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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-14-0813

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

Petitioners/Appellees,

v.

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

Respondents,

v.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors/Appellants,

v.

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION,

Intervenors/Appellants,

v.

MOUNTAIN WATER COMPANY,

Intervenor.

On Appeal from Montana First Judicial District Court, Lewis and Clark County
Cause No. BDV-2010-874, Hon. Jeffrey Sherlock, District Judge

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AMICUS CURIAE BRIEF OF WATER SYSTEMS COUNCIL IN SUPPORT OF MONTANA WELL DRILLERS ASSOCIATION

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INTRODUCTION

Water Systems Council submits this brief in support of the Intervenors and Appellants Montana Well Drillers Association, Montana Association of Realtors and Montana Building Industry Association (the "Appellants").

Water Systems Council argues the First Judicial District Court erred in ruling that Admin. Rule Mont. 36.12.101(13) is invalid, in requesting the Montana Department of Natural Resources and Conservation ("DNRC") initiate rulemaking, and in reinstating the 1987 Rule. Consequently, Water Systems Council believes the decision of the First Judicial District Court contains errors and prays that this honorable Court reverse the judgment of the Montana First Judicial District Court.

INTEREST OF AMICI

Water Systems Council ("WSC") is the only national, nonprofit organization solely focused on household wells and small water well systems. WSC is committed to ensuring that Americans who get their water from household, private wells have safe, reliable drinking water and to protecting our nation's groundwater resources. WSC maintains voluntary industry standards to promote excellence in the manufacturing of components for water well systems. WSC's main interest in this litigation is the impact on domestic water wells, but WSC also asserts the following arguments in favor of other small quantity users that form the focus of this litigation.

BACKGROUND

The Montana Constitution, Article 9, § 3 recognizes and confirms water rights in existence at the time of its enactment and directs the state legislature to provide for the "administration, control and regulation of water rights".

> 1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (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.
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

MT Const. Article 9, § 3.

The Montana Water Use Act, § 85-2-101, *et seq.*, MCA ("MWUA"), was enacted on July 1, 1973. The MWUA recognized and confirmed all existing rights for the beneficial use of water in Montana, and established a central recording system. § 85-2-101(4), MCA. The MWUA also established a permitting system to administer water rights in the state. Sections 85-2-301 and -302, MCA. The MWUA set forth the various requirements and processes the applicant must meet before a permit can be issued. *See* §§ 85-2-310 and -311, MCA. Exceptions to the

permitting requirements were set out in the predecessor to § 85-2-306, MCA. In 1987, the legislature amended § 85-2-306, MCA, to include the term "combined appropriation" in the statute. It is the definition of this term that is at issue in this case.

In 1991, the legislature amended in § 85-2-306, MCA to reduce the allow diversion from 100 gpm to 35 gpm, and to prohibit a person utilizing this provision from diverting more than 10 acre-feet of water per year. In response to this tightening of the restrictions on the exception, the DNRC changed the definition of "combined appropriation". Prior to the ruling of the First Judicial Court's ruling, the rule provided that "'Combined appropriation' means an appropriation of water from the same source aquifer by two or more groundwater developments, that are physically manifold into the same system." Admin. Rule Mont. 36.12.101(13).

This dispute centers on whether the requirement that the groundwater developments be "physically manifold" into the same system" appropriately carries out the legislative intent of MWUA.

ARGUMENT

In support of the Appellants' position, Water Systems Council addresses two issues. *First*, the administrative definition of "combined appropriation" does not contravene the MWUA. *Second*, important policy considerations support exempt wells and the exception under the MWUA.

I. The District Court Incorrectly Determined Admin. Rule Mont. 36.12.101(13) Violates the Intent of the Montana Water Use Act, § 85-2-101, *et seq.*, MCA.

The state legislature holds broad discretion to set the parameters of the administration of water rights within the state, constrained by the provisions in the Montana Constitution. Prior appropriation is a flexible doctrine that adapts over time and all prior appropriation states except for Utah include a provision similar to Montana's provision that does not require a permit of certain users. These provisions are commonly known as "exempt wells". Although the term "exempt well" inaccurately portrays the state provisions, which are generally highly regulated, this brief uses the term to refer to Montana's statutory provision, as well as the provisions in other states. These provisions contravene neither the prior appropriation doctrine nor the MWUA and do not constitute an "exception" to the doctrine or the MWUA. Specifically, the Montana provision and the definition of "combined appropriation" do not conflict with the MWUA. To the contrary, all domestic wells in Montana are required to comply with the principles of prior appropriation, and are exempted only from the permitting requirements of the MWUA.

A. Prior Appropriation is an Evolving Doctrine.

In "pristine" form, prior appropriation includes the following elements:

(1) Rights to the water do not follow land ownership; (2) Water is held by the State for acquisition by users; and (3) One acquires a right in water by withdrawing it and applying it to a beneficial use. *See* Joseph L. Sax *et al.*, *Legal Control of Water Resources: Cases and Materials* 124-26 (4th ed. 2006). However, "[a]lmost all of these rules have been subject to modification and controversy." *Id.* at 126.

Both courts and legal scholars have recognized that the prior appropriation doctrine is not a static concept. Instead, the doctrine has constantly evolved to "meet the needs of a changing West." Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. Colo. L. Rev. 675, 678 (2012) (citing A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Resources J. 769, 770 (2001)) ("Benson"). State legislatures began changing basic prior appropriation principles in 1890 and these changes have continued throughout the past century. *See id.* at 682. "The courts have continually ushered changes into prior appropriation law, modifying its characteristic features as necessary to respond to society's evolving demands and values." A. Dan Tarlock, *et al.*, *Water Resource Management: A Casebook in Law and Public Policy* 158 (5th Ed. 2002). *See, e.g., Joyce Livestock Co. v. United States*, 156 P.3d 502, 507-08 (Idaho 2007) (stating that prior appropriation has "evolved to meet the specific needs of each state"); *In re. Adjudication of Existing*

Rights to the Use of all Water, 55 P.3d 396, 399 (Mont. 2002) (noting that the doctrine of prior appropriation has "adapt[ed] flexibly to the needs of a developing society").

This adaptation is not surprising due to the broad nature of the prior appropriation doctrine. Courts and legislatures have had to fill in the gaps of the skeletal framework of prior appropriation. Indeed, the Montana Constitution expressly recognizes this gap-filling necessity, directing the state legislature to "provide for the administration, control, and regulation of water rights". MT Const. Article 9, § 3(4).

For example, one major reform of the prior appropriation doctrine involves consideration of instream flows. *See* Benson, at 688. Under traditional "use it or lose it" principles, the appropriator must actually divert the water to preserve the right. State legislatures passed laws, essentially modifying traditional prior appropriation principles, allowing instream uses such as fish habitat to qualify as beneficial use protected by prior appropriation. *See id.* Courts rejected challenges to these laws that characterized the protection of instream flows as inconsistent with prior appropriation. *Id,* pp. 688-689, (citing *Nebraska Game & Parks Comm'n v. The 25 Corp.*, 463 N.W.2d 591 (Neb. 1990), *Dep't of Parks v. Idaho Dep't of Water Admin.*, 530 P.2d 924 (Idaho 1974), and *Colorado River Water*

Conservation Dist. v. Colorado Water Conservation Bd., 594 P.2d 570 (Colo. 1979)).

Exempt well provisions for domestic wells similarly involve state legislatures utilizing the existing flexibility of prior appropriation to accommodate "other important goals." *Benson*, at 708. In fact, the Montana exception merely "ensures that property owners have continued access to the groundwater beneath their land for purposes of meeting their basic household needs - access they have enjoyed for decades..." *Id.* at 34 (citing *Bounds v. State of New Mexico*, 2011-NMCA-11, 149 N.M. 484, 252 P.3d 708 (N.M. Ct. App. 2010). In Montana, the DNRC determined that:

> The legislature intended that small ground water uses, primarily to provide for individual domestic and stock uses, could continue to be appropriated under the Water Use Act without the burden and expense of going through the permitting process. It follows that the purpose of the exempt well statute is to establish the dividing line below which ground water wells are excepted from the permitting process and above which a permit is required.

Declaratory Ruling, p. 12.

B. Exempt Wells Are an Almost Universal Element of the Prior Appropriation Doctrine in the United States.

Thirteen states use the prior appropriation rule for groundwater: Alaska, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. Water Systems Council, *Who Owns the Water: A Summary of Existing Water Rights Laws*, at 3 (Oct. 2009).

Each of these states includes exempt well provisions in the system of prior appropriation with the exception of Utah.[1] In addition, four other states use legal approaches to groundwater rights other than prior appropriation, but have permitting systems that provide at least some limited exemption from those rules for some water wells: Arizona, Nebraska, Oklahoma, and Texas. *See* Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).[2]

Montana, along with each of the states that provide special provisions for domestic wells, regulates domestic wells by subjecting them to special provisions, either explicitly or by giving different requirements for low yield wells or low quantity withdrawals.[3] These regulations include quantity and/or yield limitations,

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[1] *See* Alaska Admin Code tit. 11, §§ 93.035, 05.010; Ariz Rev. Stat. Ann. §§ 45-402, 45-454; Colo Rev. Stat § 37-90-105, 37-92-602; Idaho Code Ann. §§ 42-111, 42-227, 42-914; Kan. Stat. Ann. §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; Mont. Code Ann. § 85-2-306; Neb. Rev. Stat. §§ 46-602, 46-714 , 735, 46-740; Nev. Rev. Stat. §§ 533.024, 533.370, 534.013, 534.180; NMSA 1978, §§ 72-12-1 to -1.3; 19.27.5.14 NMAC; N.D. Cent. Code §§ 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-06.1, 61-04-06.3; Okla. Stat. tit. 82 §§ 1020.1, 1020.3; OR Rev. Stat. § 537.545; S.D. Codified Laws §§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to -52; Texas Water Code §§ 11.121 11.201 to 11.207, § 36.117; Utah Code Ann. §§ 73-3-2, 73-3-5.6, 73-3-8; Wash. Rev. Code §§ 90.44.050, 90.44.052; Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936; *see generally*, Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011); Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010).

[2] Some of these states also appear to incorporate priority into their permitting systems. *See id.*

[3] Only Idaho, South Dakota, Wyoming exempt domestic wells from priority and only South Dakota appears to completely exempt domestic wells from regulation

geographic limitations, and irrigation limits. Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011). Montana's exception includes geographic limitations, quantity limitations and yield limitations.

With regard to diversion for domestic use, four states, Idaho, Kansas, North Dakota and Oklahoma, place no quantity or capacity limits on exempt domestic wells.[4] Several other states have relatively lenient restrictions on the amount of water that may be diverted. Nebraska restricts withdrawals to 50 gallons per minute, or 80.65 AFY. *See* Neb. Rev. Stat. §§ 46-602, 46-714 , 735 and 46-740. Arizona and Montana each allow a maximum capacity of 35 gallons per minute (56.46 AFY). *See* Ariz. Rev. Stat. §§ 45-402, 45-454; Mont. Code Ann. § 85-2-306.[5]

Wyoming limits diversions to.056 cubic feet per second or 25 gallons per minute, which translates to 42.01 AFY. *See* Wyo. Stat. Ann. §§ 41-3-907, 41-3-911, 41-3-930, 41-3-935, 41-3-936. South Dakota limits the amount to 18 gallons/minute, or 29.03 AFY, while Texas limits diversions in groundwater management districts to 25,000 gallons/day (28.00 AFY). *See* S.D. Codified Laws

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under the prior appropriation doctrine. *See* Water Systems Council, *An Analysis of Exempt Well Regulations in the West* (2011).

[4] *Idaho Code Ann.* §§ 42-111, 42-227, 42-914; *Kansas Statutes Ann.* §§ 82a-701, 82a-703, 82a-703a, 82a-705a, 82a-728; *North Dakota Centennial Code* §§ 61-04-01.1, 61-04-01.2, 61-04-02, 61-04-06.1, and 61-04-06.3; *Oklahoma Statutes* Title 82 §§ 1020.1, 1020.3.

[5] However, Arizona includes a 10 AFY quantity limit in certain active management areas and Montana imposes the same annual capacity limit. *See id.*

§§ 46-1-5, 46-1-6, 46-5-8, 46-5-8.2, 46-5-50 to 46-5-52; Texas Water Code §§ 11.121, 11.201 to 11.207, § 36.117.

Colorado allows a maximum capacity of 15 gallons per minute (24.195 AFY), with an annual limit of 5 AFY in designated groundwater basins. *See* Colo. Rev. Stat. Ann. § 37-90-105, 37-92-602. Oregon limits diversions to 15,000 gallons per day, or 16.80 AFY. *See* Or. Rev. Stat. § 537.545.

Other states place stricter limits on domestic diversion. Washington allows diversions of 5,000 gallons per day (5.60 AFY), while Nevada caps diversions at 2 AFY. *See* Wash. Rev. Code §§ 90.44.050, 90.44.052; Nev. Rev. Stat. §§ 533.024, 533.370, 534.013, and 534.180. Only one state, Alaska, limits domestic well diversions more than New Mexico, allowing withdrawals of 500 gallons per day (.56 AFY). *See* Alaska Admin Code tit. 11. Only nine of the 16 states impose any limit on water diverted for irrigation

Perhaps most importantly for this dispute, Montana is one of only 9 states that provide additional requirements for subdivisions on exempt wells. Of these states only one, Idaho, prohibits exempt wells in "multiple owner subdivisions". Idaho Code Ann. § 42-111(2) and (3). One other state, Washington, limits the exemption to 5,000 gpd, regardless of the number of homes.

Washington's limitations result from a state Supreme Court ruling. *State Dept. of Ecology v. Campbell & Gwinn, Ll.L.C.,* 43 P.3d 4 (2002). The ruling has

resulted in additional litigation, with local governments arguing that the counties lack the resources and expertise to oversee exempt well administration, as required by state rules. *See, Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wash.2d 144, 256 P.3d 1193 (2011).

Montana's stringent regulations on water supply in subdivisions are contained in Mont.Admin.R. 17.36.330-17.36.336. Mont.Admin.R. 17.36.330 requires that the water systems provide adequate supply by meeting certain criteria relating to maximum contaminant levels, flow and availability. Mont.Admin.R. 17.36.330(1). In addition, if ground water is the proposed source, information on location and description of the proposed source must be supplied. Mont.Admin.R. 17.36.330(2). Mont.Admin.R. 17.36.331 requires that certain water quality standards be met. Mont.Admin.R. 17.36.332 provides requirements for water quantity and dependability.

Design and construction of water supply systems is addressed in Mont.Admin.R. 17.36.333, while Mont.Admin.R. 17.36.334 contains detailed requirements on operation, maintenance, ownership, easements and agreements. Mont.Admin.R. 17.36.335 basically applies the requirements of the regulations to existing non-public water supply systems in proposed subdivisions. That regulation also requires certain information as to water quality analysis, depth to static water and total well depth to be submitted.

Finally, Mont.Admin.R. 17.36.336 applies to alternative water supply systems. The regulation allows alternative water supply systems only where the requirements are met and the applicant shows that a water well is not economically feasible or the groundwater quality, quantity or dependability of such well would not be acceptable. Mont.Admin.R. 17.36.336(2).

Table 1 lists the state limitations on withdrawals or capacity of domestic water wells from the most stringent to the least stringent, expressed as AFY, irrigation limits, and subdivision limitations.

State	Capacity Limit	Diversion Limit	Irrigation limits	Subdivision Rules
Alaska	None	.56 AFY	None	None
New Mexico	None	1 AFY	1 acre	Local governments must adopt regulations for all subdivisions addressing water supply
Nevada	None	2 AFY	None	Required review of all subdivision maps for water supply
Washington	None	5.6 AFY	None	Total group domestic exemption of 5000 gpd.
Oregon	None	16.80 AFY	½ acre	None
Colorado	15.195 AFY	none	1 acre	Adequate

	(5 AFY in designated groundwater basins)			water supply requirements in subdivision regulations
Texas	None	28.00 AFY in groundwater management districts	None	Subdivisions requirements for counties near international border or populous cities.
South Dakota	None	29.03 AFY	None	None
Wyoming	None	42.91 AFY	1 acre	Report on adequacy and safety of water supply
Arizona	56.46 AFY	10 AFY in certain active management areas	2 acres in certain active management areas	In active management areas, "assured and adequate water supply"
Montana	56.46 AFY (but 10 AFY limit)	None	None	Detailed regulations addressing water supply requirements
Nebraska	None	80.65 AFY	None	None
Idaho	None	None	½ acre (but limit of 13,000 gallons/day)	Not allowed for "multiple owner subdivsions"
Kansas	None	None	2 acres	None
North Dakota	None	None	5 acres	None
Oklahoma	None	None	3 acres	None

Table derived from Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. Law 141 (2010); Water Systems Council, *An Analysis of Exempt Well Regulations*

in the West (2011); Jesse J. Richardson, Jr., Existing Regulation of Exempt Wells in the United States, *Journal of Contemporary Water Research & Education,* Issue 148, pp. 3-9 (August 2012).

C. Exempt Wells in Montana are Subject to the Requirements of the MWUA, with the Exception of Permitting.

The First Judicial District Court read the provision as avoiding "all of [the] salutary purposes of the Water Use Act". District Court Order on Petition for Judicial Review, page 6. However, the statute clearly exempts certain uses only from the permit requirement. § 85-2-381, MCA.

The phrase "exempt well" is a misnomer. The MWUA does not exempt domestic wells from the priority system and all remedies for the senior appropriators remain intact. Senior appropriators may enforce their rights under prior appropriation by requesting a priority call or filing suit against a junior appropriator to enjoin any use that harms the senior user's receipt of water.

These remedies are the same remedies, and the ONLY remedies, available to senior appropriators with respect to ANY other water right, whether an "exempt well" or otherwise. In addition, these are the remedies that existing appropriators MUST avail themselves of in Montana.

In addition, the First Judicial District Court appears to find that defining "combined appropriation" as requiring that the water systems be physically manifold constitutes *per se* impairment of the rights of senior appropriators. This

finding should be overturned for at least two reasons. First, if a senior user avails themselves of the available remedies, impairment may not be presumed.

New Mexico's courts have concluded that whether a user's water rights have been impaired is a factual question that must be decided based upon the specific circumstances present in each case. *See Mathers v. Texaco, Inc.,* 421 P.2d 771, 776 (N.M. 1966). Similarly, in *Bounds v. State ex rel D'Antonio*, 306 P.3d 457 (N.M. 2013), the Supreme Court of New Mexico considered an argument that the issuance of further domestic well permits in a closed basin necessarily impairs senior water users. *Bounds*, 306 P.3d at 462. The Court declined to find impairment as a matter of law, reasoning that "well-established case law" in that state has repeatedly rejected the notion of impairment as a matter of law. *Id.*, citing *Mathers,* 421 P.2d at 776–77, and *Montgomery v. Lomos Altos, Inc.,* 150 P.3d 971 (N.M. 2007).

In addition, courts must consider the futile call doctrine in considering remedies for senior appropriators. This doctrine refers to the cases where not allowing a junior appropriator to withdraw water fails to provide water for the senior appropriator. As the Supreme Court of Montana has explained,

> The Water Commissioner evidently believed that he had to enforce the decree to the extent that if a prior appropriator was without water upstream that a subsequent appropriator downstream could not divert such water under its water right because no water was available to an upstream prior appropriator, even though the river was being recharged. Such construction is groundless and irrational when dealing with the beneficial use of water.

Baker Ditch Company v. District Court of the Eighteenth Judicial District, 251 Mont. 251, 256, 824 P.2d 260 (1992).

The only "exemption" afforded to domestic wells is with regard to the permitting process, as domestic wells applicants are not required to proceed under the stringent and time consuming permitting procedures that other larger well applicants must follow. Further, the Legislature has essentially decided to shift the burden of proof in cases of excepted. Specifically, applicants for large withdrawals have the burden of proving no impairment to senior appropriators by their water use, while in applications for small withdrawals, the senior appropriators bear the burden of showing impairment.

Again, this does not somehow defeat the purposes of the MWUA, it merely creates a different procedure for the enforcement of the Act. The discretion to create this procedure lies squarely in the hands of the Legislature.

Thus, although certain uses are excused from the same permitting process as other well applicants, they are otherwise fully governed by the MWUA. Contrary to assertions otherwise, *See,* Michelle Peterson-Cook, *Water's for Fightin', Wiskey's for Drinkin': How Water Law Affects Growth in Montana,* 28 J. Envt'l L. & Litig. 79, 88 (2013), exempted water wells in Montana are subject to a series of rigorous reviews, which exceed the reviews accorded exempt wells in most states.

The Court should overturn the First Judicial District Court's misconstruction of the MWUA and reverse the decision below.

II. IMPORTANT POLICY CONSIDERATIONS SUPPORT EXEMPT WELLS AND THE EXCEPTION UNDER THE MWUA

The exempt well policies across the west were developed to promote a number of important benefits to both citizens and to government agencies. In particular, Montanans greatly benefit from the provisions which excuse some small users from the usual permit requirements under the MWUA. This section focuses on the benefits of so-called "exempt" domestic water wells. However, these same policy considerations support less onerous requirements on other small users as well.

A. The Exception under the MWUA Benefits Rural Residents.

Domestic wells are vital for Montanans. According to estimates at the Groundwater Information Center, 155,857 households in Montana use a domestic water well. Montana Bureau of Mines and Geology, Montana Tech of the University of Montana, accessed November 12, 2015, http://mbmggwic.mtech.edu/sqlserver/v11/reports/StatewideStatistics.asp. Domestic wells are most prevalent in rural areas. A public water supply is not a viable option in rural Montana due to its high cost and the remoteness of most Montana counties from metropolitan centers. *See* Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells*, at 3, 9 (2004),

available at http://robinson-noble.com/publications/white-papers/instream-flows-and-exempt-wells .

Not only are these wells the most practical and efficient source of water available to rural citizens, in many cases, they are the only viable option for obtaining potable water for households. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008), *available at* http://www.westernstateswater.org/wp-content/uploads/2012/10/laws-policies-report-final-with-cover-1.pdf; Washington State Groundwater Ass'n, *White Paper Focusing On Instream Flows and Exempt Wells*.

B. Exempt Wells Help To Promote Industry and Is Important to the Economy.

Domestic wells are also critical for rural development. *See, e.g.,* Resolution and Recommendation of the Umatilla County, Oregon Critical Groundwater Task Force (Jan. 6, 2005), *available at* http://www.co.umatilla.or.us/planning/pdf/EXEMPTWE-1.pdf. A recent moratorium on exempt wells in a portion of Kittitas County, Washington resulted in "lost jobs, reduced property value, investments wiped out, shifting tax burdens, significant local economic damages, and significant opportunity costs." Presentation of Paul Jewell, Kittitas County Board of Commissioners, summarized in Conference White Paper, *Exempt Wells: Problems and Approaches in the*

Northwest, at 7 (May 17 & 18, 2011), *available at* https://www.eiseverywhere.com/file_uploads/c0eea58c3d987fa399d191a1d5bf287a_Summary_2.pdf. Additionally, where public water is not available or feasible, exempt wells allow the development of individual rural lots. *See, e.g.,* Exempt Wells Topic Paper, Island County, Washington (2004), *available at* http://www.islandcountyeh.org/Uploads/FKCEditor/file/Topic%20Paper%20Exempt%20Wells.pdf.

Further, in addition to the burden on water users, requiring a cumbersome, time consuming permitting process would also have a negative impact on the water well industry in the state. Any legislation slowing the processing of domestic well permits would significantly impact this important industry in Montana.

In light of national recognition of the struggles facing rural Americans, *see, e.g.,* Exec. Order No. 13,575, 76 Fed. Reg. 34,841 (June 14, 2011) (President Obama creating a council to focus on rural economies and improving the quality of life in rural communities), making it more difficult to have an exempt well in Montana would be unsound from a policy perspective. Adding a time consuming, burdensome, and expensive hurdle for rural residents to overcome in order to have domestic water on their properties will only cause further difficulties in rural communities.

C. The Benefits of the Exception to the MWUA Outweigh any Burdens that it Might Impose.

The benefits of additional regulation of exempt wells are likely to be far less than the significant costs of the additional regulation. *See, e.g.,* Presentation of Dave Tuthill, Idaho Water Engineering, *Exempt Wells: Problems and Approaches in the Northwest* (May 17 & 18, 2011), Walla Walla, Washington, *available at* https://www.eiseverywhere.com/file_uploads/b2ebaa7026619363260f1eaf978bb16c_Tuthill.pdf, last accessed July 13, 2011. Most households use less than the DWS limitation of 1acre-foot per year --900 gallons--a day, of water. *Id.* A United States Geological Survey study in 1990 indicated that the average household uses .27 acre-feet of water per year per person, or about 79 gallons per day. Wayne B. Solley, Robert R. Pierce, and Howard A. Perlman, *Estimated Use of Water in the United States in 1990*, in U.S. Geological Survey 26 (1993), *available at* http://pubs.usgs.gov/circ/1993/1081/report.pdf. Because of this, domestic wells consequently have a very small impact on groundwater and hydrologically connected streams. *See id. See also* Resolution and Recommendation of the Umatilla County, Oregon Critical Groundwater Task Force, January 6, 2005.

Additionally, exempt wells drawing small amounts of water may actually provide environmental benefits. One large municipal well creates a large cone of depression, while smaller wells would create much smaller cones of depression. Thus, smaller domestic wells may, for example, prevent salt water intrusion. *See*

Exempt Wells Topic Paper, Island County, Washington (2004), *available at* http://www.islandcountyeh.org/Uploads/FKCEditor/file/Topic%20Paper%20Exempt%20Wells.pdf. In light of the negligible impact of domestic wells and the environmental benefits caused by such wells, it does not make sense from a policy perspective to impose a costly and time consuming burden on Montana residents seeking a domestic well.

From the perspective of administrative agencies, the licensing, permitting and metering of wells that are presently exempt could place an overwhelming burden on the agencies and the public. *See* Western States Water Council, *Water Laws and Policies for a Sustainable Future: A Western States Perspective* (June 2008).

CONCLUSION

In conclusion, the Montana statutory provisions that excuse certain small users from the full-blown permitting process contravenes neither the prior appropriation doctrine nor the MWUA. The Montana DNRC's definition of combined appropriation is reasonable and consistent with the Montana Constitution, the MWUA and the exempt well provisions of other states. Important public policy considerations support the DNRC's regulatory provisions. This Court should reverse the decision of the First Judicial District Court.

RESPECTFULLY SUBMITTED this 16th day of November, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that the *Amicus Curiae* Brief Of Water Systems Council In Support Of Montana Well Drillers Association, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains less than 5,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the following on the 16th day of November, 2015, via the U.S. Postal Service, first-class mail, postage prepaid, upon the following:

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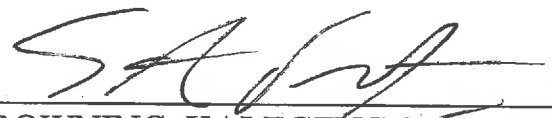

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