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

THE CLARK FORK COALITION, a non-profit organization with senior water rights; KATRIN CHANDLER, an individual with senior water rights; BETTY J. LANNEN, an individual with senior water rights; POLLY REX, an individual with senior water rights; and JOSEPH MILLER, an individual with senior water rights,

Petitioners/Appellees,

v.

JOHN E. TUBBS, in his capacity as Director of the Montana Department of Natural Resources and Conservation and THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, an executive branch agency of the State of Montana,

Respondents,

v.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors/Appellants,

v.

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION,

Intervenors/Appellants,

v.

MOUNTAIN WATER COMPANY,

Intervenor/Appellee.

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

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STATEMENT OF THE ISSUES

1. Does the Montana Department of Natural Resources and Conservation's (Department's) rule defining "combined appropriation" as two or more groundwater developments that are "physically manifold" together conflict with the Montana Water Use Act (Water Use Act or Act), § 85-2-306(3)(a)(iii)?

2. After invalidating the Department's rule defining "combined appropriation," did the District Court abuse its discretion by remanding this matter to the Department for further rulemaking consistent with its order and reinstating the previous rule in effect, in the interim, pending completion of rulemaking?

STATEMENT OF THE CASE

This case involves a question of statutory interpretation. The Water Use Act does not require a permit for appropriations of less than 35 gallons a minute (gpm) and 10 acre-feet a year (afy). § 85-2-306(3)(a), MCA. A "combined appropriation" from two or more wells or developed springs from the same source, however, that exceeds 10 afy requires a permit. § 85-2-306(3)(a)(iii), MCA. The legislature did not define "combined appropriation," but its intent, as evidenced by the plain language, legislative history, and overall purpose of the Act, was to ensure that large consumptive water users not be allowed to circumvent the Act's permitting requirements simply by drilling multiple wells—whether connected or not—for a single use. This was the Department's understanding for nearly six years after the

legislature added the "combined appropriation" provision to the Water Use Act in 1987. *See* AR 7 at 1 (the Department's 1987 rule defining "combined appropriation"). [1] In 1993, however, and for yet-to-be understood reasons, *see* AR 7 at 3-4, the Department narrowly defined "combined appropriation" as an appropriation from groundwater developments that are "physically manifold" or plumbed together. 36.12.101(13), ARM.

The Clark Fork Coalition and four ranchers with senior water rights ("the Coalition") formally petitioned the Department for a declaratory ruling and an amendment of the 1993 rule. AR 1 at 1. The Coalition's petition explained that the 1993 rule allowed large consumptive water users to evade permitting and impact senior rights holders by simply drilling multiple, unconnected wells for a single large use. *See id.* at 18-28. The Coalition's petition was supported by the Department's sister agency, the Montana Department of Fish Wildlife and Parks (MFWP), as well as by Missoula County, the Mountain Water Company, the Brown Cattle Co., Cottonwood Environmental Law Center, Northern Plains Resource Council, Richard Hixson (Bozeman's City Engineer), Stillwater Protective Association, the Tongue River Water Users' Association, Mary Jane Alstad, Trout Unlimited, and fourteen individual ranchers with senior water rights.

[1] Citations to documents included in the administrative record (AR) are given as [Tab #] at [Page #]. Citations to documents included in the District Court record are given as Doc. [Document #] at [Page #].

See AR 37, 30, 31, 33, 34, 35, 36, 39, 40, 41, 42, and 43. Opposition to the Coalition's petition came only from the three groups that bring this appeal and benefit financially from the narrow definition of "combined appropriation" in the 1993 rule: the Montana Well Drillers Association ("Well Drillers") and the Montana Association of Realtors and the Montana Building Industry Association (collectively the "Realtors").

On August 17, 2010, the Department's hearing examiner denied the Coalition's petition. AR 54. The Department determined the 1993 "physically manifold" rule was "consistent and not in conflict with applicable law under the Water Use Act, Section 85-2-101 et. seq, MCA." *Id*. at 6-7. The Department acknowledged, however, that the 1993 rule had caused exempt wells to proliferate, that the problem was especially acute in closed basins, and that the rule needed to be changed. AR 54 at 18-20.

On September 14, 2010, the Coalition filed a complaint (petition for judicial review) challenging the Department's denial of their petition. Doc. 1. The Coalition and the Department were, however, able to reach a stipulated agreement that was signed by the district court on November 10, 2010. Doc. 9. In the stipulated agreement, the Parties agreed that: (a) it was never the Montana legislature's intent to allow large consumptive water users utilizing multiple exempt wells to qualify for an exemption from the Act's permitting requirements;

and (b) the 1993 rule defining "combined appropriation" needed to be amended, broadened, and updated through rulemaking. *Id.* at 2. The Department committed to adopting a new rule that would be "broader than and not limited solely to wells or developed springs that are physically manifold or connected together." *Id.* at ¶ 2.

The stipulated agreement ultimately fell apart after two attempts at rulemaking by the Department failed. *See* Doc. 13 at Exhibit E. After the Department informed the Coalition that it would no longer pursue rulemaking to broaden the definition of "combined appropriation," as agreed to in the stipulated agreement, the Coalition filed an unopposed motion to withdraw the agreement and re-open the case, which the district court granted. Docs. 13 and 14. The Parties then briefed the petition for judicial review on the merits.

A hearing was held on September 23, 2014, and, on October 17, 2014, the district court issued an order declaring that the Department's rule defining "combined appropriation" conflicts with the Water Use Act. Doc. 53 at 13. The district court invalidated the rule, ordered the Department to conduct further rulemaking, and, in the interim, reinstated the Department's previously enacted 1987 rule defining the term. *Id.* at 13.

The Well Drillers and Realtors, who had intervened in the district court proceeding, filed coordinated but separate appeals of the district court's order. Doc. 53. The Department elected not to appeal. The Department's ability to do

further rulemaking is currently on hold pending the outcome of the Well Drillers' and the Realtors' appeals.

STATEMENT OF FACTS

A. Montana's waters.

Montana's waters belong to the State for the use of its citizens. Art. IX, § 3 (3), Mont. Const. These waters must be "put to optimum beneficial use and not wasted" and "protected and conserved" as a matter of public policy. § 85-1-101, MCA.

Because Montana's waters belong to the State, water rights holders do not own water; they possess only the right to use water within the State's guidelines. § 85-2-422, MCA. This right is guided by the prior appropriation doctrine. A long-standing principle of Western water law, the prior appropriation doctrine was first recognized by the Montana Supreme Court in 1911, *Featherman v. Hennessy* (1911), 43 Mont. 310, 316, 115 P.983, 986, and has been incorporated into the Water Use Act, § 85-2-401, MCA. Under the doctrine, water is to be allocated strictly on the basis of whose use was first.

Water users in Montana are limited to the amount of water that can be beneficially used. Each "appropriation" is the amount of water withdrawn for a particular beneficial use, such as watering a specific acreage and crop, and its measure is the amount of water that the particular use demands. *See In re*

Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, ¶ 10, 311 Mont. 327, 55 P.3d 396.

B. The Water Use Act's permitting process.

Early in Montana's history, a water right could be acquired simply by making use of water and filing a statement of the use with the county clerk. Albert W. Stone, *Montana Water Rights – A New Opportunity*, 34 Mont. L. Rev. 57, 72 (1973). In 1972, the Montana Constitutional Convention recognized the need for improved recordkeeping and regulation. In response, the Convention directed the Montana legislature to provide for "the administration, control, and regulation of water rights and a system of centralized records." Art. IX, § 3 (3), Mont. Const. The Water Use Act was enacted in 1973 to provide for such administration, control, and regulation. § 85-2-101, MCA.

Pursuant to the Act, and subject to specific exceptions, anyone who anticipates appropriating more than 35 gpm and 10 afy of groundwater must obtain a water permit from the Department. § 85-2-301, MCA; § 85-2-306, MCA. The applicant for a water right must prove that specific criteria – known as the "311 criteria"—are met, including that water is legally and physically available (this includes identification of existing demands), that the use is beneficial, and that the new appropriation will not adversely affect senior water rights. § 85-2-311, MCA.

If the Department makes a preliminary determination that the 311 criteria are satisfied and the application should be granted, the Department is required to provide (1) particularized notice to senior appropriators who may be affected and (2) generalized notice to the public of the prospective water right, along with a summary of the Department's analysis and an identification of any conditions of approval it deemed appropriate. § 85-2-307, MCA. Objectors may file written objections with the Department. *Id.* If an objection to the permit is filed, additional criteria must be met. § 85-2-311(2), MCA. Additionally, if the Department determines that the objection states a valid issue, it is required to hold a hearing. § 85-2-309, MCA. During the permit stage, the Department also prepares an environmental review to assess the direct, indirect, and cumulative impacts of the proposed appropriation under the Montana Environmental Policy Act (MEPA), §§ 75-1-101 to 75-1-1112, MCA.

C. Exempt wells.

If an appropriation falls below the 35 gpm and 10 afy threshold, it is "exempt" from permitting: none of the Act's "311 criteria" are applicable, and no notice is provided to senior appropriators. Nor do the environmental review provisions of MEPA apply.

Instead, to develop an exempt well one need only drill a well or develop a spring, complete a well-log report and send a copy to the Bureau of Mines and

Geology, put the new well to beneficial use, and submit a notice of completion along with $125 to the Department. *See* AR 2. The priority date for exempt wells is the date the Department receives the notice of completion. The Department "automatically" grants water rights for exempt wells if the well is complete and the water has been put to beneficial use. *Id.* at 11.

D. Combined appropriations.

The exempt well provision's fast track for small wells does not apply to a "combined appropriation from the same source from two or more wells or developed springs" that exceeds 10 afy. § 85-2-306(3)(a)(iii), MCA. The Act does not define "combined appropriation." In 1987—three months after the language was enacted—the Department adopted an administrative rule defining "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 from the entire project or development from these groundwater developments in the same source aquifer is the 'combined appropriation.'

AR 7 at 1, 2 (emphasis added). Under this rule—in force for six years—two or more wells or developed springs need not be physically connected to be deemed a "combined appropriation." *Id.*

In 1993, the Department significantly altered the definition to require that groundwater developments be physically connected to be a "combined appropriation." The 1993 rule defined "combined appropriation" as:

> [A]n appropriation of water from the same source aquifer by two or more groundwater developments, that <u>are physically manifold into the same system.</u>

36.12.101(13), ARM (emphasis added). No public hearing on this 1993 rule change was held and no public comments received. AR 7 at 4. Nor did the Department provide a statement explaining why the rule change was necessary as required by MAPA, § 2-4-305, MCA. This issue was raised by the Administrative Rules Committee and the Department's sole response was only that the 1987 definition was "too ambiguous and therefore difficult to administer." *Id*.

STANDARDS OF REVIEW

The first issue in this case (statutory interpretation) is reviewed *de novo*. *Clark Fork Coalition v. Montana DEQ*, 2008 MT 407, ¶19, 347 Mont. 197, 197 P.3d 482. This Court reviews the district court's conclusions of law in this case to determine if they were correct. *Id.* (citation omitted).

The Realtors maintain the district court should have granted the Department more deference. Generally, an agency's interpretation of its own rule is afforded great weight and the court should defer to that interpretation "unless it is plainly inconsistent with the spirit of the rule." *Clark Fork Coalition*, ¶ 20. But, here, the Department's interpretation is not based on any findings of fact or agency expertise, only conclusions of law. Courts review "agency conclusions of law de novo, to determine if the agency correctly interpreted and applied the law." *Molnar v. Fox*, 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824. "In reviewing conclusions of law under § 2-4-704, MCA, we determine whether the agency's interpretation of the law is correct." *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist*., 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219. This Court must determine whether the Department's 1993 rule defining "combined appropriation" is "consistent and not in conflict with [the Water Use Act] and reasonably necessary to effectuate the purpose of the statute." § 2-4-305(6), MCA. Because it is reviewed *de novo* for correctness, the Department's legal conclusion receives no deference. Deference is not appropriate where "a tribunal arrives at a conclusion of law—the tribunal either correctly or incorrectly applies the law." *Bitterroot River Protective*., ¶ 18.

Where the meaning of a statute is in doubt, courts have sometimes afforded "respectful consideration" to an agency's interpretation of statute, but only when

the "particular meaning has been ascribed to a statute by an agency through a long and continued course of consistent interpretation, resulting in an identifiable reliance." *Montana Power Co. v. Montana Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. This "respectful consideration" test, however, may still "yield to a judicial determination that the construction was nevertheless wrong." *Id.* Here, "respectful consideration" is not warranted because the Department has not demonstrated a continued course of consistent interpretation.

The second issue in this appeal (appropriateness of the district court's equitable remedy) is reviewed for abuse of discretion. *E.H. Oftedal & Sons, Inc. v. State ex rel. Montana Transp. Comm'n*, 2002 MT 1, ¶ 61, 308 Mont. 50, 40 P.3d 349 (Cotter, J., dissenting) (citing *Ruegsegger v. Welborn* (1989), 237 Mont. 317, 321, 773 P.2d 305, 308). The district court has broad discretion to provide any further necessary and appropriate relief not barred by statute. *Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (alterations omitted) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)); *United States v. Paradise*, 480 U.S. 149 (1987) (citation omitted).

SUMMARY OF ARGUMENT

This Court should affirm the district court's October 17, 2014 order in its entirety. The plain language, legislative history, and overall purpose of the Water Use Act reveals that "combined appropriation" was never intended to be defined

narrowly as two or more wells or developed springs that are "physically manifold" or piped together. Indeed, such a definition creates an exempt well "loophole" that allows large consumptive water users to bypass the Act's permitting requirements, harm senior water rights holders, and adversely impact Montana's water resources by drilling multiple unconnected wells for the same use, project, or development. This is not what the Montana legislature intended.

After invalidating the Department's narrow 1993 rule, the district court was well within its broad equitable authority to direct the Department to: (a) initiate further rulemaking consistent with its order; and (b) reinstate the previous, legally-enacted rule defining "combined appropriation" in the interim, pending completion of new rulemaking.

ARGUMENT

A. The Department's rule defining "combined appropriation" conflicts with the Water Use Act.

A court's purpose in construing a statute is "to ascertain the legislative intent and give effect to the legislative will." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426. The Department's 1993 rule conflicts with legislative intent.

1. The plain language.

"[L]egislative intent is to be ascertained, in the first instance, from the plain meaning of the words used." *Heath*, ¶ 25. The plain language of the Act states a

water permit is not required before appropriating less than 35 gpm and 10 afy, 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.

§ 85-2-306(3)(a)(iii), MCA. The Department's 1993 rule narrowly defining "combined appropriation" conflicts with this language for two reasons.

First, in English, adjectives precede the nouns they modify. Here, the word "combined" modifies "appropriation," not "wells" or "developed springs." It thus refers to the combined amount of water that an appropriator has the legal right to use, not to a physical "combination" of wells, as required by the Department's 1993 rule. *See* 36.12.101(13), ARM.

The Well Drillers concede this point (Br. at 18), but argue that the legislature actually meant "well" when it said "appropriation" and used the word "appropriation" merely to avoid redundancy, since "well" is used later in the sentence. *Id.* The Well Drillers seek to transform the phrase "combined appropriation" into the phrase "combined well," which would suggest physical connection. But this approach ignores the plain, distinct meaning of "appropriation" and contradicts several canons of construction.

To conclude that the legislature meant "well" when it said "appropriation" goes against the presumption that the legislature knows the meaning of the words

used and does not use unnecessary or superfluous words. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

"Appropriation" is a term of art in water law with a distinct meaning. "Appropriation" refers to "[t]he amount of water one has the legal right to use for beneficial use. . . . It is most commonly associated with a vested right to use some amount of water for some beneficial purpose under the western United States appropriation doctrine." John W. Johnston, *United States Water Law: An Introduction* 143 (2008). A "combined appropriation," then, is the combined amount of water, added together from multiple diversion mechanisms, that a user has the legal right to apply to a beneficial use.

"Combined" is usually used in reference to quantities (flows and volumes) or abstractions (efforts and values), not to tangible physical items such as chairs, sprinklers, or wells, which are more likely to be connected. The dictionary definition bears out this commonsense reading: to "combine" is to "bring into such close relationship as to obscure individual characters," to "merge," "intermix," "blend," or "unite into a single number or expression." WEBSTER'S NEW COLLEGIATE DICTIONARY 262 (9th ed. 1987).

This natural reading of the word "combined" as mixed or blended also comports with the placement of the word before "appropriation," not "wells." In other words, it would not make much sense to refer to "combined wells," even if the language could be contorted to reflect that reading. "Statutory terms must be interpreted reasonably and logically, and given the natural and popular meaning in which they are usually understood." *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806. When two or more things are "combined," they are not ordinarily connected; instead, they are blended or mixed together.

Second, the language "*two or more* wells or developed springs" suggests two distinct, unconnected wells or developed springs. The natural meaning of "two or more" is two or more distinct things, not two or more connected things. And the terms "well" and "developed spring" are defined by statute as single points or openings. *See* § 85-2-102, MCA (defining "well" and "developed spring"). As such, there is no language anywhere in the Act suggesting that wells or developed springs must be "manifold" or physically connected in order to be deemed a "combined appropriation." The Department's definition is invalid. § 2-4-305(6), MCA; *Gold Creek Cellular of Montana Ltd. P'ship v. State, Dep't of Revenue*, 2013 MT 273, ¶ 12, 372 Mont. 71, 310 P.3d 533.

2. The legislative history.

A plain and unambiguous statute must be applied as written. *Bradley v. N. Country Auto & Marine*, 2000 MT 81, ¶ 13, 299 Mont. 157, 999 P.2d 308. Here, the language of the statute is plain and unambiguous, so a consideration of legislative history is not necessary. However, to the extent the Court wishes to review it, the legislative history supports the notion that the legislature intended to require permitting for "combined appropriations" from multiple wells regardless of physical connection.

Notably, the Well Drillers and Realtors concede that the legislature's intent in enacting the "combined appropriation" provision in 1987 was to require permitting for appropriations from two or more wells, regardless of physical connection. *See* WD Br. at 23.This is the beginning and the end of the matter. What matters for this Court's review is the intent of the legislature that enacted the "combined appropriation" language—the 1987 legislature. "In the construction of a statute, the primary duty of the court is to give effect to the intention of the Legislature in enacting it." *State v. Hays* (1929), 86 Mont. 58, 282 P.32, 34. This "rule of law" principle ensures that citizens are governed by laws, not by the arbitrary decisions of individual government officers.

As the Well Drillers acknowledge (Br. at 23), the legislative history provides a snapshot of the legislature's intent to require permitting for large uses, regardless

of the physical connection of wells. "Combined appropriation" was added to the Water Use Act's exempt well provision in 1987 from House Bill 642 (HB 642), which was introduced by Rep. Gary Spaeth at the Department's request. AR 27 at 31. At that time, 100 gpm was the statutory limit on the flow rate for exempt wells. Rep. Spaeth explained that wells appropriating less than this amount "were exempt from the permitting process; but he understood that Mr. Doney was going to present an amendment to the effect that more than one well from the same source that brings 100 gallons a minute or more should also go through the permitting process." *Id*. During the third reading of HB 642, the following language was added to the exempt well provision: ". . . except that a combined appropriation from two or more wells or developed springs exceeding this limitation requires a permit." AR 27 at 28-29.

Discussion then occurred during a hearing on the bill. Mr. Doney, a water law attorney, disliked the word "combined" because there was some ambiguity about its meaning. *Id*. at 32. Mr. Doney "didn't know what the word meant in the bill." *Id*. It was his understanding that reference to "combined" in the bill meant "two wells that were irrigating the same tract but not physically connected." *Id*. To clear up the ambiguity and ensure that two or more wells appropriating water from the same source for the same project obtain a permit, Mr. Doney recommended inserting the phrase "from the same source" following "appropriation." *Id*. at 32,

36. Rep. Spaeth "said that he liked and supported Mr. Doney's amendment" and two days later – on March 25, 1987 – the Committee moved to adopt Mr. Doney's amendment. *Id*. at 33, 44. After adopting Mr. Doney's amendment, "Sen. Keating inquired whether there was question about the word 'combined' in the bill and both Ted Doney and Rep. Spaeth replied there was no problem with the word." *Id.* at 45. Without further discussion, the proposed amendment to HB 642 passed with a unanimous vote. *Id*.

Three months later, the Department published notice of proposed rulemaking defining the term "combined appropriation" in accordance with legislative intent: "'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments . . . [that] need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" AR 7 at 1, 2. On August 31, 1987, the Department adopted this definition without objection. *Id.* at 2. This is significant, because to the extent deference is appropriate in this case, it should be "accorded to interpretations of an agency made at the time of enactment on the theory that the agency entrusted with the administration of a statute is likely to be well informed about the intent of Congress in enacting it." *Donovan v. S. California Gas Co.*, 715 F.2d 1405, 1408 (9th Cir. 1983).

The Well Drillers' repeated reliance on post-enactment legislative history (a contradiction in terms) deserves little attention from this Court because post-enactment history is irrelevant to how "combined appropriation" was understood by the 1987 legislature. As explained by the U.S. Supreme Court, what has been deemed "post-enactment legislative history" has no probative value because it sheds no light on the understanding of the enacting legislature. *Bruesewitz v. Wyeth L.L.C.*, 562 U.S. 223, 242 (2011).

The Well Drillers also mistakenly rely on the legislative reenactment doctrine, i.e., the presumption that the legislature is aware of the administrative interpretations of a statute that it reenacts, and through re-enactment implicitly approves those interpretations. *See State ex rel. Lewis & Clark Cty. v. Montana Bd. of Pub. Welfare* (1962), 141 Mont. 209, 212, 376 P.2d 1002, 1003. The re-enactment doctrine has no bearing on this case because the Water Use Act has never been re-enacted. *See id.*

The Well Drillers cite *Grenz* for the proposition that this Court presumes that the legislature adopts the construction of "similar statutes or related rules" not just when it re-enacts a statute but also "when it amends a statute." *Grenz v.Mont. Dept. of Natural Res. & Conservation*, 2011 MT 17, ¶ 41, 359 Mont. 154, 248 P.3d 785. But *Grenz* involved the special circumstance where the amendment consisted of the addition of a new subsection to the relevant statutory section that

"essentially" codified a key portion of the administrative rule. *Id.* By contrast, the "combined appropriation" language at issue in this case, § 85-2-306(3)(a)(iii), MCA, has not been amended. *State ex rel. Lewis & Clark Cty.*, 141 Mont. at 212, 376 P.2d at 1003.

In fact, where amendments have only occurred to neighboring provisions—as here—this Court has dictated a different approach: "[W]here a section or a part of a section is amended, it is not to be considered as having been repealed and re-enacted in its amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted." *State v. Dawson Cty.* (1930), 87 Mont. 122, 286 P. 125, 131; *accord In re Wilson's Estate* (1936), 102 Mont. 178, 56 P.2d 733, 738. In other words, a legislature's intent for a particular provision is to be evaluated as of the time of enactment and amendments to neighboring provisions or language do not disturb this original intent. The Well Drillers, for example, point to the legislature's 2013 addition of subsection (3)(a)(iv) to § 85-2-306, MCA, addressing exempt wells in stream depletion zones. Br. at 26. As a neighboring provision, however, subsection (3)(a)(iv) has no effect on the construction of subsection (3)(a)(iii), which was not

altered and, as such, is considered to be the "law from the time when [it was] enacted." *Dawson Cty.*, 87 Mont. 122, 286 P. 125, 131.[2]

The Well Drillers also point to SB19, a failed 2013 bill that would have inserted the 1993 rule into § 85-2-102(7), MCA, as evidence of legislative intent. Br. at 27. But a failed bill from 2013 provides no insight into legislative intent from 1987. The failed bill never became law, so this Court has no latitude to speculate about what the legislature intended or not. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 382, n. 11 (1969) ("[U]nsuccessful attempts at legislation are not the best of guides to legislative intent."); *Allen v. State ex rel. Bd. of Tr. of Oklahoma Unif. Ret. Sys. for Justices & Judges*, 1988 OK 99, 769 P.2d 1302, 1306 ("A legislature's failure to express its will through enacted law constitutes its official silence. No intent may be divined from a lawmaking body's silence.").

In fact, since 1987, the various post-legislature enactments regarding exempt wells and "combined appropriations" cut both ways. Just as the Well Drillers can point to SB 19, the Coalition can just as easily point to other

[2] The Court should note that, in 2013, when this amendment was being made, the legislature expected and was well aware that the narrow "combined appropriation" language would soon be broadened pursuant to the stipulated agreement reached between the Coalition and the Department (Doc. 9). Indeed, in HB 602, the legislature had directed the Water Policy Interim Committee to study the issue and had ordered the Department to hold off rulemaking until at least October 1, 2012, which demonstrates the legislature was well aware the Department had committed to broadening the rule. Thus, if anything, the legislature's 2013 amendment demonstrates acquiescence to the Department's efforts to draft a broader rule.

legislative efforts, including a 2005 bill that defined "combined appropriation" as "[a]ny ground water development consisting of two or more wells or developed springs, regardless of whether their diversion works are physically connected or not, that are developed in connection with a major or minor subdivision." H.B. 403 (Mont. 2005). The import of these and other failed bills is that nothing can be deduced from the tea leaves and it is not the court's role to engage in such an exercise. Instead, this Court's inquiry must be the intent of the 1987 legislature.

The Well Drillers' final attempt to ignore the 1987 legislature's intent is also unavailing. The Well Drillers surmise—without support or citation—that the "combined appropriation" language was solely directed at preventing abuse of the exemption by irrigators. Br. at 23. According to the Well Drillers, therefore, the Department's 1993 rule is consistent with the statute because it effectively prevents the use of "combined appropriations" for irrigated agriculture, since, at the 35 gpm and 10 afy threshold, the only practical way to irrigate with multiple wells is to physically connect them. Br. at 24. The Well Drillers suggest that it "made sense" for the legislature not to require physical connection in order for a "combined appropriation" to qualify for permitting in 1987, when the limit for an exempt well was the relatively high 100 gpm, but that, after the limit for an exempt well was lowered to 10 afy in 1991, it was "logical" for the Department to expand the

exemption by requiring permitting only for physically connected wells. Br. at 23, 24. The Well Drillers' argument is misplaced.

The Water Use Act's "combined appropriation" language is not solely directed at irrigators. The public policy underlying the provision was to prevent large consumptive users of *all* types from circumventing the water permitting process and causing harm to senior water appropriators and Montana's precious water resource. Depletion is depletion, regardless of how it occurs. The legislative history does include a discussion of the potential for abuse of using multiple wells for a single irrigation project, but this was merely an illustration. *See* AR 8 at 2. And, regardless of whether or not abuse of the exemption by farmers was a salient concern to the legislators in 1987, the legislature opted for broader language that would serve the public policy of requiring permitting for all "combined appropriations" with the potential for significant impact to the water resource. *See* § 85-2-306(3)(a), MCA.

Moreover, regardless of what the Well Drillers thinks "makes sense" or is "logical," the Department has no authority to unilaterally adjust the size or the threshold of the exemption by rule; that is the legislature's role. There is no indication that the legislature ever intended permitting to apply only to combined appropriations that are physically connected, either in 1987 or in 1991. Indeed, the legislature amended the statute in 1991 to lower the exemption threshold against

the backdrop of the 1987 rule, which specifically provided that wells need not be physically connected to qualify as a combined appropriation.

3. The overall purpose of the Water Use Act.

Again, a court's "purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will." *State v. Heath*, 2004 MT 123, ¶ 24, 321 Mont. 280, 90 P.3d 426 (citing § 1-2-102, MCA). While the words used, "even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . it is one of the surest indexes of mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have a purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 454-55 (1989).

The Well Drillers (Br. at 30) and the Coalition agree that a central purpose of the Water Use Act, as directed by Article IX, section 3 (4) of the Montana Constitution, was to provide for the proper administration, control, and regulation of Montana's water resources by, among other things, establishing a permit system for the appropriation of water. § 85-2-101, MCA. This permit system replaced Montana's former loose appropriation law, which resulted in uncertainty, ignorance of what rights there were in a stream, disputes, and litigation. Albert W.

Stone, *Montana Water Rights – A New Opportunity*, 34 Mont. L. Rev. 57, 72 (1973).[3]

The 1993 rule conflicts with the purpose of the Water Use Act in three related but distinct ways: (1) it allows large consumptive water users to easily bypass the Act's permitting requirements by simply drilling multiple, unconnected wells for the same use, project, or development; (2) it allows large consumptive water users to appropriate water without regard to the adverse impacts on senior, existing rights or Montana's water resources; and (3) it inappropriately places the burden of protecting senior water rights on senior water rights holders, who receive no notice of the new appropriation, instead of on those establishing new rights.[4]

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[3] The Well Drillers boldly claim (Br. at 30) that exempt wells, because they are technically on file with the Department, are within the ambit of the new permit system envisioned by the Act because they are within the "centralized recording system" and "provide notice to senior water users." This is incorrect. The loose pre-1973 procedure for establishing an appropriation is strikingly similar to the ministerial procedure for exempt wells. This procedure provides neither generalized nor particularized notice to senior rights holders, who thus have no opportunity to object to new exempt rights before they are established.

[4] The Well Drillers' suggestion that Montana's prior appropriation doctrine is to be "balanced" against goals of utilization and development is incorrect. The prior appropriation doctrine is paramount. *See Featherman v. Hennessy*, 43 Mont. 310, 316, 115 P. 983, 986 (1911); Mont. Const. art. IX, § 3(4). To the extent that the Water Use Act contemplates any balancing, it is between benefit to people and ecosystems: a purpose of the chapter is "to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems." Mont. Code Ann. § 85-2-101.

The amount of water depleted by exempt wells under the Department's 1993 rule is significant. The Department estimates that approximately 22,151 exempt wells diverted about 25,751 acre-feet from 1993-2010 in closed basins alone. Joe Kolman, *The Exemption: To Change or Not to Change*, A Report to the 63rd Legislature by the Water Policy Interim Committee (October 2012) at Appendix B.[5] This amount of diversion is equivalent to 2,575 football fields under 10 feet of water. Stacked one atop another, those football fields would top Denali (at 20,146 feet high). *Id.* The Department estimates the number of exempt wells filed in closed basins in Montana increases steadily "at a rate of approximately 1,400 per year." AR 14 at 6. The total number of exempt wells "will increase by approximately 70,000 from current numbers and an additional 47,000 acre-feet of water will be consumed per year by 2060." *Id*.

The consequences, therefore, of the exempt well loophole created by the Department's narrow definition of "combined appropriation" in its 1993 rule are serious and significant, not just for the Coalition but other senior water rights holders and Montana's precious water resource. As the Department concedes, "100 individual wells serving a subdivision will have the same magnitude of depletion as one or more larger non-exempt wells for a public water system serving the same

[5] This report is available online at http://leg.mt.gov/content/Publications/Environmental/2013-exempt-wells.pdf (last visited on January 12, 2016).

number of households from the same aquifer at that location." AR 14 at 2. "Net depletion in both cases depends on the amount of water consumed and aquifer conditions," not on the physical design of the well system or whether the wells are physically connected to one another. *Id.*

According to the Department's sister agency, MFWP (a major water rights holder with instream flow reservations on 372 river segments) "exempt wells have the same potential for adverse effect to [MFWP's] instream water rights as permitted wells." AR 37 at 2. Both "diminish surface flow." *Id*.; *see also* AR 14 at 3 (Gallatin River flow depleted by exempt wells); AR 37 at 3-4 (describing major subdivision for 130 homes near Manhattan, Montana, using exempt wells); AR 30 at 9 (describing impacts from Hyalite Creek subdivision); AR 20 at ¶ 4 (describing impacts to existing rights from sixty-five unit subdivision using exempt wells); AR 17 at 6 (same); AR 23 (same).

While the debate around the "combined appropriation" language was precipitated and sharpened by problems caused by subdivision use of exempt wells, exempt wells can be used for any beneficial use. Thus, the "combined appropriation" language has the potential to spawn many kinds of mischief. The principle is the same whatever the use.

For example, to serve an oil and gas project, a gravel mine, or an industrial project, a water user might install one large well pumping 100 gpm and

appropriating 40 afy, or four wells, each pumping 25 gpm and 10 afy. The one well has the same effect on depletion of water and on existing rights as the four wells, but only the former must go through permitting. This lopsided treatment makes little sense but is precisely what the 1993 rule allows.

Because the Department's 1993 rule allows large amounts of water to be appropriated for a single project or development—even in closed basins—without having to obtain a water permit, there is no mechanism in place to protect senior water rights holders. In the Department's own words:

> [T]here is concern among senior water rights holders that the cumulative effects of many small ground water developments can have significant impacts in terms of reducing ground water 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 users.

AR 13 at 1; *see also* AR 17 (discussing impacts of subdivision using exempt wells on existing rights); AR 20 (same). "[E]xempt wells can pump water out of priority which in turn reduces the water available to senior water users during the times of water shortages. This concern is elevated as exempt wells are being used for large, relatively dense subdivision development in closed basins." AR 14 at 1. [6]

[6] The Well Drillers invite debate about whether, consistent with the statute, a subdivision developer should be required to go through permitting. The Well Drillers point out that only a "person" may be an appropriator, *see* Br. at 33-34,

The Well Drillers point to the expense involved in water permitting. Br. at 19. The Coalition agrees that allocating Montana's water resource involves expense to all parties: the permit applicant, the Department, the courts, and senior water rights holders. The question, however, is who should bear these costs and how best to minimize them.

The Department's 1993 rule shifted the burden of proving adverse effect from new applicants to senior rights holders by creating a loophole large enough to drive a subdivision (and other large consumptive water uses) through, thereby placing the burden on senior rights holders to "call" water when they are impacted. In *Bostwick Properties*, this Court declined to sanction such an approach. *See* 2013 MT 48, ¶ 41, 369 Mont. 150, 296 P.3d 1154 (the legislature "acted to protect the water rights of the prior appropriators. We decline to approve a shift in the burden

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but, as they acknowledge, the word "person" as used in the Water Use Act is defined broadly to include "an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity," § 85-2-102, MCA. In fact, it is often the developer who files the application for a beneficial water use permit to appropriate water for a subdivision. *See, e.g.*, *Bostwick Properties, Inc. v. DNRC*, 2009 MT 181, 351 Mont. 26, 208 P.3d 868 (case involving developers' application for a water use permit for a subdivision); AR 1-13 at 12 (describing water permitting process for subdivisions). Indeed, review of total water use at the subdivision—as opposed to the individual well—level is sensible and provided for throughout Montana law. *See* §§ 76-3-603, 608 MCA; *Aspen Trails Ranch LLC v. Simmons*, 2010 MT 79, 356 Mont. 41, 230 P.3d 808 (must take hard look at how entire 300+ lot subdivision would impact groundwater and Prickly Pear Creek).

of demonstrating adverse effect that could jeopardize these prior appropriators' water rights."). The legislature has spoken clearly in placing the burden of showing adverse effect on applicants for significant new water uses, not on established senior rights holders. Administrative efficiency should not be allowed to trump protection of Montanans' rights—here, the rights of senior water rights holders. *See, e.g.*, *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 28, 325 Mont. 148, 104 P.3d 445 (rejecting administrative efficiency defense).

Moreover, even assuming, *arguendo*, that it is appropriate to shift the burden from applicants for significant new water uses to senior rights holders, it is incorrect that exempt wells can be "called," as the Well Drillers claim. Br. at 30. As a practical matter, they cannot. Among other problems, a senior rights holder attempting to call water faces: (a) the difficulty of establishing a causal connection between his senior well and a specific junior well, since all wells contribute to mining the aquifer; (b) a time lag between pumping and its effects on surface flow: by the time the senior user recognizes that a shortage exists, the water may already be gone; (c) the futile call doctrine, which allows a junior to block a call if the hydrological connection between surface water and ground water is unclear; (d) the practical problem that a senior user making a call on a subdivision may be required to make hundreds of calls; and (e) the serious health and safety problems posed by making a call on exempt wells that serve domestic, including drinking water,

purposes. Senior water rights holders are therefore left with little to no recourse to protect their senior rights.

Finally, there is the problem of remedy. Even if pumping is curtailed, it can take months or years for impacts to dissipate. As recognized by one court, a senior rights holder should not "have to suffer actual impairment [from exempt wells]. . . It will do little good for [the senior water rights holder], and other similarly situated, to sit idly and wait for actual impairment. When the water is gone it will be too late." AR 9 at ¶ 21; *see also* AR 11 at 20 ("a person cannot see the point of no return [in terms of impacts] until that point has passed.").

The better approach, contemplated by the Water Use Act, is to allow the permit system to work by identifying future conflicts and thereby creating incentives for developers and new large consumptive water users to avoid these conflicts. If the exempt well loophole created by the 1993 rule's definition of "combined appropriation" is kept closed by this Court, new water users arriving in already stressed basins will be spurred to think flexibly about sourcing their water by purchasing existing water rights, developing community water projects, or tapping into preexisting municipal water systems. Meanwhile, land adjacent to existing public water systems or land that already has sufficient water availability will be properly valued and targeted for development. This is much preferable to the system under the 1993 rule, which invites conflict by allowing significant water

developments in already over-appropriated basins, thus spawning difficult problems in which senior rights holders are affected, but the depleting development has already gone in and cannot be dismantled. Headaches for senior rights holders and for the courts can be proactively avoided simply by requiring large water users, with Department oversight, to look before they leap.

The Well Drillers argue that some impacts from multiple wells *could be* addressed by establishing controlled groundwater areas, where no exempt wells are allowed, Br. at 36, but this fact is unhelpful and irrelevant. With this argument, the Well Drillers again ask this Court to transfer the burden of investigating the impact of significant new appropriations from the applicants for new rights, as required by § 85-2-311, MCA, to senior rights holders. To petition for a controlled groundwater area, injured rights holders must band together with one-third of the other rights holders in the area, and must include in their petition expensive and time-consuming analysis by a hydrogeologist, scientist, or engineer. *See* § 85-2-506, MCA. As such, relying on controlled groundwater areas inappropriately shifts the burden to existing water rights holders and does little to fulfill the legislature's intention to use the Water Use Act's permitting process as a proactive tool to prevent problems from occurring in the first instance.

Moreover, in the end, it is irrelevant whether or not other legal mechanisms (like controlled groundwater areas) can be called on to rein in the exempt well

loophole created by the Department's 1993 rule. The focused legal issue in this case is whether the Department's definition of "combined appropriation" in the 1993 rule is consistent with legislative intent. The plain language, legislative history, and overall purpose of the Water Use Act reveal it is not.

B. The District Court's order on remedy was appropriate.

On appeal, the Well Drillers and Realtors now object—for the first time—to the district court's decision on remedy, specifically the district court's decision to: (1) order the Department to conduct further rulemaking consistent with its order; and (2) reinstate the 1987 rule pending completion of rulemaking. Doc. 53 at 13. None of the Well Drillers' or Realtors' objections have merit.

First, as an initial matter, this Court should not consider the Well Drillers' and the Realtors' objections to the district court's decision on remedy (a non-jurisdictional issue) because they are being raised for the first time on appeal. *State v. Peterson*, 2002 MT 65, ¶ 24, 309 Mont. 199, 44 P.3d 499 (citation omitted). As recognized by this Court, a party may not raise new arguments or change its legal theory on appeal because it is "fundamentally unfair" to fault a district court for failing to rule on an issue it was never given the opportunity to consider. *State v. Martinez*, 2003 MT 65, ¶17, 314 Mont. 434, 67 P.3d 207. In this case, the Coalition requested both forms of relief in its opening and reply briefs at the

district court. *See* Doc. 27 at 20; Doc. 42 at 18-19. But neither the Well Drillers nor the Realtors responded or objected to this request.

Second, contrary to the Well Drillers' and Realtors' assertions, the district court did not err in directing the Department to conduct further rulemaking consistent with its order. Remanding to an administrative agency for further proceedings consistent with a district court opinion is common practice. Indeed, the "law of the case" doctrine requires that a trial court conform any further proceedings on remand to the principles set forth in an appellate opinion. *See Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). This rule applies equally to administrative agencies as they comply with a reviewing court's opinion. *Fed. Power Comm'n v. Pac. Power & Light Co.*, 307 U.S. 156, 160 (1939).

Traditionally, courts performing their review function rely heavily on some form of remand, including remand for further proceedings, remand with instruction, and vacate and remand. 33 Charles Alan Wright, Charles H. Koch, Jr., *Federal Practice and Procedure* § 3637 (1st ed. 2015). And, on remand, the agency is bound to follow the explicit instructions of the court. *Id.* This Court follows this practice. For example, in *Montana Trout Unlimited v. DNRC*, this Court invalidated a Department rule, finding it inconsistent with legislative intent—just as the district court did here. 2006 MT 72, ¶ 43, 331 Mont. 483, 133

P.3d 224. And, as here, this Court explained the legislative intent behind the statute at issue, outlined why the rule at issue was inconsistent with that legislative intent, and reversed and remanded "for further proceedings consistent with this opinion." *Id.* at ¶ 43-44. This is precisely what the district court did in this case. *See* Doc. 53 at 13.

Moreover, contrary to the Well Drillers' and Realtors' assertions, future rulemaking is not predetermined. On the contrary, the final, new rule defining "combined appropriation" may take a number of different forms, as guided by the Department's expertise and public input (including input from the Well Drillers, Realtors, and the Coalition). The only sideboard is a legal one: the final rule must be consistent with the legislative intent of the Water Use Act as outlined in the district court's order. With this sideboard, the Department has broad discretion to adopt an appropriate rule after public notice and comment as provided by § 2-4-302, MCA. The outcome of rulemaking is uncertain, as important issues and questions remain and will need to be addressed.

If, as the Realtors suggest, for example, the Department's 1987 rule defining "combined appropriation" is too difficult to administer or needs to be clarified, updated, or changed in response to changing circumstances, this can and should be accomplished through future rulemaking. The Department, for instance, may need to clarify and define what "project and development" means or adopt an entirely

new definition of "combined appropriation" that is neither too narrow (like the 1993 rule) nor too broad.

How the Department ultimately decides to define "combined appropriation" in accordance with legislative intent is an important issue and one that interested parties will surely be involved in. But the scope and content of a future rule—whatever it may be—does not change the fact that the 1993 rule defining "combined appropriation" solely as two or more wells that are "physically manifold" together is too narrow, in conflict with legislative intent, and needs to be changed. The Coalition agrees that there should be meaningful public participation during the rulemaking process. Nothing in the district court's order, however, restricts or limits such participation. The district court simply clarified the bounds of the statute and directed the Department to act within those bounds.

Third, the Well Drillers' and Realtors' assertion that the district court erred in reinstating the prior (1987) rule defining "combined appropriation" in the interim, pending completion of rulemaking, is also incorrect.

Pursuant to § 2-4-704(2), MCA, this Court may "reverse or modify" the Department's declaratory ruling if it is in violation of statutory provisions, in excess of statutory authority, or clearly erroneous." This Court may also issue other forms of relief provided by statute. *See* § 2-4-702(1)(a), MCA ("This section does not limit the use of or the scope of judicial review available under other

means of review, redress, relief, or trial de novo provided by statute."); *see also* § 2-4-506(2), MCA (rule may be declared invalid); § 2-4-305(6), MCA (rule not valid unless consistent and not in conflict with statute); § 27-8-101 *et seq*., MCA (declaratory judgments); § 27-19-101 *et seq*., MCA (injunctive relief).

In addition, the district court has broad discretion to provide any further necessary and appropriate relief not barred by statute. "The comprehensiveness of equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. *Plata v. Schwarzenegger*, 603 F.3d 1088, 1094 (9th Cir. 2010) (alterations omitted) (quoting *Porter v. Warner Holding Co*., 328 U.S. 395 (1946)). No statutory restriction exists here. Accordingly, "the scope of [the] district court's equitable powers to remedy past wrongs [remains] broad, for breadth and flexibility are inherent in equitable remedies." *U.S. v. Paradise*, 480 U.S. 149, 183-84 (1987) (citation omitted).[7]

[7] The Well Drillers' reliance on *Frasceli Inc. v. State Dept. of Revenue* (1988), 235 Mont. 152, 766 P.2d 850, is misplaced. In *Frasceli*, the district court went too far and abused its discretion by directing the agency to adopt a hearing examiner's draft recommendations—a "proposed order"—instead of simply remanding the matter back to the agency for further proceedings and fact finding. *Id.* at 154-57. Here, by contrast, the district court has remanded the matter back to the agency for further rulemaking and, in the interim (pending rulemaking), has merely reinstated the previous, legally-enacted rule as a temporary measure to stem ongoing harm to senior appropriators.

Typically, when a court reverses an agency, the legal status reverts back to the *status quo ante* unless and until the agency conducts a new proceeding on remand. Richard J. Pierce, Jr., Administrative Law Treatise § 7.13 (5th ed. 2010). Thus, while the court in its equitable discretion may opt to take a different course, as a general matter, "[t]he 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). The "common rationale" supporting the reinstatement of a prior rule after invalidation of a current rule "is that the current rule being invalid from its inception, the prior regulation is reinstated until validly rescinded or replaced." *Cumberland Med. Ctr. v. Sec'y of Health and Human Svcs.*, 781 F.2d 536, 538 (6th Cir.1986).

This logic has been echoed by this Court in the context of statutes: "It is well settled that an unconstitutional statute enacted to take the place of a prior statute does not affect the prior statute." *Application of O'Sullivan* (1945), 117 Mont. 295, 304, 158 P.2d 306, 310 (citing cases). This Court has also recognized, in *dicta*, that the reinstatement of a prior agency rule is appropriate after invalidation of a current rule. In the context of a mootness issue, this Court observed that, if the district court on remand determined that certain administrative rule amendments were invalid, it must then determine whether the previous version of the rules should be revived. *Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Envtl. Review*

(1997), 282 Mont. 255, 265, 937 P.2d 463, 469. In light of the fact that the district court could, within its discretion, revive the previous rules, this Court ruled that a challenge to a declaratory ruling on the interpretation of those previous rules was not moot. *Id.*

Here, the district court followed typical practice supported by sound logic. The district court's decision was also thoughtful in light of the necessities of this case. The district court opted to reinstate the 1987 rule temporarily (pending rulemaking) "so as not to impose chaos on [the Department]." AR 53 at 13. This was the prudent course to take because when the district court vacated the illegal 1993 rule, it lost any legal effect, *see Bell v. Dep't of Licensing* (1979), 182 Mont. 21, 23, 594 P.2d 331, 333, and left a void in the law. Indeed, without a definition of "combined appropriation" (the term is not statutorily defined), the Department would have no legal scaffolding with which to guide and enforce compliance with the exempt well statute.

In addition, the 1987 rule directly answers the problem identified by the district court in the 1993 rule. That is, it closes the loophole in the 1993 rule that allowed large consumptive water uses to be established without going through the permitting process. Reinstatement of the 1987 rule therefore stems the ongoing harm to senior rights holders and all Montanans that was occurring under the 1993 rule (and that could continue to occur in the absence of a rule). Sometimes, even

interim rules drafted and adopted without notice-and-comment rulemaking have been upheld where the interim rule is designed to eliminate the problems identified by the court. *Mid-Tex Elec. Co-op., Inc. v. F.E.R.C.*, 822 F.2d 1123, 1130 (D.C. Cir. 1987). But here, the 1987 rule was both appropriately adopted through notice-and-comment rulemaking and eliminates the problem identified by the district court. *See* AR 7 at 1, 2. The district court's choice to reinstate the rule pending completion of new rulemaking was therefore appropriate and should be upheld.

CONCLUSION

Wherefore, the Coalition respectfully requests this Court affirm the District Court's October 17, 2014 order (Doc. 53).

Respectfully submitted this 15th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the Brief of Petitioners/Appellees the Clark Fork Coalition et al. is double-spaced, uses a proportionately-spaced 14 point Times New Roman typeface, and contains 9,632 words.

_____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Petitioners/Appellees the Clark Fork Coalition et al. was served upon the following on January 15, 2016, via U.S. Postal Service first-class mail:

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