

# Public Land and Resources Law Review

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Volume 22

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## A Clean and Healthful Environment and Original Intent

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### Recommended Citation

22 Pub. Land & Resources L. Rev. 83 (2001)

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## A Clean and Healthful Environment and Original Intent

### The Honorable C.B. McNeil\*

Good morning. Thirty-five years ago in this very building, every Saturday morning at 8:00, federal taxation, Professor Lester Rusoff. Those are not among my fondest memories.

My comments here today are as a delegate to the 1972 constitutional convention and not in my present capacity as a Montana district judge. Some of the law professors have not only the pleasure, but probably have the duty to be critical of Supreme Court opinions, and at least one law professor has been vocal in being critical of the court as an institution. Sitting district judges do not have that luxury.

First, a brief history as to how and where this clean and healthful environment provision came from. I was asked to speak on the actual drafting and intent of Article 9 of the Montana Constitution, the clean and healthful environment provision. The 1889 constitution was the only constitution of the State of Montana for 83 years. There had been two prior constitutional conventions, but they were both territorial conventions.

The constitution adopted by the State of Montana when it became a state in 1889 endured for 83 years. In 1969, the legislature created a constitutional revision commission to cure what some of them perceived to be some Alzheimerick problems of the old constitution, believing it to be outdated.

In 1970, at a general election, the people of Montana voted for a referendum to call a constitutional convention. In 1971, the legislature enacted a Constitutional Convention Enabling Act,<sup>1</sup> and on November 2 of 1971, 100 delegates were elected to serve as delegates to the constitutional convention based upon the representative districts then existing in the State of Montana.

The regular session of the convention ran from January through March of 1972. I believe we were in session some nine weeks. The constitution,

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\* Originally from Anaconda, the Honorable C.B. McNeil graduated from the University of Montana School of Law in 1966. After graduation, Judge McNeil practiced law in Polson with the firm of Turnage, McNeil and Mercer until 1984, when he was elected district judge for the 20th Judicial District. The voters reelected him in both 1990 and 1996. In 1972, he was elected and served as a delegate to the Montana Constitutional Convention. In the first Montana Supreme Court decision addressing the right to a clean and healthy environment, *Montana Environmental Information Center v. Department of Environmental Quality*, Delegate McNeil is quoted at length from the convention transcripts. *Montana Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999) (hereinafter *MEIC* or alternately referred to as the "Seven-Up Pete Case").

1. Montana Constitutional Convention Enabling Act, 42<sup>nd</sup> Legis. Assem., ch. 296 (1971), amended by 42<sup>nd</sup> Leg. Assem., 1<sup>st</sup> Extraordinary Sess., ch. 1 (1971). For a more thorough review of the convention's inception, see *Forty-Second Legislative Assembly v. Lennon*, 481 P.2d 330 (Mont. 1971).

as proposed by the delegates, was adopted by election of the people on June 6 of 1972.

During the convention, there were ten substantive committees. I served on the Natural Resources and Agriculture Committee. Also present at this conference today is a delegate who served on the Bill of Rights Committee, Bob Campbell, who was one year behind me in this institution, the University of Montana School of Law. I was in the class of 1966. Bob was in the class of 1967.

In the 1889 Constitution, there was an article, "Article 18, Labor," which created the Department of Agriculture.<sup>2</sup> By the time the committee had finished its work and was prepared to report to the floor of the convention in 1972, it was determined that there was no necessity for a department of agriculture with constitutional status.

That does not mean that the committee did not feel that agriculture was important, but only a legislative session or two prior to the convening of the convention, the State of Montana had undergone an executive reorganization. It was felt that the reorganization ought to have some opportunity to see whether it was going to be successful, and it provided for a Department of Agriculture.<sup>3</sup> So the omission of a specific agriculture section from the 1972 constitution did not abolish agriculture as a governmental entity within the State of Montana.

With respect to the natural resources article, it was a sign of the times in 1972 of the significance that the delegates placed upon the environment in the State of Montana. There was no discussion that I can recall of not having a natural resources article within the new constitution.

I will take just a moment to read to you the verbatim provisions of Article 9, Section 1, "Protection and Improvement," as enacted by the constitutional convention and adopted by the people. Subsection (1): "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."<sup>4</sup>

Subsection (2): "The legislature shall provide for the administration and enforcement of this duty."<sup>5</sup>

Subsection (3): "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and deg-

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2. MONT. CONST. of 1889, art. 18.

3. Executive Reorganization Order 10-71 (Dec. 9, 1971); see MONT. CODE ANN. § 2-15-3001, Compiler's Cmts. (1999).

4. MONT. CONST. art. IX, § 1(1).

5. MONT. CONST. art. IX, § 1(2).

radation of natural resources.”<sup>6</sup>

In discussing this topic, I will discuss first the drafting, then the debate and intent, and finally, an interpretation. With respect to drafting, I am sure you are all familiar with the legislative process. Bills are commenced by the introduction of a bill in either the Senate or the House. During the constitutional convention, subject matter was introduced by what was called delegate proposals. Delegate Proposal No. 1 was introduced by Delegate Berthelson. It provided for a new constitutional section, entitled “Environmental Quality.” It provided for a high quality environment and had a provision for a right to sue.<sup>7</sup>

Delegate Proposal No. 12 was introduced by Delegate Jerry Cate, who was also a member of the class of 1966 from the University of Montana School of Law. It provided that the environment was a public trust, and that the public trust was common property. It also provided a personal right to sue.<sup>8</sup>

Delegate Proposal No. 20 was introduced by me. It provided for a new constitutional article entitled “Natural Resources.” It provided that it would be the policy of the State of Montana and the duty of each person to provide, maintain and enhance a quality environment for the benefit of the people.<sup>9</sup>

I also introduced Delegate Proposal No. 21, a new constitutional section in Article 3 of the Bill of Rights providing that it was the right of each person to have and the duty of each person to maintain and enhance a quality environment.<sup>10</sup>

The Bill of Rights Committee adopted a multitude of rights in a section three in the Declaration of Rights, under a general paragraph of inalienable rights, and incorporated the right to a clean and healthful environment.<sup>11</sup>

With respect to the Natural Resources Committee and the drafting and intent of the environmental provision, the majority report, as prepared and presented to the convention had, as a section 1, “Protection and Enhancement,” providing that the state and each person must maintain and enhance the environment of the state for present and future generations.<sup>12</sup> It provided under subsection (2) that the legislature must provide for administra-

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6. MONT. CONST. art. IX, § 1(3).

7. *Montana Constitutional Convention*, Vol. I at 75, Jan. 20, 1972.

8. *Montana Constitutional Convention*, Vol. I at 96, Jan. 21, 1972.

9. *Montana Constitutional Convention*, Vol. I at 107, Jan. 25, 1972.

10. *Montana Constitutional Convention*, Vol. I at 108, Jan. 25, 1972.

11. *See Montana Constitutional Convention*, Vol. V at 1637, Mar. 7, 1972.

12. *Montana Constitutional Convention*, Vol. IV at 1200, Mar. 1, 1972.

tion and enforcement, and in subsection (2), a directive to the legislature to provide adequate remedies for the protection of the environmental life support systems from degradation and to provide adequate remedies to prevent unreasonable depletion of natural resources.<sup>13</sup> The majority report to the convention floor also included a section 2 entitled "Reclamation", a section 3 as "Water Rights," and a section 4 as "Cultural Resources," none of which are pertinent to the subject of this discussion.<sup>14</sup>

The Natural Resources Committee proposal was presented to the floor of the Convention during what some have referred to as the "Great Debate." I think it was a great debate in the minds of the 100 delegates assembled— it was not necessarily of such stature to those who were looking at it from outside.

The Natural Resources Committee report is found at page 552 of the verbatim transcripts,<sup>15</sup> dated March 1, 1972, and I will make some mention of the verbatim transcripts. Any of you who have done any research in the area of intent with respect to constitutional articles have already discovered the verbatim transcripts. Those of you who have not, but some day might have a reason to look at the intent behind any constitutional provision, are recommended to refer to the verbatim transcripts. The 1889 constitutional convention transcripts were published in a single volume. Of course being somewhat more verbose, the 1972 constitutional convention transcripts were condensed into ten volumes. They are readily available throughout the state. I am confident that the law school library has multiple copies of it. It is an excellent source, because every comment that was made during the convention, during the debates, is of record in the verbatim transcripts.

In introducing the majority committee report of the Natural Resources Committee, the following are comments made by me:

The committee recommends the strongest environmental section of any state constitution. It is the only constitutional provision with an affirmative duty to enhance the environment. It mandates the legislature to maintain and enhance the environment. It mandates the legislature to provide adequate remedies to protect the environmental support system from degradation. It provides that the term environmental life-support system is all encompassing, including but not limited to air, water and land. And whatever interpretation is afforded this phrase by the legislature and the courts, there is no question that it cannot be degraded.<sup>16</sup>

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13. *Id.*

14. *Id.*

15. *Montana Constitutional Convention*, Vol. II at 552, Mar. 1, 1972.

16. *Montana Constitutional Convention*, Vol. IV at 1200, Mar. 1, 1972.

In view of some of the questions relating to arsenic that were in the last presentation at this conference in 2001, I find it interesting that the next paragraph I am about to read are comments I made into the record at the 1972 constitutional convention:

The majority of the National Resources Committee felt that the use of the word "healthful" would permit those who would pollute our environment to parade in some doctors who would say that if a person can walk around with four pounds of arsenic in his lungs or SO<sub>2</sub> gas in his lungs and wasn't dead, that that would be a healthful environment.<sup>17</sup>

Parenthetically, I should let the audience know that I do have some background in the area of arsenic pollution. Senator Grosfield is a third generation rancher in Livingston. I am a fourth generation Anacondan. My parents were classmates in the class of 1919 there. My mother's father was the last fire chief to have horse-drawn fire wagons and the chief when they got the first fire engine in Anaconda in 1912.

My father's father, Hiram McNeil, was an engineer for the Butte/Anaconda Pacific Railroad. I have a photograph of him taken in 1893 beside Steam Engine #20. My grandmother's father moved to Anaconda when Marcus Daly platted the town in 1883. My father graduated from Anaconda High in 1919, and went to the School of Mines in Butte, where he got a metallurgical engineering degree in 1923. I got my metallurgical engineering degree in 1959. But in any event, my father worked for the Anaconda Copper Mining Company as a metallurgical engineer from 1923 until he died in 1946. He was superintendent of the arsenic plant at the smelters in Anaconda. He invented and developed the Cottrell treaters, which were responsible for removing a substantial amount of the arsenic from the flue gases of the reverberatory furnaces. Prior to that time, a substantial amount of arsenic escaped in the flue gases. Anybody who has ever driven between Anaconda and Deer Lodge or Butte knows how very desolate it is there. It was not an accident that I selected arsenic pollution as an example of a potential source of degradation of our Montana environment.

You will find on page 1202 of the transcript, an amendment introduced by Delegate James which inserted the clean and healthful language to the committee proposal.<sup>18</sup> Remember that the committee proposal's goal was to maintain the environment of the state. You will find comments, such as at page 1205 by Delegate Burkhardt, who supported the clean and healthful

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17. *Id.*

18. *Montana Constitutional Convention*, Vol. IV at 1202, Mar. 1, 1972.

amendment, to strengthen the committee proposal.<sup>19</sup>

In voting against that amendment, I wanted to burn into the record and did burn into the record the comments that appear at page 1209, memorializing that with or without the word healthful, it was the intention of the convention to adopt the stronger of the two.<sup>20</sup> The only debate was as to which was the stronger provision. There was absolutely no intent on the part of any of the delegates to the constitutional convention to adopt a weak environmental provision.

At page 1205 in the transcript, I am quoted as saying that it was the committee's intention to permit no degradation of the present environment of Montana and to affirmatively require enhancement of what we had then.<sup>21</sup>

The committee was well aware of pollution in Montana in 1972. There was air pollution in Missoula. We could smell Hoerner Waldorf when we were going to law school here.<sup>22</sup> We used to refer to the body of water that flows through town as the "Red River."<sup>23</sup> It flowed red from Silverbow Creek out of the mines in Butte and from the smelter in Anaconda for years and years.

In high school in Anaconda in the early 1950's, I can remember tipping over the boat while duck hunting, floating the Red River from below Warm Springs. My watch stopped the next day. I took it into the jeweler and returned a few days later to pick it up. He simply shook his head and said, "C.B., the insides of your watch have been dissolved."

The convention was aware that surface lands were being disturbed by strip mining in Colstrip for coal. We knew there was air pollution from the

19. *Montana Constitutional Convention*, Vol. IV at 1205, Mar. 1, 1972. Delegate Burkhardt noted:

Nothing is as important that we will do here as guarantee the future of our citizens, and those who come from all over this country and the world, to enjoy the sense of cleanliness and the health of our environment in Montana. I think it does strengthen it to put these words [clean and healthful] in. I am for this amendment.  
*Id.*

20. *Montana Constitutional Convention*, Vol. IV at 1209, Mar. 1, 1972 ("I believe the entire delegation will agree that, whichever we adopt, that it is the intention of this Convention to adopt the stronger of the two.").

21. *Montana Constitutional Convention*, Vol. IV at 1205, Mar. 1, 1972.

22. The paper mill now owned by Smurfit Stone Container still graces Missoula with its characteristic bouquet when the wind drifts east.

23. The Clark Fork River bisects Missoula. Although much cleaner today than in years past, tons of toxic sediment lodged behind Milltown Dam just east of Missoula still pose an ominous danger to the river and riparian habitat. Negotiations continue on reclamation plans. See *A Tale of Two Rivers: Milltown Dam & Restoration of the Clark Fork and Blackfoot Rivers*, MISSOULIAN (2001), available at <http://www.missoulian.com/specials/two-rivers> (displaying chronological collection of articles published on the topic in the Missoula newspaper).

refineries at Laurel and that there was pollution in other parts of the state. But we were also keenly aware of the pristine air in the Bob Marshall Wilderness Area, the beautiful mountains that we enjoy in this state, and the absolutely unpolluted, at that time, waters of the Madison, the Jefferson, the Gallatin, the Yellowstone, and Rock Creek. It was the intention of the committee to have the absolute strongest constitutional environmental provision which would not allow any degradation and put an affirmative duty on the state and all citizens, including all corporations, to improve that environment.

With respect to interpretation, the only other case that came up on my computer search of Article 9, Section 1 is a 1976 case, *Montana Wilderness Association v. Board of Health and Environmental Sciences*.<sup>24</sup> In a dissent, Chief Justice Haswell made the following observation: "We cannot ignore the bare fact that the legislature has not given effect to the Article 9, Section 1 mandate over a period of years."<sup>25</sup> That is the only reference I could find to the specific clean and healthful environment constitutional provision in a Supreme Court opinion, other than the case we are about to discuss.

Before I get into the interpretation of the clean and healthful provision, are there any questions with respect to the constitutional debate or the drafting provisions up to this point?

QUESTION FROM AUDIENCE: As I understand it, you have not adopted language that says only the legislature shall enforce this duty, but it simply says, the legislature shall have a duty to enforce this, right?

JUDGE McNEIL: Well, in Section 1 it is clear that the state and each person — and person under any legal definition includes corporations as well as individuals — shall maintain and improve a clean and healthful environment. There is an affirmative duty there, a prospective duty to not just keep what we have, but to make it better.

Section 2 requires, mandates, the legislature to provide for administration and enforcement of the duty, but they cannot proscribe it by acting contrary to the requirement of maintaining and improving a clean and healthful environment.

During the debate, my very good friends Bob Campbell and Jerry Cate

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24. *Montana Wilderness Ass'n v. Board of Health and Envtl. Sciences*, 559 P.2d 1157 (Mont. 1976).

25. *Id.* at 1168 (Haswell, J., dissenting) (3-2 decision). Introducing his dissent to the majority's ruling that an inadequate environmental impact statement issued by the state board had no bearing on the issue of local subdivision control, Justice Haswell opined:

The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control.

*Id.* at 1161.



disagreed with me. They felt a clean and healthful environment was a lot stronger than maintaining and improving the environment of the state of Montana.<sup>26</sup> I thought the proposal spoke for itself. But in any event, there was no disagreement that we wanted the strongest provision possible in the constitution.

QUESTION FROM AUDIENCE: We know that the legislature has to enforce the provision, but do we know whether or not the courts or other branches of government can enforce it also?

JUDGE McNEIL: I think the Montana Supreme Court and Justice Terry Trieweiler made a strong step in that direction in the 7-Up Pete Case.<sup>27</sup>

QUESTION FROM AUDIENCE: Judge, you said that the intent was no degradation. Are you talking about how you would define that term?

JUDGE McNEIL: Absolutely not. That is why we left it up to the legislature, sir. We surely did not want the environment to get worse. And that does not mean that it was the intention of the convention to lock up industry so that there would never again be another mine in the State of Montana. But it surely was an expression of the will of the people, that whatever is done, it better be done in the best manner possible.

QUESTION FROM AUDIENCE: And at some point unreasonable degradation came in – is that correct?

JUDGE McNEIL: That is where the legislature comes into play. And believe me, the constitutional convention did trust the legislature. We made government more open, took away closed meetings, required that governmental agencies allow citizen participation.<sup>28</sup> And there were some very progressive things that happened in the 1972 Constitution that were intended just exactly to make sure that there were safeguards, that everything that would be done by the legislature would be done under public scrutiny.

QUESTION FROM AUDIENCE: While you trusted the legislature, you were aware that sometimes dirty deals got cut in the legislature?

JUDGE McNEIL: I am not certain that I agree with that, but of course — I did have a couple of highballs in the Montana Club, and there has probably been more legislation passed and killed there over the hundred-year-history of the state than in any house or senate chambers.

QUESTION FROM AUDIENCE: The delegates seemed to know that

26. See *Montana Constitutional Convention*, Vol. IV at 1204, 1206-07, Mar. 1, 1972.

27. *MEIC*, 988 P.2d 1236 (Mont. 1999).

28. See, e.g., MONT. CONST. art. II, § 9 (“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”).

sometimes the legislature, because of that process, cut deals that really were not in the best interest of the people or defending a right. Sometimes the legislature would do something that would give a favor to a particular industry, for example. The delegates knew that had happened in the history of Montana, and I don't think you sanctioned that, did you?

JUDGE McNEIL: Well, of course not. But remember, the hundred delegates assembled were a cross-section of this state, and I think the finished product is a good product — and that's not just pride of authorship because I had something to do with it. It has survived and we made it a little easier to amend. As a matter of fact, we might have made it too easy to amend. But that was one of the serious knocks on the 1889 constitution—it was virtually impossible to amend.

By making it more responsive to the people, the very concerns you have should be addressed in the public forum of the legislature. Here is the constitution saying, here is what the people want, folks: *Keep it clean and healthful.*

QUESTION FROM AUDIENCE: So if the legislature cuts some deal, it seems obvious that it could conflict with one of these rights, but that does not happen?

JUDGE McNEIL: Well, there is a solution to that— vote the scoundrels out. We did preserve the right to vote, and if the legislature is not responsive, then the people have to get busy and elect representatives who truly represent you and enact the legislation the majority of the people want. That is what we are all about.

Interpretation: What does Article 9, Section 1 mean? The answer to that question is simple. It means what the Montana Supreme Court says it means. The only case in 29 years since that constitutional provision was adopted which met that issue head-on is *Montana Environmental Information Center v. Department of Environmental Quality*.<sup>29</sup>

The Montana Supreme Court held that the two constitutional sections, the environmental section in Article 9, Section 1 and the Bill of Rights provision in Article 2, Section 3, requiring a clean and healthful environment, are interrelated and interdependent, and a strict scrutiny standard is applicable to either constitutional provision.<sup>30</sup>

The court stated in that case, the clear intention of the convention was to permit no degradation of the present environment and affirmatively require enhancement of what we then had.<sup>31</sup> The case involved an interpreta-

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29. *MEIC*, 988 P.2d 1236 (Mont. 1999).

30. *Id.* at 1246.

31. *Id.* at 1249. After reviewing the convention debate described earlier by Judge McNeil, Justice Trieweller wrote:

tion of section 75-5-303, the nondegradation policy of the state.<sup>32</sup> The court found the policy to be a reasonable legislative implementation of the environmental article.<sup>33</sup> Then it got into specific subsection (2)(j) of section 75-5-317, which defines nonsignificant activities and states that discharges of water to ground water from well water or monitoring well tests are not subject to the degradation policy.<sup>34</sup> The majority opinion held that to the extent that the nonsignificant well tests subsection temporarily excludes certain activities, specifically discharges into ground water from well monitoring tests, to the extent that it arbitrarily excludes certain activities from nondegradation review without regard to the nature or volume of the substances being discharged, it violates the environmental rights guaranteed by the two Montana constitutional provisions set forth above.<sup>35</sup>

I think it is very interesting to note that three justices signed a concurring opinion.<sup>36</sup> One is now the chief justice.<sup>37</sup> Another is our former, recently retired chief justice, who was my law partner for 18 years before he was elected chief justice.<sup>38</sup> In that special concurring opinion, three justices concluded the nonsignificant well test subsection is unconstitutional because it exempts particular water discharges from nondegradation review without consideration of the nature and volume of substances in the water that is discharged.<sup>39</sup>

Remember, now, I am still speaking as a former delegate and not as a

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We conclude, based on the eloquent record of the Montana Constitutional Convention . . . that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.

*Id.* at 1249.

32. MONT. CODE ANN. § 75-5-303 (1997).

33. *MEIC*, 988 P.2d at 1249.

34. MONT. CODE ANN. § 75-5-317(2)(j) (1997). Amendments in 1999 specified that the subsection exempted "discharges of water to ground water." MONT. CODE ANN. § 75-5-317(2)(j) (1999) (emphasis added).

35. See *MEIC*, 988 P.2d at 1249.

36. Justice Leaphart penned a specially concurring opinion questioning application of strict scrutiny to private action and the hesitance of the court to declare the blanket exemption from nondegradation review facially unconstitutional. See *id.* at 1250 (Leaphart, J., concurring). Chief Justice Turnage joined in Leaphart's remarks, and Justice Gray penned a one-paragraph special concurrence endorsing Leaphart's private action critique. *Id.* at 1251 (Gray, J., concurring).

37. Justice Karla Gray was sworn in as Chief Justice in January 2001 after defeating Justice Terry Trieweiler by a narrow margin in the November 2000 elections.

38. Chief Justice Jean Turnage served on the Montana Supreme Court from 1985 to 2000, and now practices in Polson, Montana.

39. See *MEIC*, 988 P.2d at 1250-51 (Leaphart, J., and Gray, J., concurring).

district judge. I think the special concurring opinion is correct. I think that provision is blatantly unconstitutional because it says, here is a category of use that is water well or monitoring well discharges, but it does not matter what the volume is or whether there are several pounds per liter of arsenic in it – it is not subject to review for nondegradation. It ought to be subject to review.

And remember, since that opinion was written – it was authored primarily by Justice Trieweler – we have had an election. The chief justice has retired, but the new Chief Justice Karla Gray authored this special concurring opinion.<sup>40</sup> There are now two new justices who were not on the court at the time this opinion was written. I am not going to predict what they might do with it, but I think that the special concurring opinion is a better reasoned opinion with respect to this very narrow interpretation of that one subsection. Any discharge into a water source, whether underground water or not, should be subject to nondegradation review.

As far as intent is concerned, it is my opinion, as a former delegate to the convention, that the supreme court was right-on in *MEIC*. There were extensive quotes from my presentations in the record of the constitutional convention, but the quotes that Justice Trieweler made in *MEIC* were all to support the position that there should be review, there should be standards, there ought not to be any category that is exempt from review.<sup>41</sup> The Montana Supreme Court is right-on with the intent of the convention to preserve a clean and healthful environment.

QUESTION FROM AUDIENCE: Do you mean there is literally no possibility of a category that is exempt from review? For example, cows crossing the creek. Certainly it is possible to identify some activities that would not need to go through a nondegradation review?

JUDGE McNEIL: I do not think you will find any statute that says cows cannot cross the creek. The problem in *MEIC* is that here is a statute enacted by the legislature that says water discharge from well monitoring tests is exempt from review. The legislature carved out an exemption, and that is what the supreme court took exception with. I have a lot of confidence in the district judges in the state. I do not think you would get very far seeking an injunction against Rancher Grosfield from Big Timber because the cows cross the creek on his ranch. You might if you filed it in Missoula.

QUESTION FROM AUDIENCE: Of course our mind searches for the absolute answers to things, and as we know, the democratic process is messy. But the constitution is supposed to be an absolute standard and yet

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40. *See id.* at 1251 (Gray, J., concurring).

41. *See id.* at 1246-48.

the word unreasonable is relative, and expecting that the legislature shall provide adequate remedies and so on, doesn't that gut the fundamental principles?

JUDGE McNEIL: You will find that provision only applies to depletion of natural resources. It does not apply to degradation of the life-support system. There was no intention that the word "unreasonable" would modify the degradation of the environmental life-support system. It only appears to prevent unreasonable depletion and degradation of natural resources. That provision was aimed at the coal mines, the Colstrip mine. You will not find that with respect to your water or your air.

QUESTION FROM AUDIENCE: Well, it gets to today's climate, because you started out with a climate in 1972, do you think, if the hundred people in the Montana House of Representatives this year were meeting at a constitutional convention, we would have the provision we have today?

JUDGE McNEIL: Probably not. And I hasten to add that one of the reasons the convention was successful was that the supreme court ruled, after the Enabling Act was passed and before the election was held, that sitting legislators could not run for the constitutional convention because they could not hold two state offices at the same time.<sup>42</sup> So there were no hardcore, long-term politicians that were delegates to the convention. The convention tried very hard to disassociate itself from partisan politics.

In the formative stages of the convention, the delegates were selected on the basis of Independent, Republican or Democrat. And in any event, in the formative stages, in the very infancy of the convention, the delegates voted to seat themselves alphabetically so that we were not aligned from the very first day as Democrats on this side and Republicans on that side and the Independents up in the balcony somewhere to be ignored. It just did not happen that way. And everybody approached the constitution with an idea that, let's try to do a really good job here.

Lobbyists were shunned, and I am not saying that is a good thing, but there was virtually no influence, as you will find in today's legislature, especially with term limits and no long-term senators or representatives present. I rather suspect that in today's political environment the lobbyists have a disproportionate influence compared to what they formerly had. During the convention, there was virtually no influence asserted.

The press hovered around every move made by every committee, every delegate, and the lobbyists were virtually scared away. They just left the delegates alone, which in a way was quite healthy. I seriously doubt that you could find virtually any provision in the new constitution that you

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42. *Mahoney v. Murray*, 496 P.2d 1120 (Mont. 1972).

can say, sure, the mining company drafted that, or some environmental group must have been behind this.

Any other questions?

SENATOR GROSFIELD: I want to follow up a little bit on the previous question. When I was talking about the case, I have talked about the list [of exemptions in Mont. Code Ann. 75-5-317] going from (a) to (t).

MR. JENSEN: And one of those is (l), and it says, short-term changes in existing water quality resulting from ordinary and everyday activities of humans or domesticated animals, including but not limited to boating, hiking, hunting, fishing, wading, swimming and camping, floating of streams by vehicular or other means and drinking from affording streams or otherwise water by livestock and other domesticated animals. That is one of the exceptions that was indicated.

JUDGE McNEIL: It sounds like one of the legislators must have had an agricultural background. And the system works. The one subsection, though, that the court found infirm allowed a different kind of exception, discharges into the underground water without review. And it really should be reviewed.

Any of you that have done a little research in underground water pollution may have discovered that Jake Heckathorn and I tried a case up in Flathead County many years ago, *Nelson v. C & C Plywood*,<sup>43</sup> which it was written up in ALR 3rd as their lead case in underground water pollution.<sup>44</sup> We obtained a jury verdict against the plywood company for depositing its glue waste on its own property in open ponds. It was settling out and the phenolic compounds were going undergroundover and polluting its neighbor's well. And lo and behold if we didn't convince a jury in Flathead County that they shouldn't be doing that.

That is the kind of conduct which conflicts with the traditional private property concept of a person using his land any way he wants to. However, if you're going to use it in such a fashion that pollution gets into the groundwater and ruins the neighbor's well, that's a no-no. . . . I do not have any problem with cows crossing the creek. I am a fisherman. I have caught a lot of fish out of creeks where the cows were just upstream in the meadow.

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43. *Nelson v. C&C Plywood Corp.*, 465 P.2d 314 (Mont. 1970).

44. Jonathon M. Purver, Annotation, *Landowner's Right to Relief Against Pollution of his Water Supply by Industrial or Commercial Waste*, 39 A.L.R.3d 910 (1971).

