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# Public Water, Private Rights: All Are Not Equally Protected When The State Allows Some To Divert Small Quantities Of Ground Water Outside The Permitting System

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**PUBLIC WATER, PRIVATE RIGHTS: ALL ARE NOT  
EQUALLY PROTECTED WHEN THE STATE ALLOWS  
SOME TO DIVERT SMALL QUANTITIES OF GROUND  
WATER OUTSIDE THE PERMITTING SYSTEM**

“Being a Westerner is not simple . . . . Physically, the West could only be itself. Its scale, its colors, its landforms, its plants and animals, tell a traveler what country he is in, and a native that he is at home.”

—Wallace Stegner<sup>1</sup>

**Carolyn A. Sime\***

I. INTRODUCTION

Water. We, the people, own it. Everyone needs it. But we often disagree about how best to allocate it amongst ourselves for private use. In an ideal world, there would be plenty of water to go around, available wherever and whenever we want it. But that is not the case in the west.<sup>2</sup> Montana, like other western states, routinely uses its statutory police powers to regulate access to surface and ground water for private use.<sup>3</sup> A dynamic tension exists between government regulatory authority and water as a private property interest. Legally, water is treated both as a public resource and as a usufructuary private property right subject to the prior appropriation doctrine (PAD).<sup>4</sup>

The 1972 Montana Constitution explicitly recognizes all previously existing water rights for useful or beneficial purposes.<sup>5</sup> It also declares that all surface and underground waters are property of the state,<sup>6</sup> and that water is subject to appropriation for beneficial uses by the people, as provided by

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1. Wallace Stegner, *Variations on a Theme by Crevecoeur*, in *The American West as Living Space* 64, 70 (The University of Michigan Press, Ann Arbor 2009).

2. See e.g. Jason Wells, *Drought Covers 100% of California for First Time in 15 Years*, L.A. Times, <http://www.latimes.com/local/lanow/la-me-ln-drought-covers-california-15-years-20140425,0,6033776.story#axzz300oBm2Yj> (April 25, 2014).

3. *In re the Yellowstone River*, 832 P.2d 1210, 1218 (Mont. 1992).

4. *Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179, 185 (Mont. 2011) [hereinafter *Beaverhead*].

5. Mont. Const. art. IX, § 3(1).

6. *Id.* at art. IX, § 3(3).

law.<sup>7</sup> These three subparts are self-executing, taking effect when the Constitution was ratified and without further action of the Legislature.<sup>8</sup> Lastly, it charges the Montana Legislature to create a system to administer, control and regulate water rights through a centralized system of records<sup>9</sup>—now codified as the Water Use Act (WUA).<sup>10</sup>

This elaborate statutory scheme governs both access to and use of surface and ground water by private citizens, with one notable exception: ground water wells which divert less than 35 gallons per minute (gpm) and up to 10 acre feet per year (afy) (hereinafter “exempt well”). Those seeking to appropriate ground water subject to these limitations are statutorily exempted from the permitting process in both open and closed basins—they may simply divert the water, put it to beneficial use, file a form, and pay a small fee.<sup>11</sup> Nearly all other applicants seeking to divert either surface or ground water must submit to the permitting process,<sup>12</sup> which is particularly rigorous for ground water permits in closed basins where no surface water is legally or physically available.<sup>13</sup> Surface and ground water are essentially the same within Montana water law, where the hydrologic connection<sup>14</sup> between the two increasingly informs decision makers and science increasingly permeates the policy conversation.<sup>15</sup>

The Montana Department of Natural Resources and Conservation (DNRC) issues exempt well certificates through a non-discretionary, ministerial process. The Legislature’s intent to make small quantities of ground water readily available without a permit reflected its assumption that each individual well has a low probability of impacting surface flows or other, more senior water right holders because each exempt well diverts a *de*

7. *Id.* at art. IX, § 3(2).

8. *Gen. Agric. Corp. v. Moore*, 534 P.2d 859, 862 (Mont. 1975) (construing Mont. Const. art. IX, § 3(1) as affirming the public policy of the 1889 Constitution, recognizing and confirming all rights acquired under the 1889 Constitution, and the implementing statutes enacted thereunder).

9. Mont. Const. art. IX, § 3(4).

10. Mont. Code Ann. §§ 85–2–101 through 85–2–907 (2013) (Water Use Act).

11. *Id.* at § 85–2–306(3)(a)(iii).

12. *Id.* at § 85–2–302(1) through (7).

13. *Id.* at §§ 85–2–360 through 362.

14. Admin. R. Mont. 36.12.101(31) (2013) (defines “hydrologic system” as meaning “the overall movement of water, including snow and ice, above, on, or below the earth’s surface”); *id.* at 36.12.101(30) (defines “hydraulically connected” as meaning “a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer”).

15. See Laura S. Ziemer et al., *Ground Water Management in Montana: On the Road from Beleaguered Law to Science-Based Policy*, 27 Pub. Land & Resources L. Rev. 75 (2006); see also Mont. Legis. Services Div., *The Exemption: To Change or Not to Change?*, Appendix E (Oct. 2012) (John Metesh, *Hydrology Related to Exempt Wells: A Report to the 2010–2012 Water Policy Interim Committee of the Montana Legislature*, Montana Bureau of Mines and Geology Open-File Report 612).

*minimis* quantity.<sup>16</sup> However, the aggregate effect of so many exempt wells may cause surface water depletion,<sup>17</sup> lower the water table, and adversely affect senior water rights. The presence of over 113,000 ground water wells in Montana, for which agency review and public notice did not occur,<sup>18</sup> challenges the *de minimis* assumption. The proliferation of exempt wells constrains the ability of senior water users in closed basins to fully protect their rights from encroachment and undermines the PAD. Exempt wells are increasingly controversial. Any regulatory framework affecting individual private rights or usufructuary property interests, such as the WUA, implicates the Equal Protection Clause because of unequal treatment through disparate permitting burdens between exempt and permitted wells and the inability for senior water users to protect their rights from encroachment and to make an effective call during low water periods.<sup>19</sup>

The Equal Protection Clause is a constitutional restraint on state and federal governments. The constitutionality of laws related to race, religion, gender, sexual orientation, and alienage are commonly tested against equal protection principles at both the state and federal level. The constitutional guarantee that each citizen will receive equal protection under the law is frequently asserted in criminal,<sup>20</sup> employment,<sup>21</sup> benefits,<sup>22</sup> taxation,<sup>23</sup> contract,<sup>24</sup> worker's compensation,<sup>25</sup> or education<sup>26</sup> cases.<sup>27</sup> But states also routinely use their police powers to regulate access to and use of public

16. *Black's Law Dictionary* 1952 (Bryan A. Garner ed., 9th ed., West 2009) (trifling; minimal; of a fact or thing so insignificant that a court may overlook it in deciding an issue or case).

17. John Metesh, Montana Bureau of Mines and Geology, *Stream Depletion Zones*, 2 (March 15, 2013) ("Stream depletion results from pumping groundwater until the groundwater discharge to the stream is reduced and/or flow from the stream to groundwater is induced. Both conditions reduce stream discharge.") (available at <http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/March-2014/MBMG-StreamDepletionZones.pdf>).

18. Mont. Legis. Services Div., *The Exemption: To Change or Not to Change?*, 10 (Oct. 2012) [hereinafter *To Change or Not*] (available at <http://leg.mt.gov/content/Publications/Environmental/2013-exempt-wells.pdf>).

19. U.S. Const. amend. XIV, § 1; Mont. Const. art. II, § 4; *State v. Spina*, 982 P.2d 421, 437 (Mont. 1999); *To Change or Not*, *supra* n. 18 at 5–7, 16–26.

20. See e.g. *In re S.M.K.-S.H. a Youth*, 290 P.3d 718 (Mont. 2012).

21. See e.g. *Jaksha v. Butte-Silver Bow Co.*, 214 P.3d 1248 (Mont. 2009).

22. See e.g. *Snetsinger v. Mont. U. Sys.*, 104 P.3d 445 (Mont. 2004); *Butte Comm. Union v. Lewis*, 712 P.2d 1309, 1313 (Mont. 1986) (superseded by Constitutional amendment); *Ferrier v. Teachers Ret. Bd.*, 120 P.3d 390 (Mont. 2005).

23. See e.g. *Powder River Co. v. State*, 60 P.3d 357 (Mont. 2002); *Kottel v. State*, 60 P.3d 403 (Mont. 2002).

24. See e.g. *ISC Distributors, Inc. v. Trevor*, 903 P.2d 170 (Mont. 1995).

25. See e.g. *Caldwell v. MACO Worker's Compen. Trust*, 256 P.3d 923 (Mont. 2011); *Powell v. State Compen. Ins. Fund*, 15 P.3d 877 (Mont. 2000); *Heisler v. Hines Motor Co.*, 937 P.2d 45, 50 (Mont. 1997).

26. See e.g. *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311 (Mont. 1997).

27. See e.g. *Donaldson v. State*, 292 P.3d 364 (Mont. 2012).

natural resources such as water,<sup>28</sup> fish, and wildlife.<sup>29</sup> The constitutionality of statutes allocating or managing natural resources are rarely tested against the Constitution,<sup>30</sup> compared to well-worn paths challenging state action under the Montana Environmental Policy Act or the Montana Administrative Procedures Act.<sup>31</sup> Ultimately, the Constitution controls the balance of enumerated governmental powers and private rights.<sup>32</sup>

In Montana, the same constitutional guarantee recognizing existing water rights in 1972 also “prevents the state from affecting rights vested at the time the 1972 Constitution was adopted other than through the exercise of Constitutionally provided powers such as eminent domain<sup>33</sup> or the general police power, and without affording due process of law.”<sup>34</sup> The Montana Supreme Court previously recognized that the state’s exercise of its police powers often implicates individual rights.<sup>35</sup> Yet the Equal Protection Clause restrains the state from taking action that violates individual rights.<sup>36</sup>

This article will assess Montana’s ground water exemption against the government’s duties under the Constitution and the WUA. First, the Back-

28. *McDonald v. State*, 722 P.2d 598, 604–605 (Mont. 1986) (quantification of total water rights is an expressed constitutional mandate for centralized records and falls within the police power); *In re the Yellowstone River*, 832 P.2d at 1214 (state legislature may enact constitutionally sound regulations with respect to water rights consistent with art. IX, § 3(1)); *U.S. v. Locke*, 471 U.S. 84, 104 (1985) (“even with respect to vested property rights, [a] legislature generally has the power to condition their continued retention . . . as long as the duty imposed is a reasonable restriction designed to further legitimate legislative objectives”); *Dept. of St. Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985) (state’s ability to affect existing and recognized water rights survives the adoption of art. IX, § 3(1) of the Montana Constitution but must act within constitutionally provided powers such as eminent domain or general police power).

29. *State v. Rathbone*, 100 P.2d 86, 91 (Mont. 1940) (laws to protect fish and game are special enactments of state’s police power).

30. See e.g. *State v. Jack*, 539 P.2d 726 (Mont. 1975) (statute requiring resident guide for nonresident hunter violated equal protection); *Baldwin v. Fish & Game Comm’n.*, 436 U.S. 371 (1978) (statutory scheme imposing higher fees on non-resident hunters compared to resident hunters was reasonably related to preserving finite resources upheld); *In re the Yellowstone River*, 832 P.2d 1210 (statute providing the failure of water rights claimants to file by specified date or abandon water claim did not violate equal protection because all claimants were treated equally and given equal opportunity to file by the deadline); *State v. Egdorf*, 77 P.3d 517 (Mont. 2003).

31. *N. Plains Resource Council, Inc. v. Mont. Bd. of Land Comm’r.*, 288 P.3d 169 (Mont. 2012) (abandoning clean and healthful environment claim, appealed lower court’s holding that an environmental impact analysis was not required prior to issuing coal leases); *Ravalli Co. Fish & Game Ass’n v. Mont. Dept. of St. Lands*, 903 P.2d 1362 (Mont. 1995) (challenging a lack of environmental analysis upheld against the state); *Mont. Wildlife Fedn. v. Mont. Bd. of Oil & Gas*, 280 P.3d 877 (Mont. 2012) (Board not required to prepare supplemental environmental impact analysis to earlier environmental assessments as the Board already took a “hard look” at the impacts of natural gas wells).

32. *Gen. Agric. Corp.*, 534 P.2d at 862–863 (citing the principle of the supremacy of constitutional mandates on citizens and government from 16 Am. Jur. 2d Constitutional Law § 56).

33. Mont. Const. art. II, § 29.

34. *Id.* at art. II, § 17; *Shields River Basin*, 2000 Mont. Water LEXIS 1, at \*\*13 (June 29, 2000).

35. *Rathbone*, 100 P.2d at 92.

36. Mont. Const. art. III, § 15 (1889) (superseded in 1972 by Mont. Const. art. IX, § 3); *Dept. of St. Lands v. Pettibone*, 702 P.2d 948, 956 (Mont. 1985).

ground section summarizes the general framework of Montana's water permitting process. Next, it describes an exception for certain ground water appropriations that is contrary to, and increasingly at odds with, an otherwise orderly system based on the PAD. Controversy over the exempt well provision has increased. Statutory amendments by the 2013 Montana Legislature and actions by the 2013–2014 Environmental Quality Council may have deepened and perpetuated the conflict.

Next, the Discussion section examines the law's failure to safeguard the equal protection rights of senior water users. Three levels of scrutiny are analyzed, and the exemption plausibly fails both strict and middle-tier scrutiny. The law is likely to survive rational basis review; however, even the lowest level of scrutiny casts doubt on the State's approach. Therefore, revision is still warranted for public policy reasons.

The article concludes by suggesting that proliferation of exempt wells in closed basins injures not only senior water users, but also the public at large. When first enacting the WUA, the Legislature determined that "the water resources . . . must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life."<sup>37</sup> The state has a duty to govern water allocation and use in such a way that not only protects private rights, but also sustains the public's treasure and lifeline for this and future generations.

## II. BACKGROUND

The Constitution, WUA, and common water law traditions are intertwined historically but still provide the contemporaneous framework by which the state allocates water for private, beneficial use among its citizens. Montanans have long recognized the dichotomy of water as an important resource that should be available for public use, but also that an orderly system should guide citizens' use.<sup>38</sup> The Montana Supreme Court recognized the PAD (first in time, first in right) in 1911.<sup>39</sup> The 1972 Constitutional Convention delegates felt so strongly about preserving 80 years of practice and legal tradition that it carried Article III, section 15 of the 1889 Constitution forward with little debate.<sup>40</sup> Delegates also voted against ad-

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37. Mont. Code Ann. § 85–1–101(5).

38. Mont. Const. art. III, § 15 (1889) (superseded by 1972 Mont. Const. art. IX, § 3).

39. *Featherman v. Hennessy*, 115 P. 983, 986 (Mont. 1911).

40. Mont. Const. art. IX, § 3(2) ("The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use."). See also Mont. Const. Conv. Transcr., vol. v, 1303 (Mar. 1972) (available at [http://courts.mt.gov/content/library/mt\\_cons\\_convention/vol5.pdf](http://courts.mt.gov/content/library/mt_cons_convention/vol5.pdf)).

ding the phrase “priority of appropriation for beneficial uses shall be the better right”<sup>41</sup> because it was already so well-rooted in Montana’s legal and practical traditions. The Constitution recognizes and vests water rights existing as of July 1, 1973.<sup>42</sup> Montana asserted state ownership of all surface, ground, flood, and atmospheric waters within the state and declared that all waters are subject to appropriation for beneficial use as provided by the Legislature.<sup>43</sup> Lastly, the 1972 Constitution directed the Legislature to provide for the administration, control, and regulation of water rights and to create a centralized permitting process for all new surface and ground water uses.<sup>44</sup> The 1973 WUA codified existing common law and established the review and permitting process for all surface and ground water uses proposed after July 1, 1973. After July 1, 1973, a person may not appropriate surface or ground water except as provided by law.<sup>45</sup> The law does not prioritize different types of beneficial use,<sup>46</sup> instead relying on strict adherence to the PAD by all surface and ground water users. Since its enactment, the WUA afforded a blanket exemption for certain ground water wells. The exemption has become increasing controversial, even as the Legislature focused on the issue for four consecutive interim sessions.<sup>47</sup> The “debate” is largely precipitated by rural subdivisions, where exempt wells served about 66% of the new subdivision lots created from July 2004 to June 2011.<sup>48</sup> The significance of the cumulative effects of so many individually exempt wells prompts concern over surface and ground water depletion. Given that exempt well water can be used for any beneficial purpose, the debate could expand in the future.

*A. Montana Department of Natural Resources and Conservation  
Implements the 1973 Water Use Act*

*1. Permitting Beneficial Surface and Ground Water Uses*

Applications for either new surface or ground water uses proceed through a single DNRC permitting system.<sup>49</sup> By a preponderance of evidence, applicants must show that: water is legally and physically available

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41. *Id.* at 1348.

42. Mont. Const. art. IX, § 3(1).

43. *Id.* at § 3(3).

44. *Id.* at § 3(4).

45. Mont. Code Ann. § 85–2–301(1) through (4).

46. *Id.* at § 85–2–102(4)(a) through (f) (defines beneficial use broadly unless otherwise provided); Admin. R. Mont. 36.12.1202(4).

47. *To Change or Not*, *supra* n. 18, at 1.

48. *Id.* at 2.

49. Mont. Depart. of Nat. Resources and Conserv., *Water Rights in Montana*, 21–22 (Apr. 2012) (available at <http://leg.mt.gov/content/publications/environmental/2012-water-rights-handbook.pdf>).

when the use is proposed, the use is beneficial, the new appropriation will not deplete surface flow, and the new appropriation will not adversely affect the water rights of prior appropriators.<sup>50</sup> The applicant's use of the water must be controlled so the prior appropriators' rights will still be satisfied.<sup>51</sup> DNRC may only issue a new permit if these criteria are met.

Newer surface or ground water uses may still affect senior water right holders, but the PAD ensures senior rights are fulfilled first and chronologically from oldest priority date to the youngest in low water years.<sup>52</sup> Any person having a water right, a property interest, or other interests which would be adversely affected by the approval of a new surface or ground water appropriation can file an objection with DNRC.<sup>53</sup>

In 1983, the Legislature acknowledged that basins or subbasins might already be highly over-appropriated—claims to water exceed availability. The Legislature or DNRC may close a highly appropriated basin to new appropriations by law or administrative rule, respectively. By 2010, five highly-appropriated western Montana basins were closed: Upper Missouri above Morony Dam near Great Falls, Teton, Jefferson/Madison, Upper Clark Fork, and Bitterroot basins.<sup>54</sup> Additional localized subbasins are closed where negotiated compacts with the federal government or tribes were approved, or controlled ground water areas were established.<sup>55</sup>

In closed basins or subbasins, DNRC may not issue new surface water permits but could at least evaluate applications for new ground water permits.<sup>56</sup> These applicants must show ground water is legally and physically available by a preponderance of evidence using empirical data<sup>57</sup> such as water supply data, field reports, or other information developed by the applicant, DNRC, the U.S. Geological Survey, or the U.S. Natural Resources and Conservation Survey.<sup>58</sup> The application must contain a hydrological assessment analyzing whether the proposed appropriation will cause net surface water depletion and adversely affect a prior appropriator.<sup>59</sup> If a net depletion of surface water is predicted, the applicant must also submit an

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50. Mont. Code Ann. § 85–2–311.

51. *Id.* § 85–2–311(1)(b).

52. *Id.* at § 85–2–40 (“as between appropriators, the first in time is the first in right”); Admin. R. Mont. 36.12.101(53) (“Priority date means the clock, day, month, and year assigned to a water right application or notice upon department acceptance of the application or notice. The priority date determines the ranking among water rights.”).

53. Mont. Code Ann. § 85–2–308(3).

54. *To Change or Not, supra* n. 18, at Appendix C.

55. *Id.* (statewide map of closed basins and subbasins).

56. Mont. Code Ann. § 85–2–360(1) through (3).

57. *Id.* at §§ 85–2–360 through 362.

58. *Id.* at § 85–2–311(5).

59. *Id.* at § 85–2–361(1) through (3).

aquifer recharge or mitigation plan to offset it.<sup>60</sup> DNRC determines adverse effects by considering the rate, location, and timing of the proposed net depletion as compared to the prior appropriators' historic beneficial use.<sup>61</sup> After receiving public notice for a permit application or an application to change an appropriation and resolving any objections to the new ground water permit, DNRC may grant or deny the permit.<sup>62</sup>

In *Bostwick Properties Inc., v. Montana Department of Natural Resources and Conservation*,<sup>63</sup> the Montana Supreme Court again recognized the hydrologic connection between surface and ground water.<sup>64</sup> Bostwick challenged DNRC's denial of a ground water permit in the closed Upper Missouri River basin. DNRC denied the application because Bostwick failed to: demonstrate no net surface water depletion; prove water was legally available; and show by a preponderance of evidence a lack of adverse impacts on senior appropriators.<sup>65</sup> The Court emphasized that the statute's plain language places the burden on applicants seeking a new ground water permit to prove lack of adverse effect. The Court expressly declined to shift the burden to senior appropriators to prove they were adversely affected, even in situations where the proposed new usage was *de minimis* and the hydrological connection was attenuated enough to make it difficult for anyone to demonstrate adverse effects.<sup>66</sup>

## 2. Certain New Beneficial Ground Water Uses are Exempted from Permitting Review

The Legislature created an exception for exempt well applicants to the rigorous permitting process.<sup>67</sup> The applicants need only drill the well and put the water to any beneficial use.<sup>68</sup> The new appropriator then submits a one-page Notice of Completion form, along with \$125, to DNRC.<sup>69</sup> DNRC

60. *Id.* at § 85-2-362(1) through (4).

61. *Id.* at § 85-2-360(3)(a).

62. Mont. Code Ann. § 85-2-307(1). Under Mont. Code Ann. § 85-2-307(b), if the DNRC preliminarily determines that it will grant the permit, it must publish notice in a newspaper of general circulation in the area of the [water] source. DNRC also may use its discretion to "serve notice upon any state agency or person the department feels may be interested in or affected by the proposed appropriation" under § 85-2-307(2)(e).

63. *Bostwick Properties, Inc. v. Mont. Dept. of Nat. Resources*, 296 P.3d 1154, 1160 (Mont. 2013) [hereinafter *Bostwick II*].

64. *Id.* at 1154. The Montana Supreme Court first recognized the hydrologic connection in *Mont. Trout Unlimited v. Mont. Dept. of Nat. Resources*, 133 P.3d 224, 230 (Mont. 2006) [hereinafter *Trout Unlimited*].

65. *Bostwick II*, 296 P.3d at 1157.

66. *Id.* at 1161-1162.

67. Mont. Code Ann. § 85-2-306(3)(a).

68. *Id.* at § 85-2-306(3)(b).

69. *Id.* at § 85-2-306(3)(a)(i) through (c); Admin. R. Mont. 36.12.103(e).

assigns a priority date as of when the application was complete and correct, and then DNRC issues an exempt well certificate. It is a simple ministerial process.<sup>70</sup>

DNRC must issue all exempt well certificates without regard to whether a basin is open or closed.<sup>71</sup> Individual exempt well applications, and the aggregate effect of the increasing number of exempt wells, are not reviewed for negative impacts to surface waters or prior appropriators because the Legislature did not grant DNRC the authority or discretion to do so. This contrasts with the careful scrutiny of new proposed surface or ground water permits.

Exempt well users avoid many of the duties and responsibilities of permitted users. Exempt well users may pump ground water continuously, regardless of priority date, so long as the flow rate does not exceed the statutory limitation. Exempt wells are not metered, so the threshold flow rate and total annual quantity are not verified or enforced. The amount of water actually used is unknown.<sup>72</sup> Exempt well users are not required to mitigate adverse impacts to surface waters or senior appropriators; nor are they required to augment ground water to offset surface water depletion or adverse impacts to senior users. Moreover, exempt well certificate applications are not subject to general public notice requirements. Senior users are not provided particularized notice either. Other water users cannot object because the Legislature has not provided these procedural safeguards so that senior users can protect their rights from encroachment or the cumulative effects of multiple exempt wells. Exempt well certificates are typically not recognized in water decrees administered by water commissioners;<sup>73</sup> thus, exempt ground water use occurs outside the normal water use accounting ledger. Any diverted exempt ground water subsequently consumed represents an unaccounted, net loss from the hydrologic system.

*a. The Montana Legislature Responds to Consequences of the Exempt Well Provision*

The Legislature enacted the 1973 WUA's exempt well provision as a matter of public policy to assure localized water availability consistent with

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70. *Black's Law Dictionary* at 16c (of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill). Each applicant receives a certificate after DNRC determines that the application is complete and the fee was paid. Mont. Code Ann. § 85-2-306(3)(c).

71. Mont. Code Ann. § 85-2-306(3)(a)(i) through (c).

72. Pet. For Decl. Rul. & Req. to Amend R. 36.12.101(13), *Clark Fork Coalition v. Mont. Dept. Nat. Resource. & Conserv.* 9 [hereinafter *Clark Fork Petition*] (available at [http://www.dnrc.mt.gov/wrd/declaratory\\_ruling/petition\\_declaratory\\_ruling.pdf](http://www.dnrc.mt.gov/wrd/declaratory_ruling/petition_declaratory_ruling.pdf)).

73. Mont. Dept. of Natl. Resources and Conserv., *Effects of Exempt Wells on Existing Water Rights*, 1 (Feb. 2008) (available at [http://leg.mt.gov/content/Committees/Interim/2007\\_2008/water\\_policy/staffmemos/exemptwelleffects.pdf](http://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/exemptwelleffects.pdf)).

the constitutional mandate to make water available for appropriation.<sup>74</sup> Small ground water appropriations for discrete purposes are allowed in rural areas to provide for domestic and stock uses without the burden and expense of the permitting process.<sup>75</sup> The statute explicitly established a threshold to discern wells requiring a permit and therefore triggering review, from wells exempted from review altogether. The Legislature determined that because exempt ground water wells typically serve small dispersed uses, adverse effects to neighboring water rights would have a low probability because total water use would be *de minimis*.<sup>76</sup> However, questions emerged about the use of ground water for irrigation, the interrelationship with surface water, and the potential impact to surface water rights.<sup>77</sup>

Two legislative amendments established practical and economic limitations to using exempt wells for irrigated agriculture outside the permitting process.<sup>78</sup> In 1987, the phrase “except that a combined appropriation *from the same source* from two more wells or developed springs exceeding this limitation required a permit”<sup>79</sup> was added. In 1991, the Legislature decreased the permissible flow rate from 100 gpm to 35 gpm and imposed a 10 afy limit to address the concern that exempt wells could still be drilled to irrigate larger land parcels, with correspondingly larger impacts on water resources.<sup>80</sup>

While constraining exempt well use for irrigation, the statute enabled proliferation of exempt wells for individual domestic purposes in a way the Legislature did not anticipate.<sup>81</sup> Rural lands were systematically developed for housing outside incorporated city limits and beyond the reach of municipal services, given that individual lot owners could obtain an exempt well certificate more easily than the developer could secure a new ground water permit for the subdivision as a whole.<sup>82</sup> In western Montana alone, where most basins are closed to new surface appropriations and new ground water permits may not adversely impact senior users, about 26,370 exempt wells

74. Mont. Legis. Services Div., *Boiling It Down: A Study of Water Policy in Montana*, 36 (Nov. 2010) [hereinafter *2010 Boiling It Down*] (available at <http://leg.mt.gov/content/Publications/Environmental/2010-water-policy.pdf>).

75. *Clark Fork Coalition v. Mont. Dept. Nat. Resource & Cons.*, Declaratory Rul., 11 (Aug. 17, 2011) [hereinafter DNRC Ruling *Clark Fork Coalition*] (available at [http://www.dnrc.mt.gov/wrd/declaratory\\_ruling/declaratory\\_ruling.pdf](http://www.dnrc.mt.gov/wrd/declaratory_ruling/declaratory_ruling.pdf)).

76. *Id.*

77. *Id.* at 15 n. 8.

78. *Id.* at 14, 16–17 n. 11; *To Change or Not*, *supra* n. 18, at 10.

79. *2010 Boiling It Down*, *supra* n. 74, at 36 (emphasis added); DNRC Ruling *Clark Fork Coalition*, *supra* n. 75, at 13.

80. DNRC Ruling *Clark Fork Coalition*, *supra* n. 75, at 16.

81. *Id.* at 18.

82. Michele Peterson-Cook, *Water's for Fightin', Whiskey's for Drinkin': How Water Law Affects Growth in Montana*, 28 J. Envtl. L. & Litig. 79, 80, 93–98 (2013) (identifying the nexus between water law and rural subdivision land development and how the exempt well provision encourages sprawl).

were drilled by the end of 2010, compared to 1,400 at the end of 1991.<sup>83</sup> Of the more than 28,000 residential lots created within rural subdivisions from 2004–2011, about 18,700 lots (67%) were served by exempt wells.<sup>84</sup> DNRC anticipates 53,000 exempt wells in Montana’s five closed basins by 2030.<sup>85</sup> Of the new exempt well certificates issued by DNRC from 1991 to 2010, 75% were for domestic, multiple domestic, municipal, and lawn and garden purposes.<sup>86</sup>

The assumption that exempt wells have a low probability of adversely affecting senior users appears increasingly tenuous. In response, the 2013 Legislature amended the exempt well statute a third time after finding: 1) Montana has allocated water under the PAD for at least 100 years; 2) the 1972 Constitution recognizes and confirms all existing water rights; 3) water rights are recognized as a usufructuary property right; 4) exempt wells may have an adverse effect on other water rights; 5) the WUA requires DNRC to actualize full use, conservation, and protection of water; and 6) the ability to develop exempt ground water wells contributes to the full utilization of Montana’s water.<sup>87</sup> The Legislature granted DNRC authority to establish stream depletion zones (SDZ) in a closed basin if petitioned to do so by a municipality, county, conservation district, local water quality district, or by the owners of at least 15% of the flow rate of the surface rights in the area estimated to be affected.<sup>88</sup> SDZ’s are defined to mean:

an area where hydrogeologic modeling concludes that as a result of ground water withdrawal, the surface water would be depleted by a rate equal to at least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons per minute.<sup>89</sup>

Petitioners bear the burden and expense of the entire process, including a \$750 petition fee and financing reasonable agency costs to give notice, hold public hearings, conduct investigations, and other expenses.<sup>90</sup> Furthermore, petitioners must: 1) show the proposed SDZ is in a closed basin; 2) submit a qualified hydrologic assessment for the proposed area conducted by either a hydrogeologist, the ground water investigation program,<sup>91</sup> or a qualified li-

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83. *To Change or Not*, *supra* n. 18, at Appendix C, 2.

84. *Id.* at 11.

85. *Id.*

86. *Id.* at Appendix C, 4.

87. Mont. Code Ann. § 85–2–381(1)(a) through (f).

88. *Id.* at § 85–2–380(1) through (4).

89. *Id.* at § 85–2–102(23).

90. Admin. R. Mont. 36.12.102(aj) (creating DNRC Form 652 “Petition for Stream Depletion Zone”); *id.* at 36.12.103(ab) (establishing \$750 fee for Form 652; form available at [http://dnrc.mt.gov/wrd/water\\_rts/wr\\_general\\_info/wrforms/652.pdf](http://dnrc.mt.gov/wrd/water_rts/wr_general_info/wrforms/652.pdf)).

91. Mont. Code Ann. § 85–2–525 (program established by statute).

censed professional engineer;<sup>92</sup> 3) provide the name and address of all water right owners who may be affected; and 4) submit a topographical map with additional details.<sup>93</sup> DNRC will return any incomplete or non-qualifying petitions.<sup>94</sup> The Legislature granted DNRC the authority to conduct rulemaking upon receipt of a complete, qualifying petition, and DNRC must notify any appropriator who it determines may be affected by the proposed SDZ as a part of the rulemaking process.<sup>95</sup>

Importantly, exempt ground water wells may still be drilled even after a SDZ is designated, but are limited to 20 gpm or less, up to 2 afy.<sup>96</sup> As before, no metering or enforcement mechanisms were specifically created to monitor exempt ground wells in SDZs. The Legislature did not intend to limit the ability of senior appropriators to enforce a water right or limit enforcement to a specific area; likewise, a SDZ designation is not required for a call against junior exempt well users.<sup>97</sup> However, while making a call on permitted ground water wells or exempt wells is legally possible, it is practically very difficult—if not impossible—to enforce.<sup>98</sup>

### B. *The Statutory Exemption and Combined Appropriation Definition in Controversy*

The statutory trigger granting an exemption from permitting review is consequential because of high water demand in closed basins, where new surface diversions are completely barred and new ground water permit applications must meet heightened evidentiary requirements. A permit is required for a “combined appropriation from the same source by two or more wells or developed springs exceeding 10 afy, regardless of the flow rate.”<sup>99</sup> Thus, the meaning of “combined appropriation”<sup>100</sup> determines which proposed ground water wells are exempted from permitting review and which

92. Admin. R. Mont. 36.12.102(aj); *id.* at 36.12.103(ab).

93. *Id.* at 36.12.102(aj); *id.* at 36.12.103(ab). USGS map must also depict the following: accurate outline of proposed stream depletion zone, location of any known groundwater recording equipment, location of any known surface water recording equipment, and points of diversion for all groundwater users, including wells and developed springs.

94. *Id.* at 36.12.102(aj); *id.* at 36.12.103(ab).

95. Mont. Code Ann. § 85–2–380(3).

96. *Id.* at § 85–2–306(3)(a)(iv).

97. *Id.* at § 85–2–381(3).

98. Memo. from Helen Thigpen, Staff Atty., Mont. Water Policy Interim Comm., to Mont. Water Policy Interim Comm., *Ground Water, Exempt Wells, and Enforcing a Water Right Through a Call*, 5 (Aug. 30, 2011) (available at <http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Staff-Reports/ground-water-calls.pdf>).

99. Mont. Code Ann. § 85–2–301(3)(a)(i) through (iii). In SDZs, a permit is similarly required for “a combined appropriation from the same source by two or more wells or developed springs exceeding this [20 gallons a minute or less, and does not exceed 2-acre-feet a year] limitation. *Id.* at § 85–2–301(3)(a)(iv).

100. *Id.* at § 85–2–306(3)(a)(i) through (iii).

are not. In 1993, DNRC defined combined appropriation as “an appropriation of water from the same source aquifer by two or more ground water developments that are physically manifold into the same system.”<sup>101</sup> Thus, if multiple small ground water uses were physically connected to create a single water development through a pipe or distribution system, each individual well would require a permit. So long as the exempt well water is not physically combined, each individual well is exempt from permitting.

DNRC was petitioned twice to change the definition of combined appropriation, each alleging DNRC’s definition of combined appropriation was not consistent with legislative intent.<sup>102</sup> The Gallatin County Commissioners filed the first petition in 2006. As a local government making land use decisions, the commissioners were concerned that large-scale subdivisions with multiple, individually exempt wells evaded DNRC’s review.<sup>103</sup> Local governments exercise their delegated police powers to regulate rural subdivision development, thereby indirectly affecting the number, distribution, and density of exempt wells.<sup>104</sup> The commissioners argued the proliferation of exempt wells had a cumulative adverse effect on senior surface water rights and water resources in Gallatin County.<sup>105</sup> DNRC denied the petition, concluding that the administration and costs were prohibitively burdensome and that the proposed change would shut down all new subdivision ground water permits.<sup>106</sup> The Clark Fork Coalition filed the second petition in November 2009, on behalf of several named, senior water right holders. The petitioners alleged DNRC’s definition of combined appropriation threatened their water rights because it failed to protect them against the aggregate effect of many small, exempt ground water developments.<sup>107</sup> After DNRC denied petitioners’ request, they sought declaratory and injunctive relief in district court in September 2010. In a stipulated settlement agreement, DNRC agreed to initiate rulemaking. However, the parties modified the agreement after the 2011 Montana Legislature prohibited DNRC from adopting new rules before October 1, 2012.<sup>108</sup> DNRC then committed to complete formal rulemaking to amend the definition, within the limits of

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101. Admin. R. Mont. 36.12.101(13).

102. *2010 Boiling It Down*, *supra* n. 74, at 37.

103. Clark Fork Petition, *supra* n. 72, at Exhibit 4, 2 (The commissioners had difficulty encouraging central water and sewer systems; the exemption loop-hole disfavored considering subdivisions as a single water development requiring a ground water permit subject to review.).

104. Ziemer et al., *supra* n. 15, at 87.

105. Clark Fork Petition, *supra* n. 72, at Exhibit 4, 2.

106. *Id.* at Exhibit 5, 4–5 (administrative difficulty and cost of proposed change); *id.* at Exhibit 5, 5–9 (stop all permitting of new subdivision ground water permits).

107. *Id.* at 2.

108. Modified Stip., *Clark Fork Coalition v. Dept. Nat. Resources & Conserv.*, slip op. 2 (Dec. 5, 2011) (available at <http://www.clarkfork.org/images/stories/publications/exemptwells/Settlement.Modified.Signed.December.5.2011.pdf>).

its authority, by July 1, 2013, and after the 2013 Legislature. The parties stipulated to the following:

WHEREAS, due to increased demands to use the small ground water use exception under Montana Code Annotated § 85–2–306(3)(a)—especially in closed basins—and the new and creative ways large water users are seeking to qualify for an exception under the Montana Water Use Act, DNRC recognizes that the 1993 administrative rule defining “combined appropriation” in Administrative Rules of Montana 36.12.101(13) needs to be amended, broadened, and updated.<sup>109</sup>

In blocking DNRC from amending the “combined appropriation” definition, the 2011 Legislature charged the Water Policy Interim Committee (WPIC) to study and report back to the 2013 Legislature.<sup>110</sup> The SDZ petition concept emerged and eventually became law in 2013, but without the Governor’s signature.<sup>111</sup> The 2013 Legislature also passed a statutory definition of “combined appropriation,” but the Governor responded with an amendatory veto—which the House never considered.<sup>112</sup> The exemption creates a legal contradiction in who, exactly, bears the burden of protecting senior water rights under the PAD in the face of ground water development. *Bostwick II* places the burden on new applicants to show no adverse effect from new ground water permits by a preponderance of the evidence, whereas the SDZ designation burdens senior users, as the petitioners, to show harm from exempt wells.<sup>113</sup>

The exempt well provision remains controversial. DNRC’s subsequent efforts to define “combined appropriation” pursuant to the Clark Fork Coalition settlement were twice blocked by the Montana Environmental Quality Council (Council), a standing interim legislative committee having oversight authority.<sup>114</sup> In both instances, DNRC withdrew the proposal.<sup>115</sup>

109. *Id.* (The stipulated order also required the new, combined appropriation definition be more broad and “not solely limited to wells or developed springs that are physically manifold or connected together and that DNRC consider cumulative or collective impacts as a result of multiple, unconnected wells or developed springs that appropriate water from a single source aquifer and for a single project.”); 16 Mont. Admin. Register, 1466, 1496 (Aug. 22, 2013).

110. *To Change or Not*, *supra* n. 18, at Appendix A.

111. Mont. Sen. 346, 63d Legis. (May 7, 2013) (available at <http://leg.mt.gov/bills/2013/billpdf/SB0346.pdf>) (This bill became law without the Governor’s signature per Joint Rule 40-210(2). “If the Governor does not sign or veto a bill within 10 days after its delivery, the bill becomes law.”).

112. Mont. Sen. 19, 63d Legis. (May 5, 2013) (available at <http://leg.mt.gov/bills/2013/billpdf/SB0019.pdf>); Ltr. from Steve Bullock, Mont. Gov., to Linda McCulloch, Mont. Sec. of St., vetoing Sen. Bill 19 (May 3, 2013) (stating concerns about upholding prior appropriation doctrine and the impacts of multiple concentrated wells in rural subdivisions on neighboring senior water right holders) (available at <http://leg.mt.gov/bills/2013/AmdHtmS/SB0019GovVeto.pdf>).

113. Mont. Code Ann. § 85–2–360(3)(b); *Bostwick II*, 296 P.3d at 1161–1162 (emphasizing the burden is on new ground water permit applicants to show no adverse effects and not on senior appropriators).

114. Mont. Code Ann. § 75–1–324(10)(d) (Council to perform administrative rule review for DNRC proposals); *id.* at § 2–4–305(9) (authority to object to proposed DNRC rules by majority vote). The

When DNRC withdrew the second proposed rule, it noted that the exemption has been controversial for “well over a decade” and was the subject of legislative efforts over four consecutive interims.<sup>116</sup> DNRC also stated that, even as exempt well use “proliferated,” any further attempts to solve the combined appropriation issue would be futile,<sup>117</sup> and litigation is “inevitable.”<sup>118</sup> Indeed, the Clark Fork Coalition’s motion to withdraw its stipulated agreement and re-open the case was granted in March 2014.<sup>119</sup> Ranch Homeowners Association and several named plaintiffs filed a different complaint and petition for judicial review in the Eighteenth Judicial District of Gallatin County after county commissioners approved a new 76-lot subdivision, each served by an individually exempt well.

### III. DISCUSSION

Both the U.S. Constitution and the Montana Constitution enshrine a right to equal protection of the laws, and ensure that citizens are not subject to indiscriminate state action.<sup>120</sup> The Fourteenth Amendment of the U.S. Constitution forbids any state from depriving “any person of life, liberty, or property without due process of law; nor [shall any state] deny any person within its jurisdiction the equal protection of the laws.”<sup>121</sup> As a fundamental

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Council first objected in September 2013 (Ltr. From Chas Vincent, Chairman, Water Policy Interim Committee, to Millie Heffner, Mont. Dept. of Natural Resources and Conserv., expressing concerns about DNRC’s proposed rule, 2 (Sept. 10, 2013) (available at <http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/WPIC-letter-to-DNRC.pdf>)); Ltr. from Helen Thigpen, Staff Atty., Mont. Env’tl. Quality Council, to Dir. Tubbs, Mont. Dept. of Natural Resources and Conserv., formally objecting to DNRC’s proposed definition of combined appropriation (Sept. 13, 2013) (available at <http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/rule-objection-letter.pdf>). The Council objected again in January 2014 (Ltr. from Helen Thigpen, Staff Atty., Mont. Env’tl. Quality Council, to John Tubbs, Director, Mont. Dept. of Natural Resources and Conserv., formally objecting to DNRC’s proposed definition of combined appropriation (Jan. 9, 2014) (available at <http://www.leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Rules/Jan%202014%20Exempt%20Well%20Objection%20Letter.pdf>)).

115. See Memo. from Helen Thigpen, Staff Atty., Mont. Water Policy Interim Comm., to Mont. Env’tl. Quality Council, *Summary of Recent Rulemaking Activity from DEQ, FWP, and DNRC*, 3 (Dec. 16, 2013) (available at <http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/January-8-9-2014/eqc-rules-memo-december-2013.pdf>) (informing members that DNRC withdrew the August 2013 proposed rule); see 2 Mont. Admin Register 141, 216 (Jan. 21, 2014) for the second withdrawal.

116. See Ltr. from Tim Davis, Water Resources Div. Administrator, Montana Dept. of Natural Resources and Conserv., to Sen. John Brenden, Chairman of Mont. Env’tl. Quality Council, summarizing the controversy and DNRC’s efforts to resolve it (Jan. 21, 2014) (available at <http://www.leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Rules/2014-01-21%20Response%20to%20EQC.pdf>).

117. *Id.* at 1.

118. *Id.* at 2.

119. Order Granting Unopposed Motion to Withdraw Stipulated Agreement and Re-open Case, First Judicial District, Lewis and Clark County CIV No. BDV-2010-874 (March 11, 2014).

120. *Godfrey v. Mont. St. Fish & Game Comm’n.*, 631 P.2d 1265, 1267 (Mont. 1981).

121. U.S. Const. amend. XIV, § 1.

matter of individual dignity in Montana, “[n]o person shall be denied the equal protection of the laws.”<sup>122</sup> Montana’s Constitution provides even more protection than the U.S. Constitution.<sup>123</sup>

Analyzing a Montana equal protection claim requires a two-step approach. First, a claimant must show the state adopted a classification affecting two or more similarly situated groups in an unequal manner, or that a law imposes *different burdens* on different classes of persons even though the law may be neutral and implemented evenhandedly.<sup>124</sup> If the classes are not similarly situated, then the first criterion fails and the court need not proceed.<sup>125</sup> If classifications exist and the classes are similarly situated, the court applies the appropriate level of scrutiny: strict scrutiny, middle-tier scrutiny, or rational basis.<sup>126</sup>

With a keen focus on closed basins, a facial analysis of the exempt well provision suggests that senior water users have a valid equal protection claim, as discussed below. First, water users are similarly situated for legal reasons pursuant to the WUA, and also for practical reasons because surface and ground water are hydrologically connected and subject to consumption and depletion. Next, the exemption is subjected to three levels of scrutiny as to its constitutionality. Under strict scrutiny, several arguments are advanced as to why the state’s interest in blanket exemption is not compelling and narrowly tailored. Middle-tier scrutiny, while not commonly applied, suggests that the state’s interest in providing the exemption is not reasonable when balanced against the interests of other water users. Under rational basis review, it could likely be shown that the state’s objective in making small quantities of ground water readily available through the exemption is legitimate and rational. Nonetheless, the exempt well provision should be revised for public policy reasons.

A. *All Water Users are Similarly Situated Under the 1973 Water Use Act for Legal and Practical Reasons Based on Water Hydrology*

A predicate showing for any equal protection claimant is to establish that the government sanctioned a classification. A senior water right holder can allege the WUA facially classifies water users, that a classification exists when the statute is applied to their circumstances, or the classification imposes different and unequal burdens on different classes in reality.<sup>127</sup> In fact, the WUA classifies water appropriators in a variety of ways. For ex-

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122. Mont. Const. art. II, § 4.

123. *Cottrill v. Cottrill Sodding Serv.*, 744 P.2d 895, 897 (Mont. 1987).

124. *Powell*, 15 P.3d at 883; *State v. Spina*, 982 P.2d 421, 437 (Mont. 1999).

125. *Rausch v. St. Compen. Ins. Fund*, 114 P.3d 192, 195 (Mont. 2005).

126. *Snetsinger*, 104 P.3d at 450.

127. *Spina*, 982 P.2d at 437.

ample, water users are classified by their geographic location in either open or closed basins.<sup>128</sup> The WUA classifies water users based on whether their water right is constitutionally vested or arises through a statutory permit granted by DNRC after July 1973.<sup>129</sup> The WUA also classifies water users based on whether water is appropriated from surface or ground sources.<sup>130</sup> If ground water, the quantity appropriated further classifies water users as either subject to or exempt from permitting.<sup>131</sup> Each type of classification could be analyzed against the Equal Protection Clause uniquely, but the classes must be similarly situated for a claim to proceed. This article argues that water users are similarly situated for legal and practical reasons and that an equal protection claim could be viable.

Exempt well users—and all other water users—are similarly situated for legal reasons because both groups possess a right to use the water pursuant to either the Constitution or the WUA. The WUA codified the common law and recognizes that a water appropriation occurs when elements of intent, notice, diversion, and beneficial use are met.<sup>132</sup> Montana treats both surface and ground water rights as a property interest granted by the state, even if the right is usufructuary.<sup>133</sup> The Constitution does not discern between different classes of water users or types of water use, and the WUA is intended to administer, control, and regulate all water rights.<sup>134</sup> The WUA also eschews a preferential system of one user (or beneficial use) over another.<sup>135</sup>

Montana law historically differentiated between ground and surface water, but that is far less true today.<sup>136</sup> Beginning in 1966, the Montana Supreme Court recognized ground and surface waters are connected.<sup>137</sup> The 1973 WUA broadly defines water to mean “all water of the state, surface and subsurface, regardless of its character or manner of occurrence, includ-

128. Mont. Code Ann. § 85–2–301(1) (rights to appropriate-recognition and confirmation of permits issued after July 1, 1973); *id.* at § 85–2–302 (application for permit or change in appropriation right); *id.* at § 85–2–319 (permit action in highly appropriated basins or subbasins); *id.* at § 85–2–360 (ground water appropriation right in closed basins).

129. Mont. Const. art. IX, § 3; Mont. Code Ann. §§ 85–2–301 through 302.

130. Mont. Code Ann. § 85–2–360; *id.* at § 85–2–102(13) (defining groundwater); *id.* at § 85–2–102(31) (defining well); Admin. R. Mont. 36.12.101 (defining surface water).

131. Mont. Code Ann. § 85–2–306 (exceptions to permit requirements).

132. *In re Adjudication of the Existing Rights to the Use of All the Water*, 55 P.3d 396, 399 (Mont. 2002).

133. *Mont. Power Co. v. Carey*, 685 P.2d 336, 340 (Mont. 1984).

134. Mont. Const. art. IX, § 3; Mont. Code Ann. § 85–2–101(2).

135. Joe Kolman, Water Policy Interim Comm., *Water—Montana’s Treasure: An Analysis of Water Management in Montana*, 39 (Sept. 2008) (available at <http://leg.mt.gov/content/Publications/Environmental/2008montanastreasure.pdf>) [hereinafter *Montana’s Treasure*].

136. *To Change or Not*, *supra* n. 18, at 20.

137. *Perkins v. Kramer*, 423 P.2d 587, 595 (1966) (“traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists”).

ing but not limited to geothermal water, diffuse surface water, and sewage effluent.”<sup>138</sup> The scientific understanding and legal recognition that surface and ground water are hydrologically connected<sup>139</sup> has deepened.<sup>140</sup> For purposes of water appropriation and management, the Legislature often considers them concurrently now, particularly in closed basins.<sup>141</sup> For example, the Legislature recognized some ground water bears a close relationship with surface water in the Upper Missouri Basin and closed it to new appropriations unless an exception applied.<sup>142</sup> In *Bostwick II*, the Court noted that the Legislature recognized how ground water depletion could cause surface water depletion, which is why the Legislature requires ground water permit applicants to show their proposed use, in a closed basin, will not adversely affect senior surface water users.<sup>143</sup>

Exempt well users and all other water users are similarly situated for practical reasons because surface and ground water are hydrologically connected, subject to consumption and depletion.<sup>144</sup> As a “basic hydrologic principle[,] groundwater and surface water are two manifestations of a unitary resource, and an increase in the consumption of groundwater can reduce surface flows by intercepting water that would otherwise recharge a stream or by capturing water from the stream itself.”<sup>145</sup> The depletion rate depends on the distance between the well(s) and the stream.<sup>146</sup> “The legislature has adopted a system that recognizes the hydrological cycle and the adverse effect that new appropriations of surface water or ground water could cause senior appropriators. The legislature specifically recognized that depletion of ground water could cause a depletion of surface water.”<sup>147</sup> Whereas precise hydrological relationships can vary geographically, “a new ground water appropriation that is immediately and directly connected to surface water by inducing water out of a stream also would affect senior water users’ water supply in an over-appropriated basin like the Upper Mis-

138. Mont. Code Ann. § 85–2–102(26).

139. Admin. R. Mont. 36.12.101(30) (hydraulically connected “means a saturated water-bearing zone or aquifer in contact with surface water or other water-bearing zone where rate of exchange of water between the two sources depends on the water level of the water-bearing zone or aquifer”).

140. See *Trout Unlimited*, 133 P.3d 224; *Bostwick II*, 296 P.3d 1154, *To Change or Not*, *supra* n. 18, at Appendix E; *2010 Boiling it Down*, *supra* n. 74, at Appendix K.

141. Mont. H. 831, 60th Legis. (2007) (revising water laws in closed basins—affecting 14 statutes and two administrative rules).

142. Mont. Code Ann. §§ 85–2–342 through 343; *Trout Unlimited*, 133 P.3d at 229.

143. *Bostwick II*, 296 P.3d at 1160.

144. Water is consumed when it is removed from the hydrologic system without replacement or return. *To Change or Not*, *supra* n. 18, at Appendix E, 11.

145. Nathan Bracken, *Exempt Well Issues in the West*, 40 *Env’tl. L.* 141, 198 (Winter 2010).

146. Metesh, *supra* n. 17, at 2; see also *Water Policy Interim Video*, video of Powerpoint presentation (Mar. 18, 2014) (available at [http://montanalegislature.granicus.com/MediaPlayer.php?view\\_id=67&clip\\_id=12911](http://montanalegislature.granicus.com/MediaPlayer.php?view_id=67&clip_id=12911) starting at 1:46:40).

147. *Bostwick II*, 296 P.3d at 1160.

souri River.”<sup>148</sup> “Stream depletion results from pumping ground water until the groundwater discharge to the stream is reduced and/or flow from the stream to groundwater is induced. Both conditions reduce stream discharge.”<sup>149</sup> “Exempt wells can cumulatively deplete surface flows proportionally to permitted wells.”<sup>150</sup> “Stream depletion is independent of well interference[.] It is both cumulative and additive. [One] well pumping 500 gpm has the same effect as 50 wells pumping 10 gpm.”<sup>151</sup> Therefore, the aggregate effect of multiple exempt wells in a high enough density can mimic larger ground water diversions for which a permit would otherwise be required.

*B. The Ground Water Exemption Fails Strict Scrutiny Because Articles II and IX, Taken Together, Guarantee a Clean and Healthful Environment Free From Unreasonable Degradation and Depletion*

Strict scrutiny applies when fundamental rights enumerated in Article II of the Montana Constitution are at issue. The exempt well statute is subject to strict scrutiny because Montanans have a fundamental right to a clean and healthful environment, and the state has a duty to prevent unreasonable depletion and degradation of natural resources.<sup>152</sup> In *MEIC v. Department of Environmental Quality*,<sup>153</sup> the Montana Supreme Court held that Article II, section 3 of the Montana Constitution guarantees a fundamental right to a clean and healthful environment.<sup>154</sup> After comprehensively analyzing the framers’ intent, the Court concluded “the right to a clean and healthful environment guaranteed by Article II, section 3, and those rights provided for in Article IX, section 1 were intended . . . to be interrelated and interdependent.”<sup>155</sup> The delegates intended to provide “protections which are both anticipatory and preventative.”<sup>156</sup> Thus, state actions which implicate environmental rights under either Article II, section 3 or Article IX, section 1 are subject to strict scrutiny.<sup>157</sup> Degradation and depletion are both contemplated simultaneously in the constitutional provisions for a clean and healthful environment.<sup>158</sup> Because the *MEIC* Court applied strict scrutiny in light of the constitutional text “unreasonable degradation,” it is

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148. *Trout Unlimited*, 133 P.3d at 230.

149. Metesh, *supra* n. 17, at 2.

150. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at 2, 7.

151. Metesh, *supra* n. 17, at 2.

152. Mont. Const. art. II, § 3; *id.* at art. IX, § 1.

153. *MEIC v. Dept. of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999).

154. *Id.* at 1246.

155. *Id.*

156. *Id.* at 1249.

157. *Id.* at 1246.

158. Mont. Const. art IX, § 1(1), (3).

reasonable that statutes offering similar blanket exemptions that could cause “unreasonable depletion” are also subject to strict scrutiny. To survive an equal protection challenge to the exempt well statute under strict scrutiny, the state must show its interests are compelling and narrowly tailored.

Degradation of water quality was at issue in *MEIC*, where the Montana Supreme Court held a statute exempting certain discharges from non-degradation review unconstitutional.<sup>159</sup> To the extent that the statute categorically excluded activities from environmental review without regard to the nature or volume of the discharged substances, the statute violated a fundamental constitutional right. The Montana Department of Environmental Quality issued discharge permits to a mining company without review, even though the levels of arsenic and zinc in the discharged water exceeded the existing water quality standards *and* the ambient arsenic concentration levels in the Blackfoot River, which in turn degraded water quality.<sup>160</sup> An important underlying fact was that the contaminated mining discharge was re-injected into a well that was hydrologically connected to the river. The Court held the mining discharge could not be exempted from environmental review.<sup>161</sup> Further, the statute would likely fail strict scrutiny because it did not embody the constitutional guarantee that the state would provide adequate remedies to protect the environmental life support system from degradation and prevent unreasonable natural resource degradation.<sup>162</sup>

Depletion of surface water due to excessive ground water pumping in a closed basin was at issue in *Trout Unlimited*.<sup>163</sup> Trout Unlimited challenged whether DNRC’s interpretation of the Upper Missouri River Basin closure law and the phrase “immediately or directly connected to surface water” was correct as a matter of law, but did not claim a clean and healthful environment violation.<sup>164</sup> Nonetheless, the Court’s analysis of the hydrologic connection between surface flows, ground water pumping, and depletion is informative when taken together with *MEIC*.

Previously, the Legislature recognized that some ground water is closely associated with surface water and to allow unrestricted ground water appropriations would defeat the purpose of closing the basin.<sup>165</sup> Because the Upper Missouri Basin was already over-appropriated, the Legislature barred DNRC from processing new ground water permit applications

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159. *MEIC*, 988 P.2d at 1249 (Court limiting its holding to this as-applied challenge, but the analysis informs any facial or as-applied challenge to state action which affects the quality and quantity of natural resources).

160. *Id.* at 1238–1239 (emphasis added); *see also* Mont. Code Ann. §§ 75–5–301, 303(3), 317.

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

162. *Id.*

163. *Trout Unlimited*, 133 P.3d at 226–227.

164. *Id.* at 227.

165. *Id.* at 230.

that are “immediately or directly connected to the Upper Missouri River basin’s surface waters.”<sup>166</sup>

Still, DNRC granted a new ground water permit in the Smith River area but had not considered the impacts of pre-stream capture of tributary ground water (e.g. where ground water pumping draws up ground water that would otherwise flow to the river and become surface flow).<sup>167</sup> DNRC should have analyzed the impacts of both pre-stream capture and induced infiltration to determine whether there was an immediate or direct connection with surface flows, which would lead to surface water depletion and harm more senior users.<sup>168</sup> The Court concluded that:

[i]t makes no difference to senior appropriators whether ground water pumping reduces surface flows because of induced infiltration or from pre-stream capture of tributary ground water. The end result is the same: less surface flow in direct contravention of the Legislature’s intent [when it closed the basin to new appropriations].<sup>169</sup>

The Court also articulated its ongoing recognition that surface and ground water are hydrologically connected; moreover, ground water pumping can impermissibly deplete surface flows under certain conditions and harm senior appropriators.<sup>170</sup> Adequate surface flows not only protect more senior users, they also maintain instream flows for viable fisheries populations,<sup>171</sup> and assure adequate water quantity to maintain appropriate water quality for drinking water and other valid public purposes.<sup>172</sup> As the *MEIC* Court concluded:

[t]he 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.<sup>173</sup>

It stands to reason that the constitutional provisions at issue in *MEIC* must also include the duty to provide remedies for and prevent “unreasonable depletion . . . of natural resources”<sup>174</sup> as contemplated in *Trout Unlimited*. Therefore, strict scrutiny should be applied to the exempt ground water

166. Mont. Code Ann. §§ 85–2–342 through 343.

167. *Trout Unlimited*, 133 P.3d at 227, 232.

168. *Id.* (DNRC’s limited analysis violated the Legislature’s intent and the plain language of the statute which closed the basin to new appropriations.).

169. *Id.*

170. *Id.* at 230.

171. Mont. Code Ann. § 85–2–102(1) (defining appropriation to encompass a change in appropriation right to instream flow to protect, maintain, or enhance stream flows to benefit the fishery resource); *id.* at § 85–2–102(4) (indicating instream flows to benefit and sustain fisheries and wildlife are valid beneficial uses).

172. *Id.* at § 75–5–101(1) through (3).

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

174. Mont. Const. art. IX, § 1(3) (emphasis added).

well provision, which similarly grants categorical exemption from permitting review like the exempted discharge permits in *MEIC*. To survive strict scrutiny,<sup>175</sup> the state must show its interest in the exempt well provision is compelling and the statute is narrowly tailored.

*1. State's Interest in Preserving the Current Exemption is Not Compelling Because Demand for Water Will Increase in the Future While Supplies Remain the Same or Decrease*

The state's interests in granting water certificates for exempt wells is not compelling in the context of the Montana Constitution and the WUA because the exemption cannot be isolated from the broader framework—legally or practically. Certainly the exemption is consistent with the framers' intent that state waters are available and subject to appropriation for beneficial uses.<sup>176</sup> After all, access to water is necessary and is incident to the fundamental right to pursue life's basic necessities, such as housing in rural areas apart from a centralized water system, water to sustain livestock, or even water to sustain a lawn or garden.<sup>177</sup> Nonetheless, even fundamental rights are not absolute and can be subject to state regulation if constitutional safeguards preventing government infringement on individual rights are satisfied.<sup>178</sup>

The right to pursue life's basic necessities using exempt wells must be taken in companionship with other inalienable rights listed in the Montana Constitution Article II, section 3: right to a clean and healthful environment; enjoying and defending lives and liberties; acquiring, possessing, and protecting property; and seeking safety, health, and happiness in all lawful ways. As a necessity of life, water is required to actualize all of those rights, but the state retained ownership. Water rights are usufructuary property interests, where the state grants rights to use the water subject to applicable law.<sup>179</sup> No single individual right prevails over another, except as determined by individual priority date.<sup>180</sup> Justifying access to small quantities of water through individually *de minimis* wells, as though upholding a free-standing fundamental right, does not adequately consider the blanket exemption in light of other individual rights, including pre-July 1st, 1973 constitutionally vested water rights. Furthermore, the state also has a constitu-

175. *Snetsinger*, 104 P.3d at 450.

176. Mont. Const. art. IX, § 3(3).

177. *Id.* at art. II, § 3.

178. *State v. Skurdal*, 767 P.2d 304, 306–307 (Mont. 1988).

179. Mont. Code Ann. § 85–2–101(1) through (6).

180. Mont. Depart. of Nat. Resources and Conserv., *supra* n. 49, at 1.

tional duty to sustain public water resources for present and future beneficial uses.<sup>181</sup>

Granting exemptions to facilitate rural development while avoiding an administrative burden may have been compelling for the state 30 years ago, but no longer remains so today. Increasingly, the state will be challenged by higher demand for water in the future while supplies remain the same or decrease.<sup>182</sup> In 2008, DNRC predicted the number of exempt wells in closed basins would increase by about 30,000 and consumption “will increase by approximately 20,000 acre-feet per year by 2030.”<sup>183</sup> Yet exempt wells are not considered in the adjudication process unless the owner took the initiative to file a claim, even if not legally required to do so.<sup>184</sup> Furthermore, Montana Water Court adjudication decrees for pre-1973 water rights will not take into account all the new exempt well certificates issued by DNRC and their associated water use.<sup>185</sup> This is problematic for two reasons: 1) cumulative depletion and consumption can occur with exempt well use, and 2) exempt wells cannot effectively be called under the PAD’s priority system.<sup>186</sup> Preserving the current exempt well parameters is not compelling, because it is at odds with DNRC’s requirement to assure “future beneficial use and development of Montana’s water for the state and its citizens”<sup>187</sup> and its obligation to “coordinate the development, and use of the water resources . . . so as to effect full utilization, conservation, and protection of water resources.”<sup>188</sup>

## 2. *The Exempt Well Provision is Not Narrowly Tailored Because the De Minimis Assumption Disregards Significant Water Use and Because “Beneficial Use” is Broadly Defined*

The state could argue that the ground water exemption is narrowly tailored to allow appropriation of small quantities of water, which are individually *de minimis* and have a low probability of impacting surface flows and other water users. Most exempt wells likely pump less than the maximum allowed. However, the interrelationships between the location, type of use, and consumption rates are integral to whether or not the exemption is narrowly tailored to the degree necessary to simultaneously grant exempt

181. Mont. Const. art IX, § 3; Mont. Code Ann. § 85–1–101; *see also* *Beaverhead*, 255 P.3d at 184–185.

182. Kolman, *supra* n. 135, at 2.

183. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at 6.

184. Mont. Code Ann. §§ 85–2–212, 221 through 222.

185. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at 1.

186. *Id.*; *see also* Ltr., *supra* n. 116; Memo., *supra* n. 98.

187. Mont. Code Ann. § 85–2–101(2).

188. 2011 H. 602, 62d Legis., § 1(5) (available at [http://leg.mt.gov/bills/2011/hb0699/HB0602\\_x.pdf](http://leg.mt.gov/bills/2011/hb0699/HB0602_x.pdf)) (establishing process for Legislature to provide direction for implementation of exempt well laws).

well certificates under the current framework and protect senior water rights. The exemption is not narrowly tailored for many reasons.

First, the *de minimis* assumption is no longer valid given today's human footprint on the landscape. The assumption fails to account for the cumulative amount of water diverted by an ever-increasing number of individually-exempt wells and their consumption. From 1991–2010, 47% of the exempt well certificates were issued in over-appropriated basins that are closed to new surface appropriations.<sup>189</sup> The aggregate effect of exempt wells is not *de minimis* and likely impacts surface flows and other water users. For example, DNRC estimated 26,373 exempt wells diverted about 30,660 afy in Montana's closed basins from 1991–2010. Of that, approximately 17,900 afy was consumed.<sup>190</sup> For comparison, any single request to appropriate 3,000 afy or more of ground water requires not only an adverse effects analysis, but also legislative approval.<sup>191</sup>

The notion that exempt wells do not warrant consideration in the aggregate because each individual appropriation qualifies as *de minimis* is myopic. Validating the *de minimis* assumption would mandate that the vast majority of water is not consumed, and any potential depletion does not adversely impact senior appropriators. Once diverted, the water is supposed to later become available to fulfill other water rights, regardless of priority date. In reality, high consumption rates associated with certain beneficial uses undermine this assumption. Consumption removes water from the hydrological system without replacement or return, causing depletion in the absence of mitigation or augmentation from other sources.<sup>192</sup> For example, lawn and garden irrigation from an exempt well may divert 1.9 afy but consume 1.33 afy, a 70% consumption rate.<sup>193</sup> Some industrial uses of exempt wells such as dust abatement or gravel operations would consume 100%.<sup>194</sup>

Second, Montana law defines beneficial use so broadly that any tailoring effect is lost. Accordingly, any public policy argument that the exemption makes water readily available for rural domestic use and for livestock is weakened. The WUA broadly defines beneficial use, and exempt well water can be put to *any use* that benefits the appropriator, other persons, or

189. *To Change or Not*, *supra* n. 18, at Appendix B (total number of exempt wells in closed basins 26,373 divided by statewide total of 56,083).

190. *Id.* (DNRC assumed half-acre lawns).

191. Mont. Code Ann. §§ 85–2–311, 317; *see also id.* at § 85–2–311 (requiring an applicant for 4,000 afy or more prove by “clear and convincing evidence” that water is physically and legally available).

192. *To Change or Not*, *supra* n. 18, at Appendix E.

193. *Id.* at Appendix B.

194. *Id.*

the public.<sup>195</sup> For some applications, the 10 afy limitation is not so severe to preclude exempt wells, which could be significant in closed basins where the legal and physical availability is already constrained. For example, DNRC included exempt wells in a list of potential legal water sources for the oil and gas industry.<sup>196</sup> About 80,000 gallons of water are needed to drill a well in preparation for fracking,<sup>197</sup> which is well within the statutory limit. Hydrofracking the well typically requires about 3,800,000 gallons of water, but can range from two to four million gallons depending on the depth and horizontal drilling distances.<sup>198</sup> An exempt well would be sufficient at the low end of that range.<sup>199</sup> While exempt wells may not be feasible for certain drilling applications, they could be used for dust abatement or other industrial operations. Also, the exempt well statute is silent about storing water pumped from exempt wells in tanks or pits. The statute is also silent regarding physically moving the water via pipes or trucks to other locations (so long as multiple wells drilled in the same source aquifer are not physically manifold together<sup>200</sup>).

Third, the exemption is also not narrowly tailored because the number or density of exempt wells that can be drilled on a single parcel of land or general area is not limited, provided each well taps a different source aquifer, the volume does not exceed 10 afy, and the wells are not physically manifold into the same system.<sup>201</sup> For technical reasons, discerning whether multiple wells tap the same or different source aquifers may prove difficult.<sup>202</sup>

195. Mont. Code Ann. § 85–2–102(4)(a) (The Code defines beneficial use as “a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agriculture, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.”) (emphasis added).

196. Mont. Dept. of Nat. Resources and Conserv., *Water Use Options for Oil Well Development 2* (Apr. 19, 2012) (available at [http://dnrc.mt.gov/wrd/water\\_rts/oil\\_gas\\_water/water\\_options\\_oil\\_development.pdf](http://dnrc.mt.gov/wrd/water_rts/oil_gas_water/water_options_oil_development.pdf)).

197. Robert E. Beck, *Current Water Issues in Oil and Gas Development and Production: Will Water Control What Energy We Have?*, 49 Washburn L.J. 423, 425 (Winter 2010).

198. *Id.*; see also Jay Gunderson, *Unconventional “Shale Plays” in Montana: A Look at the Geology and Development of the Bakken and Heath Formations*, 31–32 (Mont. Bureau of Mines and Geology, August 2012) (estimating a 2-mile lateral [unconventional shale well] uses about two million gallons of water for a frack job) (available at [http://www.mbm.g.mtech.edu/gwip/gwip\\_pdf/2012/Energy\\_Ground-water\\_Non\\_traditional-oil\\_gas\\_potential.pdf](http://www.mbm.g.mtech.edu/gwip/gwip_pdf/2012/Energy_Ground-water_Non_traditional-oil_gas_potential.pdf)).

199. Two million gallons is about 6 acre feet (1 acre feet equals 325,851 gallons, <http://www.convertnits.com/from/acre-feet/to/gallons>); one exempt well could provide about 85% of the water necessary to frack a typical well (3,800,000 divided by 3,258,510 gallons, the number of gallons allowed under the 10 afy total volume statutory limit for exempt wells).

200. Admin. R. Mont. 36.12.101(13) (defining combined appropriation as “an appropriation of water from the same source aquifer by two or more ground water developments, that are physically manifold into the same system”).

201. Mont. Code Ann. § 85–2–306; Admin. R. Mont. 36.12.101(13).

202. Admin. R. Mont. 36.12.101(61) (defining source aquifer to mean “the specific ground water source from which water is diverted for beneficial use”). DNRC proposed to amend this definition to

Fourth, the exemption grants rights without consideration or review of potential impacts to those holding constitutionally-vested water rights. Granting an exempt certificate in isolation of other water uses is inapposite to the narrow tailoring requirement. While the implicit *de minimis* assumption could be construed as narrowly tailored as to each individual well, an exempt well certificate is nonetheless granted within a larger water rights administrative framework that is rooted in the PAD and the hydrologic connection between surface and ground water. The law disregards “trifles.”<sup>203</sup> But in water law, consideration of the aggregate<sup>204</sup> of all individual appropriations (whether *de minimis* or not) is a silent, though implicit requirement. After July 1, 1973, water may not be appropriated except as provided by law. The law requires a determination about the legal and physical availability of water.<sup>205</sup> The PAD would be hollow were it not for summing the aggregate quantity of more senior water appropriations to determine the legal and physical availability of water, and therefore whether a new appropriation would harm senior users or deplete surface flows. More appropriately, the exemption should be analyzed within its comprehensive parent statute, the WUA, and the hydrologic system. Moreover, a basin cannot be legitimately closed to new appropriations without a full accounting of all diversions and consumption. A blanket exemption premised on *de minimis* assumptions could only be narrowly tailored to its own secondary system of extra-legal water rights, separate from the state’s constitutionally mandated, singular, and centralized framework. The exemption undermines carefully crafted rules honed over a century of water law.

Lastly, designating SDZs in closed basins to protect senior appropriators appears narrowly tailored, but this is a false pretense. By the plain language of the statute, a SDZ can only be designated *after* potential harm has already occurred, as demonstrated by a hydrologic assessment.<sup>206</sup> A SDZ is statutorily defined to exist only *after* surface water would be depleted by “a rate equal to at least 30% of the ground water withdrawn within 30 days after the first day a well or developed spring is pumped at a rate of 35 gallons a minute.”<sup>207</sup> The definition does not clarify whether the

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identify the aquifers it would consider connected for the purposes of combined appropriations because exempt wells are not subject to site-specific review and analysis (Mont. Admin. Reg. Notice No. 36-22-176 (Dec. 26, 2013)), but withdrew the rule after the Montana Environmental Quality Council formally objected.

203. Mont. Code Ann. § 1–3–224. A legal matter is *de minimis* if it is trifling or too minor to be considered in light of judicial economy. *City of Bozeman on Behalf of Dept. of Transp. of St. of Mont. v. Vaniman*, 898 P.2d 1208, 1211 (Mont. 1995) (citing *Hopkins v. Kitts*, 94 P. 201 (Mont. 1908)).

204. *Black’s Law Dictionary* at 76 (to collect into a whole, as in to aggregate the claims).

205. Mont. Code Ann. §§ 85–2–301 through 302 (permit required); Mont. Code Ann. § 85–2–306 (exceptions to permit requirement); Mont. Code Ann. § 85–2–311 (criteria for issuance of a permit).

206. *Id.* at § 85–2–380.

207. *Id.* at § 85–2–102(23).

depletion rate is an instantaneous rate or cumulative. Because neither public nor particularized notice is required, senior water users could not reasonably be expected to know when a new exempt well is drilled. Likewise, they could not reasonably know the pumping rate of the new well and whether surface water is being depleted by a rate equal to at least 30% of the ground water withdrawn—all facial requirements to fulfill the definition of a SDZ and submit a “qualifying petition.”<sup>208</sup> Even if senior users did get notice, they still carry the burden to show an adverse effect through a scientific, hydrologic assessment, which can cost from tens to several hundred thousand dollars.<sup>209</sup> The expense and the technical requirements present a very high bar.<sup>210</sup> Lastly, even after a SDZ is designated, DNRC must still grant exempt well certificates within the SDZ for 20 gpm and up to a maximum volume of 2 afy.<sup>211</sup>

*C. The Ground Water Exemption Fails Middle-Tier Scrutiny Because the State’s Interests in Granting a Blanket Exemption are Unreasonable and Do Not Outweigh Private Interests*

The Montana Supreme Court should apply middle-tier scrutiny if it declines to apply strict scrutiny. The Court pioneered a middle-tier scrutiny test for individual benefits or rights sufficiently important to be recognized in the Constitution, yet fall outside the Declaration of Rights.<sup>212</sup> Some examples include: Water Rights, Article IX, section 3; Clean and Healthful Environment, Article IX, section 1; and Education, Article X, section 1. The court conducts a fact-specific, circumstantial inquiry and must balance government interests with individual rights. A law or policy will be upheld if reasonable and the need for the resulting classification outweighs the value of the individual’s right.<sup>213</sup> “Where constitutionally significant interests are implicated by government classification, arbitrary lines should be condemned.”<sup>214</sup>

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208. *Id.*; *id.* at § 85–2–380.

209. *Water Policy Interim Video*, *supra* n. 146 (in response to committee member’s questions about the cost and SDZ size, stating an assessment would cost “tens of thousands of dollars” if the applicable baseline studies have been completed, but where baseline data and studies have not been completed, it would resemble a ground water assessment study done by the Bureau which can cost \$500,000).

210. *Id.* (science behind SDZs and their designation); *see also Trout Unlimited*, 133 P.3d 224. Assuming a surface water depletion would be measureable within 30 days is questionable, given the lag time of developing pre-stream capture or reduced infiltration caused by ground water pumping. *See also Memo.*, *supra* n. 98.

211. Mont. Code Ann. § 85–2–306(3)(a)(iv).

212. *Butte Community Union*, 712 P.2d at 1313–1314.

213. *Snetsinger*, 104 P.3d at 450.

214. *Butte Community Union*, 712 P.2d at 1314.

Middle-tier scrutiny is appropriate here because pre-1973 water rights are constitutionally vested, and they must be balanced against the constitutional requirement that the state make water available for beneficial use. To withstand middle-tier scrutiny, the state must show: 1) the threshold 35 gpm flow rate to categorically exempt certain wells from permitting is reasonable, and 2) the state's interest in granting the exemption is more important than senior water users' interests to protect their rights from encroachment.<sup>215</sup> The state could argue that exempting certain ground water wells from the permitting process is reasonable to meet water needs in rural areas. The Legislature must then prescribe a threshold well flow rate and total volume. Thirty-five gpm up to 10 afy allows for irrigation up to four acres, which might be a reasonable limitation before requiring an appropriator and DNRC to complete the rigorous permitting process previously described. But middle-tier analysis requires a balancing of state interests with those of senior water users, many of whom possess constitutionally vested water rights and very old priority dates.<sup>216</sup> When balancing on the whole, the state's interests in maintaining a blanket exemption from permitting are not reasonable and do not outweigh the interests of senior water appropriators.

*1. The Government's Classifications are Unreasonable Because Exempt Wells can be Relied on to Supply Water Where a Water Permit Might Otherwise be Denied*

First, the 35 gpm threshold was an arbitrary policy choice. During a Free Conference Committee, the threshold was decreased from 100 gpm to 35 gpm, with limited scientific scrutiny or public comment.<sup>217</sup> This statutory trigger discriminates between ground water users who appropriate less than 35 gpm (exempt) from those who appropriate 36 gpm (not exempt and subject to high evidentiary requirements).<sup>218</sup> In closed basins, a mitigation or augmentation plan may be required for wells flowing at 36 gpm.<sup>219</sup> The criterion at issue boils down to the assumption that a well appropriating less than 35 gpm is *de minimis*, whereas 36 gpm is not.

An example from the Gallatin Valley further illustrates the arbitrary nature of the statutory flow rate and volume thresholds for discerning between a ground water well for which a permit is required and an exempt

215. *Id.* at 1313–1314.

216. *See Bostwick II*, 296 P.3d at 1161–1162 (Court observing the Gallatin Water Commissioner generally cuts off priority dates later than 1890 during most irrigation seasons, and priority dates junior to 1883 were cut off in 2012).

217. DNRC Ruling *Clark Fork Coalition*, *supra* n. 75.

218. Mont. Code Ann. § 85–2–360(3)(b) (burden of proof for no adverse effect is a preponderance of evidence).

219. *Id.* at § 85–2–362(1) through (4).

well. In *Bostwick II*, the Montana Supreme Court upheld DNRC's denial of Bostwick's ground water permit for a subdivision, in part because the proposed mitigation was insufficient to avoid surface water depletion and harm to senior users.<sup>220</sup> The Court noted that even depletion "as minimal as 39 afy" could cause adverse effects.<sup>221</sup> Ironically, this quantity approaches the total maximum volume allowed for four individually exempt wells for identical beneficial uses contrary to the spirit of the WUA.

Second, an example from Gallatin Valley illustrates how exempt wells can still be developed even where a permit applicant had to scale back the amount of water diverted because water available for mitigation was insufficient.<sup>222</sup> Here, several parties objected to a proposed ground water permit, but a negotiated settlement was reached after the developer incorporated water mitigation and augmentation measures to avoid surface depletion to the Gallatin River and harm to senior users. After the settlement, however, the developer still drilled exempt wells to obtain the remaining water needed for commercial and residential landscaping needs.<sup>223</sup> None of the exempt well water was mitigated because mitigation is not required for individual, or even multiple, exempt wells so long as they are not physically manifold together, which would trigger the definition of combined appropriation and permitting review.<sup>224</sup> Furthermore, neither settlement signatories nor other water users could object to new exempt wells because the Legislature did not create an objection process for exempt well certificate applications like it did for ground water permits.<sup>225</sup> Not only did the added exempt wells evade permitting review, but they likely contributed to depletion.

Lastly, the government's classification is unreasonable because exempt wells divert and consume a significant amount of water beyond DNRC's oversight and the ability of senior appropriators to protect their rights, particularly in closed basins. The Montana Legislature expressly closed basins to new surface appropriations and required mitigation for permitted ground water wells that adversely affect senior users, recognizing more claims exist than there is water to fulfill them.<sup>226</sup> In Montana's five closed basins, DNRC estimated exempt wells diverted about 30,660 afy in 2010. About 17,859 afy were consumed.<sup>227</sup> By 2020, DNRC predicted

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220. *Bostwick II*, 296 P.3d 1154 at 1162.

221. *Id.*

222. Ziemer et al., *supra* n. 15, at 89–91.

223. *Id.* at 90, nn. 74–76.

224. *Id.* The developer chose not to voluntarily mitigate water diverted by exempt wells despite being asked to do so by the settling parties; Admin. R. Mont. 36.12.101(13).

225. Ziemer et al., *supra* n. 15, at 90.

226. See Basin Closure Statutes, Mont. Code Ann. §§ 85–2–319, 321, 330, 336, 341, 343, 344.

227. *To Change or Not*, *supra* n. 18, at Appendix B (DNRC assumed half-acre acre lawns).

48,000 afy will be diverted and about 28,000 afy will be consumed.<sup>228</sup> This is equivalent to 21,000 football fields, each having one foot of standing water. Stacked vertically, the football fields would nearly top Mount Everest.<sup>229</sup> Thus, a significant quantity of water is diverted and consumed in closed basins, having evaded permitting review, with no consideration for aggregate impacts. Excluding exempt wells from the otherwise comprehensive system of accounting for water diversion, use, and consumption is unreasonable. Doing so impairs the integrity of the centralized system and limits DNRC's ability to fulfill its other WUA responsibilities.

*2. The State's Interest in Granting the Exemption Does Not Outweigh the Interests of Other Water Users Under the Prior Appropriation Doctrine, Particularly Those Holding Constitutionally Vested Water Rights*

Even if the state interests are reasonable, they do not outweigh the interests of senior appropriators to whom the state already granted a water right. The state cannot ministerially grant exempt ground water certificates and ignore the aggregate effects while simultaneously promising other water users that it will administer water rights methodically, all while upholding their existing water rights under the WUA and the PAD. The state's interest in granting exempt well certificates in a way that procedurally undermines the property interests it previously granted does not entitle it to prevail in a balancing test. The exemption impairs the state's ability to fully recognize and protect constitutionally vested water rights.

The state lacks salient mechanisms to ensure that, cumulatively, exempt wells do not adversely affect senior users or deplete surface flows because applications are not reviewed in light of other water rights already recognized—and that need protection. Exempt wells can deplete surface water flows in the same proportion to wells subjected to the permitting review process.<sup>230</sup> The exemption omits certain water users from an otherwise methodical and comprehensive statutory scheme that controls and regulates all other water users. The state's interests to exempt some water users do not outweigh interests of other senior appropriators for two reasons.

First, administrative convenience and cost control are not enough to tip the balance in the state's favor. While administrative convenience is a legit-

228. *Id.*

229. Encyclopedia Britannica, *Mount Everest*, <http://www.britannica.com/EBchecked/topic/197160/Mount-Everest/230896/The-height-of-Everest> (accessed Apr. 15, 2014).

230. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at 2, 6–7; *see also* Metesh, *supra* n. 17, at 2 (“Stream depletion is independent of well interference; it is both cumulative and additive [in that] 1 well pumping 500 gpm has the same effect as 50 wells pumping 10 gpm. Depletion does not stop when pumping stops.”).

imate state interest, it is not sufficiently important to be considered compelling.<sup>231</sup> Administrative convenience is not enough to justify a policy that infringes on constitutional provisions protecting all Montanans.<sup>232</sup> Even cost control alone has not justified disparate treatment in some cases.<sup>233</sup> Similar to how the *Snetsinger* Court suggested a university could implement new procedures, here, the state could devise new procedures to allow small rural domestic uses without unduly burdening citizens or DNRC. Indeed, computerized databases already exist.<sup>234</sup> The state's interest in minimizing its work load while ostensibly making small quantities of ground water freely available for any beneficial use improperly disadvantages existing senior appropriators to whom the state *already* granted a water right.

Second, exempt wells are shielded from call, negating the PAD. There is a legal and a practical presumption that the prior appropriation applies to all water users. It is the primary mechanism by which water users protect their water rights in an orderly fashion in any given year. In fact, the entire constitutional and statutory scheme places a high value on ensuring an orderly system for administering, controlling, and implementing Montana's water rights. But exempt wells can pump water 24/7 and out of priority.<sup>235</sup> A call by a senior user must be enforced against junior users in the chronological order of the least priority, that is, the youngest priority date, regardless of whether those rights are surface or ground water rights.<sup>236</sup> Even if exempt wells could be administered based on priority date, invoking a call would be ineffective in a practical sense. Because the effect on stream flows would be so delayed, a call by a senior surface water user may still go unfulfilled.<sup>237</sup> It is unlikely a court would enforce a call on domestic use in a subdivision against a more senior, agricultural-use water right. That exempt wells are used for large, relatively dense rural subdivisions in closed basins deepens the injury to senior appropriators because the aggregate ef-

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231. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

232. *Snetsinger*, 104 P.3d at 452.

233. *Heisler*, 937 P.2d at 52 (reversing the Worker's Compensation Court finding in favor of an injured worker that the state's policy of discriminating between injured workers based solely on which plan they belonged to was not rationally related to a legitimate government objective).

234. DNRC, *Water Rights Query System*, <http://nris.mt.gov/dnrc/waterrights/default.aspx> (last updated Apr. 11, 2014).

235. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at Exhibit 7, 1–2; *To Change or Not*, *supra* n. 18, at 16–19; Mont. Code Ann. § 85–2–306 only limits exempt well flow rates and the total annual volume.

236. *Trout Unlimited*, 133 P.3d at 232 (Standing for the premise that senior appropriators can be similarly harmed by reduced surface flows caused by excessive ground water pumping as by excessive surface water use by junior appropriators. The effect is the same due to the hydrologic connectivity between surface and ground water.).

237. Mont. Dept. of Natl. Resources and Conserv., *supra* n. 73, at Exhibit 7, 2.

fect is intensified. A technical legal remedy may exist, but it is pragmatically unenforceable.<sup>238</sup>

The state may cite the New Mexico Supreme Court as persuasive authority for the premise that exempt wells do not violate the PAD or impair senior water users, but caution is warranted.<sup>239</sup> The *Bounds* Court declined to address equal protection arguments.<sup>240</sup> Instead, it differentiated between how domestic rights are obtained (permitting) and regulated by the state engineer (administration).<sup>241</sup> Importantly, New Mexico's exempt well regulatory framework is considerably more robust than Montana's, including: 1) exempt wells can only be used to irrigate up to one acre of noncommercial landscaping or household/domestic use; 2) maximum diversion for a single household is 1 afy; 3) the state engineer can require meters; and 4) the state engineer can declare a Domestic Well Management Area where maximum diversion is 0.25 afy per single household.<sup>242</sup> The Court largely focused on the state engineer's authority to "supervise water apportionment"<sup>243</sup> and other statutory safeguards. Unlike Montana, the New Mexico Legislature passed two statutes squarely aimed at discouraging reliance on domestic wells for subdivisions. Where water rights were severed from the land, a subdivision cannot be approved without "state engineer approval of sufficient water" or proof that domestic wells will not be used because other water rights were acquired.<sup>244</sup> Another statute precludes clusters of domestic wells for "any subdivision of 'ten or more parcels, any one of which is two acres or less.'" <sup>245</sup> New Mexico "has taken at least some remedial action short of an outright repeal of the [domestic well statute] to mitigate its effects."<sup>246</sup>

Again, *Bostwick II* provides an insightful analogy. The *Bostwick II* Court concluded that for ground water permitting review, an applicant re-

238. *To Change or Not*, *supra* n. 18, at 24–26.

239. *Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 465–467 (N.M. 2013) (holding New Mexico's domestic well statute does not violate Constitution's phrase that "priority of appropriation shall give the better right" because the statute addresses permitting only, and not water administration; further holding that domestic wells are still conditioned on water availability and subject to regulation by the state engineer).

240. *Id.* at 461, n. 1 ("mentioned in the brief but not developed"); *id.* at 466–467 (Court acknowledged the "practical effects of the issues raised" but said that it cannot rely on petitioner's speculation without specific facts supported in an as-applied challenge); *id.* at 468 (believing that senior users have legal recourse by making call or filing an as-applied challenge).

241. *Id.* at 465–467.

242. *Id.*; N.M. Stat. § 72–12–1.1 (1978); N.M. Code § 19.27.5.

243. *Bounds*, 306 P.3d at 467.

244. *Id.* at 468; N.M. Stat. § 3–20–9.1 (proof of adequate water supply on lands from which irrigation water rights have been severed precludes "double dipping").

245. *Bounds*, 306 P.3d at 468; N.M. Stat. § 47–6–11.2 (water permit required for final plat approval).

246. *Bounds*, 306 P.3d at 468.

tains the burden of demonstrating no adverse impacts to senior appropriators, *regardless* of how uncertain or attenuated the hydrological connection might be.<sup>247</sup> Here, the developer had an unmitigated, residual depletion of 39 afy but argued that any adversely affected senior users could make a call through the PAD.<sup>248</sup> The Court flatly rejected Bostwick's argument to shift the burden and concluded it would be difficult for senior appropriators to protect their water rights.<sup>249</sup> Hypothetically, even with a designated SDZ in this area, Bostwick could still develop a 20-home subdivision, each with an exempt well diverting 20 gpm up to 2 afy. None of these exempt wells could be effectively called.<sup>250</sup> If calls are ineffective, the PAD becomes meaningless and the orderly system is nullified. Montana subdivision laws do not require proof of water availability prior to approval.

The state's interest in granting categorical blanket exemptions to some citizens is not more important than the ability of others to uphold their rights, which were obtained through the same state. Fairness is an important underlying principle requiring the law to treat similarly situated individuals in a similar manner.<sup>251</sup> Even under the Constitution, water rights are not immune from the sovereign powers of the state and are not granted indefeasible status because the state retained ownership of both surface and ground water. Nonetheless, water users are still protected against unreasonable state action.<sup>252</sup>

*D. The Exempt Well Provision Would Likely Survive Rational Basis Review, but Should be Revised for Public Policy Reasons Because it Segregates a Class of Water Users from the Centralized System of Water Allocation and the Prior Appropriation Doctrine*

Rational basis review is appropriate when neither strict scrutiny nor middle-tier scrutiny apply. It is the lowest, least exacting level of judicial inquiry and the state usually prevails. A court will apply rational basis to rights or benefits conferred by statute, administrative rule, or policy,<sup>253</sup> unless a constitutional mandate exists or a self-executing provision is at issue—which a court can enforce.<sup>254</sup> Courts discern between fundamental rights, constitutionally created rights, and legislative benefits.<sup>255</sup> Even when the plaintiffs cited several constitutional provisions that would trigger mid-

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247. *Bostwick II*, 296 P.3d at 1161 (emphasis added).

248. *Id.* at 1162.

249. *Id.*

250. *To Change or Not*, *supra* n. 18, at 16–19.

251. *McDermott v. Mont. Dept. of Correct.*, 29 P.3d 992, 998 (Mont. 2001).

252. *In re the Yellowstone River*, 832 P.2d at 1214.

253. *Wiser v. Dept. of Com.*, 129 P.3d 133, 138 (Mont. 2006).

254. *Powder River Co.*, 60 P.3d at 374–375.

255. *Snetsinger*, 104 P.3d at 449–450.

dle-tier scrutiny, the Court may still apply rational basis analysis, like in *Snetsinger* where the plaintiffs alleged several constitutional violations.<sup>256</sup> Similarly, in *Jaksha*, where a statute facially established an age eligibility requirement, the Court still applied rational basis review and held for the state.<sup>257</sup> To survive a rational basis challenge, the state need only show the statute's legitimate objectives are rationally related to the classification.<sup>258</sup>

Whether rational basis would be applied to the exempt well provision is arguable. Because the right to put Montana's water to beneficial use is lodged in the Constitution,<sup>259</sup> rational basis review of the exempt well statute would be incorrect under the *Butte Community Union* holding. Nonetheless, a court may cite the phrase "as provided by law" in Article IX, section 3(3) as a reason to decline heightened scrutiny. For example, the exempt well provision may be seen as a legislatively-created benefit because the Constitution did not require the Legislature to create it or establish the flow rate limitation.

The state would likely make its showing under rational basis. When enacting the WUA, the Legislature articulated legitimate government interests in public welfare and economic prosperity.<sup>260</sup> It found that making small quantities of ground water available in rural areas would further that interest.<sup>261</sup> The state may also argue that a senior appropriator can enforce water rights under the PAD in district court, or petition DNRC to create a SDZ. The Legislature expressly concluded that establishing a SDZ provides a "conclusive, scientific basis for determining where ground water rights that are exempt from permitting are affecting senior water rights."<sup>262</sup>

Nonetheless, a court should closely scrutinize the state's arguments for their underlying inconsistency in how different classifications of water users are treated. For example, DNRC notifies senior users after receiving a new ground water permit application, but not when it receives an exempt well certification of completion. A state policy that burdens SDZ-petitioning senior users to submit a hydrologic assessment showing adverse impacts of a single exempt well, or even multiple exempt wells, is not rational—especially when the senior users never receive notice. It is particularly irrational given their ability to establish harm, and in light of *Bostwick II*'s holding that applicants for permitted wells bear the burden statutorily—even if the proposed use constitutes only a *de minimis* quantity.<sup>263</sup> The PAD

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256. *Id.* at 452.

257. *Jaksha*, 214 P.3d at 1254–1255 (the court applied rational basis review).

258. *Powell*, 15 P.3d at 883.

259. Mont. Const. art. IX, § 3.

260. Mont. Code Ann. § 85–1–101.

261. *Id.* at § 85–2–101; *To Change or Not, supra* n. 18, at 32.

262. Mont. Code Ann. § 85–2–381(2).

263. *Bostwick II*, 296 P.3d. at 1161–1162.

presumes that senior water rights are protected from encroachment and enforceable. New applicants are statutorily burdened to show lack of adverse impacts—except for exempt wells. Furthermore, placing a call on exempt wells is likely unenforceable.<sup>264</sup>

For public policy reasons, the exempt well statutory and administrative rules warrant revision. Both the Montana Legislature<sup>265</sup> and DNRC<sup>266</sup> acknowledge the validity of the issue, even if they cannot agree on interim solutions moving forward. DNRC's most recent proposed rule sought to at least: 1) align the exemption with existing standards for water use for an average household enforced by the Montana Department of Environmental Quality; and 2) "create a consistent standard for future combined appropriations of exempt wells or developed springs for subdivisions, divisions of land, or wells that are located on the same tract of land."<sup>267</sup>

Montana's water laws and policies are inherently inconsistent in many respects. For example, the exempt well provision is not rationally related to a policy of carefully accounting for water uses, scrutinizing proposed new diversions for adverse effects on stream flows and senior users, or upholding the PAD. While statutes need not be consistent to be upheld by a court,<sup>268</sup> the law should provide agencies and the public with coherent guidance. Agencies may not take actions that appear to be random, unreasonable, or seemingly unmotivated on the existing record.<sup>269</sup>

#### IV. CONCLUSION

Montana law treats water as both an individual, private property interest and as a public resource, casting the Equal Protection Clause in an unusual light in two respects. First, Montanans have a constitutionally-created, usufructuary right to use water beneficially. Montana's statutory framework formally recognizes the PAD as the fundamental rule governing water use, while simultaneously exempting certain ground water wells from the permitting process. Equity issues are triggered by the difference between the ministerial<sup>270</sup> process by which the state grants exempt well certificates

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264. *To Change or Not*, *supra* n. 18, at 24–26.

265. *Id.* at Appendix A (House Bill 602 § 1(6), 61st Montana Legislature) (finding development of ground water wells exempt from permitting may have an adverse effect on other water rights and WUA does not provide DNRC with clear direction on the administration of ground water wells exempt from permitting).

266. Clark Fork Petition, *supra* n. 72, at Exhibit 4, 7; *see also* Ltr., *supra* n. 116.

267. 24 Mont. Admin Reg. 2389 (Dec. 26, 2013).

268. *Powder River Co.*, 60 P.3d at 371–372 (court may apply statutory construction rules to ascertain the laws).

269. *Hobble Diamond Ranch, LLC v. State*, 268 P.3d 31, 37 (Mont. 2012).

270. *Bostwick Prop. Inc. v. Mont. Dept. of Nat. Resources*, 208 P.3d 868, 873 (Mont. 2009) (citing *Beasley v. Flathead Co. Bd. of Adjustments*, 205 P.3d 812 (Mont. 2009)) (*Beasley* defined ministerial as

compared to the permitting process required to obtain any other type of water right.<sup>271</sup> Also, there is increasing skepticism that Montana's WUA<sup>272</sup> can actually protect existing senior users from encroachment by junior water users<sup>273</sup> because the aggregate effect of multiple exempt wells mimics non-exempt well use, and also because exempt wells elude call. The validity of the *de minimis* assumption is in doubt, particularly when the impact of individually exempt wells is aggregated. Nonetheless, the assumption that exempt wells are *de minimis* persists, even as the WUA goes to painstaking lengths to methodically regulate and administer every other facet of Montana's water rights and appropriation system. Early legislative and agency suspicion that the exemption would be sought out in lieu of the more rigorous permitting process was prescient. Yet, the state still has not effectively addressed the inherent linkage between land-use law and water law.

Montanans have long recognized water as an important public resource, ultimately recognizing surface waters within the scope of the public trust doctrine and the Montana Constitution for the purposes of both ownership and public recreation.<sup>274</sup> The WUA also articulates policies aimed to conserve water and preserve aquatic ecosystems. Protection from unreasonable depletion is a constitutionally lodged right.

It may seem contradictory to assert an equal protection claim on behalf of senior water users whose diversionary water use practices deplete stream flows alongside exempt ground water wells. However, protecting the rights of senior appropriators helps protect the corpus of remaining surface flows and ground water aquifers. This in turn, helps fulfill Montana's stated public policy to conserve "the waters of the state for the maximum benefit of its people with the least possible degradation of natural aquatic ecosystems."<sup>275</sup> Preventing "death by 1,000 cuts" requires preserving the largest, oldest water rights. Even though the alleged injury is particularized to senior water users, the remedy extends to the public interest in a more generalized fashion. Resource managers cannot effectively address areas of surface flow depletion or chronic dewatering unless the rights of senior users are protected and enforced because typically senior agricultural water users have the oldest priority dates and the largest water rights. For example, managers often work with large agricultural surface water irrigators to in-

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"where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Where the act to be done involves the exercise of discretion or judgment, however, it is not deemed merely ministerial.").

271. Mont. Code Ann. §§ 85-2-301, 306.

272. *Id.* at §§ 85-1-101 through 85-2-907.

273. *Mont. Power Co.*, 685 P.2d at 340.

274. *Galt v. Montana*, 731 P.2d 912, 915 (Mont. 1987).

275. Mont. Code Ann. § 85-2-101.

crease efficiency or to lease water for in-stream flows during critical times of the year.<sup>276</sup> Long-term efforts to improve stream flows will be limited by the extent to which senior water users successfully protected their water rights from encroachment. Upholding the integrity of the PAD also benefits the public interest because all water users should be similarly constrained by a common, orderly system so that “the waters of the state [are] protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.”<sup>277</sup>

Competing public policies need not be fulfilled in a mutually exclusive fashion. Rather, they should be contemplated and balanced in a holistic, systematic way. Montana recognizes the unitary nature of surface and ground water both in law<sup>278</sup> and in practice, where the hydrologic connectivity between the two is increasingly acknowledged.<sup>279</sup> State waters include both surface and ground water; both are owned by the people.<sup>280</sup> Because water is hydrologically connected, all users should be equally constrained by depletion principles and the aggregate effects of diversion and consumption. The state should pay careful attention to both sides of the water ledger. Cogent governance and sustainable practices are critical to ensuring an ongoing supply into the future while also protecting private rights under the Equal Protection Clause.

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276. *Id.* at § 85–2–436 (Montana Fish, Wildlife & Parks can change an existing right to an instream flow purpose to benefit fishery).

277. *Id.* at § 85–1–101; *see also* *Beaverhead*, 255 P.3d 179, 184–185 (harmonizing statutes and reiterating common law regarding the public’s interest in water and that the state “became the trustee of . . . the waters of this State upon achieving statehood”).

278. *Id.* at § 85–2–101(26) (defining water to include surface and subsurface); *Trout Unlimited*, 133 P.3d 244; *Bostwick II*, 296 P.3d 1154.

279. *Trout Unlimited*, 133 P.3d at 232; *Fellows v. Office of Water Comm’r ex rel. Perry v. Beattie Decree Case No. 371*, 285 P.3d 448, 453 (Mont. 2012) (holding if connectivity is at issue, either a plaintiff’s allegations must be taken as truthful or plaintiff must be given the opportunity to prove connectivity prior to dismissing a complaint).

280. Mont. Const. art. IX, § 3.

