

**SYNOPSIS OF THE CASE**

**2016 MT 229, DA 14-0813: THE CLARK FORK COALITION, a non-profit organization, KATRIN CHANDLER, and individual, BETTY J. LANNEN, an individual, POLLY REX, an individual, and JOSEPH MILLER, an individual, Petitioners and Appellees, v. JOHN E. TUBBS, in his capacity as Director of the Montana Department of Natural Resources and Conservation and THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, an executive branch agency of the State of Montana, Respondents, v. MONTANA WELL DRILLERS ASSOCIATION, Intervenor and Appellant, v. MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION, Intervenors and Appellants, v. MOUNTAIN WATER COMPANY, Intervenor.**<sup>1</sup>

The Montana Water Use Act (Act) sets forth a statutory framework by which water rights are obtained, administered, and adjudicated. A critical component of the Act is the permit system, administered by the Department of Natural Resources and Conservation (DNRC), which functions to protect senior water rights from encroachment by prospective junior appropriators. The Act requires that a senior appropriator be given notice and an opportunity to object, and requires that the new appropriation will not adversely affect a senior appropriator's existing rights. Where water consumption is small, the Legislature provided certain exemptions to this rigorous permitting process. Relevant here, if a well or developed spring does not exceed 35 gallons per minute and 10 acre-feet per year, an appropriator is exempt from having to obtain a permit for water. However, in 1987 the Legislature determined that the exemption did not apply to a "combined appropriation" from the same source by two or more wells or developed springs which exceed 10-acre feet, regardless of the flow rate.

Clark Fork Coalition and senior water right users challenged the validity of a 1993 rule promulgated by the DNRC which interpreted and defined the term "combined appropriation" to require a physical connection between two or more wells or developed springs which appropriated from the same source. The District Court invalidated the 1993 rule because it was inconsistent with the purpose of the Act and impermissibly expanded a narrow legislative exemption to the permitting process. The District Court reinstated the 1987 DNRC rule, which did not contain a requirement that the groundwater developments be physically connected, and required that the DNRC conduct rulemaking to promulgate a new rule consistent with its order.

After conducting oral arguments on the case, the Montana Supreme Court affirmed the District Court's order and held that the plain language of the statute creating the exemption did not contain a requirement that two or more groundwater developments appropriating from the same source be physically connected. The Court determined that

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<sup>1</sup> This synopsis has been prepared for the convenience of the reader. It constitutes no part of the Opinion of the Court and may not be cited as precedent.

the 1993 rule was inconsistent with the purpose of the Act to protect senior appropriators and with the prior appropriation doctrine, and that it added a requirement not otherwise contained within the language of the statute. The term “appropriation” is defined within the Act as a “quantity” of water which may be put to beneficial use. Therefore, the quantity of water which may be appropriated for any “combined appropriation” refers to the combined quantity and may not exceed 10 acre-feet per year when it is from the same source.

The Court upheld the District Court’s decision to reinstate the 1987 rule, concluding that the effect of invalidating an agency rule is to reinstate the rule previously in force. Further, while the District Court had the authority to require that any rule promulgated by an agency be consistent with a court order, it did not have authority to require the agency to conduct further rulemaking. It will be up to the DNRC, which did not appeal the District Court’s invalidation of the 1993 rule, to decide whether further rulemaking is necessary.

Believing that the statutory language was ambiguous, and noting that every judicial officer who has considered the issue had come to that conclusion as well, Justice Rice would have applied the canons of statutory construction for determining legislative intent that deferred to DNRC’s longstanding, 23-year interpretation of the statute and its implementation in the field, which the Legislature was aware of and recently reaffirmed. He thus would have reversed the District Court and reinstated the 1993 rule.