federal case law to validate reinstatement of a previous rule when an existing rule is abolished. Such reliance is misplaced. The federal Administrative Procedures Act is not accompanied by the right of public participation guaranteed by the Montana Constitution.[2] As discussed above, the District Court's action abridged this right. That federal agencies automatically reinstate old rules when existing rules are held invalid does not amount to a justified infringement on a fundamental right.

Second, and just as important, the one Montana case on which CFC relies to support the argument for automatic reinstatement of the 1987 rule does not stand for the proposition for which CFC cites it. In Missoula City-Co. Air Pollution Control Bd. v. Bd. of Envtl. Rev., what this Court found was that if amendments to a rule are determined invalid, the district court must also determine if "the pre-amendment rules are still in effect." 282 Mont. at 265, 937 P.2d at 469. Missoula City-Co. Air Pollution Control Bd. does not hold that previous rules are

[2] Montana Trout Unlimited makes a cursory statement that MAPA "is analogous to the federal act. Lohmeier v. State, 346 Mont. 23, 30-31 (2008) (analyzing Mont. Code Ann. §2-4-506)." Mont. Trout Unlimited *Amicus Curiae* Br. in Support of Appellees at 18 (Jan. 15, 2016). Nowhere does Lohmeier even mention the federal Administrative Procedures Act, let alone find that it is analogous to MAPA. This citation should be disregarded.

automatically reinstated when a rule is found invalid. To so hold would be to make a mockery of both MAPA and the public's constitutionally guaranteed right to participate in governmental rulemaking. This Court should not perpetuate a district court doing so.

Finally, CFC argues that it is improper for MAR and MBIA to raise an objection to the District Court's remedy because MAR and MBIA did not object to the remedy before appealing the District Court's October 2014 order. CFC states that it requested in its petition for declaratory ruling that the District Court find Admin. R. Mont. 36.12.101(13) (1993) invalid, set aside the rule, and reinstate the 1987 rule pending further rulemaking; therefore, MAR and MBIA had notice that the District Court would grant the relief it did.

While CFC correctly reiterates its request for relief as set forth in its petition for declaratory ruling, [3] it is incorrect that MAR and MBIA did not object to such relief. In fact, in their proposed answer submitted with their motion for intervention, MAR and MBIA expressed alleged that CFC was not entitled to any of the relief it sought. *See*, R. 16 at 14 (Mar. 27, 2014). MAR and MBIA registered their objection to CFC's requested relief well before any decision by the District Court.

[3] *See*, R. 1 at 23 (Sept. 14, 2010).

Second, prior to the District Court entering its October 2014 order, MAR and MBIA had no notice that the District Court would order the outcome of future rulemaking. CFC merely requested that the District Court "reinstate DNRC's 1987 administrative rule defining 'combined appropriation' pending completion of any new, future rulemaking." R. 1 at 23. CFC did not request, nor would it have been entitled to request, that the District Court order a specific outcome to any future rulemaking. CFC's argument would essentially require MAR and MBIA to object to a remedy that CFC did not request and that the District Court had no authority to grant before the District Court erred and granted it. MAR and MBIA objected to the improper grant of remedy as soon as the District Court, *sua sponte*, predetermined the outcome of rulemaking on remand by timely filing notice of appeal with this Court.

B. The District Court Had No "Compelling Indications" to Justify Invalidation of DNRC's Interpretation of Admin. R. Mont. 36.12.101(13) (1993).

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. Dept. of Nat. Resources & Conserv., 2006 MT 72, ¶ 37, 331 Mont. 483, 133 P.3d 224 (citing Mont. Power Co. v. Mont. Pub. Serv. Commn., 2001 MT 102, ¶ 24, 305 Mont. 260, 26 P.3d 91). *See*

also, Core-Mark Intl. 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, 228 Mont. 335, 340, 742 P.2d 1015, 1018 (1987)).

In the present case, the District Court found no such "compelling indications," but, instead relied on unsubstantiated allegations of harm to reject DNRC's 20-plus year rule. To so rely, the District Court looked far outside the record, as CFC and multiple *amicus* parties now invite this Court to do as well. This invitation should be rejected, not only because it is improper on review of an administrative decision under Mont. Code Ann. § 2-4-704 to go beyond the record before the administrative agency, but also because even the extraneous information presented does not endorse the fear CFC and *amicus* parties would perpetuate.

First, this Court should disregard the information not contained in the administrative record, but presented directly to the District Court or, in some cases, even presented for the first time on appeal. In reviewing an agency decision under Mont. Code Ann. § 2-4-704, "[a] district court must confine its review of an agency's decision to the record." Grenz v. Mont. Dept. of Nat. Resources & Conserv., 2011 MT 17, ¶ 16, 359 Mont. 154, 158, 248 P.3d 785, 788; *see also*, O'Neill v. Dept. of Revenue, 227 Mont. 226, 230-31, 739 P.2d 456, 458-59

(1987). This Court applies the same standard of review. Grentz, *supra.* Because review is limited to what was before DNRC at the time of its declaratory ruling, this Court should reject the District Court's reliance on information outside the administrative record to hold that the DNRC's ruling was incorrect. This Court should also disregard new information now presented by *amicus* parties to this Court, as it well outside the record that was before the agency at the time of decision.

CFC and *amicus* parties make much of the historical and future projected proliferation of wells under Admin. R. Mont. 36.12.101(13) (1993) and Mont. Code Ann. § 85-2-306 (2009), but provide no verification of actual impact from these wells. This Court should not be scared by numbers. As DNRC found, "the vast majority" of wells authorized under Admin R. Mont. 36.12.101(13) (1993) appropriate far less than the statutorily allowed amount of 35 gallons per minute and 10 acre-feet a year. *See*, Declaratory Ruling at 17 (Admin. R. File 1, Tab 1). As DNRC also found, "For areas where the statewide approach does work because the area is experiencing local problems with exempt wells, the Water Use Act is structured to address problems on a site specific basis through controlled groundwater areas." *Id.*[4] *Amicus* parties and CFC are unable to bring to this Court

[4] Controlled groundwater areas are the solution referred to by the declaratory ruling. Since the issuance of DNRC's declaratory ruling, stream depletion zones have been added to the Montana Water Use Act as another means of creating site-

an example of where wells authorized under Admin. R. Mont. 36.12.101(13) (1993) have been directly linked to the inability of other appropriators to make use of their water rights. And to the extent that such a situation would exist, the Montana Water Use Act has options for addressing those situations. *See*, Mont. Code Ann. §§ 85-2-380, 85-2-506. To invalidate a rule that has worked well for over 20 years based on unverified fears is not only inequitable, but not in line with the law, which requires that a district court find "compelling indications" that a long-standing agency interpretation is incorrect in order to invalidate it. Uncorroborated fears and an attempt to inhibit residential development through the water use statutes do not amount to such "compelling indications."

C. The Public Trust Doctrine Does Not Support Invalidation of Admin. R. Mont. 36.12.101(13) (1993).

Environmental Groups spend the majority of their brief urging this Court to apply the judicially-created public trust doctrine to justify the District Court's improper invalidation of Admin. R. Mont. 36.12.101(13) (1993). This Court should reject this encouragement, not only because application of the public trust doctrine to a self-executing constitutional provision is on its own improper, but also because Environmental Groups' interpretation of Article IX, section 3(3) of

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specific solutions in those isolated areas where water availability is an issue. *See*, Mont. Code Ann. § 85-2-380.

the Montana Constitution fails to even take into account a full half of the constitutional provision.

Article IX, section 3 of the Montana Constitution requires no outside judicially-created doctrine to give it effect. "Article IX, Section 3, with the exception of subdivision (4) is self-executing." Gen. Ag. Corp. v. Moore, 166 Mont. 510, 515, 534 P.2d 859, 862 (1975). The operative language at issue in Environmental Groups' argument is Article IX, section 3(3) of the Montana Constitution, which, in its entirety, reads as follows: "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***" (emphasis added). No additional doctrine is required to give this language effect.

The entirety of Article IX, section 3(3) of the Montana Constitution gives rise to the second reason why Environmental Groups' urging should be rebuffed—Environmental Groups simply fail to take into account the second half of the constitutional provision. Environmental Groups' quotation of Article IX, section 3(3) of the Montana Constitution stops at "for the use of its people," intimating to this Court that waters within Montana are only for general public use. Environmental Groups' failure to even mention the second half of Article IX, section 3(3) of the Montana Constitution disregards an important part of the

provision, namely that the waters in Montana are subject to appropriation by private parties for beneficial uses as provided by law, not simply subject to conservation for public use.

The idea that water is subject to private appropriation for beneficial use is once again emphasized in the statement of policy underlying the Montana Water Use Act. "Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter." Mont. Code Ann. § 85-2-101(1); *see also,* Mont. Code Ann. § 85-2-101(3). Simply put, the constitutional guarantee to Montana citizens is that water may be appropriated for beneficial use, and the policy of this state is to maximize the beneficial use of state waters for appropriative purposes.

D. Wells Authorized Under Admin. R. Mont. 36.12.101(13) (1993) Are Subject to Enforcement.

The League in particular advances the argument that enforcement is not available against wells authorized under Admin. R. Mont. 36.12.101(13) (1993) because "the futile call doctrine may prevent the senior from enforcement," another water user may not be able to identify what well, if any, is going to produce "useful water," and "a call will only be enforced when the senior is actually not receiving all the water to which it is entitled." *Amicus Curiae* Br. of

Mont. League of Cities & Towns 6-7 (Jan. 15, 2016). Having to prove that a call is not futile and that the calling water user is actually injured by a junior water user's diversion cannot be brushed aside merely because they are inconvenient requirements of making a call that a senior water user may not be able to prove against a well. Rather, both the futile call doctrine and the material injury rule are vital parts of the enforcement process in that they maximize the principle of beneficial use.

It is true that both the futile call doctrine, which prohibits call on junior users when such call will not actually produce water for the senior user, and the material injury rule, which requires the senior water user making call to show actual injury to their water right, are both exceptions to the strict rule of priority. However, they are exceptions that Montana law has consistently applied in order to maximize beneficial use of water. In Raymond v. Wimsette, the senior appropriator was only authorized to insist that the junior user cease diversion as long as a useful quantity of water would reach the senior user's diversion.

> Would it not, therefore, be unreasonable, and contrary to the theory of the law governing the subject under consideration, to hold that although experience of many years, and actual demonstration, confirm the proposition that none of the water in controversy could, if left in the stream, reach plaintiff's place of diversion, at a distant point below, still defendant should be restrained from the use thereof on the ground of plaintiff's prior claim to the water of said stream, at the place of his diversion? In our judgment, such holding would be entirely contrary to the spirit, if not the letter, of the law, anything tending to such a doctrine.

12 Mont. 551, 31 P. 537, 540 (1892). This Court affirmed the same principle decades later. "An appropriator may not insist upon the upstream release of water which would do him no good; he cannot insist upon the maintenance of a barren right; he may not complain if another user upstream takes water during times when they would otherwise be lost." Midkiff v. Kincheloe, 127 Mont. 324, 333, 363 P.2d 976, 980 (1953). Finally, this Court recently reiterated the same principle in Baker Ditch Co. v. Dist. Ct. of 18th Jud. Dist., holding that where a subsequent appropriator is using water in accord with their right and that use cannot be shown to be a detriment to the prior appropriator, "the subsequent appropriator has the right to the use of such water." 251 Mont. 251, 256, 824 P.2d 260, 263 (1992) (citing Custer v. Missoula Pub. Serv. Co., 91 Mont. 136, 6 P.2d 131 (1931); Quigley v. McIntosh, 88 Mont. 103, 290 P. 266 (1930)).

That a senior user must prove that a well authorized under Admin. R. Mont. 36.12.101(13) (1993) is the actual source of injury to the senior user's water right and that shutting of said well will actually result in water to the senior user does not preclude enforcement. It is merely a requirement of the enforcement process that any senior user making a call, on either a groundwater or a surface water right, must prove up. The entire purpose behind the futile call doctrine and the material injury rule is to maximize beneficial use, rather than simply letting water go unused by anyone. To accept the League's argument would be to disregard the

long-standing principles of the futile call doctrine and the material injury rule. This Court should affirm both principles and reject the League's argument.

III. CONCLUSION

In implementing a rule without public notice and reasonable 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. Finally, the District Court erred by failing to grant deference to DNRC's long-standing interpretation and made no finding of "compelling indications" that DNRC's construction of the statute was wrong. Such errors have implications well beyond the subject of water, going to broader topics of rulemaking procedure and review of administrative decisions.

This Court should reject the invitations to consider information not contained in the administrative record, to apply the judicially-created public trust doctrine to a self-executing provision of the Montana Constitution, and to disregard the futile call doctrine and material injury rule.

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 29th day of January, 2016.

/s/ Abigail J. St. Lawrence

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(a) and (d), I certify that the *Reply 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 2013, is not more than 5,000 words, excluding Certificate of Compliance and Certificate of Service.

DATED this 29th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2016, a true and correct copy of the foregoing *Reply Brief of Intervenors/Appellants Montana Association of REALTORS® and Montana Building Industry Association* was duly served, via United States Postal Service, first-class postage prepaid, and electronic mail on the attorneys of record addressed as follows:

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