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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

Cause No. BDV-2010-874

**ORDER ON MOTION
TO STAY COURT'S ORDER ON
PETITION FOR JUDICIAL
REVIEW**

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

Petitioners,

v.

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

Respondents

v.

MONTANA WELL DRILLERS
ASSOCIATION,

Intervenors,

1 v.

2 MONTANA ASSOCIATION OF
3 REALTORS and MONTANA
4 BUILDING INDUSTRY
5 ASSOCIATION,

6 Intervenor,

7 MOUNTAIN WATER COMPANY,

8 Intervenor.

9 On October 17, 2014, this Court entered its Order on Petition for Judicial
10 Review. That decision was appealed on December 23, 2014 by Intervenor Montana
11 Well Drillers Association (MWDA). MWDA now seeks a stay on two aspects of the
12 aforementioned order.

13 In its order, this Court directed the Montana Department of Natural
14 Resources and Conservation (DNRC) to engage in rule making consistent with the
15 Court's decision. The Court also reinstated DNRC's 1987 rule to replace the 1993
16 rule, which the Court found defective.

17 Montana Rule of Appellate Procedure 22 allows a district court to issue a
18 stay in an appeal. The parties generally agree with the standard to be applied in
19 determining whether a stay should be issued. (See MWDA's Mot. Stay Ct.'s Or. Pet.
20 J. Review, at 8 (Feb. 23, 2015); Petr's Resp. Opp'n MWDA's Mot. Stay Ct.'s Or., at 2
21 (Mar. 27, 2015).)

22 A stay is an "intrusion into the ordinary processes of administration and
23 judicial review," *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U.S.
24 App. D.C. 106, 259 F.2d 921, 925 (CADC 1958) (per curiam), and
25 accordingly "is not a matter of right, even if irreparable injury might
otherwise result to the appellant," *Virginian R. Co. v. United States*, 272
U.S. 658, 672, 47 S. Ct. 222, 71 L. Ed. 463 (1926). The parties and the
public, while entitled to both careful review and a meaningful decision,

1 are also generally entitled to the prompt execution of orders that the
2 legislature has made final.

3 *Nken v. Holder*, 556 U.S. 418, 427 (2009).

4 The party requesting a stay the burden of showing that the circumstances
5 justify an exercise of that discretion.

6 The fact that the issuance of a stay is left to the court's discretion
7 "does not mean that no legal standard governs that discretion. . . . '[A]
8 motion to [a court's] discretion is a motion, not to its inclination, but to
9 its judgment; and its judgment is to be guided by sound legal
10 principles.'" As noted earlier, those legal principles have been distilled
11 into consideration of four factors: "(1) whether the stay applicant has
12 made a strong showing that he is likely to succeed on the merits; (2)
13 whether the applicant will be irreparably injured absent a stay; (3)
14 whether issuance of the stay will substantially injure the other parties
15 interested in the proceeding; and (4) where the public interest lies."
16 There is substantial overlap between these and the factors governing
17 preliminary injunctions . . . not because the two are one and the same, but
18 because similar concerns arise whenever a court order may allow or
19 disallow anticipated action before the legality of that action has been
20 conclusively determined.

21 *Id.* at 434 (citations omitted).

22 Using the above principles, the Court will not place a stay on that portion
23 of its order which reinstated DNRC's 1987 rule. There has been no showing that
24 MWDA is "likely to succeed on the merits," and the Court does not see how MWDA
25 will be irreparably injured absent a stay. MWDA suggests that it may have trouble
advising its customers as to the proper standard applicable to their various wells, but
the Court does not see this as an irreparable injury.

In addition, a stay could substantially injure other parties interested in the
proceedings. At the hearing, the Court reviewed evidence that other parties to this
proceeding, specifically Mountain Water Company of Missoula and the Montana
Department of Fish, Wildlife and Parks, have been adversely affected by the 1993 rule.
To place a stay on this portion of the Court's order would continue that damage.


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1 Finally, the Court does not see how placing a stay on the portion of its
2 order reinstating the 1987 rule is in the public interest. The Court feels its decision
3 clearly served the public interest.

4 As to that portion of this Court's order which required DNRC to engage
5 in rule making, the Court will effect a stay until the matter is disposed of by the
6 Montana Supreme Court. The Court is primarily concerned with the argument by
7 MWDA that this matter conceivably could become moot pending the appeal depending
8 on the exact rule enacted by DNRC. An issue may become moot when a court cannot
9 grant meaningful relief or restore the parties to their original position. *Plain Grains*
10 *L.P. v. Cascade Co. Comm'rs*, 2010 MT 155, ¶ 34, 357 Mont. 61, 238 P.3d 332. The
11 Clark Fork Coalition notes that the last time DNRC was engaged in making the rules
12 with which we are here concerned, it took approximately three years from beginning to
13 end. While this may or may not be the time frame with which we are here concerned,
14 there is no good way to judge how long the DNRC rule making could take. With the
15 reinstatement of the 1987 rule, this Court does not feel that any of the parties or the
16 public will be harmed by a stay concerning the rule making portion of this Court's
17 order.

18 Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND
19 DECREED that this Court's Order on Petition for Judicial Review dated
20 October 17, 2014 will not be stayed concerning this Court's reinstatement of DNRC's
21 prior 1987 rule. However, that portion of the order which required DNRC to engage in
22 rule making will be stayed pending a decision by the Montana Supreme Court.

23 DATED this 8 day of May 2015.

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JEFFREY M. SHERLOCK
District Court Judge

1 pcs: Laura King/Matthew Bishop
2 Kevin R. Peterson/Anne W. Yates
3 Abigail J. St. Lawrence
4 Stephen R. Brown
5 Ryan K. Mattick

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7 T/JMS/clark fork coalition v tubbs ord mot stay.wpd

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