Public Land and Resources Law Review

Volume 0 *Case Summaries 2016-2017*

The Clark Fork Coalition v. Tubbs

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The Clark Fork Coalition v. Tubbs, 384 Mont. 503, 380 P.3d 771 (Mont. 2016)

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Before landowners may appropriate groundwater in Montana, they must first apply for a DNRC permit pursuant to the Montana Water Use Act. Landowners may qualify for an exemption from the arduous permitting process if their appropriation meets certain criteria. However, the Act provides an exception to the exemption when a "combined appropriation" from the same source is in excess of ten acre-feet per year. *The Clark Fork Coalition v. Tubbs* affirmed the district court's invalidation of the DNRC rule defining "combined appropriation" to only include physically connected groundwater wells.

I. INTRODUCTION

The Montana Water Use Act ("Act") provides for a comprehensive, but arduous water appropriation process.[1] In 1973, Montana's legislature established the Act and current water rights system, setting forth criteria for obtaining a water right.[2] The Act requires a Department of Natural Resources and Conservation ("DNRC") permit application to seek a groundwater appropriation.[3] The Act further provides that groundwater appropriations may be exempt from the permitting process if certain criteria are met.[4] However, an exception to the exemption exists if there is a "combined appropriation" from the same source by at least two wells in excess of 10 acre-feet per year.[5] "Combined appropriation" is not defined in the Act. However, within a period of six years, the DNRC established two conflicting interpretations as to whether wells needed to be physically connected in order to constitute a "combined appropriation."[6]

The Clark Fork Coalition v. Tubbs concerned the DNRC's 1993 interpretation of "combined appropriation" that required groundwater developments to be physically connected.[7] The Clark Fork Coalition ("Coalition") challenged the validity of the interpretation as inconsistent with the controlling statute and argued that the statute requires no physical connection.[8] The Montana Well Drillers Association, the Montana Association of Realtors, and the Montana Building Industry

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1. The Clark Fork Coalition v. Tubbs, 384 Mont. 503, ¶1 (Mont. 2016).
2. *Id.* at ¶ 5.
3. *Id.* (citing Mont. Code Ann. § 85-2-301).
4. *Id.* at ¶ 1 (citing Mont. Code Ann. § 85-2-306(3)(a)(iii)).
5. *Id.*
6. *Tubbs,* 384 Mont. at ¶ 2 (*see* Admin. R. M. 36.12.101(7) (1987); Admin. R. M. 36.12.101(13) (1993)).
7. *Id.* at ¶ 2 (citing Admin. R. M. 36.12.101(13) (1993)).
8. *Id.* at ¶ 3.

Association (collectively "Well Drillers") sought to maintain the physical connection requirement of the 1993 interpretation.[9] After a ruling in favor of the Well Drillers by the DNRC Hearings Examiner, the Coalition challenged the interpretation again in the First Judicial District Court of Lewis and Clark County. The district court reversed, holding in the Coalition's favor.[10] The Well Drillers appealed and the Montana Supreme Court affirmed the district court's ruling that "combined appropriation" only includes wells with a physical connection.[11]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Permitting

In 1973, the Act put forth the statutory framework for obtaining water rights in Montana.[12] The Act's purpose is to "provide for the administration, control and regulation of water rights and establish a system of centralized records of all water rights."[13] In general, the Act maintains that a person cannot appropriate water unless they receive a permit or authorization from the DNRC.[14] When a permit application is submitted, the applicant, through the DNRC, is required to give notice of the application for the permit to provide senior appropriators an opportunity to protect their water rights from encroachment by the prospective junior appropriator.[15] A permit may not be issued until the applicant proves that the water is physically available, the proposed use of water is a beneficial use, and the water rights of senior appropriators will not be adversely affected.[16]

In "closed basins" the DNRC may consider groundwater permits, but the process for obtaining such a permit in these highly appropriated areas is demanding.[17] The applicant must provide a hydrological report in addition to the general requirements for obtaining a permit.[18] If the report indicates a hydrological connection to surface water, the appropriator must then show that there is no depletion of the surface water.[19]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at ¶ 5.
13. Mont. Code Ann. § 85-2-101(2).
14. The Clark Fork Coalition v. Tubbs, No. BDV-2010-87, at 5 (Mont. First Jud. Dist. Ct. Lewis and Clark Cnty. Oct. 17, 2014) (citing Mont. Code Ann. § 85-2-302(1)).
15. *Tubbs*, 384 Mont. at ¶ 6.
16. Mont. Code Ann. § 85-2-311(1)(a)-(h).
17. *Tubbs,* 384 Mont. at ¶ 7.
18. *Id.* (citing Mont. Code Ann. § 85-2-360(2)).
19. Mont. Code Ann. § 85-2-360(3)(b).

B. Exemption

The Act establishes certain exemptions to the permitting process.[20] If an applicant meets the exemption qualifications, none of the Act's permitting procedures on general appropriation requirements, nor the more rigorous requirements for closed basins will apply.[21] Here, the relevant exemption is for *de minimis* groundwater appropriations, meaning the appropriation does not exceed thirty-five gallons per minute and ten acre-feet per year.[22] According to the DNRC, the purpose of the exemption is to provide for small uses of water that are unlikely to impact the water resource from having to go through the expensive permitting process.[23]

C. Exception to the Exemption

In 1987, the Montana legislature amended the *de minimis* groundwater exemption to include the term "combined appropriation."[24] The incorporation of this term provided an exception to the permitting exemption if "… a combined appropriation from the same source by two or more wells or developed springs exceed[s] [the] limitation."[25] In other words, if a combined appropriation by two or more wells is present, the appropriation requires a permit.[26]

The statute did not define the term "combined appropriation," so in 1987 the DNRC put forth Admin. R. M. 36.12.101(7) (1987) ("the 1987 rule").[27] The 1987 rule provided that if two or more groundwater developments are used together for a single "project or development," a "combined appropriation" is present, regardless of whether the system itself is physically connected.[28]

Then, in 1993 the DNRC issued Admin R. M. 36.12.101(13) ("the 1993 rule"), altering the definition of "combined appropriation."[29] The new rule defined "combined appropriation" as "two or more groundwater developments, that are physically manifold into the same system."[30] The effect of this rule was that groundwater developments were permissible from the same source as long as the system remained unconnected.[31] This meant that an appropriator could avoid the permitting process for infinite appropriations as long as the groundwater

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20. *Tubbs,* 384 Mont. at ¶ 8 (citing Mont. Code Ann. § 85-2-306).
21. *Id.* (citing Mont. Code Ann. § 85-2-306(1)-(9)).
22. *Id.* at ¶ 9 (citing Mont. Code Ann. § 85-2-306(3)(a)(iii)).
23. *Tubbs*, No. BDV-2010-87, at 9-10.
24. *Tubbs*, 384 Mont. at ¶ 9 (citing Mont. Code Ann. § 85-2-306(3)(a)(iii) (1987)).
25. *Id.*
26. *Tubbs,* No. BDV-2010-87, at 2.
27. *Tubbs*, 384 Mont. at ¶ 9.
28. *Id*. (citing Admin. R. M. 36.12.101(7) (1987).
29. *Id.* at ¶ 11 (citing Admin. R. M. 36.12.101(13)).
30. *Id.* (quoting Admin. R. M. 36.12.101(13)).
31. *Id.*

development system was not physically connected.[32] Since the adoption of the 1993 rule, the number of exempt appropriations has steadily increased by approximately 3,000 wells per year.[33] An estimation found over 113,000 exempt appropriations in Montana.[34]

D. Procedural Background

On November 30, 2009, the Coalition sought a declaratory ruling from the DNRC Hearings Examiner to clarify the 1993 rule's inconsistency with the statute's purpose.[35] The Coalition argued that the statute does not require physical connectivity between ground water developments for a "combined appropriation."[36] The Hearings Examiner denied the petition on August 17, 2010, concluding that the 1993 rule did not conflict with the statute.[37]

On September 14, 2010, the Coalition challenged the Hearings Examiner's conclusion in district court.[38] The district court determined that the Hearings Examiner's conclusion was erroneous because the 1993 rule allowed large consumptive uses of groundwater without regard for senior users' rights.[39] The district court held that the 1993 rule violated "not only the spirit of the legislative intent behind the Act, but that it also violated the legislative intent in the enactment of the exempt well statute."[40] The Montana Supreme Court affirmed the district court's decision by reinstating the 1987 rule, but deferring to the DNRC to determine whether a new rule should be implemented.[41]

III. ANALYSIS

The Montana Supreme Court reviewed the district court's conclusion that the 1993 rule was erroneous by looking at the intent of the Montana legislature when it incorporated the term "combined appropriation" into § 85-2-306(3)(a)(iii).[42] "When the legislature has not defined a statutory term, [the court] consider[s] the term to have its plain

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32. *Id.*
33. *Id.* at ¶ 13.
34. *Id.* (The DNRC estimated that by 2020, there could be an additional 78,000 exempt appropriations in Montana. Further, DNRC estimates that 30,000 new exempt appropriations could be added in closed basins alone.)
35. *Id.* at ¶ 14.
36. *Id.*
37. *Id.*
38. *Id.* at ¶ 16.
39. *Tubbs*, No. BDV-2010-87, at 10.
40. *Id.* at 4.
41. *Tubbs,* 384 Mont. at ¶ 45. ((It is the responsibility of the administrative agency to "adopt rules necessary to implement and carry out the purposes of this chapter.") (quoting Mont. Code Ann. 85-2-113(2))).
42. *Id.* at ¶ 19 (citing Montana Wildlife Fed'n v. Sager, 190 Mont. 247, 264, 620 P.2d 1189, 1199 (1980)).

and ordinary meaning."[43] The exception to the permitting exemption applies when (1) there are at least two wells or developed springs, (2) from the same source, and (3) the combined appropriation exceeds ten acre-feet per year.[44] Thus, the legislature expressed its intent to limit the appropriation on any particular source of water to less than ten acre-feet per year.[45]

The court determined that the terms "combined" and "appropriation" work conjunctively to reference the *combined quantity* of water that an appropriator has a right to use.[46] Thus, the plain meaning of the statute provides no indication that the legislature intended for "combined appropriation" to mean "combined well."[47] The court held that the intent of the legislature in setting forth subsection (3)(a)(iii) was to ensure that the de minimus *quantity* of water appropriated from the same source would not exceed ten acre-feet per year in the absence of a permit.[48]

The purpose of the Act is to protect senior appropriators from encroachment by junior appropriators.[49] The 1993 rule effectively allowed a user to appropriate an unlimited quantity of water from the same source as long as the wells were not physically connected.[50] The 1993 rule clearly rendered meaningless the limit on volume or quantity of ten acre-feet, directly contradicting the purpose as established by the legislature.[51] Thus, the court concluded that the 1993 rule was inconsistent with the plain language of the statute and contradicted the purpose of the Act.[52]

The court next examined the district court's decision to reinstate the 1987 rule.[53] The Well Drillers asserted that the district court lacked such authority.[54] The Coalition countered by arguing that the former rule should be reinstated by default.[55] The court held that, despite the Montana Administrative Procedure Act's silence on this issue, the same

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43. *Id.* (quoting Giacomelli v. Scottsdale Ins. Co., 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666).

44. *Id.* at ¶ 22 ("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 flow rate, requires a permit[.]") *Id.* at ¶ 21 (quoting Mont. Code Ann. § 85-2-306(3)(a)(iii)).

45. *Id.* at ¶ 22.

46. *Id.* at ¶ 23.

47. *Id.*

48. *Id.* at ¶ 24.

49. *Id.* (citing Mont. Power Co. v. Carey, 2111 Mont. 91, 98, 685 P.2d 336, 340 (1984)).

50. *Id.* at ¶ 27.

51. *Id.*

52. *Id.*

53. *Id.* at ¶ 37.

54. *Id.*

55. *Id.*

reasoning as the invalidation of statutes applies.[56] "When an amended statute is invalidated, the statute is left in the same position it was in before the amendment was introduced."[57] Accordingly, the court held that when an administrative rule is invalidated, the remedy is to reinstate the former.[58]

Finally, the court looked at the district court order requiring the DNRC to conduct further rulemaking.[59] Courts retain the power "to make binding orders or judgments."[60] However, at the same time, it is the DNRC's responsibility to adopt and implement rules necessary to carry out the Act.[61] Therefore, the court upheld the district court's requirement to establish a rule consistent with the order, deferring to the DNRC to determine whether a new rule was required, or if the 1987 rule was appropriate.[62] The 1987 rule was thus reinstated, and awaits action by the DNRC.[63]

IV. CONCLUSION

The purpose of the Act is to protect senior water rights holders from adverse encroachment by junior appropriators.[64] The exempt well statute was established to allow for small uses of water that will not impact senior appropriators to avoid the burden of the expensive permit process.[65] The implementation of the 1993 rule contradicted the Act's intended protections by allowing large consumptive uses from the same source that cumulatively harmed senior water users.[66] The Montana Supreme Court's holding in *The Clark Fork Coalition v. Tubbs* effectively closed the 1993 rule's loophole allowing developers to bypass the arduous permitting process for physically unconnected well systems.[67] By invalidating the 1993 rule, senior water users will be afforded the protections that the Act originally intended.

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56. *Id.* at ¶ 40.
57. *Id.* (citing In re O'Sullivan, 117 Mont. 295, 304, 158 P.2d 306, 310 (1945)).
58. *Id.* at ¶ 41.
59. *Id.* at ¶ 43.
60. *Id.* at ¶ 44 (quoting State ex rel. Bennett v. Bonner, 123 Mont. 414, 425, 214 P.2d 747, 753 (1950)).
61. *Id.* at ¶ 45 (citing Mont. Code Ann. § 85-2-113(2)).
62. *Id.*
63. *Id.* at ¶ 46.
64. *Id.* at ¶ 24 (citing Mont. Power Co. v. Carey, 2111 Mont. 91, 98, 685 P.2d 336, 340 (1984)).
65. *Tubbs*, No. BDV-2010-87, at 9 (citing DNRC & John Tubbs' Ans. Br., 13 (May 30, 2014)).
66. *Tubbs,* 384 Mont. at ¶ 13.
67. *Id.* at 11.