

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

THE CLARK FORK COALITION, a non-profit
organization, *et al.*,

Appellees,

v.

JOHN TUBBS, in his official capacity as
Director of the Montana Department of Natural
Resources and Conservation, *et al.*,

Respondents,

MONTANA WELL DRILLERS ASSOCIATION,
Intervenor-Appellants,

MONTANA ASSOCIATION OF REALTORS
and MONTANA BUILDING INDUSTRY
ASSOCIATION,

Intervenors-Appellants,

MOUNTAIN WATER COMPANY,

Intervenors

**MONTANA TROUT UNLIMITED'S AMICUS CURIAE BRIEF IN
SUPPORT OF APPELLEES**

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Statement of the Issue

Was the district court correct in finding that the 1993 “combined appropriation rule” was inconsistent with the Water Use Act’s protections of senior water rights and supported by substantial evidence that unbridled use of exempt wells harms senior water right owners?

Statement of the Facts

Montana Trout Unlimited (TU) files this *amicus curiae* brief in support of Appellees to assist the Court in understanding the harm from permit-exempt wells on Montana’s stream flows and senior water right claims. TU has been involved in creating and implementing innovations in water management to address water supply needs formerly met by unregulated use of permit-exempt wells. As *amicus*, TU also describes some of these water management innovations that are underway to facilitate community development without undue burdens placed on senior water rights and stream flows.

Montana TU is a membership organization of 4,000 anglers dedicated

to conservation, protection, and restoration of Montana's wild and native trout. In addition to acquiring water right leases to restore and protect instream flows, maintaining Montana Fish, Wildlife, and Parks' (FWP's) instream flow rights and constitutionally-protected non-appropriative uses on streams across Montana is central to TU's mission to conserve, protect, and restore Montana's wild and native trout. See, *Montana Trout Unlimited v. Beaverhead Water Company*, 2011 MT 151, ¶¶ 5-6, 361 Mont. 77, 79, 255 P.3d 179, 181 (2011). TU worked with the Horse Creek Water Users long before they filed their *Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13)* on November 30, 2009. TU helped the Horse Creek Water Users navigate some of the complex Department of Natural Resources and Conservation (DNRC) regulatory process around Controlled Groundwater Area designation that they petitioned for back in 2001 to try and protect their senior water right claims.

Katrin Chandler describes how the springs and Horse Creek flowing through her ranch have provided year-round stock water in her family's living memory since 1917, without ever going dry even during drought. Admin. R. 18 at ¶ 2. In the 1920's her ancestors supplied the town of Absarokee with ice for their ice boxes out of what is still her ranch's current

point of diversion from Horse Creek. *Id.* Katrin describes her frustration with the impact of individual wells being developed in the Crow Chief Meadows subdivision in the Horse Creek watershed, drawing on the same aquifer feeding the creek and the springs on her ranch. *Id.* at ¶¶ 3-6. In describing the difference in the protections her senior water rights would get if the Crow Chief Meadows development went through the water permitting process rather than relying on permit-exempt wells, Katrin says starkly, “It is a system that calls it murder if you use a big gun, but it’s fine if you cut the person 1,000 times and they bleed to death.” *Id.* at ¶ 6.

Betty Jane Lannen has lived on the same ranch in the Horse Creek watershed since she’s been 16 years old. Admin. R. 19 at ¶ 2. She raises 60-100 cow/calf pairs or yearlings on 900 acres. *Id.* at ¶ 3. Betty says, “This is agricultural land and an old-time cow operation. I can’t operate without water.” *Id.* at ¶ 6. She and her neighbors petitioned the DNRC for a controlled groundwater area because of their concern over the impact of the 67 permit-exempt wells planned by the Crow Chief Meadows subdivision. *Id.* at ¶¶ 4-5. Betty says that the Horse Creek Water Users’ “independent water study [shows] that we will ultimately ‘water down’ the water resource to the point that none of us will have adequate water.” “Then what?” Betty

asks. “The developer will be gone and those of us still standing, will be left holding the bag.” *Id.* at ¶ 5.

Polly Rex was also raised on a ranch in the Horse Creek watershed, where she still lives. Admin. R. 20 at ¶ 2. Polly says, “We raise Angus cattle, dry-land wheat and hay.” *Id.* “The dry-land portion of the ranch [is] approximately 1,250 acres . . . [with] 100 cow/calf pairs.” Polly describes the numerous springs on her ranch that supply stock water, and her water rights in the Mendenhall Ditch Company with a priority date of 1893 that irrigate her hay crops. *Id.* Polly describes the results of the DNRC study that states “proposed ground-water withdrawals at the prevailing rates could reduce or eliminate discharge along faults and **noticeably reduce flows to springs and Horse Creek during dry years.**” *Id.* at ¶ 4 (emphasis added).

Polly describes her frustration that despite the fact that the “DNRC agrees we have reasons for concern,” that the “DNRC continues to issue exempt well certificates to the Crow Chief Meadows subdivision and other water users in the watershed without any public review or oversight and without any analysis of how such wells may impact my senior rights.” *Id.*

Horse Creek ranchers are not the only ranchers in Montana worried about permit-exempt wells’ impact on their senior water rights. In the

Gallatin River valley, Joseph Miller’s 500-acre ranch has been in his family for two generations. Admin. R. 23 at ¶ 1. Joseph Miller flood irrigates a hay crop on three-quarters of his 500 acres. *Id.* at ¶ 1. In addition to the water right claims on Joseph’s 19 springs, he has 1865 and 1866 water right claims from the Gallatin River. *Id.* at ¶ 2.

Joseph says, “Over the past 20 years I’ve seen a lot of growth—including new home developments with exempt wells and ponds—both above and below my ranch.” *Id.* at ¶ 4. “Spring creek on my ranch was once inhabited by fish but is now completely dry.” *Id.* at ¶ 4. Joseph emphasized, “In fact, all of the springs on my ranch dried up completely after what I call the ‘Hollywood Hills’ subdivision was built which lowered the water table.” *Id.* at ¶ 4. “We need to restore the aquifer.” *Id.* at ¶ 6.

Appellee Clark Fork Coalition manages the Dry Cottonwood Ranch raising cattle ranch near Deer Lodge, Montana and is concerned that a large proportion of exempt wells were drilled along streams and will further deplete streamflows of the chronically-dewatered Clark Fork River and effect the ranch’s water right. Admin. R. 20 at ¶¶ 12, 15

Appellees and TU have been working for over a decade to ensure that the unbridled use of exempt wells do not circumvent the Water Use Act,

Mont. Code Ann. §§ 85-1-101 *et. seq.*, to the detriment of their water rights and streamflows .

Summary of the Argument

Ample evidence on the record demonstrates that large numbers of permit-exempt wells on over-appropriated streams harm senior water rights. Montana water management is evolving to meet the demand for new water supply without the past, heavy reliance on permit-exempt wells.

Argument

I. Evidence of Harm from Permit-Exempt Wells

Montana is no exception to the West-wide trend of more frequent droughts coupled with increasing water demand from growing populations in over-appropriated river basins. Dry streams and dewatered rivers have driven the call for a change in Montana's permit-exempt well management for a decade. Admin. R. 9. As the twin forces of drought and water demand escalated, so did reliance on permit-exempt wells. With increasing scrutiny and requirements for new

groundwater permits, the attractiveness of a permit-free pathway to a new water supply also grew. The administrative record in this case is packed with data and examples of an explosive growth in the reliance on permit-exempt wells since the adoption of the DNRC's 1993 administrative rule that directly contradicted and changed the 1987 definition. *See, e.g.*, Admin. R. 12 at 10-11; Admin. R. 13 at 1-23; Admin. R. 14 at 1-6; Admin. R. 16 at 1-2; Admin. R. 17 at 2-7; Admin. R. 29 at 4-8; Admin. R. 48; Admin. R. 49; Admin. R. 50; Admin. R. 51. The 1993 rule—invalidated by the district court—declared a combined appropriation to be “an appropriation of water from the same source aquifer by two or more ground water developments, that are *physically manifold* into the same system” (emphasis added). Admin. R. Mont. §36.12.101(13). The 1993 rule's physical connection requirement meant that there was no permit review for most wells.

Despite the administrative record's overwhelming evidence of permit-exempt wells' increasing, cumulative impact on Montana's water resources, Appellants casually state:

The concern with the definition of 'combined appropriation' ...is a generalized concern based on anecdote and unsubstantiated belief that multiple individual wells are being utilized for residential development in such a way that other water rights may be adversely affected... These concerns as alleged by the Clark Fork Coalition were and remain unsubstantiated by data.

Opening Brief of Montana Association of Realtors and Montana Building Industry Association at 8 (citing Clark Fork Coalition *et al.*'s District Court Complaint, at ¶¶ 22, 26, 29, 37-38, 42).

Yet, some of the most hydrologically-precise evidence in the record countering Appellants' contention comes from the DNRC's own hydrologic study of the Horse Creek watershed. Admin. R. 17 at ¶¶ 5-15, *citing v. Ground Water Conditions at the Horse Creek Temporary Controlled Ground Water Area*, by Montana Department of Natural Resources and Conservation, (April 2009). (http://dnrc.mt.gov/divisions/water/water-rights/docs/cgwa/horse_creek_report.pdf (accessed January 12, 2016)).

A. Harm to Horse Creek Water Users from Permit-Exempt Wells.

It was the Horse Creek Water Users' concern for their senior water rights that drove their filing of the petition in this case. The Horse Creek Water Users were concerned about new stream depletions from a 65-lot subdivision near Horse Creek. Admin. R. 22. The DNRC's 2009 study of the Horse Creek watershed found, at page 20, that: "Under worst case assumptions, **springs in the Horse Creek**

Drainage could dry up and average annual flows in Horse Creek could be reduced by 25 percent during dry years upon full build-out [of the Crow Chief Meadows exempt-well subdivision].” Admin R. 17 at ¶ 12 (emphasis added).

Because Horse Creek is fully appropriated by existing water right claims senior to the permit-exempt wells, even depletion of Horse Creek flows by less than 25% would harm the senior water users represented in this case. Admin. R. 17 at ¶ 14.

B. Harm to Gallatin Water Right Claims from Permit-Exempt Wells.

Evidence of harm to senior water right claims in the record is not limited to the Horse Creek drainage. Joe Miller irrigates in the Gallatin Valley from the Gallatin River and its springs. Admin. R. 23 at ¶ 1. From 1990-2007, the Gallatin County Planning Department processed 498 subdivision final plat applications, the approval of which created a total of 7,974 lots on the outskirts of Bozeman and Belgrade. During that same time, 13,321 exempt well certificates of completion were recorded in Gallatin County. Admin. R. 44 at 5.

This rapid expansion increase in the number of exempt wells impacts highly appropriated tributaries of the Gallatin and East Gallatin rivers in which FWP’s instream flow reservations are seldom fulfilled. These tributaries are severed by a

network of diversions taking stream flows for municipal, agricultural, and domestic purposes. The high demands placed on the Gallatin River and its tributaries leave over 83 miles of streams chronically dewatered in the basin, diminishing water quality and aquatic habitat quality.

http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs144p2_053304.pdf

(accessed January 11, 2016)); *see also* Admin. R. 44 at 5-6. Over 30 miles of the lower Gallatin River suffers from high water temperatures and low flows due to chronic dewatering. FWP's instream flow reservations are seldom met in these highly-appropriated streams that are chronically dewatered by legal appropriations.

Habitat and flow impairments are only exacerbated by proliferation of exempt wells. The Gallatin County Planning Department's approval of subdivision lots between 1990 and 2000, and demonstrates the increased reliance on permit-exempt wells in the wake of the 1993 DNRC rule change. Admin. R. 48 through 50. During the decade from 1990-2000, the number of subdivision lots granted final plat approval annually more than tripled—going from below 100/year to over 300/year. *Id.* This represents between 1,000 and 1,500 acres divided each year to create lots. Admin. R. 44 at 7.

The majority of the City's growth during this decade between 1990 and 2000, occurred in the areas just beyond the municipal boundaries. Fully 43% of the

lots created (and granted final plat approval) between 1994 and 2000 were just beyond Belgrade city limits alone. Admin. R. 48 (*see Charts Tab, indicated as “Belgrade City-County”*). Together, the lots created on the outskirts of Belgrade, Bozeman, and Manhattan accounted for 56% of the entire County’s growth. *Id.*

The record also contains detailed evidence regarding how these patterns of growth within Gallatin County relate to reliance on permit-exempt wells versus a central water supply over the course of the decade, 2000-2010. Admin. R. 50. As one would expect, these data demonstrate that the majority of minor subdivisions (85%) are developed through individual, permit-exempt wells. *Id.* It also confirms Gallatin County’s encouragement of central water and sewer for major subdivisions over the last decade. The majority of major subdivisions (83%) within the County are served by central water.

More surprising, however, is the number of major subdivisions going in on exempt wells during the last decade, despite the Gallatin County Commission’s encouragement toward central water and sewer. Twelve major subdivisions were developed and granted final plat approval relying on exempt wells. *Id.* This represents 465 lots on exempt wells within major subdivision developments between 2000-2010. Admin. R. 44 at 10.

A 71-lot major subdivision on exempt wells was approved near South

Cottonwood Creek, south of the town of Bozeman. South Cottonwood Creek is chronically dewatered for a 6 mile reach, elevating water temperatures, desiccating habitat, and severing the headwaters from the Gallatin River. Admin. R. 44 at 11. Two major subdivisions, both 24 lots on exempt wells, were approved near Hyalite Creek, also listed as chronically dewatered for over 20 miles. Admin. R. 44 at 11-12; Admin. R. 50. One of these developments, “Spanish Meadows,” is located near one of Hyalite Creek’s most dewatered reaches. Another 41-lot subdivision on exempt wells was given final plat approval near Middle Cottonwood Creek on the west side of the Bridger Mountains which runs dry within two miles of leaving the mountains. A 42-lot major subdivision on exempt wells went in along the East Gallatin River and its tributaries Churn and Bridger Creeks. This subdivision’s wells draw from groundwater destined for the chronically dewatered reach of Bridger Creek and the periodically dewatered reach of the East Gallatin River. Admin. R. 44 at 12; Admin. R. 50.

In a particularly dewatered reach of the Gallatin River, a 21-lot major subdivision on exempt wells was granted final plat approval near the intersection of Baxter and Jackrabbit Lane. *See*, Admin. R. 50.

In addition to these acute impacts on particular tributaries, the United States Geologic Survey (USGS) long record of flow data show that Gallatin River flows at

Logan were frequently below the level of FWP’s instream right on the Gallatin. In fact, from 1996 to 2005, average flows were below the level of FWP’s instream right **nine out of the ten years** during the months of January, February, August and September. Only in the months of May and June have flows regularly exceeded FWP’s instream rights at Logan. Admin. R. 44 at 5.

Gallatin River dewatering is even worse than the relatively down-stream Logan USGS gauge demonstrates, according to the DNRC Report of February, 2008, “Effects of Exempt Wells on Existing Water Rights.” Admin. R. 14 at 3. Figure 1 of this study shows much more acute dewatering up-stream of the Logan USGS gauge, where I-90 crosses the Gallatin River. Admin. R. 14 at 4. “Surface water users with priority dates back to the 1890’s are curtailed in the Gallatin during most years and, if not for voluntary reductions, the Gallatin River at Amsterdam Road Bridge and the I-90 Bridge would go dry.” Admin. R. 14 at 3 (citing Compton, 2007). The DNRC Report concludes: “**Depletion of surface water by exempt well use continues during these periods of shortages** and ultimately increases the need to curtail more junior surface water rights or the need for more voluntary reductions.” *Id.* (emphasis added).

Exempt wells supplying new subdivisions—major and minor—without review of impacts to instream water rights have already harmed over-appropriated,

chronically dewatered Gallatin Valley streams. Each additional burden placed on the aquifer further diminishes streamflows in these impaired streams and burdens existing water rights like Joseph Miller's.

C. Permit-Exempt Wells Impact Montana's Water-Scarce Basins

The 26,373 permit-exempt wells drilled between 1991 and 2010 in over-appropriated basins in Montana pumped approximately 30,660 acre-feet and consumptively used approximately 17,859 acre-feet. *Journal of Contemporary Water Research & Education*, Issue 148. Aug 2012, p. 33-43 at 34 (citing DNRC, 2011a, *Exempt Well Statistics*, Prepared for Water Policy Interim Committee Meeting, Helena, Montana). In its 2008 Report, "Effects of Exempt Wells on Existing Water Rights," the DNRC summarized data meticulously compiled by DNRC geographic information specialists reviewing aerial photographs in over-appropriated basins closed to new surface-water appropriations. Admin. R. 14 at 5 and Table 2. These data estimate the amount of acreage irrigated with permit-exempt wells. *Id.* The DNRC's Report summarized that "300 homes using exempt wells with ½-acre irrigation will consume 204 acre-feet of water each year, which is about equivalent to an estimated 207-acre feet consumed by one center pivot used

to irrigate 138 acres of alfalfa.” Admin. R. 14 at 6. The DNRC Report found that “if current trends continue, there will be a total increase of 70,000 exempt wells and 47,000 acre-feet per year of water consumption in closed basins by 2060. Admin. R. 14 at 7 and Table 4.

D. The Water Use Act’s Permit Process Protects Existing Rights from the Cumulative Impact of Multiple Permit-Exempt Wells

1. The Montana Constitution Protects Senior Water Rights

The Montana Constitution expressly provides that “[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.” Mont. Const. Art. IX § 3(1). In keeping with the constitutional protection of senior water users, the legislature has discharged its duty to “provide for the administration, control, and regulation of water rights,” Mont. Const. Art. IX § 3(4), and enacted several statutory provisions to ensure that new water uses do not infringe upon senior rights. An applicant for a water right permit must prove “by a preponderance of evidence” that “the water rights of a prior appropriator . . . will not be adversely affected.” Mont. Code Ann. §85-2-311(1)(b) (2015). A prior appropriator may object to a new permit or a change in water use if the

appropriator's water rights would be adversely affected by the new water use or change in water use. Mont. Code Ann. §§ 85-2-308(3) and 85-2-402(2)(a) (2015).

In sum, senior water rights are constitutionally-protected property rights that the DNRC is charged with protecting through the Water Use Act. In sum, senior water rights are constitutionally-protected property rights DNRC is charged with protecting through the Water Use Act.

The Montana Supreme Court has long held that it will avoid an interpretation of a statute that raises serious constitutional concerns when an alternative construction is consistent with the plain meaning of the statute. *See O'Connell v. State Board of Equalization*, 95 Mont. 91, 107 (1933); *Merlin Myers Revocable Trust v. Yellowstone County*, 2002 MT 201 ¶ 24, 311 Mont. 194, ¶ 24. In *Montana Power Co. v. Carey*, the Montana Supreme Court affirmed the constitutional protection of existing water rights:

The Water Use Act emphasizes the underlying policy of state participation in water appropriation "to recognize and confirm all existing rights to the use of any waters . . . " Section 85-2-101(4), MCA ["Pursuant to Article IX, section 3(1) of the Montana constitution . . . "]. This unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co. v. Carey, 211 Mont. 91, 97-98, 685 P.2d 336, 340

(Mont. 1984).

The DNRC's 1993 definition of "combined appropriation" failed to afford senior water rights the opportunity to protect their rights in the permitting process. In the words of the *Carey* court: "Such uncontrolled development of a valuable natural resource contradicts the spirit and purpose underlying the Water Use Act." *Carey*, 211 Mont. at 96, 685 P.2d at 339. Other western states, such as Colorado, Idaho, New Mexico, Washington, and Utah, have recognized the tension between such permit-exempt wells and the protection of senior water rights required by the prior appropriation doctrine, and have wrestled with this tension in a variety of ways. *See, e.g.*, Admin. R. 29 at 10-13.

A New Mexico district court, for example, declared its entire exempt well statute facially unconstitutional because of the harm that multiple, permit-exempt wells could have on senior water rights in water-scarce river basins. Admin. R. 9, *Bounds v. New Mexico*, No. CV-2006-166, (6th Dist. N.M.) (July 10, 2008). The New Mexico court found that "Bounds does not have to suffer actual impairment to attack the constitutionality of the statute. It will do little good for Bounds, and others similarly situated, to sit idly and wait for actual impairment. When the water is gone it will be too late." Admin. R. 9, *Bounds*, at 3, ¶ 21. Five years later, when

the New Mexico Supreme Court reversed the district court in *Bounds v. New Mexico*, 2013 N.M.S.C. 37 (2013), it did so on the strength of recently-promulgated regulations and 2013 New Mexico legislation limiting the cumulative impact of exempt wells.

The district court's invalidation of the 1993 regulation was correct in this case, and it was a proper remedy to reinstate the 1987 regulation pending new rule-making by the agency. "The effect of invalidating an agency rule is to reinstate the rule previously in force." *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005); *see also Motor Vehicle Manufacturer's Assoc. v. State Farm Mutual Ins.*, 463 U.S. 29.34, 103 S. Ct. 2856, 2862 (1983). The application of this standard to this case requires reinstatement of the DNRC's 1987 definition of "combined appropriation."

Moreover, there is nothing in the Montana Administrative Procedure Act (MAPA) that dictates a departure from this settled rule. The relevant sections of the federal APA and MAPA are nearly identical. The federal APA provides that when agency rules are declared arbitrary and capricious or not otherwise in accordance with the law, they may be invalidated and set aside. *See* 5 U.S.C. § 706 (2). The state statute is analogous to the federal act. *Lohmeier v. State*, 346 Mont. 23, 30-31 (2008) (analyzing Mont. Code Ann. §2-4-506).

Because the MAPA is in harmony with the federal APA, there is nothing

unique to MAPA that dictates a result different than applying the well-settled remedy of “reinstating the rule previously in force” when a rule is invalidated.

Paulsen, 413 F.3d at 1008.

II. The Future Of 21st Century Water Management Is Transfers Between Water Rights.

The Water Use Act is equipped to accommodate groundwater development and protect senior water rights. Already, reforms are underway and innovations are being piloted around the growing communities of Missoula and Bozeman.

"The hallmark of 21st Century water management is the transfer of water rights from one use to another." Laura Ziemer, Stan Bradshaw and Megan Casey. *Changing Changes; A Roadman for Montana's Water Management*. 14Univ. Denver L. Rev. 47, 49 (2010). At the root of this case is an aversion (common among Appellants, their Amici, and Montana water right owners) to the Water Use Act's required administrative process to transfer water rights between uses. *Id.* at 64-76. Indeed, the process of obtaining a water permit or changing elements of a water right is costly, unpredictable, and often intractable as evident in recent decisions by this Court. *Id.*, *Hohenlohe v. Mont. Dept. Nat. Res. Cons.*, 2010 MT 203, 240 P.3d 628 (2010)(reversing DNRC's denial of a change from irrigation to

instream flow and raising concerns about DNRC's practices), *Bostwick Properties, Inc. v. Mont. Dept. Nat. Res. Cons.*, 2009 MT 181, 208 P.3d 868 (2009) ("Bostwick I") and *Bostwick Properties, Inc. v. Mont. Dept. Nat. Res. Cons.*, 2013 MT 48, 296 P.3d 1154 (2013) ("Bostwick II") (regarding DNRC's denial of a permit and mitigation plan), and *Town of Manhattan v. Mont. Dept. Nat. Res. Cons.*, 2012 MT 81, 276 P.3d 920 (2012) (reviewing DNRC's treatment of Manhattan's application for groundwater). Simply exempting cumulative groundwater development under the 1993 rule may have provided a convenient bypass around the Water Use Act, but it only exacerbated water scarcity conflicts. The district court correctly set exempt well management back on a course more consistent with the Water Use Act.

This Court, the Legislature, and DNRC have recognized that managing groundwater development is critical. Since the Court held that groundwater and surface water must be consistently and conjunctively managed, legislative and administrative reforms to Water Use Act have been evolving to ensure that groundwater developments do not impinge upon senior water rights and instream flow. *Montana Trout Unlimited v. Mont. Dept. Nat. Res. Cons.*, 2006 MT 72, 133 P.3d 224 (2006).

Over the last 10 years, this Court has been asked multiple times to consider impacts of groundwater development on senior water rights. In *Bostwick I* and *II*,

the Court twice addressed DNRC's treatment of a groundwater permit for a major development and ultimately reversed the DNRC's finding that its proffered mitigation was inadequate. 2009 MT 181; 2013 MT 48 at 47. In *Town of Manhattan*, the Court addressed a municipality's groundwater appropriation and DNRC's treatment of the applicant. 2012 MT 81. These cases demonstrate administrative difficulties and high transaction costs for those seeking to develop groundwater. Both cases illustrate the perverse incentive to avoid the Water Use Act. Appellant well drillers, builders, realtors, and *amicus* county governments have good reasons for their strong affinity for unbridled use of exempt wells. However, overturning the district court sends water management backwards, not forwards, and would undercut innovations in Montana water management already underway.

The Legislature and DNRC are acting on reforms to facilitate transfers of water rights between uses. The Legislature has worked to streamline the water right application or change process. *See, e.g.,* Mont. Code Ann. § 85-2-310. The DNRC has undertaken internal reforms and rulemaking to increase efficiency of administrative processes (e.g. Admin. R. Mont. §36.12.1902 ; 11 Mont. Admin. Register 931 (June 6, 2013)). The evolution in Montana's integration of ground and surface water management led to the 2011 Legislature's authorization of mitigation

banks or water exchanges to facilitate water transfers from one purpose to another without harming existing agricultural or environmental uses. Mont. Code. Ann. § 85-2-420. The Montana Legislature’s Water Policy Interim Committee (WPIC) has considered the potential of water mitigation banks to alleviate the permitting pressure on the agency, applicants, and potential objectors alike. *See, e.g.*, “The Exemption: To change or not to change? A study of water wells allowed without a permit,” Report to the 63rd Legislature by the Water Policy Interim Committee (October 2012) by Joe Kolman, published by Montana Legislative Services Division, 1-131 at 29, *citing* Bill Draft LC 8000, <http://leg.mt.gov/content/Publications/Environmental/2013-exempt-wells.pdf> (last visited Jan. 14, 2016); *see also* January 11, 2016 WPIC meeting and materials, <http://leg.mt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/Jan-2016/jan-2016.asp> (last visited Jan. 12, 2016).

The 18-month long planning process that produced the new State Water Plan specifically recommends using water banking to meet new water demands, stating that “opportunities for mitigation, water marketing, and water banking require more research, innovation, and application in the next decade.” 2015 State Water Plan at 71; http://dnrc.mt.gov/divisions/water/management/docs/state-water-plan/2015_mt_water_plan.pdf (last visited Jan. 14, 2016). The State Water Plan’s

explicit intermediate-term recommendation is to “Create well-managed systems that offer economic development opportunities to market, transfer, and lease water and build public awareness of water marketing opportunities.” *Id.*

A coalition of agricultural, municipal, and conservation stakeholders in the Gallatin Valley have been working together for over a decade to address water scarcity in the Gallatin valley, and the proposed water exchange is a natural evolution in their efforts to create workable solutions for all stakeholders. *See*, January 11, 2016 WPIC meeting agenda, <http://leg.mt.gov/content/Committees/Interim/2015-2016/Water-Policy/Meetings/Jan-2016/jan-2016.asp> (last visited Jan. 12, 2016). Along with legislative and executive reforms, the example of the Gallatin Valley Water Exchange is a private sector effort to create efficient transfers of water rights between uses in a manner that protects property rights in water, decreases transaction costs, and allows development to proceed without affecting senior water rights through shadow appropriations in exempt wells.

Montana's first water bank was established by one of Missoula’s County's oldest and largest irrigation companies, the Grass Valley French Ditch Company. Recognizing that suburban growth encroaching on their irrigated lands jeopardized their water rights, Grass Valley last year obtained DNRC’s approval on their

application to change a portion of their irrigation rights to a mitigation purpose.

Now Grass Valley can sell some of this pre-approved mitigation water to new water withdrawals in the growing Missoula Valley.

(<http://www.grassvalleywaterbank.com> (accessed January 8, 2016)) The water bank protects the Company's property rights facilitates water supply for new growth without increasing the burden on the Clark Fork River, water rights, or instream flow.

Conclusion

Innovation in Montana's water management is the only way to avoid repeating the mistakes of other, more populated, western States. California's over-drawn aquifers and subsiding lands are evidence that pumping more groundwater in response to water scarcity only deepens the ultimate problem. Although Montana has high-growth areas, our largely rural, headwaters state has had the luxury of learning from other states. Facilitating water transfers from one use to another is the hallmark of successful water management in the face of water scarcity. The district court's re-instatement of the DNRC's 1987 rule is not only consistent with Montana's Water Use Act, but is putting Montana's best foot forward in meeting

future water supply needs while protecting Montana's agricultural and natural resource heritage.

Dated this __14th__ day of January, 2016.

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Certificate of Compliance

This document is proportionately spaced using a 14 point, Times New Roman typeface. The document is double-spaced and is __4986____ words.

Dated this __14th ____ day of January, 2016.

By: ___/s/_____

Stan Bradshaw,
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Certificate of Service

This is to certify that the foregoing was duly served upon the following at their electronic mail addresses, on the 15th day of January, 2016, with a printed copy sent via first-class mail to their mailing addresses upon request, as follows:

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