IN THE SUPREME COURT OF THE STATE OF MONTANA
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; 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,

Respondent,

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.

ANSWER BRIEF OF INTERVENOR/APPELLEE MOUNTAIN WATER COMPANY

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

Stephen R. Brown
J. Andrew Person
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909 • 350 Ryman Street
Missoula, MT 59807-7909
srbrown@garlington.com
japerson@garlington.com
Attorneys for Mountain Water Company – Intervenor/Appellee

Brian B. Bramblett
Kevin R. Peterson
Anne W. Yates
Special Assistant Attorneys General
Department of Natural Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601
BBramblett@mt.gov
KevinPeterson@mt.gov
ayates@mt.gov
Attorneys for Montana DNRC - Respondent

Ryan K. Mattick
Moore, O'Connell & Refling, P.C.
P.O. Box 1288
Bozeman, MT 59771-1288
morlaw@qwestoffice.net
Attorneys for Montana Well Drillers Association - Intervenors/Appellants

Matthew K. Bishop
Laura King
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
bishop@westernlaw.org
king@westernlaw.org
Attorneys for Petitioners/Appellees

Abigail J. St. Lawrence
Bloomquist Law Firm
3355 Colton Dr., Suite A
Helena, MT 59602
blf@helenalaw.com
Attorneys for Defendant-Intervenor Montana Association of REALTORS® and Montana Building Industries Association - Intervenors/Appellants

FILED _____, 2016
_____, Clerk

IN THE SUPREME COURT OF THE STATE OF MONTANA
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; 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,

Respondent,

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.

ANSWER BRIEF OF INTERVENOR/APPELLEE MOUNTAIN WATER COMPANY

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

Stephen R. Brown
J. Andrew Person
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909 • 350 Ryman Street
Missoula, MT 59807-7909
srbrown@garlington.com
japerson@garlington.com
Attorneys for Mountain Water Company -Intervenor/Appellee

Brian B. Bramblett
Kevin R. Peterson
Anne W. Yates
Special Assistant Attorneys General
Department of Natural Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601
BBramblett@mt.gov
KevinPeterson@mt.gov
ayates@mt.gov
Attorneys for Montana DNRC - Respondent

Ryan K. Mattick
Moore, O'Connell & Refling, P.C.
P.O. Box 1288
Bozeman, MT 59771-1288
morlaw@qwestoffice.net
Attorneys for Montana Well Drillers Association - Intervenors/Appellants

Matthew K. Bishop
Laura King
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
bishop@westernlaw.org
king@westernlaw.org
Attorneys for Petitioners/Appellees

Abigail J. St. Lawrence
Bloomquist Law Firm
3355 Colton Dr., Suite A
Helena, MT 59602
blf@helenalaw.com
Attorneys for Defendant-Intervenor Montana Association of REALTORS® and Montana Building Industries Association - Intervenors/Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

Page(s)

TABLE OF CONTENTS (cont'd)

Page(s)

TABLE OF CONTENTS (cont'd)

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes (cont'd)

Other Authorities

Rules

I. STATEMENT OF ISSUES

Whether the District Court correctly determined that Administrative Rule of Montana 36.12.101(13), as adopted by the Department of Natural Resources and Conservation ("DNRC"), impermissibly conflicts with the Montana Water Use Act, specifically Montana Code Annotated § 85-2-306, and is not reasonably necessary to effectuate the purpose of the statute.

II. STATEMENT OF THE CASE

In 2009, Clark Fork Coalition filed a petition with the DNRC for declaratory ruling and request to amend Administrative Rule of Montana 36.12.101(13). Pursuant to Montana Code Annotated § 2-4-501, the agency processed the request for a declaratory ruling under the contested case procedures of the Montana Administrative Procedure Act, title 2, chapter 4, part 6. In August 2010, DNRC denied the petition, and Clark Fork Coalition filed a petition for judicial review under Montana Code Annotated § 2-4-501 and § 2-4-704. On November 8, 2010, the parties entered into a stipulation and order of dismissal in which DNRC agreed to initiate a rulemaking process to change the Rule. (CRR 9.)

After the DNRC failed to adopt revisions to bring the rule in compliance with the Montana Water Use Act, the Clark Fork Coalition withdrew from the stipulation and petitioned the District Court for judicial

review under Montana Code Annotated § 2-4-501 and § 2-4-704. The District Court granted Mountain Water's motion to intervene in May 2014. (CRR 30.)

The District Court concluded that Administrative Rule of Montana 36.12.101(13) conflicts with the general purposes of Montana's Water Use Act, and specifically Montana Code Annotated § 85-2-306. *Id.* The Court invalidated the rule, reinstated DNRC's previous rule defining the term "combined appropriation," and ordered the DNRC to conduct rulemaking consistent with the Order. *Id.*

Intervenors, Montana Association of Realtors and Montana Building Industry Association appealed the ruling to this Court. DNRC did not appeal.

III. STATEMENT OF FACTS

This case involves the interpretation of a narrow exception to the Montana Water Use Act. The Montana Constitution, adopted in 1972, requires the Legislature to, "provide for the administration, control, and regulation of water rights and [to] establish a system of centralized records, in addition to the present system of legal records." Mont. Const. art IX, § 3(4). Shortly after adoption of this new Constitutional mandate, the Legislature passed the landmark Montana Water Use Act of 1973 ("Water

Use Act"). App. 1. The Water Use Act sets forth the statutory framework under which water rights are administered and adjudicated today.

A critical component of the Water Use Act is the permit system administered by DNRC. The Act requires those seeking new appropriations of water to apply to DNRC for a permit. Mont. Code Ann. § 85-2-302 (2015). DNRC reviews all permit applications to confirm that water is both physically and legally available before issuing a permit for a new water use. Mont. Code Ann. § 85-2-311 (2015). The law also requires the DNRC to provide notice of the permit application to those potentially impacted by the appropriation, and senior appropriators are afforded an opportunity to object. Mont. Code Ann. § 85-2-307 (2015). If an objection to issuance of permit is filed, the law requires additional scrutiny of the permit application. If the application is for ground water in a closed basin, the statute requires even further scrutiny, including a hydrogeologic report and aquifer recharge or mitigation plan. Mont. Code Ann. § 85-2-360 (2015).

As originally adopted, the Water Use Act, § 16, provided a narrow exception to the permitting process for small, individual wells. The original statute stated:

> Outside the boundaries of a controlled ground water area, a permit is not required before appropriating ground water for domestic,

> agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons a minute. . . .

App. 1 at § 16(4); Mont. Rev. Code Ann. § 89-880(4) (1973).

In 1987, the Legislature narrowed the exception by adding the following language: "except that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit." App. 2 at § 2. The 1987 statute did not define the term "combined appropriation."

Following the change in 1987, DNRC adopted a rule to implement the modified statute. The 1987 rule defined "combined appropriation" as:

> [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 for the entire project or development from these ground water developments in the same source aquifer is the 'combined appropriation.'

App. 1 at 13-14 to Intervenor/Appellants Mont. Well Drillers Ass'n Opening

Br., Nov. 16, 2015 ("Well Drillers Br.").

In 1991, after the combined appropriation rule was in effect, the Legislature again amended the statute to reduce the maximum allowable flow rate eligible for the exemption to 35 gallons per minute. The 1991 legislation also added a 10 acre-feet annual volume limit. App 3. In 1993, in the absence of any statutory directive to do so, and without holding a public hearing or receiving public comment, the DNRC changed the administrative rule definition of "combined appropriation" to mean wells "physically manifold into the same system." Mont. Admin. R. 36.12.101(13). The "physically manifold" definition had no basis in statute or the legislative record, and was at cross purposes with the most recent legislative amendment to the statute aimed at narrowing the exception to the permitting requirements of the Water Use Act.

The DNRC exempt well rule has turned the issuance of permits under the Water Use Act on its head. The purpose of the Water Use Act is to establish an orderly system for water rights in Montana and to protect senior appropriators. To accomplish these ends, the law requires assessment of availability of water before new appropriations are permitted, notice to senior users, an opportunity for senior users to object, and a system to allow senior appropriators to make calls on junior users.

The DNRC exempt well rule, as modified in 1993, erodes the foundation of the Water Use Act. Large new housing developments need not comply with the Act's requirement to assess physical and legal availability of water in a permitting process before making large new appropriations. The DNRC exempt well rule allows new wells to be installed without notice to senior users and gives senior appropriators no effective opportunity to object before the large-scale new appropriations begin. Instead, senior users must police the use of exempt wells to defend their rights after appropriations have already begun, which is part of the burden the Water Use Act was designed to prevent. The DNRC rule provides no effective system to allow senior appropriators to enforce their senior rights.

The DNRC rule made the narrow exception to the Water Use Act a major avenue for new unpermitted domestic water rights in Montana, undermining the Water Use Act. Roughly two-thirds of the subdivision lots established in Montana between July 2004 and June 2011 received water from exempt wells. App. 7 at 4. Projections show that the number of exempt wells could more than double by 2040. App. 7 at 6.

IV. STANDARD OF REVIEW

This Court applies the same standard of review applied by the District

Court. *Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 15, 340 Mont. 309, 174 P.3d 496 (citing *Mont. Power Co. v. Public Serv. Comm'n*, 2001 MT 102, ¶ 18, 305 Mont. 260, 26 P.3d 91; *Synek v. State Comp. Ins. Fund*, 272 Mont. 246, 250, 900 P.2d 884, 886 (1995)). In this Court, as in the District Court, questions of law are reviewed to determine if the Agency's interpretation of the law is correct. *Id.* Therefore, the Court must review the Agency's interpretation of the statute, as well as the District Court's conclusions of law, to determine if they are correct. *Id.* (citing *Ruby Mountain Trust v. Dep't of Revenue*, 2000 MT 166, ¶ 13, 300 Mont. 297, 3 P.3d 654; *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990)).

V. SUMMARY OF ARGUMENT

This case is about an agency construction of a narrow exception within the Water Use Act that is at odds with the overall structure of the Act, and Montana water law. Since 1973, when the statute was adopted, a comprehensive system for permitting new appropriations forms the backbone of Montana water law. The statutory framework for permitting new appropriations protects senior appropriators by requiring an evaluation of the availability of water, providing notice to senior users and allowing senior users to object to any new permit. The law also provides effective

remedies to senior appropriators after permitting new uses to allow for calls upon junior water rights holders in times of water scarcity.

Within the landmark Water Use Act, the Legislature provided a narrow exception to permitting requirements under Montana Code Annotated § 85-2-306(3)(a). The exception allows for small appropriation of groundwater diverting 35 gallons per minute or less, not exceeding a volume of 10 acre-feet a year without a permit from the DNRC. Mont. Code Ann. § 85-2-306(3)(a)(iii) (2015). Driven by concern that the exception would be used for larger appropriations than intended, the Legislature later added limiting language to the exception, clarifying 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." *Id.*

By rule, the DNRC provided that "combined 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." Mont. Admin. R. 36.12.101(13). The "physically manifold" requirement has no basis in the exempt well statute itself, the Water Use Act as a whole, or the legislative record. The DNRC's exempt well rule created such a large loophole to the Water Use Act that, rather than the intended

narrow exception to the Water Use Act, it grew to become a major avenue for acquiring new appropriations of water across Montana without the need to obtain a permit.

The DNRC's exempt well rule harms senior appropriators by undermining major pillars of the Water Use Act. It allows major new housing developments near Montana's growing urban areas to make large appropriations of water for domestic uses without evaluating the availability of the water as required by the Water Use Act. If restored, the rule would deny senior appropriators the notice and opportunity to object required by the Water Use Act. Left unchecked, the rule would deny senior rights holders of any effective remedy to enforce their water rights against large housing developments in future times of scarcity.

The DNRC rule cannot coexist peacefully with the Water Use Act, and thus the District Court correctly concluded that the rule impermissibly conflicts with the general purpose of Montana's Water Use Act and specifically with Montana Code Annotated § 85-2-306. The District Court properly vacated the rule, reinstated the DNRC's prior rule defining "combined appropriation," and ordered further rulemaking consistent with the Water Use Act.

///

VI. ARGUMENT

A. The Purpose of the Water Use Act was to Replace Chaos with Order and Protect Senior Appropriators.

The purpose of the Water Use Act was to bring an end to the chaos of the system of administering water rights for much of Montana's history and provide for an orderly system for permitting new uses and protecting senior appropriators. When viewed in context -- including the purpose of the Water Use Act, how the provisions of the Water Use Act fulfill its purpose, and the specific language of the exempt well statute -- it is clear the statutory exception for small, individual wells was never intended to be a major avenue to authorize large new appropriations without complying with the provisions of the Water Use Act.

1. The interpretation of the exempt well statute must be interpreted in a way that gives effect to the Water Use Act as a whole.

When reviewing the construction of a statute within the Water Use Act, the court must "view the statute within the context of the meaning and purpose of water rights adjudication in Montana." *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 31, 361 Mont. 77, 255 P.3d 179 (citing Mont. Code Ann. § 85-2-101(1)). The court should "endeavor to avoid a statutory construction that renders any section of the statute

superfluous or fails to give effect to all the words used." *Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224 ("*Mont. Trout I*"). When a court interprets multiple related statutes related to the same subject, it must "harmonize" them in order to give effect to each. When possible, the court interprets statutes to give effect to the Legislature's intent and will "read and construe the statute as a whole to avoid an absurd result and to give effect to a statute's purpose." *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. In situations where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls. *Id.* (citing *State v. Oie*, 2007 MT 328, ¶ 17, 340 Mont. 205, 174 P.3d 937).

2. The purpose of the Water Use Act is to codify the doctrine of prior appropriation by establishing a structured process for acquiring and protecting water rights.

The doctrine of prior appropriation – based on the concept of "first in time, first in right" – is the foundation of Western water law and deeply rooted in Montana jurisprudence. As far back as 1911, the Montana Supreme Court recognized "first in time, first in right" as the law governing rights between appropriators. *Featherman v. Hennessy*, 43 Mont. 310, 316, 115 P. 983, 986 (1911). In 1953, the Court affirmed that the doctrine was alive and well, stating that, "he who first diverts the water to a beneficial use

has the prior right thereto where the right is based upon the custom and practice of the early settlers as here . . . ." *Midkiff v. Kincheloe*, 127 Mont. 324, 328, 263 P.2d 976, 978 (1953).

Montana law provided two possible ways of perfecting a water right before 1973. A claimant could post a notice at the point of diversion and file a notice with the county clerk pursuant to statute. Mont. Laws 1885, §§ 6 through 10; Mont. Rev. Code Ann. §§ 89-810 through -814 (1947). The second method required the claimant simply to put the water to beneficial use. *See Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897). Over time, both of these methods had significant shortcomings because they resulted in unclear records and lack of certainty.

By the 1970s, the growing population of Montana required an alternative to the "chaos" of Montana water law. *See* Apps. 10 and 11. The 1972 Montana Constitutional Convention aimed to replace Montana's dysfunctional appropriation system. *Mont. Trout I*, ¶¶ 5-6. The 1972 Constitution required the Legislature to "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." Mont. Const. art. IX, § 3(4). The next year, the Legislature passed the Water Use Act of 1973, Montana Code Annotated §§ 85-2-212 to -907,

establishing a "system of general stream adjudication administered by the Department of Natural Resources and Conservation (DNRC) and also provided, from that time on, that the statutory method was the exclusive way to acquire a water right." *In re Powder River Drainage Area*, 216 Mont. 361, 367, 702 P.2d 948, 951 (1985).

As noted in the Order on appeal, Professor Albert Stone of the University of Montana explained the need for a permit system shortly before passage of the Water Use Act in 1973. He wrote:

> Montana's present loose law, by which a water right may be acquired simply by making use of water, inherently results in uncertainty, ignorance of what rights there are in a stream, disputes, and litigation. And the statutory method of appropriation, under which a person files with the county clerk a statement of what he hopes to put to a beneficial use, has exactly the same deficiencies.
>
> . . .
>
> 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 . . . [A]nother reason for requiring persons to obtain a permit from a state agency which is concerned with water uses: to introduce some control over how much water a person may claim for a particular use. And lastly, when a person appropriates under a permit system, both he and anyone else who is interested will be able to ascertain what has been done, what the new appropriator is entitled to do, when he can do it, and what his relationship is to other users.

App. 4 at 17.

Perhaps anticipating future disputes over the meaning and purpose of the Act, the drafters of the Water Use Act took care to explicitly set forth the bill's purpose in statute. The bill explicitly endorses the doctrine of prior appropriation. *See* App. 1 at 8; Mont. Code Ann. § 85-2-401 (2015) ("between appropriators, the first in time is the first in right."). The Act references the requirement in the Montana Constitution "that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights" and that "[i]t is . . . the policy of this state and a purpose of this chapter to recognize and confirm all existing rights to the use of any waters for any useful or beneficial purpose." Mont. Code Ann. § 85-2-101(2), (4) (2015). The Act also lists as a "policy consideration" that the "greatest economic benefit to the people of Montana can be secured only by the sound coordination of development and utilization of water resources with the development and utilization of all other resources of the state." Mont. Code Ann. § 85-1-101(8) (2015).

3. The Water Use Act established an orderly system of permitting new appropriations aimed at protecting senior appropriators.

Consistent with Professor Stone's recommendations, the Water Use

Act aimed to replace the chaotic prior system that caused "uncertainty, ignorance of what rights there are in a stream, disputes, and litigation" (App. 4 at 17) with a comprehensive new permitting process that requires an assessment of the availability of water, notice and opportunity to object to senior appropriators, and a system for enforcing senior water rights in times of water scarcity.

a. Evaluation of physical and legal availability of water before permitting new appropriations.

Under the Water Use Act, all new water appropriations after July 1, 1973 require a permit from the DNRC. Under the Act, groundwater and surface water are managed under the same permitting system, and an applicant for a ground water permit must generally follow the same permitting process as a surface water applicant. Mont. Code Ann. § 85-2-311(1)(b).[1] Under the Water Use Act, an applicant for a water permit has the burden to establish:

1) the proposed use of water is a beneficial use,

2) water is physically available at the proposed point of diversion in the amount and during the period that the applicant

[1] Unless Administrative Rule of Montana 36.12.101(13) applies, a ground water applicant generally must demonstrate that "the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected."

seeks to appropriate;

3) the amount of water requested can reasonably be considered legally available during the period in which the applicant seeks to appropriate; AND

4) the water rights of a prior appropriator will not be adversely affected.

See Mont. Code Ann. § 85-2-311.

The Act strictly adheres to the prior appropriation doctrine and does not prioritize any water use over any other. *In re Adjudication of the Existing Rights to the Use of all the Water, Both Surface & Underground Within the Clark Fork River Drainage Area*, 274 Mont. 340, 908 P.2d 1353, 1356 (1995). If the applicant meets the statutory criteria, the DNRC issues a preliminary determination that the permit will be granted. If an objection is filed, the DNRC considers additional criteria. The Act requires additional procedures before approving new appropriations in closed basins, including a mandatory hydrogeologic report and other criteria under Montana Code Annotated § 85-2-360, applying a "no net depletion of water" standard. In a concurrent but separate process, the State of Montana continues to adjudicate existing water rights under comprehensive general adjudication of

the entire state.[2]

b. Senior appropriators provided notice and opportunity to object.

Upon receipt of an application for a permit for a new appropriation, the DNRC publishes notice of receipt of the application on the DNRC Website. Mont. Code Ann. § 85-2-307. The DNRC may then meet informally with the applicant and persons with standing to discuss the application. The DNRC then publishes notice in a newspaper of general circulation in the area of the source and specific notice is provided to senior water right holders and others who may be affected by the new appropriation. *Id.*

Any person whose property, water rights, or interests would be adversely affected by a proposed new appropriation may object to the permit application. Mont. Code Ann. § 85-2-307(3). The objector must list facts indicating that one or more of the approval criteria under the Water Use Act permitting process are not met. Mont. Code Ann. § 85-2-311(2). The

---

[2] Senate Bill No. 76 in the 1979 Legislature established a Montana Water Court with jurisdiction over adjudication of pre-1973 water right claims. In 1979, the Montana Supreme Court issued a Water Rights Order requiring all persons claiming existing water rights to file claims with the DNRC by date certain. Failure to file by the deadline would result in a presumption of an abandonment of the right. *See* Mont. Code Ann. § 85-2-212 (1979). Claims were subject to a rigorous process of notice and resolving objections.

burden is on the applicant to show that the objector is wrong. *Id.* This process reduces the "uncertainty, ignorance of what rights there are in a stream, disputes, and litigation" by giving senior appropriators an opportunity to evaluate a possible new appropriation and object *before* the new appropriation is permitted, not after the new user has begun relying upon the water. App. 4 at 17.

c. System of enforceable seniority in times of water scarcity.

Under the Water Use Act, a senior appropriator may make a "call" on a junior appropriator documenting a request to cease water withdrawals in an amount necessary for the senior user to appropriate if she believes water is not reaching her diversion because of appropriations by junior appropriator. If the junior appropriator fails to comply with the call, the senior appropriator may file a complaint with the DNRC. Mont. Code Ann. § 85-2-114 (2015). Other remedies include petitioning the District Court for a water commissioner, a temporary restraining order, or a preliminary injunction in District Court. Mont. Code Ann. § 85-5-101 (2015).

4. The exempt well statute is written as a narrow exception to the permitting requirements established by the Water Use Act.

Deep within the Water Use Act, a few lines of code provide the

following exception to the overarching permitting system established by the Water Use Act:

> 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; . . . .

Mont. Code Ann. § 85-2-306(3)(a).

The exception is written narrowly with numerous qualifiers, reflecting the intent of the legislators who drafted it to prevent the exception from undermining the purpose of the Water Use Act.

a. The plain language of the exempt well statute establishes it as a narrow exception.

The language of the exception is deliberately narrow. Mont. Code Ann. § 85-2-306(3)(a). It specifies a long list of facts that would prevent a well from qualifying for the exception. By the strict terms of the statute, a well cannot qualify for the exception if it lies within a stream depletion zone, if it pumps more than 35 gallons a minute, *or* it exceeds 10 acre-feet per year. Even satisfying these criteria, a well may still be disqualified for the

exception under the plain language of the statute if it is 1) a "combined appropriation," 2) from the "same source," 3) by "two or more wells or developed springs," and 4) exceeds 10 acre-feet per year.

The exempt well statute is an exception to the permitting requirements of the Water Use Act for which a long list of statutory criteria aim at limiting its scope. The drafters of the exception went to great lengths to limit the scope of the exception and it is properly read narrowly. This Court narrowly construes stated exemptions and exceptions included within a statute. *See Charlotte Mills, Clerk & Recorder v. Alta Vista Ranch*, 2008 MT 214, ¶ 18, 344 Mont. 212, 187 P.3d 627. It has refused to construe exceptions in a way that swallows the overarching rule. *Id; see also Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649 ("we must narrowly construe the exceptions lest they swallow the rule"). As described above, the Water Use Act is a remedial statute aimed at protecting senior appropriators, and exceptions to remedial legislation are strictly construed. *See Hulse v. Job Serv. N.D.*, 492 N.W.2d 604, 607 (N.D. 1992); *Marckstadt v. Lockheed Martin Corp.*, 228 P.3d 462, 467 (N.M. 2009); *In re R.C.*, No. 11CA1940, 2013 Colo. App. LEXIS 2059, at *4 (May 23, 2013). Any correct interpretation of this statute must provide the exempt well statute with a narrow construction.

b. The Legislative intent makes clear that the exempt well statute is a narrow exception to the Water Use Act.

The Legislature never intended the narrowly drafted exempt well exception to the Water Use Act to be a primary source of new water rights for large-scale new appropriations. In contrast, since passage of the Water Use Act in 1973, the Legislature has taken a number of steps to further narrow the exception to protect senior appropriators. The 1987 Legislature *narrowed* the exemption by adding the "combined appropriation" limiting language that is at issue before the Court in this appeal. App. 2. In 1991, while the previous DNRC exempt well rule was in effect (the 1987 rule that did not include a physical connectivity requirement), the Legislature further *narrowed* the exception by lowering the flow rate limit to 35 gallons per minute and adding a 10 acre-feet volume limit to the exempt well statute. The purpose of the change was driven by concern at the time that the 100 gallons per minute flow limitation was allowing large appropriations of water for large parcels of land, subdivisions, and trailer parks. App. 5 at 3.

The Opening Brief of the Well Drillers argued that the Legislature's singular goal for the 1991 amendment was to prevent large agricultural uses from exploiting the exception. Well Drillers Br. 24. They argue that, when the Legislature imposed a volume limit to the exempt well statute in 1991,

the DNRC properly found that it need only exclude those wells that were physically manifold together to meet the legislative intent of preventing the use of exempt wells for large-scale agricultural uses. This argument is inconsistent with settled tenets of law. Montana water law does not discriminate among uses. *Hohenlohe v. State*, 2010 MT 203, ¶ 48, 357 Mont. 438, 240 P.3d 628 (citing Mont. Code Ann. § 85-1-101(4)). When the statute is silent as to the purpose of the water use, it is impermissible for an Agency to interpret the statute as if it applied only to a particular type of use.

If the sole concern of the 1991 Legislature in establishing a new volume limit to the exempt well statute was agricultural purposes, the Legislature could have drafted the amendment to single out agricultural uses rather than broadly limiting all exempt wells to 10 acre-feet per year. However, the Legislature has never enacted such a preference for a particular type of use, and instead has strictly adhered to the doctrine of prior appropriation deeply rooted in Montana water law, giving equal treatment to beneficial uses. Mont. Code Ann. 85-2-301(1) (2015) ("A person may appropriate water only for a beneficial use."); *Fitzpatrick v. Montgomery*, 20 Mont. 181, 187, 50 P. 416, 417 (1897) (an appropriator for one useful purpose "has no preference or superior right in law to an appropriator for

any other purpose").

Second, there is no reason to believe the Legislature was concerned any more about one type of use than another when enacting the volume limitation. Any excessive appropriation via the exempt well statute threatens senior appropriators and therefore all appropriations via the exempt well statute were subject to the new volume limitation.

Third, in their Opening Brief, the Well Drillers argue that if there was "any doubt about the legislative intent [of the exempt well statute], it was clarified by the passage of Senate Bill 19 during the 2013 legislative session." Well Drillers Br. 27. If enacted into law, the bill would have codified the DNRC exempt well rule. App. 6. Although the Governor vetoed Senate Bill 19, the Well Drillers argue that the bill nonetheless "demonstrates a definitive legislative understanding that the 1993 Rule is consistent with the plain language of 85-2-306(3), MCA." Well Drillers Br. 27. This argument rests on the flawed notion that a bill that fails to become law somehow changes the meaning of a previously enacted statute. No bill may become law if the governor properly and timely vetoes the bill. Mont. Const. art. VI, § 10. When the Governor vetoed Senate Bill 19, he blocked an effort to amend the exempt well statute. Thus, the only relevant law governing this matter remains the exempt well statute as enacted by the 1991

Legislature. It is the plain language of that 1991 statute, as well as the legislative intent for that statute, that is relevant to this matter, not the language or purpose of any subsequently vetoed pieces of legislation.

B. The District Court Correctly found that Administrative Rule of Montana 36.12.101(13) conflicts with the Water Use Act.

The District Court correctly found that the DNRC rule conflicts with the Water Use Act because it turns a narrow exception to the Act into a major mechanism for acquiring water for new residential development in Montana, leading to the chaos and uncertainty the Water Use Act aims to prevent. Further, the DNRC definition of "combined appropriation" has no basis in the exempt well statute or the legislative record.

1. Administrative Rule of Montana 36.12.101(13) turns a narrow exception of the Water Use Act into a major mechanism for acquiring water for new residential development in Montana, conflicting with the Water Use Act.

Although the Water Use Act aimed to create an orderly permit system to control new water appropriations, the DNRC rule allows for large, unpermitted new appropriations of water that render major aspects of the Water Use Act impotent.

///

///

a. The DNRC rule incentivizes those seeking large, new appropriations to skip the Water Use Act process for evaluating the availability of water.

The DNRC's restructured exempt well rule created an incentive for those seeking large new appropriations for residential development to avoid permitting, thereby creating an unlawful result. The exempt well rule provided developers a choice. They can seek a permit as provided for under the Water Use Act, which requires the extensive process described above to protect senior appropriators. Or a developer can choose to provide water to hundreds of new homes without complying with any analysis of the physical or legal availability of water by pumping water to the homes through exempt wells. As a result of what amounts to be a perverse incentive to avoid permits, the volume of water pumped through exempt wells is expected to more than double by 2030. App. 7 at 6.

Thus, the DNRC's exempt well rule is unlawfully eroding the protections the Water Use Act was structured to provide to senior appropriators. The perverse incentive has even more severe consequences in a closed basin: under the Water Use Act, groundwater in a closed basin is only available under strict conditions requiring extensive study to determine whether water is available and adverse effects to senior surface water users will not occur. Mont. Code Ann. § 85-2-360. The problem is obvious: as

the exception from permitting expands, senior water rights owners lose the protections afforded to them in statute under the Water Use Act.

This incentive to avoid permitting particularly harms municipal water providers holding senior water rights in growing urban areas. For example, Mountain Water Company provides municipal water service to new developments within the greater Missoula area by extending any water mains from its existing wells and distribution system. Under Montana law, growth in municipal water use must proceed within the confines of the Water Use Act because municipal water use enjoys no preference. Before water mains are extended, Mountain Water must obtain regulatory authorizations. *See* Mont. Admin. R. 38.5.2503(6) (requiring regulatory approval of engineering plans before water mains are extended). It also must determine whether its existing water rights are satisfactory, or whether new water rights must be obtained.

In a closed basin, groundwater is only available under strict conditions requiring extensive study to determine that water is available and adverse effects to senior surface water users will not occur. Mont. Code Ann. § 85-2-360. Mountain Water's service area is surrounded by designated closed basins. The Upper Clark Fork Basin begins at the confluence of the Blackfoot and Clark Fork Rivers, which is immediately east of Mountain

Water's service area. Mont. Code Ann. § 85-2-335 (2015). The closed Bitterroot Basin ends at the confluence of the Bitterroot and Clark Fork Rivers, within a portion of the service area and above the Missoula aquifer. Mont. Code Ann. §§ 85-2-336 (2015) (Upper Clark Fork Basin); 85-2-344(2) (2015); *see generally Bostwick Props., Inc. v. Mont. Dep't. of Natural Res. & Conservation*, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154 (upholding denial of permit and mitigation plan in closed basin).

In 1998, Mountain Water applied to expand their water right to serve entire Missoula valley, including East Missoula. DNRC granted the change. App. 8 at 4. In 2006, Mountain Water applied for a new well water right to link East Missoula subdivision to municipal water. DNRC denied the application. *Id.* The Clark Fork River flows northwest out of Missoula and has its confluence with the Flathead River 60 miles downstream. Senior appropriators object if Mountain Water increases appropriations from this source. Thus, Mountain Water is forced to buy new water rights.

Estimates for complying with the various procedures and studies required to obtain a permit for a non-exempt well range from $40,000 to well over $100,000, plus whatever additional costs are attributed to any required mitigation plan and purchase of mitigation water. In highly appropriated closed drainages such as the Clark Fork and Bitterroot

drainages, additional water rights for mitigation may not be available at any cost.

When a new housing development connects to the Mountain Water system, the costs associated with complying with the Water Use Act are part of the deal. The DNRC exempt well rule provides an attractive, cheap alternative to developers. As a result, the obvious choice for new housing developments in the Missoula Valley is to acquire water the cheap and easy way: through the DNRC's broad exempt well rule. The consequence of this violates spirit of the Water Use Act by avoiding the requirement that large new appropriations of water be permitted after careful review.

The perverse incentive plays out all around the Missoula area. For example, Ravalli County is located within the closed Bitterroot Basin and has seen a 61% population increase from 1990 to 2010. A substantial portion of that new population relied upon exempt wells, not permits, to acquire water. From 1991 to 2010, the DNRC issued 6,509 exempt well certificates in the County. The same trends are happening elsewhere in the Missoula area. By 2040, experts are projecting 18,000 exempt wells in Bitterroot, 9,100 in the Upper Clark Fork, with a volume of 21,000 and 10,600 respectively. App. 7 at 6.

Given the hydrologic connections between the exempt wells and the

Missoula aquifer, the DNRC exempt well rule threatens to cause an adverse effect on the water rights of Mountain Water and other senior rights holders in the Missoula area.

Ironically, the perverse incentive created by the DNRC exempt well rule punishes developers who chose centralized, planned sources of water for the new homes by imposing the cost of assessing water availability upon them, while leaving others off the hook. Two developers in Lewis and Clark County in 2011 provide a great side-by-side example. The Timberworks Estates development in the Helena Valley relied upon exempt wells for water. Although the development occurred in a closed basin, the development was not required to conduct any analysis of legal availability or water or adverse effect from the proposed withdrawal. Meanwhile a separate development underway at the same time relied on a three well system serving roughly 150 people. This development, also in a closed basin, required both a study of the availability of water and mitigation plan. App. 7 at 5. Allowing one housing development to appropriate large amounts of water without a study of availability under the Water Use Act, while requiring another to do so, makes no sense and violates the Water Use Act.

b. The DNRC rule denies senior appropriators notice and opportunity to object before new, large-scale appropriations are made.

The Water Use Act provides senior appropriators an opportunity to object to the DNRC before new appropriations are permitted. The reason why the Water Use Act required such a process is simple: the senior water rights holder has an opportunity to object *before* he is harmed by the new appropriation and the new user has begun relying upon the new appropriation of water. This eases the burden on senior appropriators and reduces conflict over new uses.

The DNRC's rule flips this process on its head. When large volumes of water are appropriated for a new subdivision via exempt wells, senior users are deprived of the notice and opportunity to object required by the Water Use Act. Senior appropriators must affirmatively police the use of water by exempt wells and then demonstrate, after the fact, that the appropriations are adverse to their water right. For reasons explained below, the ability to make a call upon large developments is ineffective.

c. The DNRC rule renders impracticable process of senior users making calls on junior appropriators.

Any senior water rights holder may make a call upon a junior water rights holder. This remains true regardless if the junior user has a permit or

if he has appropriated the water through an exempt well. However, in practice, the DNRC rule deprives senior appropriators of effectively utilizing remedies under Montana law to protect their water rights against junior users.

The first reason the rule denies senior appropriators an effective remedy is the "cumulative effect problem." When a large subdivision can be shown to impact senior users, it is impossible to determine which of the exempt wells is impacting senior users. This gives senior water users the choice of making a call on an entire subdivision or making no call at all. Forcing a senior water rights holder to take on hundreds of homeowners is a sure recipe for uncertainty, litigation, and chaos.

Second, a senior water rights holder may not realistically expect to shut water off to an entire subdivision because of the inevitable health and safety problems such a remedy would pose. Turning off water to hundreds of homes would render the neighborhoods unsafe and uninhabitable. This presents a court asked to enforce senior water rights with a remedy that cannot realistically be enforced. This also establishes a de facto, impermissible water use preference.

Third, under the DNRC rule it is extremely difficult for senior appropriators to demonstrate that an appropriation of groundwater already

underway has impacted their water rights. The DNRC rule requires senior water users to police the exempt wells and then demonstrate that the wells are impacting their surface or groundwater. This is an extremely difficult task to perform after the fact in part because of the difficulty of anticipating and preventing the adverse effect of large underwater appropriations. A report issued by the Montana Bureau of Mines and Geology issued to the Water Policy Interim Committee in 2008 illustrated the problem:

> There may be a considerable time lag between the start of pumping and any reduction in stream flow depending upon the location of the pumping well (distance and depth) relative to the stream, the hydraulic characteristics of the aquifer, and the pumping rate. Furthermore, the effect of ground-water pumping on stream flow may persist long after pumping has stopped. This is a simplified scenario; in the real world, there will be other hydrogeologic factors such as ET, recharge variability, the presence of disconnected streams or reaches, low-permeability streambeds, and deep confined ground-water systems that complicate the stream–aquifer interactions.

App. 9 at 7.

The deliberative process established by the Water Use Act is designed to evaluate the complex relationship between a proposed new groundwater appropriation and impact on senior users. The DNRC rule undermines the Water Use Act by forcing senior users to make a showing of harm after the

appropriation is well underway. This task is nearly impossible.

The overall impossibility of enforcing senior water rights under the rule leaves senior water rights with few options. By neutering a senior water rights holder's enforcement options, the DNRC rule risks rendering the doctrine of prior appropriation as codified by the Water Use Act a relic of the past.

2. The DNRC rule lacks any basis in the exempt well statute or the legislative record.

In the absence of any statutory directive to do so, in 1993 the DNRC changed the administrative rule definition of "combined appropriation" to mean wells "physically manifold into the same system." Nowhere in the statute is there any language suggesting a requirement that a combined appropriation be from wells "physically manifold" together.

The Maxim of interpretation, *expressio unius est exclusio alterius,* is "routinely cited" in Montana case law. *Carbon Cnty. v. Union Reserve Coal Co.*, 271 Mont. 459, 898 P.2d 680, 684 (1995) (citations omitted). When a statute includes specific list of three criteria that narrows the small well exception, the statute should not and cannot be read to include an additional "physically manifold" requirement.

Further, at no point during the extensive litigation has any party cited

any evidence that, when enacting either the original exempt well statute under the Water Use Act, or in enacting the multiple amendments narrowing the exception, the Legislature intended the definition of "combined appropriation" to mean "physically manifold together."

3. If the District Court is reversed, DNRC exempt well rule would return Montana water law to the "chaos" of pre-Montana Water Use Act.

By directly conflicting with the Water Use Act, the DNRC exempt well rule has lurched Montana water law back toward the chaos that reigned before passage of the Water Use Act complete with the "uncertainty, ignorance of what rights there are in a stream, disputes, and litigation" that Albert Stone argued were among the ailments the MUWA aimed to cure. *See* App. 4 at 17.

Building large subdivisions without carefully assessing whether such developments impair senior water rights is a recipe for economic disaster. If, during times of water scarcity, new subdivisions are deprived of water due to calls by senior users, the value of homes relying on exempt wells across the state would collapse. No housing market can be sustained without a reliable water supply.

The use of the exempt well provision to provide water to dense subdivisions is also a recipe for a public health crisis. The exempt well

provision never intended for dense subdivisions. Private individual sewer facilities in close proximity with exempt wells run a high risk of contamination of an aquifer. If left in place, the DNRC's exempt well rule places Montanan's future access to clean water at risk.

C. The District Court Correctly vacated Administrative Rule of Montana 36.12.101(13), reinstated the prior rule, and ordered new rulemaking process.

When a state agency has authority to adopt rules to carry out the provisions of a statute, the rule is not valid or effective unless it is "consistent and not in conflict with the statute" and "reasonably necessary to effectuate the purpose of the statute." Mont. Code Ann. § 2-4-305(6)(a)-(b) (2015); *see also Mont. Trout I*, 2006 MT 72. The District Court correctly concluded that the DNRC's administrative rule 36.12.101(13) conflicted with the general purpose of the Water Use Act and specifically with Montana Code Annotated § 85-2-306 and therefore vacated the rule. The effect of invalidating an agency rule is to reinstate the rule previously in force. *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (citing *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983)), *cited by Defenders of Wildlife v. Salazar*, 776 F. Supp. 2d 1178, 1186 (D. Mont. 2011). Therefore, the District Court properly reinstated the DNRC's previous exempt well rule pending further rulemaking consistent

with the law.

1. A district court correctly vacates an agency rule when it prejudices the substantial rights of senior appropriators.

This Court recently struck down an agency rule that failed to protect the rights of senior appropriators under Montana law in *Mont. Trout I,* ¶ 43. In that case, this Court reviewed a DNRC rule that failed to account for impacts to surface flow caused by the pre-stream capture of tributary groundwater under Montana Code Annotated § 2-4-305(6). The Court held the rule invalid, finding it conflicted with the Basin Closure Law for groundwater and thus failed to protect senior appropriators and surface flows. The Court concluded that, "[i]t makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent." *Mont. Trout I,* ¶ 43.

Here, as in *Montana Trout Unlimited,* it makes no difference to senior appropriators whether large-scale groundwater pumping for a new housing development is via thousands of individual exempt wells or a handful of large wells. The end result is the same: less surface flow in direct contravention of the Legislature's intent.

2. A district court need not defer to an agency interpretation of rule when compelling indications show agency interpretation is wrong.

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 Envtl. Review*, 2010 MT 10, ¶ 13, 355 Mont. 60, 227 P.3d 583 (citing *Steer, Inc.*, 803 P.2d at 603). Even when the public has relied upon a long-standing agency interpretation of a statute, the district court need not defer to an agency interpretation when compelling indications suggest that interpretation is wrong.

a. A district court need not defer to agency interpretation when no public reliance can be shown on agency decision.

Intervenors/Appellants Montana Association of Realtors and Montana Building Industry Association argue that the District Court violated Article II, section 8 of the Montana Constitution by giving insufficient deference to DNRC's interpretation of the exempt well statute. They cite *D'Ewart v. Neibauer*, 228 Mont. 335, 340, 742 P.2d 1015, 1018 (1987), as authority that an agency's interpretation of a statute should be given deference when the interpretation has been unchallenged for a long time unless compelling indication support a judicial determination the agency is wrong. However, deference to agencies is "most appropriate 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 I,* ¶ 37 (citing *Mont. Power Co.,* ¶ 24) (emphasis added). Absent public reliance on the long-standing rule, the court need not – and may not – defer to an agency rule that conflicts with a statute.

In this case, the District Court was not obligated to show deference to the DNRC interpretation because there was no public reliance on future water appropriations based on the DNRC's rule. Those who had relied upon the rule to appropriate water can continue to rely on the water provided by their exempt well. The District Court's invalidation of the exempt well rule impacted only future appropriators who have no justifiable basis for relying on the continuation of the DNRC's exempt well rule.

b. Compelling indications showed the agency interpretation was wrong.

Even assuming, *arguendo*, justifiable public reliance on the continuation of the DNRC's interpretation of the exempt well statute, such administrative interpretations are "not necessarily . . . binding on the courts." *Id.* (citing *Mont. Power Co.*, ¶ 25; *Doe v. Colburg*, 171 Mont. 97, 100, 555 P.2d 753, 754 (1976)).

Rather, the District Court should accord "such long-standing

administrative interpretations 'respectful consideration.'" *Id.* (citing *Mont. Power Co.*, ¶ 25 (quoting *Colburg*, 555 P.2d at 754)). The District Court may nonetheless find the construction of a statute by the person or agency responsible for its execution invalid when "there are compelling indications that the construction is wrong." *Mont. Power Co.*, ¶ 23 (quoting *D'Ewart*, 742 P.2d at 1018).

Compelling indications show that the DNRC construction of the exempt well statute is wrong. As argued above, as the Missoula area grows in population, there are tens of thousands of compelling indications that the DNRC's construction of the exempt well statute is wrong. The explosion of exempt wells in the Missoula valley threatens senior appropriators and undermines the entire structure of the Water Use Act. Left unchecked, as Montana's population continues to grow, the harmful and unlawful explosion of exempt wells is sure to return Montana to the chaos of pre-1973 Montana water law.

3. The District Court properly invalidated the DNRC rule when it found it failed to protect the rights of senior appropriators.

Compelling indications across the state of Montana show that the DNRC rule has turned what should be a narrow exception into a broad avenue around the Water Use Act. Since the rule conflicts with the Water

Use Act and harms senior appropriators, the District Court properly invalidated the rule. Since the effect of invalidating an agency rule is to reinstate the rule previously in force, the District Court properly reinstated the rule previously in force.

VII. CONCLUSION

This Court should affirm the judgment of the District Court invalidating the DNRC's Administrative Rule 36.12.101(13), reinstating DNRC's prior rule defining "combined appropriation," and ordering further rulemaking consistent with the Water Use Act.

DATED this 14th day of January, 2016.

Attorneys for Mountain Water Company

GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street - P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500

By _____
for Stephen R. Brown

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010 is 8,652 words, excluding Certificate of Service and Certificate of Compliance.

For Stephen R. Brown

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing ANSWER BRIEF OF INTERVENOR/APPELLEE MOUNTAIN WATER COMPANY by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

1. Matthew K. Bishop
Laura King
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
bishop@westernlaw.org
king@westernlaw.org
Attorneys for Petitioners/Appellees

2. Ryan K. Mattick
Moore, O'Connell & Refling, P.C.
P.O. Box 1288
Bozeman, MT 59771-1288
morlaw@qwestoffice.net
Attorneys for Montana Water Well Drillers Association – Intervenors/Appellants

3. Brian B. Bramblett
Kevin R. Peterson
Anne W. Yates
Special Assistant Attorneys General
Department of Natural Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601
BBramblett@mt.gov
KevinPeterson@mt.gov
ayates@mt.gov
Attorneys for Montana DNRC - Respondent

4. Abigail J. St. Lawrence
Bloomquist Law Firm
3355 Colton Dr., Suite A
Helena, MT 59602
blf@helenalaw.com
Attorneys for Defendant-Intervenor Montana Association of REALTORS® and Montana Building Industries Association - Intervenors/Appellants

DATED this 14h day of January, 2016.

Joan L. Feeley

Joan L. Feeley