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Clark Fork Coalition v. Tubbs: Well, Well, Well, If It Isn't Another Combined Appropriation . . .

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PRECAP; *Clark Fork Coalition v. Tubbs*: Well, Well, Well, If It Isn't Another Combined Appropriation . . .

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I. QUESTIONS PRESENTED

1. Did the district court err in ruling that an administrative rule defining "combined appropriation" conflicted with the Montana Water Use Act?

2. Did the district court err in reinstating a previous version of the administrative rule?

II. FACTUAL AND PROCEDURAL BACKGROUND

This case revolves around the term "combined appropriation"[1] as it applied to the "exempt well" statute[2] of the Water Use Act.[3] Specifically, the issue is whether or not two or more "combined appropriations" of groundwater developments need to be physically connected so as to exclude them from the exempt well statute.

Put simply, the exempt well statute allows small appropriations of water (via wells, drainages, etc.) to circumvent the Department of Natural Resources and Conservation's (DNRC) permitting process. As originally drafted, an exempt well was defined as a well "with a maximum yield of less than one hundred (100) gallons a minute."[4] In 1987, the Legislature added an exception to the exception, stating that a "combined appropriation" of two or more wells from the same source would need a permit if together they exceeded the 100 gallon per minute ("gpm") limit.[5] Accordingly, the DNRC adopted a rule defining "combined appropriation," which specifically stated that the "[g]roundwater developments need not be physically connected."[6]

In 1991, the Legislature amended the exempt well statute to reduce the maximum flow rate to 35 gpm and to include an annual volume limit of ten acre-feet per year."[7] Two years later, the DNRC redefined the term "combined appropriation" to mean that the appropriations need to be "physically manifold into the same system."[8]

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[1] ADMIN. R. MONT. 36.12.101(13) (1993).
[2] MONT. CODE ANN. § 85–2–306 (2015).
[3] MONT. CODE ANN. §§ 85–2–101, *et. seq*.
[4] Revised Code Mont. § 89–880(4) (1973).
[5] Revised Code Mont. § 89–880(5).
[6] ADMIN. R. MONT. 36.12.101(7) (1987).
[7] MONT. CODE ANN. § 85–2–306(3)(a)(iii).
[8] ADMIN. R. MONT. 36.12.101(13).

In 2009, the Clark Fork Coalition, along with several ranchers with senior water rights, filed a petition with the DNRC for declaratory ruling and requested an amendment to the 1993 definition.[9] After receiving the Clark Fork Coalition's petition, the DNRC analyzed the definition of "combined appropriation." Using the process set out in the Montana Administrative Procedure Act ("MAPA"),[10] it decided that the definition was consistent and not in conflict with applicable law under the Water Use Act."[11] The district court used a hypothetical to illustrate its point that the exempt well statute allows for "larger consumptive water uses to be established without going through the permitting process."[12] The district court suggested that a 1,000-lot subdivision, each house with an exempt well appropriated from the same source, would avoid the permitting process and have a significant effect on senior water rights.[13]

Subsequently, the Clark Fork Coalition filed a complaint with the district court seeking review of the denied petition.[14] After a failed attempt between the Clark Fork Coalition and the DNRC to reach a stipulated agreement, the case was re-opened in 2014.[15] On October 17, 2014, the district court found in favor of the Clark Fork Coalition and declared that the DNRC's 1993 definition conflicted with the purpose of the Water Use Act.[16] The district court invalidated the 1993 rule and reinstated the 1987 definition until the DNRC rewrote the rule.[17]

Though the DNRC elected not to appeal, the intervenors from the district court proceedings—the Montana Well Driller's Association, the Montana Association of Realtors, and the Montana Building Industry—appealed the ruling separately.[18] Both the Clark Fork Coalition and the intervenor Mountain Water Company wrote briefs supporting the district

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[9] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n at 1, *Clark Fork Coalition v. Tubbs*, https://supremecourtdocket.mt.gov/search/getDocument?documentid=124616 (Mont. Nov. 17, 2015) (No. DA 14-0813).

[10] MONT. CODE ANN § 2–4–305(6).

[11] Intervenor/Appellants Montana Well Driller's Assoc.'s Opening Brief at 3, *Clark Fork Coalition v. Tubbs* https://supremecourtdocket.mt.gov/search/getDocument?documentid=124614 (Mont. Nov. 18, 2015) (No. DA 14-0813) (quoting Declaratory Ruling, File 2, Tab 54, p.6., COR, RA BDV-2010-874, Doc. 3, Appendix 1).

[12] Order on Petition for Judicial Review at 9 https://www.google.com/url?q=http://leg.mt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/Sept-2015/ClarkForkCoalition_v_DNRC-opinion.pdf&sa=U&ved=0ahUKEwi_nfPZzdPMAhVUz2MKHcY1BAwQFggFMAA&client=internal-uds-cse&usg=AFQjCNHPeJPl_WpAZiHXRCx9re-i1eIozw (Mont. Oct. 17, 2014) (No. BDV–210–874).

[13] *Id*. at 10.

[14] Answer Brief of the Clark Fork Coalition et al. at 3, *Clark Fork Coalition v. Tubbs*, https://supremecourtdocket.mt.gov/search/getDocument?documentid=129429 (Mont. Jan. 15, 2016) (No. DA 14-0813).

[15] *Id*. at 4.

[16] *Id*.; *See* Order, *supra* note 12, p. 13, App. 2.

[17] *Id*.

[18] *Id*.

court's ruling.[19] Additionally, both the appellants and appellees are joined in briefing by amicus curiae.[20]

III. ISSUES ON APPEAL

Based on the extensive briefing by the appellants, appellees, and five amici curiae, there are too many issues to address in oral argument. The parties will likely spend most of their time addressing the two most important issues: 1) whether the district court correctly interpreted the DNRC's definition, and 2) whether the district court's remedy was proper after ruling against the 1993 definition.

A. Whether the DNRC's Definition of "Combined Appropriation" Was Inconsistent with the Purpose of the Water Use Act

1. Appellants' Arguments

Both the Montana Well Driller's Association's brief and the combined brief of the Montana Association of Realtors and the Montana Building Industry (collectively "the appellants") argue that the district court erroneously invalidated the 1993 rule. "The District Court failed to analyze whether the 1993 Rule is consistent with the exempt well statute, conceding that DNRC correctly determined its rule is consistent with the plain reading of the term 'combined appropriation.'"[21] "The prohibition on 'combined appropriations' means a person shall not connect two or more wells or developed springs together in order to exceed the 35-gpm flow rate and 10-acre-foot volume limitation."[22] The appellants argue that the complete phrase "combined appropriation" means a physical joining of appropriations into one appropriation.[23] The appellants contend that a plain reading of the statute means the wells must be physically combined. In order to rule against an agency's rule, the definition must be "plainly and palpably inconsistent" with the statutory language; the appellants argue it was not.[24]

The original purpose of the exempt well statute, the appellants argue, "has always been to provide a property owner with the ability to make a small groundwater appropriation without having to go through

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[19] Answer Brief of the Clark Fork Coalition et al., *supra* note 14, at 4; Intervenor/Appellants Montana Well Driller's Assoc.'s Opening Br., *supra* note 11, at 4.
[20] The Montana Association of Counties and the Water Systems Council have written briefs in support the appellants, while the Montana League of Cities and Towns, Montana Trout Unlimited, and Bitterrooters for Planning, et al., have written briefs supporting the appellees.
[21] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 16.
[22] *Id*.
[23] *Id*.
[24] Moe v. Wesen, 172 F.Supp 259, 263 (Mont. 1959).

DNRC's permitting requirements."[25] Under the 1987 Rule, a combined appropriation did not require that the wells were physically manifold together, which made sense, according to the Appellants, because the 1987 Rule also had no volume restriction.[26] However, in light of the 1993 amendment to the Rule, which significantly decreased the flow rate and imposed a volume limit to the exempt well statute, the appellants argue that the DNRC was right to remove it from the definition.[27] According to the appellants, narrowing the limitation on exempt wells "made it physically impossible to circumvent the purposes of the 'combined appropriation' term without physically connecting two or more wells together in order to make one large appropriation."[28]

The appellants argue, however, that allowing each person the ability to appropriate his or her own exempt well is the express purpose of the statute, and that the DNRC has redundant protections available to protect senior water users besides requiring a permit.[29] Contrary to the appellees' contention, "the 1993 Rule is not a 'loophole' allowing the use of exempt wells for large consumptive uses. By the very plain reading of the statute, exempt wells are allowed to be utilized by anyone who has a property interest where the well is located and who does not appropriate more than 35 GPM and 10 acre-feet of water a year."[30]

Finally, the appellants argue that the district court did not give enough deference to the agency's decision to reword the definition to include "physically manifold." According to case law, the regulatory agency is given deference when the interpretation of its rule has stood for a considerable length of time.[31] Of course, a court can overrule the longstanding interpretation, but only when its decision is based on "compelling indications."[32] The DNRC had already determined that the 1987 rule was "ambiguous and difficult to administer" and specifically changed the meaning to address this difficulty.[33] Additionally, the exempt well statute has been modified almost every session since 1993 and has never changed the definition of "combined appropriation."[34] The Appellants argue that the district court gave too much weight to legislative

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[25] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 20.
[26] *Id*. at 23.
[27] *Id*. at 24.
[28] *Id.*
[29] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 35, 36. Appellant's Brief mentions two other protections available to concerned water users: establishing a controlled groundwater area under MONT. CODE ANN. § 85–2–206, or creating a stream depletion zone under MONT. CODE ANN. § 85–2–380. *Id.* at 36.
[30] *Id*. at 42.
[31] Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conserv., 113 P.3d 224, 231 (Mont. 2006).
[32] Mont. Power Co. v. Mont. Pub. Serv. Comm'n, 26 P.3d 91, 94 (Mont. 2001).
[33] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 7. The brief cited 1993 Mont Admin. Reg. 1334A (June 24, 1993), in which the DNRC stated that it had a difficult time "fairly and consistently" administering the 1987 definition of "combined appropriation" because of its ambiguous terms.
[34] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 26.

intent and relied on an "uncorroborated and unspecified concern that multiple wells were being utilized for residential development" which might affect senior water rights.[35]

2. Appellees' Argument

The appellees contend that the district court correctly analyzed the plain language, the legislative history, and the overall purpose of the Water Use Act in ruling that a combined appropriation need not be physically connected.[36] "Since 1973, when the statute was adopted, a comprehensive system for permitting new appropriations forms the backbone of Montana water law."[37] Ultimately, the appellants argue that the DNRC's process of permitting groundwater developments was the means for the State, who owns the water, to conserve its use. The DNRC itself acknowledged that adding the "physically manifold" requirement "had caused exempt wells to proliferate, that the problem was especially acute in closed basins, and that the rule needed to be changed."[38]

The appellees state that the plain language of the exempt well statute, the legislative intent of the 1987 Rule, and the overall purpose of the Water Use Act all support a definition of "combined appropriation" which does not have a physical requirement. The plain language, the appellees argue, indicates that the plain language denotes "distinct things, not two or more connected things."[39] Nothing suggests that the developments must be manifold or physically connected in order to be combined.[40]

Additionally, the appellees argue that the legislative intent behind the 1987 Rule did not state the wells needed to be physically connected. The appellees argue that, because the 1987 Legislature wrote the law, its intent provides the only relevant legislative history. "In the construction of a statute, the primary duty of the court is to give effect to the intention of the Legislature enacting it.[41] Appellees point out that the appellants concede that the original drafting of the rule did not care about whether the wells were physically connected.[42]

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[35] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 20–21.
[36] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 11.
[37] Answer Brief of Intervenor/Appellee Mountain Water Company at 7, *Clark Fork Coalition v. Tubbs*, https://supremecourtdocket.mt.gov/search/getDocument?documentid=129135 (Mont. Jan. 15, 2016) (No. DA 14-0813).
[38] Answer Brief of the Clark Fork Coalition et al., *supra* note 14, at 3.
[39] *Id*. at 15.
[40] *Id*.
[41] State v. Hays, 282 P. 32, 34 (Mont. 1929).
[42] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 16; *see also* Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 23 ("The District Court also looked at DNRC's enactment of the 1987 Rule, which did not require that two wells be physically connected to be a combined appropriation.").

The Water Use Act was enacted not only to protect natural resources, but also to allow beneficial appropriation of water.[43] The appellees argue that, contrary to the purpose of the Act, the 1993 Rule both allows large consumptive use without a permit and improperly puts the burden on senior water right holders to protect their own rights.[44] "The public policy underlying the provision was to prevent large consumptive users of *all* types [not just irrigators] from circumventing the water permitting process."[45] This circumvention, the appellees argue, both endangers existing senior water rights through the risk of overconsumption and encumbers senior water owners to affirmatively protect what the law already stands to protect.

3. Analysis

Questions of water law are often especially contentious because of the inherent countervailing interests: conservation and beneficial use. "The District Court determined the central purpose of the Act was to implement a permitting system, which in turn provided notice to other water users to take action in order to protect their established water rights."[46] It is possible, however, that the district court concerned itself too much with the exempt well statute and ignored the nature of the exception; that is, exceptions are specifically cut out from the general rule. The exempt well statute is not at issue, and this carve out for small wells has been expressly allowed by the Act.[47] The appellants state that the act is not simply about permitting and controlling water use, but also "'encourag[ing] the wise use of the state's water resources' and [seeking] the stabilization of streamflows.'"[48] Siding with the appellants would prevent a watering down of the nature of the exception.

Conversely, by expanding the definition of an exception, the Court would risk lessening the available protections to senior water rights owners. The Water Use Act is based partially on the idea of "first in time, first in right" with respect to water appropriators.[49] As the appellees point out, the broadening of a permitting exclusion could potentially upend the protections specifically provided for senior water right owners. Indeed, that is precisely what happened here, as the Clark Fork Coalition and several concerned ranchers preemptively sought to protect their rights from being harmed by the DNRC's interpretation of the rule. Under the

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[43] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 25.
[44] *Id*.
[45] *Id*. at 23.
[46] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 28 (citing Order, *supra* note 12, p.5, App. 2).
[47] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 30.
[48] Hohenlohe v. State, 240 P.3d 628, (Mont. 2010) (citing MONT. CODE ANN. § 85–2–101(3)).
[49] Featherman v. Hennessy, 115 P. 983, 986 (Mont. 1991); Answer Brief of Intervenor/Appellee Mountain Water Co. at 14.

broad 1993 Rule, the appellees feared that they would not only have no notice of a potentially substantial appropriation, but they would have no opportunity to object to said appropriation.[50] While the appellants note that there are redundant protections implemented in the Water Use Act,[51] as stated in the appellee's brief, the exclusion was intended to be narrow because a narrow interpretation gives preference to senior appropriators and protects water sources from being overconsumed.[52]

Finally, while both parties argued in detail about the plain language of the statute in their briefs, the Supreme Court may not ask for much discussion on this. The Court is not allowed to give deference to the agency because this issue is reviewed *de novo*.[53] Additionally, the district court specifically mentioned that it gave due deference to the DNRC's interpretation. As such, the Supreme Court is unlikely to review it.

B. Whether Reinstatement of the 1987 Rule Was Appropriate

1. Appellants' Argument

Even if the district court properly struck down the 1993 Rule as invalid, the appellants argue that the district court erred by reinstating the 1987 definition rather than remanding the issue back to the DNRC so that it could amend the rule.[54] Appellants argue that the district court created its own rule and subverted the MAPA.[55] A court is limited by the MAPA and can only "affirm a decision of an agency, remand back to the agency for further proceedings, reverse the agency decision, or modify the decision."[56] The appellants contend that reinstating the 1987 Rule—which was expressly found unworkable over 20 years ago—does not comply with the MAPA.[57] "Unless a rule is adopted in substantial compliance with these procedures [e.g. the MAPA], the rule is not valid."[58]

Finally, the appellants contend that the district court also overstepped its constitutional authority by reinstating the 1987 Rule because it did not give the people an opportunity to be present at the rulemaking.[59] The DNRC is the executive branch and has the sole authority to "adopt rules necessary to implement and carry out the

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[50] Answer Brief of Intervenor/Appellee Mountain Water Co., *supra* note 37, at 17, 30.
[51] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 36.
[52] Answer Brief of Intervenor/Appellee Mountain Water Co., *supra* note 37, at 19–20.
[53] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 10.
[54] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 13.
[55] MONT. CODE ANN. § 2–4–101, *et seq*.
[56] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 40 (*See* MONT. CODE ANN. § 2–4–704).
[57] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 26–28.
[58] State v. Vainio, 35 Pl.3d 948, (2001).
[59] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 15.

purposes" of the Water Use Act.[60] The appellants accuse the district court of simply instating a rule that complied with its Order, thereby violating the Separation of Powers Doctrine.[61] The appellants argue the district court should have ordered the DNRC to re-write the rule instead of assuming an executive role and creating a new rule to fit its Order.[62] The appellants content that the district court denied the people an opportunity to participate in the operation of a governmental agency prior to its final decision.[63] Because there was no such opportunity, the appellants state that the remedy set down by the district court is unavailable as it violates the both the MAPA and the Montana Constitution.

2. Appellee's Arguments

The appellees claim that the district court's remedy of remanding back to the DNRC and reinstating the 1987 Rule in the interim was appropriate. The appellees state that the district court did not create a new rule, but rather gave guidelines for the DNRC to follow in rewriting the rule.[64] "[T]he scope and content of a future rule—whatever it may be—does not change the fact that the 1993 rule defining 'combined appropriation' . . . is too narrow [and is] in conflict with legislative intent."[65]

Additionally, they contend that reinstatement of the old rule was proper because the district court has broad discretion in its remand procedures. Under the MAPA, the district court can provide any remedy not barred by statute.[66] The appellees claim that because there is no statutory restriction in the MAPA, the district court has broad power to enforce equitable remedies.[67] Accordingly, "the effect of invalidating an agency rule is to reinstate the rule previously in force."[68] Put simply, the district court, not wanting "to impose chaos upon DNRC," used its equity power to implement a previous administrative rule until the DNRC created a new rule.[69]

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[60] MONT. CODE ANN. § 85–2–113(2).
[61] Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 37.
[62] *Id*.
[63] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 16–17 (citing Mont. Const. art. II, § 8 (1972); MONT. CODE ANN. § 2–3–101 (1975)).
[64] Answer Brief of The Clark Fork Coalition et al., *supra* note 12, at 35 ("[F]uture rulemaking is not predetermined . . . . The only sideboard is a legal one; the final rule must be consistent with . . . the district court's order").
[65] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 36.
[66] *Id.* at 37.
[67] *Id.*
[68] Answer Brief of Intervenor/Appellee Mountain Water Co., *supra* note 37, at 35 (citing Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) *cited by* Defenders of Wildlife v. Salazar, 776 F.Supp.2d 1178, 1186 (D. Mont. 2011)).
[69] Order, *supra* note 12, p. 13, App. 2.

3. Analysis

The Court must analyze whether or not, after invalidating the current definition of "combined appropriation," the district court acted within its power by reinstating the 1987 Rule. Of course, this issue need not be addressed if the Court finds that the 1993 Rule is valid.

There have been several attempts to re-write the definition of "combined appropriation," though none so far have been successful. As stated above, after the Clark Fork Coalition originally filed suit, the two parties attempted to enter into a stipulated agreement that the DNRC would amend the definition to exclude the physically manifold requirement, but this ultimately failed because the parties could not agree on a definition.[70] Additionally, there have been at least two failed attempts by the Legislature to successfully define the statute, one in 2005 and one in 2013.[71] Once the district court invalidated the 1993 Rule, it set up a vacuum which it had no way of filling other than reinstating the 1987 Rule.

However, the Supreme Court could potentially take issue with the district court's reinstatement of a dated and unworkable rule. As the appellants and appellees agree, the rule must be "valid and not in conflict with the statute."[72] The DNRC specifically stated that the 1987 Rule was difficult to administer "fairly and consistently."[73] Not only was the definition of "combined appropriation" changed, but the water limits of the underlying exempt well statute were significantly altered.[74] Moreover, the appellees seem to be arguing that the 1993 Rule did not meet the current needs of Montana's growing population and water needs, but that reinstating an even older version is an adequate remedy.[75] It is difficult to see how reinstating the 1987 Rule would be consistent with the Water Use Act.

IV. CONCLUSION

Water law remains a particularly contentious issue in Montana, and the Court must carefully balance the appellants' right to use water with the appellee's "first in time" right. By narrowing the definition of "combined appropriation," the Court risks overreaching by severely limiting an exception specifically enacted by the Legislature. Conversely, by broadening the definition, the Court risks undermining the "first in time" rule. Ultimately, the appellants will have a difficult time arguing

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[70] Answer Brief of The Clark Fork Coalition et al., *supra* note 14, at 3–4.
[71] *Id*. at 21–22; Intervenor/Appellants Montana Well Drillers Assoc.'s Opening Brief, *supra* note 11, at 27.
[72] MONT. CODE ANN. § 2–4–305(6).
[73] Opening Brief of Intervenors/Appellants Montana Ass'n of Realtors & Montana Building Industry Ass'n, *supra* note 9, at 7.
[74] MONT. CODE ANN. § 85–2–306(3)(a).
[75] Answer Brief of Intervenor/Appellee Mountain Water Co., *supra* note 37, at 39.

against the longstanding rule protecting the rights of senior owners. By reinstating a dated and unworkable rule, however, the district court may have overreached, and the Court will have to determine the proper procedure for remand.