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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, and 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 on 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,

vs.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors/Appellants

vs.

APPELLANT MONTANA WELL DRILLERS ASSOCIATION'S RESPONSE OPPOSING APPELLEE PETITIONER'S MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MONTANA ASSOCIATION OF REALTOR and MONTANA BUILDING INDUSTRY ASSOCIATION,	)
Intervenors/Appellants	)
vs.	)
MOUNTAIN WATER COMPANY,	)
Intervenor.	)

COMES NOW, Intervenor/Appellant Montana Well Drillers Association ("MWDA"), through its counsel of record, and files this Response Opposing Appellee Clark Fork Coalition, *et al.* ("CFC") October 9, 2015 Motion to Dismiss Intervenors' Appeal for Lack of Jurisdiction. CFC encourages this Court to adopt the federal "remand rule." Requesting the Court adopt a matter of first impression based solely on federal law is entirely inappropriate given there is a Montana statute, with supporting case law directly on point. Pursuant to § 2-4-711, MCA and Montana case law, MWDA, as an intervening party in this case, has a statutory right to appeal the District Court's October 17, 2014 Order on Petition for Judicial Review ("Order"), which is attached as Exhibit 1. The Order is a final determination; therefore, this Court has jurisdiction to hear and determine MWDA's instant appeal of the merits of the Order. Accordingly, MWDA respectfully requests the Court deny CFC's Motion to Dismiss and deny CFC's request for leave to file a reply brief.

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BACKGROUND

This case undisputedly proceeded under the Montana Administrative Procedure Act (MAPA). *See* Scheduling Or., p. 2 (April 9, 2014) (C.R. 22.000). CFC petitioned for judicial review of DNRC's final agency decision not to amend Admin. R. Mont. 36.12.101(13) defining "combined appropriation." *See* Exh. 1, p. 4. MWDA is a party to this case pursuant to the Order Granting Intervention (Nov. 8, 2010) (C.R.8.00). MWDA's intervention was unopposed. As a unique party litigant in this matter, MWDA's interests and remedies are distinct from DNRC. *See Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992). Additionally, once intervention was granted, MWDA had all the rights of any other party in the case, including the right of appeal. *Allman v. Potts*, 140 Mont. 312, 315, 371 P.2d 11, 12 (1962); *State ex rel. Westlake v. Dist. Ct.*, 118 Mont. 414, 424, 167 P.2d 588, 590.

Contrary to CFC's characterization, the Order is not simply a "remand order," but rather it reversed, modified, and remanded the DNRC's final agency decision by: (1) declaring ARM 36.12.101(13) invalid because it conflicts with the Water Use Act and § 85-2-306, MCA; (2) reinstating DNRC's prior rule defining "combined appropriation" until rule making is completed; and (3) requiring DNRC to engage in further rule making "as requested by Petitioners so that these various intricacies and complexities of Montana's groundwater system can be addressed." Exh. 1, p. 13.

On October 2, 2015, DNRC and CFC entered into a negotiated settlement, to which MWDA was not a party. A copy of the Stipulated Judgment by Consent Decree and Order is attached as Exhibit 2, with Exhibit A. Notably, in the agreement between DNRC and CFC, the parties recognized Intervenors' rights to appeal in the Agreement *and* anticipated this Court would have the final decision on the merits of this matter. *See* Exh. 2, p. 2 and enclosed Exh. A, ¶ 5.

I. The District Court's Order Is a Final and Appealable Order

"Statutes relating to appeals are mandatory and jurisdictional." *Mont. Power Co. v. Mont. Dep't of Pub. Serv. Regulation*, 218 Mont. 471, 479, 709 P.2d 995, 999 (1985). Section 2-4-711 states "An aggrieved party may obtain review of a final judgment of a district court under this part by appeal to the supreme court within 60 days after entry of judgment. Such appeal shall be taken in the manner provided by law for appeals from district courts in civil cases." Section 2-4-711 does not condition an aggrieved party's right to appeal upon whether the district court's final order affirmed, remanded, reversed (or some combination thereof) an agency's final decision. Likewise, § 2-4-711 does not distinguish between agency or non-agency parties; instead *all* parties have a right to appeal judicial review of agency decisions.

A cardinal rule of statutory interpretation prohibits this Court from inserting additional language into the statute. *In re Formation of E. Bench Irrigation Dist.*, 2009 MT 135, ¶ 31, 350 Mont. 309, 207 P.3d 1097. If the Legislature intended to

exclude the ability to appeal judicial review determinations that only remanded cases (in whole or in part), it would have said so. *Compare* § 2-4-711, *with* § 2-4-704(2), MCA; *see Eisenmenger by Eisenmenger v. Ethicon, Inc.*, 264 Mont. 393, 411-12, 871 P.2d 1313, 1324-25 (1994) (discussing rules of statutory construction).

Finally, this Court has repeatedly stated a district court's order on judicial review of an agency decision is a final, appealable judgment without conditioning the finality on the fact that the agency was the appealing party. *In re Mont. Power Co.*, 180 Mont. 385, 391, 590 P.2d 1140, 1144 (1979); *Whitehall Wind, LLC v. Mont. PSC*, 2010 MT 2, ¶ 18, 355 Mont. 15, 19, 223 P.3d 907; *Grenz v. DNRC*, 2011 MT 17, ¶ 20, 359 Mont. 154, 248 P.3d 785. The case law is consistent with MWDA's right to appeal the Order. Coupled with the plain language of § 2-4-711, this Court has appellate jurisdiction to hear MWDA's appeal of the Order.

II. CFC's Reliance on Federal Case Law Is Misplaced

Federal law does not govern this dispute because this is not an area of state law superseded by federal law. *See Orr v. State*, 2004 MT 354, ¶ 51, 324 Mont. 391, 106 P.3d 100 (discussing federal preemption doctrine). Additionally, there is no federal equivalent to § 2-4-711, MCA. *See* 5 U.S.C. §§ 701 to 706 (Administrative Procedure Act ("APA"), which is the federal equivalent to MAPA). Therefore, all of the federal case law cited by CFC interpreting the APA is irrelevant.

Furthermore, the federal cases cited by CFC are factually distinguishable from this matter because none of them discuss the unique circumstances presented here – where the agency stipulated not to appeal the merits of the Order because of a negotiated settlement regarding award of attorney fees.

CFC incorrectly suggests DNRC believed appealing the merits was not "worthy of pressing." The actual language of the parties' Stipulated Judgement provides otherwise. *See* Exh. 2, p. 2, Exh. A, at ¶¶ 5 and 7. The Stipulated Judgment provides that the settlement of attorney's fees is of no force or effect if Intervenors prevail on the merits of the appeal and defined what constitutes "prevailing on the merits." Exh. 2, p. 2, Exh. A, ¶ 5.

It was not until the DNRC agreed, in settling the attorney's fee award, not to appeal the merits that CFC suddenly argued the Order was just an Order to remand and not final. However, throughout this matter, CFC itself acknowledged MWDA's appeal on the merits would be heard by this Court. *See* Exh. 2, p. 2; CFC's Response in Opposition to MWDA's Motion to Stay District Court's Order, pp. 8-9, attached as Exhibit 3. And, while jurisdictional challenges can be raised at any time, CFC's meritless Motion to Dismiss is contrary to the position it has taken and its treatment of MWDA for the last year.

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III. The Coalition's Request for Leave to File a Reply Brief Should Be Denied

Montana Appellate Rule 16(3) unambiguously prohibits CFC's filing of a reply brief in support of its motion. The Rules of Appellate Procedure govern proceedings before this Court. M.R.App.P. 1(2); *In re Formation of E. Bench Irrigation Dist.*, ¶ 9. Therefore, under the plain language of M.R.App.P. 16(3), MWDA requests the Court deny CFC's request.

For the foregoing reasons, MWDA respectfully requests the Court DENY CFC's Motion to Dismiss, DENY CFC's request for further briefing, and GRANT any further relief this Court deems necessary.

DATED this 19th day of October, 2015.

Ryan Mattick

RYAN K. MATTICK
Attorney for Intervenor/Appellant
Montana Well Drillers Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, I certify that the above document printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; WordPerfect X5; and has a word count of 1,243, not averaging more than 280 words per page, excluding the certificate of service and certificate of compliance.

DATED this 19th day of October, 2015.

Ryan Mattick

RYAN K. MATTICK
Attorney for Intervenor/Appellant
Montana Well Drillers Association

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed with the Clerk of Supreme Court of Montana by forwarding the original and seven copies on the 19th day of October, 2015, via overnight delivery with Federal Express, and duly served upon all counsel of record at the below addresses, via U.S. Mail, first-class postage prepaid, on this 19th day of October, 2015, upon the following:

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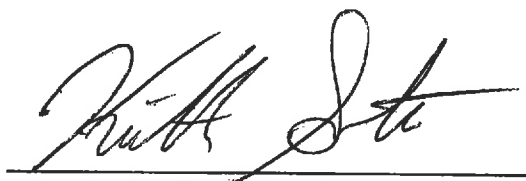

Moore, O'Connell and Refling

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.
>
> . . . 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.

/////

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

T/JMS/clark fork coalition v tubbs or pet j review.wpd

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

THE CLARK FORK COALITION, a non-profit organization, KATRIN CHANDLER, an individual, BETTY J. LANNEN, an individual, and JOSEPH MILLER, an individual, Petitioners -vs- JOHN E. TUBBS, in his capacity as Director on 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, -vs- MONTANA WELL DRILLERS ASSOCIATION, MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION and MOUNTAIN WATER CO., Intervenors.	Cause No. BDV-2010-874 Judge: Hon. Jeffery M. Sherlock STIPULATED JUDGMENT BY CONSENT DECREE AND ORDER

The Department of Natural Resources and Conservation, Respondent in the above captioned matter (hereafter DNRC) and Clark Fork Coalition, Katrin Chandler, Betty Lannen, and Joseph Miller Plaintiffs (hereinafter CFC), by and through Counsel of Record, Western Environmental Law Center (hereafter WELC) (collectively the "Parties" to this Agreement) have entered into a Memorandum of Agreement to resolve one outstanding issue that is presently before the Court. Through negotiation, the Parties have agreed to enter into this Judgment by

operation of law upon the issuance of the last Remittitur of the case without further action by this Court.

Pursuant to Rule 58(e), M.R.Civ.P., the Clerk is directed to enter Judgment for the Plaintiffs along with this Court's Order staying collection or any other action by Plaintiffs as directed above regarding the monetary portion of this Stipulated Judgment by Consent Decree and Order.

Dated this 5 day of Oct, 2015

Hon. Jeffery M. Sherlock
First Judicial District Court Judge, Lewis and Clark County, Montana

CONSENT DECREE

This Stipulated Judgment and Consent Decree reflects the terms and conditions of the Stipulated Agreement reached between the Parties as a result of the District Court's *ORDER ON MOTION FOR ATTORNEY FEES AND COSTS* filed June 12, 2015. Should any term or condition as stated herein conflict or not be addressed or is ambiguous, the Agreement executed by the Parties controls any interpretation that may be necessary of the content of this document.

The monetary portion of this Stipulated Judgment by Consent Decree is governed by and subject to the following terms and conditions agreed to by the Parties and presented to this Court by stipulation:

1. DNRC agrees to pay CFC the sum of One Hundred Thousand and 00/100 dollars ($100,000.00) and CFC agrees to accept this sum in full satisfaction of reasonable attorneys' fees and all costs of litigation.

2. The cash settlement includes all phases of District Court and administrative proceedings in the *Clark Fork Coalition v. Tubbs*, Cause No. BDV-2010-874 (hereinafter "this matter"). No additional consideration shall be given by DNRC for any District Court or administrative proceeding in this matter.

12. This document may be executed in counterparts and each signature page collectively shall constitute the whole.

BY _____ Dated this 2nd day of October, 2015
Anne W. Yates
Kevin Peterson
Special Assistant Attorneys General
Montana Department of Natural
Resources and Conservation
Attorneys for Defendant State of Montana
Director John E. Tubbs and the Department
Of Natural Resources and Conservation.

BY _____ Dated this 2nd day of October, 2015
Western Environmental Law Center
Mathew K. Bishop
Laura King
Attorneys for Clark fork Coalition et al.

ADOPTED BY THIS COURT, AND IT IS HEREBY ORDERED. The Clerk shall issue a copy of this Judgment by Consent Decree and Order to all parties on the caption.

DATED this 5 Day of Oct, 2015.

_____
Hon. Jeffery M. Sherlock, District Court Judge

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

THE CLARK FORK COALITION, a non-profit organization, KATRIN CHANDLER, an individual, BETTY J. LANNEN, an individual, and JOSEPH MILLER, an individual, Petitioners -vs- JOHN E. TUBBS, in his capacity as Director on 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, -vs- MONTANA WELL DRILLERS ASSOCIATION, MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION and MOUNTAIN WATER CO., Intervenors.	Cause No. BDV-2010-874 EXHIBIT A MEMORANDUM OF AGREEMENT FOR A STIPULATED JUDGMENT BY CONSENT DECREE.

The Department of Natural Resources and Conservation, Respondent in the above captioned matter (hereafter DNRC) and Clark Fork Coalition, Katrin Chandler, Betty Lannen, and Joseph Miller Plaintiffs (hereinafter CFC), by and through Counsel of Record, Western Environmental Law Center (hereafter WELC) (collectively the "Parties" to this Agreement) hereby enter into this Memorandum of Agreement (hereinafter Agreement) to resolve one outstanding issue that is presently before the Court. Through negotiation, the Parties have agreed in good faith to enter into a Stipulated Judgment by Consent Decree to be filed with the Court. The scope of this Agreement addresses a stipulated amount that the Parties have agreed will represent the total sum for reasonable attorneys' fees and costs for all litigation prior to Appellate level of review. This Agreement addresses the terms and conditions under which the Agreement has been reached as a result of the District Court's *ORDER ON MOTION FOR ATTORNEY FEES AND COSTS* filed June 12, 2015.

the entitlement to reasonable attorneys' fees and costs. DNRC is not limited to any specific theory or arguments it may advance on appeal for the issue regarding entitlement to reasonable attorneys' fees and costs.

5. If an appeal from any other party in this matter prevails on the merits of *ORDER ON PETITION FOR JUDICIAL REVIEW* filed October 17, 2014, then no attorney fees and costs will apply just as if DNRC had prevailed on the merits. For the purposes of the Agreement, "prevailing on the merits" such that DNRC's obligation to pay attorneys' fees and costs in this matter is dissolved, means the other parties prevailed on the merits of their appeal by reversing in whole or part the District Court's *ORDER ON PETITION FOR JUDICIAL REVIEW* filed October 17, 2014 declaring DNRC's 1993 rule defining "combined appropriation" to be inconsistent with the Montana Water Use Act. If the Montana Supreme Court: (1) affirms the District's Court's *ORDER ON PETITION FOR JUDICIAL REVIEW* filed October 17, 2014 declaring DNRC's 1993 rule defining "combined appropriation" to be inconsistent with the Montana Water Use Act; or (2) dismisses the other parties' appeals (for any reason), then the other parties will not be deemed to have "prevailed on the merits" and DNRC will be obligated to pay attorneys' fees and costs consistent with this Agreement.

a. Attorneys' fees and costs are not due and owning from DNRC until all appeals of any Order or issue in this case have been resolved by final order of the Montana Supreme Court and it has issued its last Remittitur of the case. Payment will be made by either electronic transfer or check to the client trust account (case #448) of CFC's attorneys, the Western Environmental Law Center, 1216 Lincoln Street, Eugene, OR 97401. CFC agrees to furnish the DNRC with the information necessary to effectuate payment pursuant to this paragraph. DNRC agrees to submit all necessary paperwork for the processing of attorneys' fees and costs and make the payment (if necessary and required to do so by this Agreement) within thirty days (30) of the last remittitur from Montana Supreme Court.

b. The Parties stipulate that post-judgment interest on the agreed sum of $100,000 shall not begin to accrue until the condition in 5.a above has been met. There is no pre-judgment interest involved in this matter.

c. The Parties shall present to the District Court in the Judgment by Consent Decree as part of the Order that to the extent the Judgment by Consent Decree contains a dollar value as a money judgment, that the District Court will impose a stay of that portion of the Judgment by Consent Decree by agreement of the Parties pursuant to Rule 62(a) M.R.Civ.P. until such time as the condition in 5.a above has been met.

Entered this 2nd day of October, 2015

On Behalf of Plaintiffs:
THE CLARK FORK COALITION,
KATRIN CHANDLER, BETTY LANNEN,
AND JOSEPH MILLER

By
Attorneys for Plaintiffs
Mathew K. Bishop
Laura King
Western Environmental Law Center

On Behalf of Respondents:
John E. Tubbs, Director and Montana Department of Natural Resources & Conservation,

By
John E. Tubbs, Director
Department of Natural Resources and Conservation

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Counsel for Petitioners

MONTANA FIRST JUDICIAL DISTRICT
LEWIS AND CLARK COUNTY

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

Petitioners,

vs.

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

State-Respondents,

MONTANA WELL DRILLERS ASSOC. *et al.*,

Intervenors.

Civ No. BDV-2010-874

RESPONSE IN OPPOSITION TO THE WELL DRILLERS' MOTION TO STAY THIS COURT'S ORDER

TABLE OF CONTENTS

INTRODUCTION

Petitioners, the Clark Fork Coalition *et al.*, hereby submit this response in opposition to Respondent-Intervenors', the Montana Well Drillers Association's (hereinafter "Well Drillers"), motion to stay this Court's October 17, 2014, order pending appeal. After waiting over four months to file its motion for stay pending appeal, the Well Drillers – the *only party* seeking a stay in this matter – now maintain a stay is necessary in order to protect their interests and prevent irreparable injury to their members. As described below, this Court should deny the Well Drillers' late motion because they do not meet any of the requirements for obtaining a stay pending appeal.

ARGUMENT

The Well Drillers do not satisfy the requirements for obtaining a stay pending appeal in this matter. "A stay is an 'intrusion into the ordinary processes of administration and judicial review' . . . ." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation omitted). Accordingly, even in cases where irreparable injury might otherwise result to the appellant, this intrusive remedy "is not a matter of right." *Nken*, 556 U.S. at 427 (citation omitted); *see also State ex rel. Lay v. Dist. Court, Fourth Judicial Dist. in & for Ravalli Cnty.*, 122 Mont. 61, 75, 198 P.2d 761, 768 (1948) (provision for stay of execution of judgment was made "as a matter of grace and not of right"). Rather, a stay is "extraordinary relief." *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *cf. Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (a preliminary injunction is an extraordinary remedy and should be granted with caution); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (a preliminary injunction is an extraordinary remedy never awarded as of right). In addition to interrupting the ordinary process of judicial review, stays also

postpone relief for the prevailing party. *Dellums v. Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984) (citing *United States v. State of Tex.*, 523 F. Supp. 703, 729 (E.D. Tex. 1981)).

Accordingly, courts have held that stays are a disfavored remedy that should be sparingly granted. *Id.* In order to justify the use of this extraordinary device, the burden is on the Well Drillers to demonstrate that: (1) they are likely to succeed on the merits of their appeal; (2) they will be irreparably injured absent a stay; (3) the issuance of the stay will not substantially injure the other parties interested in the proceedings; and (4) the stay is in the public interest. *Nken*, 556 U.S. at 433-34.[1]

Here, the Well Drillers' request to stay the portions of this Court's order (a) directing the Department of Natural Resources and Conservation (DNRC) to initiate rulemaking consistent with the Court's Order, and (b) reinstating DNRC's prior rule defining "combined appropriation" (hereinafter the "1987 Rule") should be denied because the Well Drillers do not satisfy one, let alone all four factors, for obtaining a stay pending appeal.[2]

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[1]The Well Drillers agree this is the appropriate four-part test for issuance of a stay pending appeal under Mont. R. App. P. Rule 22. *See* Br. at 8 (citing *Textana, Inc. v. Klabzuba Oil & Gas*, 2008 Mont. Dist. Lexis 179 (April 30, 2008) (Twelfth Judicial District Court, Hill County)). The test is substantially the same as that governing the issuance of preliminary injunctions under *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20-21 (2008).

[2]The Well Drillers also suggest that this Court should interpret § 2-4-711, MCA to require a stay of its ruling. Br. at 11. The Well Drillers' reading of § 2-4-711, MCA is incorrect. § 2-4-711, MCA concerns stays of *agency* rulings and provides sole authority for the Supreme Court to lift or issue such stays. Specifically, § 2-4-711(2), MCA provides that, when a district court reverses an agency ruling and the district court's ruling is appealed, the agency ruling is automatically stayed pending resolution of the appeal "unless the Supreme Court orders otherwise." Thus, § 2-4-711, MCA has no applicability to the Well Drillers' request to this Court to stay its own ruling.

A. The Well Drillers are not likely to prevail on the merits.

The Well Drillers have not made the requisite "strong showing" that they are likely to prevail on the merits. *Nken*, 556 U.S. at 434. In fact, they have made no showing at all.[3] The Montana Supreme Court reviews a district court's conclusions of law to determine if they are correct. *Gold Creek Cellular of Montana Ltd. P'ship v. State, Dep't of Revenue*, 2013 MT 273, ¶ 9, 372 Mont. 71, 310 P.3d 533. Accordingly, for this Court to issue a stay pending appeal, the Well Drillers must identify some basis on which this Court's opinion is likely to be overturned; i.e. some specific legal error or errors. The Well Drillers, however, fail to identify *any* alleged errors in the Court's opinion (and cannot do so for the first time in a reply brief). A showing of likelihood of success on the merits is "critical" because it allows the Court to satisfy itself that the legality of an order is truly at question before it exercises its discretion to allow the intrusive remedy of a stay. *See Nken*, 556 U.S. at 427, 434; *see also Virginia Petroleum*

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[3]The Well Drillers contend that whether the stay applicant has made a strong showing that he is likely to succeed on the merits is "not determinative or given much weight" in Montana. Br. at 8. There is no Montana Supreme Court caselaw on this point so the the Well Drillers rely on two Montana district court cases that pre-date the U.S. Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20-21 (2008). Although courts have always required a showing of likelihood of success on the merits before issuing injunctions or stays, federal circuit courts before *Winter* employed various "sliding scale" tests that allowed a stronger showing on "likelihood of success on the merits" to counterbalance a weaker showing on "irreparable harm," or vice versa. *Winter* rejected the "sliding scale" approach and strengthened the traditional four-factor test by requiring an applicant to show both that it is "likely" to succeed on the merits and that it is "likely" to suffer irreparable harm. *Winter*, 555 U.S. at 22. *Winter* was decided in the context of a preliminary injunction, but in the context of a stay of a court's order, the U.S. Supreme Court post-*Winter* has also emphasized the importance of a strong showing on the first two, "most critical" factors. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Without a strong showing of likely success, there is no justification for the Court to interrupt the ordinary process of judicial review and postpone relief for the prevailing party.

In this case, as detailed in the Clark Fork Coalition's briefing and in this Court's opinion and order, the Well Drillers are not likely to succeed on the merits of their claim. At issue in this case was DNRC's narrow definition of the term "combined appropriation," which allowed large consumptive water users to evade the Montana Water Use Act's permitting process. Under the Montana Water Use Act, a permit is required for "combined appropriations" that exceed 10 acre-feet a year. *See* § 85-2-306(3)(a). DNRC's exempt well regulation, however, limited "combined appropriations" only to those appropriations involving "physically manifold," or connected, wells. The regulation thus allowed large consumptive water users, including extractive resource industries and large subdivisions, to drill multiple, unconnected wells for a single project or development without seeking a permit. This was true even in Montana's "closed basins" i.e., over-appropriated basins that are protected by heightened permitting requirements. *See* § 85-2-311(8); § 85-2-360.

This Court correctly found that the exempt well regulation was in violation of the purpose of the Montana Water Use Act, *see generally* Order at 5-10, as well as the Act's legislative history, *see generally* Order at 11-12, and that, under these circumstances, deference to the agency was not appropriate.

Specifically, this Court found that the purpose of the Water Use Act is to provide for the administration, control, and regulation of water rights, and that the Act achieves this purpose via a permit process that requires new users to provide notice to senior water users and to demonstrate that existing rights will not be affected. *See* Order at 5-6. The exempt well regulation undermines this purpose by allowing large new users that

have drilled multiple, unconnected wells that tap the same source and that serve the same project to bypass the permit system, thereby causing injury to existing rights-holders and placing a growing strain on Montana's water resource. *See* Order at 7-10.

This Court also ruled that the exempt well regulation was in violation of the legislative intent of the drafters of the exempt well statute. *See* Order at 11-12. The "combined appropriation" language was added to the exempt well provision in 1987 via House Bill 642. *See id.* at 11. At the bill's hearing in front of the Senate Natural Resources Committee, water law attorney Ted Doney raised concerns about ambiguity surrounding the word "combined." *See id.* Doney indicated that he understood "combined" to mean "two wells that were irrigating the same tract but not physically connected." *Id.* To clarify the ambiguity, Doney recommended inserting the phrase "from the same source" following the word "appropriation." *Id.* The committee moved to adopt Doney's amendment, and the amendment passed unanimously. *See id.* at 11. Just months later, DNRC adopted a rule (the 1987 rule) defining "combined appropriation" in accordance with this legislative intent. That rule provided in part that two or more groundwater developments "need not be physically connected" in order to qualify as a "combined appropriation." *Id.* The rule invalided by this Court's order (the 1993 rule), by contrast, upended legislative intent by requiring permits only for those combined appropriations that involved physically connected wells. *See id.* at 12.

Finally, this Court ruled that while it owes respectful deference to the DNRC's interpretation of a statute which it is directed to administer, that deference cannot overcome the Court's "firm" conclusion that the 1993 rule is inconsistent with the Act's legislative intent and overall purpose. *See* Order at 12. The Court's conclusion is well supported by the law. Where the meaning of a statute is in doubt, courts have, in some circumstances, afforded "respectful consideration" to an agency's interpretation of a

statute "where a particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in identifiable reliance." *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. Here, however, "respectful consideration" was not warranted because, rather than charting a consistent course, DNRC adopted two diametrically-opposed regulations: a 1987 rule contemplating that wells need not be physically connected in order to qualify as a "combined appropriation," and a 1993 rule requiring that they must be connected. *See generally* Pl's Reply Br. at 1-4. Moreover, "respectful consideration . . . may yield to a judicial determination that construction is nevertheless wrong," as it did in this case. *Montana Power Co.*, ¶ 25.

The Court's legal analysis, therefore, is sound, and the Well Drillers show no flaws or errors in the opinion. In sum, far from making a "strong showing" that they are likely to prevail on the merits, the Well Drillers make no showing at all on this "critical" factor. *Nken*, 556 U.S. at 434 (2009). On this basis alone, the Well Drillers fail the test for a stay pending appeal.

B. The Well Drillers have not demonstrated the likelihood of irreparable harm.

To obtain a stay, the Well Drillers must also demonstrate a likelihood of irreparable injury. *Nken*, 556 U.S. at 434-35. "[T]he courts have developed several well known and indisputable principles to guide them in the determination of whether this requirement has been met." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

First, the injury must be "both certain and great; it must be actual and not theoretical." *Id.*; *accord Bitterrooters for Planning v. Bd. of Cnty. Comm'rs of Ravalli Cnty.*, 2008 MT 249, ¶ 16, 344 Mont. 529, 189 P.3d 624 (quoting and affirming the

district court) (irreparable harm must be demonstrated "beyond mere speculation"); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir.1984) (speculative injury does not constitute irreparable injury). Second, "economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas*, 758 F.2d at 674; *accord Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont. 328, 308 P.3d 81; *Rent-A-Center, Inc.*, 944 F.2d 597, 603 (9th Cir.1991). "The key word in this consideration is *irreparable*." *Wisconsin Gas*, 758 F.2d at 674. "Irreparable" means "irremediable by a future award of legal or equitable relief." *Bitterrooters for Planning*, ¶ 16 (quoting and affirming the district court). Thus, "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Wisconsin Gas*, 758 F.2d at 674 (quoting *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925). "Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Id.* "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." *Id.* Here, the Well Drillers merely allege – *without any* supporting evidence, document or citation to evidence in the record – two types of irreparable harm, neither of which is likely to occur or irreparable in nature.

1. The Well Drillers' "right to appeal" is not being harmed.

The Well Drillers maintain that, if DNRC completes new rulemaking, as per this Court's order, the Supreme Court will be unable to make the Well Drillers whole on appeal or the Well Drillers' appeal will become moot and this would cause irreparable harm to their "right to appeal." This argument has no merit.

As an initial matter, the possibility that a case will become moot is generally not considered irreparable harm. *See Dellums v. Smith*, 577 F. Supp. 1456, 1458 (N.D. Cal.

1984) ("The possibility that defendants' appeal might become moot absent a stay does not affect the considerations which obtain when the Court is asked to stay its order pending appeal."); *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) ("I think the matter is cast in no different light when one consequence of staying an injunction pending appeal may be to render the appeal moot in whole or in part."); *In re Irwin*, 338 B.R. 839, 853 (E.D.Cal.2006) (quoting *In re 203 N. LaSalle St. P'shp.*, 190 B.R. 595, 598 (N.D.Ill.1995) ("It is well settled than an appeal being rendered moot does not itself constitute irreparable harm."). Even if one assumes, however, that having the appeal become moot may result in the possibility of such harm, such harm is unlikely to occur in this case for four reasons.

First, rulemaking is not likely to be completed during the pendency of the appeal. This Court has given DNRC no deadline for completing rulemaking. Even when DNRC had a rulemaking deadline (under the stipulated agreement between the parties in this case), it took DNRC three years – from November 10, 2010 to November 11, 2013, including two extensions – to propose a new rule, take public comment, hold a hearing, and withdraw the rule in response to comments. The concern, therefore, that DNRC will initiate and complete rulemaking before the appeal is resolved is remote and premised entirely on speculation.

Second, even if rulemaking does occur during the pendency of the appeal, it will not necessarily render the Well Drillers' appeal moot or compromise the relief the Well Drillers can receive. In deciding whether a case is moot, the Court determines whether it can fashion effective relief. *In re Marriage of Caras*, 2012 MT 25, ¶ 10, 364 Mont. 32, 270 P.3d 48 (citations omitted). Here, whether or not rulemaking occurs, the Supreme Court will still retain the ability to fashion effective relief, and indeed, retains the ability to provide all the relief that would be available absent rulemaking. The Supreme Court,

for example, could reverse this Court, and: (a) rule that this Court inappropriately ordered rulemaking; (b) reinstate the 1993 rule invalidated by this Court's order; and/or (3) order rulemaking consistent with the Supreme Court's order.

Third, if and when rulemaking is undertaken, it will be open to the public, including the Well Drillers, and take account of the interests of all stakeholders. The Well Drillers can (and likely will) take advantage of the opportunities for public participation and engagement that are an integral part of the rulemaking process. Thus, even if the Well Drillers lose the ability to appeal this Court's order due to new rulemaking, they will have the ability to shape the rulemaking itself.

Fourth, even if one assumes, *arguendo*, that DNRC initiates and completes rulemaking during the appeal and that such rulemaking moots the Well Drillers' appeal, and that the Well Drillers are unsatisfied with the new rule promulgated by DNRC despite their participation in rulemaking, they retain the right to challenge any new rule in separate litigation. Thus, any harm that Well Drillers suffer as a result of that rulemaking is still judicially remediable, i.e. *not* irreparable. *See Bitterroot River Prot. Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 18, 309 Mont. 207, 45 P.3d 24 (injury is not irreparable where judicial review remains available).

2. The Well Drillers are not harmed by the 1987 rule.

Next, the Well Drillers allege that the 1987 rule irreparably harms their interests because it makes it difficult to advise their customers about whether a particular well is required to go through the permitting process. Br. at 7. This argument deserves little attention from this Court.

A purported difficulty for the Well Drillers in understanding and advising customers about implementation of the 1987 rule – even assuming this is true – does not amount to irreparable harm. Inconveniences are not irreparable harm. *See Caribbean*

Marine Servs. Co. v. Baldrige, 844 F.2d 668, 676 (9th Cir. 1988). In order to qualify as "irreparable injury," the harm must be more than "trifling." *Weinberger v. Romero-Barcelo, 456 U.S. 305*, 311 (1982). It must be "great." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985); *PremierTox 2.0 v. Miniard*, 407 S.W.3d 542, 548 (Ky. 2013) (irreparable injury is "something of a ruinous nature").

Here, the Well Drillers' harms are trifling and not great because they are easily surmountable through reading the 1987 rule and DNRC's new guidance interpreting the 1987 rule and conferring with DNRC as needed. These harms, if they exist at all, are mere inconveniences or annoyances and do not justify the intrusive remedy of a stay. Indeed, contrary to the Well Drillers' allegation, the 1987 rule is working and clear on its face. The 1987 rule has also been supplemented by new DNRC guidance (dated November 12, 2014) that clarifies its implementation in the wake of this Court's ruling. Among other things, the detailed, 3½-page guidance clarifies various terms in the 1987 rule, including "project or development" and "same source aquifer" and explains how the 1987 rule will be implemented for subdivisions. If, after consulting the 1987 rule and DNRC's guidance, the Well Drillers still have questions about implementation of the rule, they may call, visit, or email DNRC.

The Well Drillers also allege that they are irreparably harmed because "[w]ells that could be drilled under the [1993 rule] will now not be able to be drilled under the 1987 rule." This is wrong. Wells can still be drilled under either rule. The question, rather, is whether a water permit is required.

Many wells will still qualify for an exemption to permitting under the 1987 rule and DNRC's guidance. For the remaining wells that must get a permit, it may mean more time and more paperwork, but these wells can also still be drilled, albeit with a water permit. The need to go through additional legal process is not irreparable harm but

more of an inconvenience or annoyance. *See In re Search of The Rayburn House Office Bldg. Room No. 2113 Washington, D.C. 20515*, 434 F. Supp. 2d 3, 4 (D.D.C. 2006) (Congressman did not suffer irreparable harm from seizure of his documents, even though the only way he could protect those documents would be to surmount additional legal hurdles). Moreover, even if the reinstatement of the 1987 rule means that fewer wells will be drilled (which the Well Drillers have not demonstrated – closing the loophole simply means more permits for wells), such harm is only monetary and not irreparable in nature. It is well-established that financial harm is not irreparable. *See, e.g., Caldwell v. Sabo*, 2013 MT 240, ¶ 29, 371 Mont. 328, 308 P.3d 81; *Dicken v. Shaw*, 255 Mont. 231, 236, 841 P.2d 1126, 1129 (1992).

In sum, the Well Drillers have not demonstrated that they are likely to be harmed, let alone irreparably harmed, by this Court's order. In fact, the Well Drillers have not offered any support or evidence for their general allegations that they will suffer harm, nor is there any such support in the record.

C. The issuance of the stay will substantially injure the other parties interested in the proceedings.

Even assuming the Well Drillers have demonstrated probable success and irreparable injury (they have not), they must also demonstrate that the issuance of a stay will not substantially injure the other parties interested in the proceedings.

Here, evidence in the record demonstrates that the issuance of a stay will re-open a large loophole from permitting that has caused and will continue to cause harm to the Petitioners', other interested parties' (Mountain Water Company's and Montana Fish, Wildlife & Parks') and the public's interest in Montana's precious water resource. The Petitioners' constitutionally-protected existing water rights would likely be adversely affected and the loss of such constitutionally-protected rights is considered irreparable.

Montana Cannabis Indus. Ass'n v. State, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)). Montana's precious water resources would also be harmed and such longstanding environmental injury is irreparable. *Amoco Prod. Co. v. Vill. of Gambell*, AK, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."). Thus, even if a stay represents legitimate relief for the Well Drillers, it should not issue here, where weightier harms will fall on Petitioners, other interested parties, and indeed all Montanans. "Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents." *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925.

The Well Drillers assert that there is "no evidence of actual, specific, and proven adverse impact" to Petitioners. But this is not the test. The test is whether interested parties will be "substantially injured." Evidence in the record reveals the Petitioners and other interested parties have been (and will continue to be) substantially injured in this case by the exempt loophole created by DNRC's 1993 rule. *See* AR 1-17 at 6 (declaration of expert hydrogeologist John Gerstle); AR 1-20 at 2 (declaration of Polly Rex); *see also* AR 1-19 (declaration of Betty Lannen); AR 1-18 (declaration of Katrin Chandler). Indeed, after a subdivision was built near Joseph Miller's ranch, all of the springs on his ranch dried up completely. *See* AR 1-23 at 2 (declaration of Joseph Miller). Although Mr. Miller did not have the benefit of a hydrogeologist's report to put numbers on the recharge/withdrawal balance in his watershed, his observations are nevertheless compelling evidence of harm. The injuries experienced by Petitioners Polly Rex, Katrin Chandler, Betty Lannen, and Joseph Miller are illustrative of the kind of "mischief" that the 1993 rule can cause. This mischief is especially damaging in closed

basins such as the upper Clark Fork watershed, where the Clark Fork Coalition has senior water rights. *See* AR 1-21 at 2 (declaration of Clark Fork Coalition).

In addition, as the public water supplier for the Missoula community, Intervenor Mountain Water Company will also suffer substantial injury if a stay issues. The 1993 rule created inequity by allowing the Missoula aquifer to be punctured by innumerable free wells, which in turn forced Mountain Water to seek new, permitted wells to compensate for the off-record withdrawals. This meant that the costs that should have been borne by those drilling exempt wells were externalized to Mountain Water and in turn to the Missoula community. This inequity should not be revived through the issuance of a stay.

The Montana Department of Fish, Wildlife, and Parks (Montana FWP), also submitted comments raising concerns over impact to Montana's instream water rights. *See* AR 1-37. Montana FWP is a major water rights holder with 106 "Murphy Right" fishery claims on twelve Montana streams and instream flow reservations on 372 river segments in the Yellowstone, Missouri, and Lower Missouri drainages. *See id.* at 2. According to Montana FWP, "exempt wells have the same potential for adverse effect to FWP's instream water rights as permitted wells" and "the consumptive use of water from exempt wells does diminish surface flow." *Id.*; *see also* AR 1-14 at 3 (Gallatin River flow depleted by exempt wells). Reopening the loophole closed by this Court's order will harm Montana FWP's existing instream rights, which in turn protect Montana's blue-ribbon trout streams for all Montanans.

Review of the record also reveals there are numerous other parties interested in this proceeding who will be harmed by a stay of this Court's order, including those parties who supported Clark Fork Coalition's petition and whose declarations of harm are in the record: Missoula County, the Brown Cattle Co., the Cottonwood

Environmental Law Center, the Northern Plains Resource Council, Richard Hixson (Bozeman's City Engineer), the Stillwater Protective Assocation, the Tongue River Water Users' Association, Mary Jane Alstad, Trout Unlimited's Montana Water Project, and fourteen individual ranchers with senior water rights. *See* AR 1-30, 1-31, 1-34, 1-35, 1-36, 1-39, 1-40, 1-41, 1-42, 1-43.

D. The public interest favors keeping the Court's order in place and the exempt well loophole created by the 1993 rule closed.

The final factor is whether a stay is in the public interest. Here, a stay would re-open the massive exempt-well loophole that this Court's order closed which, among other things, will: (a) cause harm to farmers, ranchers, and homeowners with longstanding senior water rights, *see supra*; (b) put stress without commensurate tax relief on cities by encouraging suburban growth fueled by exempt wells, *see* AR 1-35 (statement of position of Richard Hixson, Bozeman's City Engineer); (c) increase litigation by fostering water disputes, *see* AR 1-14 (DNRC, "Effects of Exempt Wells on Existing Water Rights"); (d) likely cause contamination because there is no oversight of exempt wells, *see* AR 1-11 at 14, 17, 19, 21 (WPIC Minutes); and (e) compromise Montana's trout streams by depleting them of water, *see* AR 1-37 (exempt wells threaten Montana FWP's instream rights). Without question, such impacts are not in the public's interest.

The Clark Fork Coalition agrees with the Well Drillers that there is public interest in the "quick resolution and implementation of the Court's determination." Br. at 10. This is precisely what happened in this case: the Court issued an order declaring the 1993 rule invalid, setting aside the 1993 rule, and reinstating the 1987 rule pending completion of the rulemaking ordered by this Court. This was a quick and clear resolution of this case in accordance with well-established principles. *See Paulsen v.*

Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) (the effect of invalidating an agency rule is to reinstate the rule previously in force). The exempt well loophole created by DNRC's 1993 rule is now closed and the public's interest in Montana's precious water resources and existing rights remains protected. It may not suit the Well Drillers to have resort to the 1987 rule, meet and confer with DNRC about exemptions, or read the guidance and possibly have to advise clients to obtain a water permit before drilling, but doing so is in the public interest. The Well Drillers maintain it is in the public interest to leave the 1993 rule on the books because it was a "longstanding agency rule." But leaving an illegal rule – one that conflicts with legislative intent and creates a loophole that you can drive a 100-unit subdivision through – is not in the public interest. Properly managing and regulating water use in Montana is, and the Court's order ensures this remains the case.

CONCLUSION

For the forgoing reasons, the Clark Fork Coalition respectfully requests this Court deny the Well Drillers' motion for a stay pending appeal.

Respectfully submitted this 27th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 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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