

## Water's For Fightin', Whiskey's For Drinkin': How Water Law Affects Growth in Montana

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“[T]he most powerful drivers of [Montana’s] growth pattern include the ease and cost of acquiring or accessing water, waste water, and other infrastructure . . . .”<sup>1</sup> Development in Montana and the state’s use of a finite supply of water is hurtling the state toward unsustainable growth. Land divisions do not occur without access to water. Recent court decisions, legislative amendments, rural growth issues, municipal annexation issues, and a petition to the Montana Department of Natural Resources and Conservation (DNRC) requesting a change of existing regulations have exponentially affected the way Montanans utilize water. This nexus between water use and land use will determine whether Montana’s growth pattern is sustainable.

Water law is predominately state law, and every state has nuances in its allocation and administration of water rights.<sup>2</sup> Similar to other western states, Montana allocates water using the doctrine of prior appropriation.<sup>3</sup> Prior appropriation is a “first in time, first in right” system that protects senior rights by honoring senior rights fully before junior appropriators are entitled to exercise their water rights.<sup>4</sup> Under Montana’s water rights system, both groundwater and surface water are administered through a statewide prior appropriation permit system.<sup>5</sup>

In its allocation of groundwater, Montana’s water laws allow certain groundwater wells to be exempt from the permitting process (exempt wells).<sup>6</sup> These exempt wells include certain wells drawing

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<sup>1</sup> Declaration of Tim Davis, Petition for a Declaratory Ruling and Request to Amend Rule 36.12.101(13) at 2, ¶ 4 (Nov. 2, 2009) (attached as exhibit 11 to the 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).

<sup>2</sup> See DAVID H. GETCHES, WATER LAW IN A NUTSHELL 1–16 (4th ed. 2009).

<sup>3</sup> MONT. DEP’T OF NATURAL RES. & CONSERVATION ET AL., WATER RIGHTS IN MONTANA 1 (Apr. 2012) [hereinafter WATER RIGHTS IN MONTANA], available at <http://leg.mt.gov/content/publications/environmental/2012-water-rights-handbook.pdf>.

<sup>4</sup> GETCHES, *supra* note 2, at 78. This system creates a hierarchy of water rights holders, with the oldest water rights being the most senior (held by senior water right holders) and the younger water rights being junior to all water rights with an older date stamp. Prior appropriation requires that the most senior water right holder be completely satisfied before any more junior water right holders are satisfied, and then satisfaction goes down the hierarchical line of water rights holders. The system is relatively clean to administer because it is typically clear who established his or her right first by using the date the right was established. *Id.*

<sup>5</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 2–3, 21–23. This Article will focus mainly on Montana’s groundwater permit system, addressing Montana’s surface water permitting only when relevant.

<sup>6</sup> *Id.* at 23.

less than thirty-five gallons per minute or ten acre-feet per year.<sup>7</sup> Exempt wells are utilized by those dividing land as a cheaper and faster way to acquire water for their land divisions by allowing them to avoid an uncertain and tedious process with DNRC to acquire water rights. Exempt wells require splitting land into larger parcel sizes than is required for permitted wells.<sup>8</sup> The increase in the amount of land required to utilize exempt wells causes land divisions to consume more square footage and pushes land divisions farther from municipalities into areas where larger chunks of land can be acquired. These factors add up to the fact that exempt wells encourage sprawl.

The allowance of exempt wells under Montana's groundwater permit system, along with changes in Montana's laws and a recent court case, *Montana Trout Unlimited v. Montana Department of Natural Resources & Conservation*,<sup>9</sup> have changed the way Montana is growing. The current growth trend takes advantage of the exempt well provisions by creating a cumulative effect on Montana's groundwater and pushing developers away from city-like, small lot development toward large sprawling developments. For example, the Montana city of Manhattan attempted to annex a new development, and after years of negotiations with various parties and a complicated application process with DNRC, its efforts were halted due to the complexity of the water rights permitting system.<sup>10</sup> The proposed development was an urban-like subdivision, but the inability to obtain the appropriate water right for the development precluded the developer from annexing into the city and building the proposed development.<sup>11</sup> Stories like Manhattan's appear all over Montana in both the municipal and rural context. As a result, developers are moving towards the utilization of exempt wells and away from sustainable developments, such as city-like development.

Montana is not alone in its struggle to preserve its natural resources and manage its growth in a sustainable way. In order to improve the

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<sup>7</sup> MONT. CODE ANN. § 85-2-306(3)(a)(i)(A) (2011).

<sup>8</sup> MONT. ADMIN. R. 17.36.340(1) (2012).

<sup>9</sup> *Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation*, 133 P.3d 224 (Mont. 2006).

<sup>10</sup> Laura Ziemer et al., *Changing Changes; A Road Map for Montana's Water Management*, 14 U. DENV. WATER L. REV. 47, 66-68 (2010). A more complete version of the story of the city of Manhattan will be explored later in this article, along with an example of a subdivision within Lewis and Clark County. See *infra* Part IV.

<sup>11</sup> Ziemer et al., *supra* note 10, at 68.

current system, Montana needs to make changes and look to the future as opposed to merely placing Band-Aids on its current issues.

This Article will examine the troubling impact Montana's exempt well provisions have on Montana's growth pattern. Part I provides an overview of Montana's water laws, focusing specifically on groundwater laws. Part II dives into Montana's regulation of exempt wells. Part III provides an overview of Montana's land use laws, focusing on the intersection between land use laws and the issue of water. Part IV analyzes the effect Montana's laws have on growth patterns and what possible effects it might have on water use, referencing two specific case studies. Part V compares Montana's system of water allocation and land use management to Oregon's to provide possible lessons for Montana to utilize as it moves forward. Part VI provides a set of tools for Montana to consider when dealing with the concerns between exempt wells and growth. The tools consist of a list of possibilities Montana can explore while trying to correct the negative impacts of exempt wells on Montana's water supply and growth pattern. These tools include both small and large changes that Montana can weave into its current water law system; the tools range from implementing a community education program to changing certain interpretations within its current water law system. These tools could provide a means for Montana to focus on a more sustainable future by correcting some of the issues between exempt wells and their effects on growth.

## I

### AN OVERVIEW OF MONTANA'S GROUNDWATER LAWS

"Montana recognizes water as a finite resource."<sup>12</sup> Montana has chosen to allocate its surface and groundwater conjunctively using the prior appropriation doctrine,<sup>13</sup> administering its water through a statewide permit system.<sup>14</sup> The Montana Constitution states that "[a]ll

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<sup>12</sup> *Id.* at 50.

<sup>13</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 1–2, 14, 21–23. Managing water conjunctively requires the state to take into account the effects one water appropriation will have on existing appropriations, regardless of the source. GETCHES, *supra* note 2, at 293–94.

<sup>14</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 3–4. In Montana, a water right must be obtained prior to diverting any surface water. *Id.* at 21–22. However, the same is not true for groundwater; groundwater rights are required depending on how much water is being diverted from the source. *Id.* at 2–3; see *Mont. Trout Unlimited*, 133 P.3d 224. See generally John B. Carter, *Montana Groundwater Law in the Twenty-First Century*, 70 MONT. L. REV. 221 (2009).

surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people . . . .”<sup>15</sup> Additionally, Montana statutes provide “a water right means the right to use water as documented by a claim to an existing right, a permit, [or] a certificate of water right . . . .”<sup>16</sup> These two portions of Montana law prove that the state owns the water within its boundaries and those who receive water rights only have a usufructuary right to use water within the state; they do not own the water that comes with their rights.<sup>17</sup> The means by which a person or entity can acquire a right to use Montana’s water and other nuances of Montana’s water law are laid out below.

### ***A. Administering Montana’s Permit System***

Montana instituted its current water rights permitting system in 1973 by adopting the Montana Water Use Act.<sup>18</sup> The Act creates a system for administering and obtaining water rights, as well as a system to adjudicate water rights established prior to its enactment.<sup>19</sup> The permit system creates a central way for Montana to allocate and administer its water.

Montana’s current water rights permit system is not administered by a single agency or entity; there are several that aid in its administration.<sup>20</sup> Each agency and entity serves its own purpose in the overall process of administering Montana’s water rights.<sup>21</sup> A few entities play an integral role in the way Montana’s water right permit system works, but DNRC plays the main role in the administration of water rights.<sup>22</sup> DNRC issues and maintains all water rights for the state.<sup>23</sup>

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<sup>15</sup> MONT. CONST., art. IX, § 3(3).

<sup>16</sup> MONT. CODE ANN. § 85-2-422 (2011).

<sup>17</sup> *See* Mont. Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 184–85 (Mont. 2011) (“All waters in Montana are the property of the State of Montana for the use of its people.”).

<sup>18</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 2, 14, 21–22.

<sup>19</sup> Carter, *supra* note 14, at 22.

<sup>20</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 3–4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

### ***B. Obtaining a Groundwater Water Right Permit***

Under Montana's water laws, an individual or entity must obtain a groundwater permit to appropriate water, with certain exceptions.<sup>24</sup> The basic requirement for applying for and being granted a water right permit is water must be put to beneficial use.<sup>25</sup> After meeting this requirement, the remainder of the process is mostly administrative.

The administrative process begins by submitting a water right application to DNRC with any required supplemental information.<sup>26</sup> DNRC reviews applications its staff deems correct and complete.<sup>27</sup> The date DNRC receives the original permit application establishes the priority date assigned to the appropriation, essentially holding the applicant's place in the water rights line.<sup>28</sup>

In preparation for an application, the applicant must show how the proposed groundwater allocation will affect other allocations and possibly provide a mitigation plan to correct any adverse impacts the proposed water right may cause.<sup>29</sup> Montana's statutes set out the criteria for issuance of a permit.<sup>30</sup> After review of the criteria and the

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<sup>24</sup> *Id.* at 21–23. These exceptions include exempt wells.

<sup>25</sup> *Id.* at 21–22. Beneficial use is a threshold requirement. Montana's statutes contain a list of beneficial uses: domestic, stock, irrigation, lawn and garden, mining, municipal, industrial, commercial, agricultural spraying, fisheries, wildlife, and recreation. MONT. CODE ANN. § 85-2-102 (2011); WATER RIGHTS IN MONTANA, *supra* note 3, at 22. The requirement for a use to be beneficial is a carryover component requirement from Montana's previous water rights system and prior appropriation in general. *Id.* at 1, 21–22.

<sup>26</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 22–23. The process for obtaining a water rights permit is generally the same for both surface water and groundwater. This article focuses on groundwater and how the effects of the instances where no permit is required (exempt wells) affects Montana and its growth. It is also important to note that for a person or entity planning on using an exempt well, an application does not need to be filled out, rather it is more of a notice system. *See infra* Part II.

<sup>27</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 30–32. The definition of correct and complete is described as “the documentation necessary for the ‘department to begin evaluating the information.’” Ziemer et al., *supra* note 10, at 76.

<sup>28</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 30–33. If an application is not correct and complete after review, the applicant has thirty days from when DNRC notifies him to correct the application. If the application is not corrected within thirty days, the priority date will change to the priority date when it is deemed correct and complete. *Id.*

<sup>29</sup> MONT. CODE ANN. § 85-2-402; Ziemer et al., *supra* note 10, at 52. The mitigation plans typically involve retiring an existing water right. For example, in order to pump groundwater, an applicant would have to acquire and propose to retire a surface water right with enough water so the proposed permit would not negatively impact senior water rights holders affected by the new permit. MONT. CODE ANN. § 85-2-402; Ziemer et al., *supra* note 10, at 52.

<sup>30</sup> MONT. CODE ANN. § 85-2-311(1).

application, DNRC will issue a preliminary determination to grant or deny an application.<sup>31</sup> If the preliminary determination is to grant the permit, the application moves into the public notice stage, which allows for objections to the proposed permit to be aired.<sup>32</sup> If no objections are raised, a final order is issued granting the permit.<sup>33</sup> If objections arise, DNRC holds a hearing and issues a final order on whether the permit is granted or denied.<sup>34</sup> If granted, with or without objections, DNRC issues a provisional permit.<sup>35</sup>

After receiving the permit, the process is still not finished. The applicant must construct the project, divert the water, put the water to the intended beneficial use, and submit a statement to DNRC showing completion.<sup>36</sup> Once DNRC certifies all required steps as complete, it will issue a Certificate of Water Right.<sup>37</sup>

An approved water right may be amended; reasons for amending include the severance of the water right from the land it is attached to or the amendment of a water right to an off-tract use.<sup>38</sup> When these amendments occur, a “change application” must be filed and other water right owners have a chance to protest the proposed change.<sup>39</sup> The change process is the same as the process to establish a new water right.<sup>40</sup>

### *C. Controlled Groundwater Areas and Closed Basins*

Montana water law has two built-in mechanisms to protect areas where water quality and quantity issues occur.<sup>41</sup> These mechanisms,

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<sup>31</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 32; MONT. CODE ANN. § 85-2-307(2)(a) (the determination must be issued within 120 days of deeming the application correct and complete).

<sup>32</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 32; *see* MONT. CODE ANN. § 85-2-308(2) (sets out the requirements for a valid objection).

<sup>33</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 32–33.

<sup>34</sup> *Id.* at 33. All final orders can be appealed to district court. *Id.*

<sup>35</sup> *Id.* at 31–33.

<sup>36</sup> *Id.* at 34.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* at 35.

<sup>39</sup> MONT. CODE ANN. § 85-2-308 (2011); WATER RIGHTS IN MONTANA, *supra* note 3, at 35–37.

<sup>40</sup> MONT. CODE ANN. § 85-2-307; *see* WATER RIGHTS IN MONTANA, *supra* note 3, at 21–37.

<sup>41</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 42–50.

controlled groundwater areas and closed basins, help Montana protect its water from depletion and degradation.<sup>42</sup>

There are many permanent and temporary controlled groundwater areas in Montana, both for water quantity and water quality issues.<sup>43</sup> Controlled groundwater areas are designated to protect the quantity or quality of the water in a specific geographic area.<sup>44</sup> In general, these areas prohibit the wasteful use of groundwater.<sup>45</sup> DNRC may designate a controlled groundwater area based on a number of criteria; these groundwater areas contain various control provisions that depend on the needs of each area.<sup>46</sup>

Certain basins in Montana have been closed from further appropriation for being too highly appropriated.<sup>47</sup> These closed basins are different from controlled groundwater areas because they focus on the quantity of surface water within certain areas or areas containing large permitted groundwater allocations.<sup>48</sup> However, even with this restriction, there are still exceptions to these closures that allow certain individuals or entities to divert water.<sup>49</sup> Additionally, closed basins place further pressure on groundwater, particularly exempt wells, to fill the gap closed basins create by removing the ability to allocate surface water or by removing the allowance of large groundwater allocations permitted by the state.<sup>50</sup> Exempt wells can be used to fill this gap because exempt wells are allowed in closed basins where other water allocations are not.<sup>51</sup>

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<sup>42</sup> *See id.* at 42–48.

<sup>43</sup> *Id.* at 42–46; *Controlled Groundwater Areas*, STATE OF MONTANA, [http://dnrc.mt.gov/wrd/water\\_rts/cgwa/](http://dnrc.mt.gov/wrd/water_rts/cgwa/) (last visited Sept. 2, 2013).

<sup>44</sup> MONT. CODE ANN. § 85-2-506; WATER RIGHTS IN MONTANA, *supra* note 3, at 42–43.

<sup>45</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 42–44.

<sup>46</sup> *Id.* at 43–44.

<sup>47</sup> *See id.* at 46–50.

<sup>48</sup> MONT. CODE ANN. §§ 85-2-319, -330, -336, -341, -343, -344; CURT MARTIN, DEP'T OF NATURAL RES. & CONSERVATION, MONTANA STATE WATER PLAN ISSUE/DISCUSSION PAPER: PERMITTING EXEMPTION FOR SMALL GROUNDWATER DEVELOPMENTS 1 (June 20, 2008) (attached as exhibit twelve to the Petition for a Declaratory Ruling and Request to Amend Rule 36.12.101(13)), 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); see WATER RIGHTS IN MONTANA, *supra* note 3, 46–47.

<sup>49</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 46–47. Each basin has its own rules on what can and what cannot be appropriated; therefore, exceptions to basin closures are basin specific.

<sup>50</sup> Ziemer et al., *supra* note 10, at 51.

<sup>51</sup> MARTIN, *supra* note 48; MONT. CODE ANN. § 85-2-360; see WATER RIGHTS IN MONTANA, *supra* note 3, at 26.



Montana's statutes establish its system for appropriating water and the agencies charged with executing it generally follow this system. The system has built-in ways to challenge the issuance of a permit, as well as ways to close areas with issues of water quantity and quality. Even though this comprehensive system exists, pressures on Montana's water—which in turn pressure land resources—create an uncertain and possibly destructive future for these natural resources.

## II

### DANGER: EXEMPT WELLS IN MONTANA

Montana's administration of exempt wells is detrimental in the way it affects Montana's growth. Exempt wells are groundwater diversions for which one is not required to obtain a water right permit for pumping groundwater.<sup>52</sup> Exempt wells, as they are presently utilized, present a hazard to the quantity and quality of water in Montana, as well as to Montana's growth pattern.

Montana defines an exempt well as a well that draws less than thirty-five gallons of water per minute or less than ten acre-feet of water per year.<sup>53</sup> Exempt wells may exist where others cannot, such as in closed basin areas. Exempt wells may exist in these basins because closed basins restrict only permitted water allocation, with some exceptions.<sup>54</sup>

Exempt wells are not wholly unregulated in Montana. To obtain an exemption, a well must be drilled, a well log report must be completed, the well must be put to a specified use within sixty days of the drilling, and the owner must submit a notice of completion to DNRC.<sup>55</sup> Once these four procedural steps are completed, a certificate of right is issued to the owner for the specified use of the exempt well.<sup>56</sup> Significantly, however, nothing in the process requires an examination of how the new water allocation will affect existing

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<sup>52</sup> MONT. CODE ANN. § 85-2-306(3)(a); WATER RIGHTS IN MONTANA, *supra* note 3, at 23. The requirements for a typical water right permit are laid out above in Part I.B.

<sup>53</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 23.

<sup>54</sup> MARTIN, *supra* note 48; MONT. CODE ANN. § 85-2-360; *see* WATER RIGHTS IN MONTANA, *supra* note 3, at 23, 42–44. There are certain exceptions to exempt wells, such as some controlled groundwater areas might require a permit for typically exempt wells. MONT. CODE ANN. § 85-2-306(2).

<sup>55</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 23.

<sup>56</sup> *Id.*

water rights.<sup>57</sup> After DNRC issues the certificate, no further review occurs—no metering, no reporting, and no verification of the use of the well.<sup>58</sup>

Exempt groundwater wells can be combined, meaning two or more wells can be linked to become one source.<sup>59</sup> In order for the wells to be considered combined, they must be physically plumbed together.<sup>60</sup> The use of the combined wells cannot exceed the requirements for a single exempt well, which is thirty-five gallons per minute or ten acre feet per year, ultimately creating no incentive to combine exempt wells.<sup>61</sup> This rule has been challenged for failing to take into account the combined effects certain uses might have on the overall hydrological system.<sup>62</sup> For example, subdivisions act like one combined draw on an aquifer because the water they draw from the aquifer is from one concentrated area, but each lot is treated as a separate draw because the homes are not physically plumbed together.<sup>63</sup>

The allowance of exempt wells creates many negative implications. First, the amount of water withdrawn by these exempt wells is unknown because they are not metered, personally checked, or reported to anyone.<sup>64</sup> Second, the number of exempt wells is quite high; as of 2008, there were over 100,000 exempt wells in Montana.<sup>65</sup> DNRC estimates that by 2020 there will be between 32,000 and 78,000 additional exempt wells in Montana.<sup>66</sup> How much water does each of these exempt wells draw from the aquifer? DRNC estimates each 2.5 person household consumes on average about 3,400 gallons

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<sup>57</sup> *See id.*

<sup>58</sup> MARTIN, *supra* note 48, at 8.

<sup>59</sup> *See id.*; MONT. ADMIN. R. 36.12.101(13) (2012).

<sup>60</sup> MARTIN, *supra* note 48, at 2.

<sup>61</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 23, 25–26.

<sup>62</sup> *See* Chandler et al., Petition for Declaratory Ruling and Request to Amend Rule 36.12.101(13) (Mont. Dep't of Natural Res. & Conservation Nov. 30, 2009), 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).

<sup>63</sup> *See id.*; Gallatin County Comm'n, Petition to Amend Rule (Mont. Dep't of Natural Res. & Conservation Oct. 26, 2006), 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) (attached as exhibit four to Chandler et al., *supra* note 62).

<sup>64</sup> MARTIN, *supra* note 48, at 9.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> WATER POLICY INTERIM COMM., WPIC 2008 FINDINGS: WATER SUPPLY AND SEWAGE DISPOSAL (2008), 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) (attached as exhibit fifteen to Chandler et al., *supra* note 62).

of water per year in household uses alone (not including any outside irrigation or lawn watering).<sup>67</sup> Multiplying this estimated increase in exempt wells with the estimated amount of water used per household produces a significant amount of unregulated water that will place a growing strain on Montana's water resources. Exempt wells can be found all over the state; and their presence is not only placing a expounding strain on existing water resources but is also changing how Montana's growth is occurring.

### III OVERVIEW OF MONTANA'S LAND USE SYSTEM

Growth in Montana intertwines directly with land management and water allocation decisions. In order to fully understand the effects water has on Montana's growth, a basic understanding of Montana's land use system is useful.

Before dividing land, any person or entity must go through a process to review an application to divide land, typically completed at the local government level.<sup>68</sup> Some divisions are considered subdivisions and others are considered exempt from the subdivision review process<sup>69</sup> (similar to the permitting of groundwater allocation). In both types of land divisions, the divider must prove a sufficient quantity and quality of water exists to support the proposed parcels.<sup>70</sup>

Municipalities typically provide water for their residents. In order to gain access to municipal water, the divider must prove that there is sufficient water in the existing system to accommodate the additional impact or how the system will be expanded to accommodate the additional impacts.<sup>71</sup>

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<sup>67</sup> MARTIN, *supra* note 48, at 9. This estimate could be low depending on the type of system installed in a household. *Id.*

<sup>68</sup> See generally MONT. CODE ANN. § 76-3 (2011). For purposes of looking at exempt wells, this section will focus on creating new parcels of land and their requirements regarding water.

<sup>69</sup> See *id.* §§ 76-3-103(16), -201, -207. Montana's land use laws are located in Montana's Subdivision and Platting Act. See generally *id.* tit. 76, ch. 3.

<sup>70</sup> See *id.* § 76-3-622 (describing requirements for proof of water in a subdivision application); MONT. ADMIN. R. 17.36.330 to .336 (2012). The Montana Department of Environmental Quality defines "subdivision" as "only those parcels of less than 20 acres . . ." MONT. CODE ANN. § 76-4-103 (this definition includes any division of land, not just those considered subdivisions under the Montana Subdivision and Platting Act).

<sup>71</sup> MONT. CODE ANN. § 73-3-622 (the rules for subdividers describing what to submit regarding water are the same for municipalities and unincorporated areas); *id.* § 76-4-125, -127 (describing municipal exemptions).

In areas outside municipal limits, there are a few options a divider can choose to utilize for water. These options dictate the size of the parcels the divider can create.<sup>72</sup> These options include either the utilization of exempt wells or the installation of a community or public water system for multiple parcels to use. The Montana Department of Environmental Quality reviews water systems for proposed land divisions to ensure compliance with state statutes and the Department's applicable regulations.<sup>73</sup> However, the review does not dictate if there is a water right. The power to regulate water rights exists solely with DNRC.<sup>74</sup>

When dividing land outside a municipality, acreage limits are associated with each type of water system that can be utilized.<sup>75</sup> These water system options, exempt wells and community or public water systems, create different incentives for those dividing land. If a divider chooses to utilize exempt wells for the parcels, the parcels are required to contain at least one acre of land.<sup>76</sup> The incentive for using exempt wells is that each person who buys a parcel deals with the cost of installing the well and working with DNRC.<sup>77</sup> This allows the developer to avoid many administrative complications regarding water rights, such as a lengthy process or mitigation efforts. If a divider decides to install a community or public water system, he or she can decrease the required size of each parcel, allowing the division of the existing property into a significantly higher number of new parcels.<sup>78</sup> The required size of parcels utilizing a community or public water system is reduced to approximately one half acre,<sup>79</sup>

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<sup>72</sup> See MONT. ADMIN. R. 17.36.340(1).

<sup>73</sup> *Id.* 17.36.330 to .336. Land divisions creating parcels over twenty acres are not reviewed by the Montana Department of Environmental Quality; they are only reviewed by DNRC for water allocation purposes and by the local health board. MONT. CODE ANN. § 76-4-103.

<sup>74</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 3-4.

<sup>75</sup> See MONT. ADMIN. R. 17.36.340(1).

<sup>76</sup> *Id.*

<sup>77</sup> See WATER RIGHTS IN MONTANA, *supra* note 3, at 23.

<sup>78</sup> MONT. ADMIN. R. 17.36.340(1)(c).

<sup>79</sup> *Id.* It should be noted that density bonuses can be granted for installing a community or public waste-water system as well, allowing the acreage per parcel to decrease down to approximately one half acre. However, the installation does typically require more land than a public or community water system because not only is there a requirement to house the system, but an area for the waste-water to be treated is also required (typically done through a lagoon or other waste-water treatment option). MONT. ADMIN. R. 17.36.340(1).

which almost doubles the number of lots a divider can parcel off.<sup>80</sup> This additional density bonus is designed to act as an enticement for dividers to install community or public water systems because they can make more money by selling the additional lots. However, the divider must go through the process to approve the water system and work with DNRC to receive an approved water right permit.

Aside from the acreage requirements, divisions of land that are required to go through subdivision review<sup>81</sup> have additional requirements that must be evaluated. A subdivider must comply with stringent requirements to show there is sufficient water for the development and that the water is of adequate quality.<sup>82</sup> Also, any subdivision creating more than five parcels<sup>83</sup> must complete an environmental assessment, which addresses the impacts and availability of water for the proposed subdivision.<sup>84</sup> But, if subdividers utilize exempt wells, there is no check on the draw the wells have on the area.

The method in which property is divided and the water systems that are chosen to support the divisions create an impact on the way Montana grows by dictating the required size of the divided parcels. By utilizing exempt wells, parcel sizes are required to be larger; therefore, each division of land that chooses to utilize exempt wells eats up more land, pushing people farther and farther away from municipalities and sustainable development—promoting sprawl.

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<sup>80</sup> There is not an exact doubling because typically the water system is placed on the property to be divided, which removes a small portion of land from being turned into lots for development.

<sup>81</sup> Under Montana's Subdivision and Platting Act. *See generally* MONT. CODE ANN. tit. 76, ch. 3 (2011).

<sup>82</sup> *Id.* § 76-3-622.

<sup>83</sup> Either from the original tract as of 1973, or from the current tract. *Id.* § 76-3-609(3) (minor and subsequent minor subdivision definitions). Any subdivision that does not fit into the category of minor or subsequent minor subdivision is considered a major subdivision.

<sup>84</sup> *Id.* §§ 76-3-603, -609. The current Montana statutes reflect a recent change to the requirement of completing an environmental assessment. The statutes require subdivisions, creating five or less lots, but creating more than five lots from the original 1973 parcel (called a subsequent minor subdivision) to complete an environmental assessment. *Id.* This is an improvement on the review of subdivisions because local governments can look at cumulative impacts of successive divisions of land, rather than individual divisions. However, this requirement is only for subdivisions.

**IV**  
**HOW MONTANA'S WATER RIGHTS SYSTEM AFFECTS ITS LAND  
USE SYSTEM**

The tie between Montana's water and land use laws is evident by looking at its statutes. The interface between these two sets of laws has provided a means for depleting Montana's water and for causing Montana to grow in an unsustainable manner. Recent court decisions, legislative amendments, rural growth issues, municipal issues, and a petition to DNRC to change its existing regulations have shaped the effect Montana's water laws have on its growth pattern.

***A. Decisions Towards Change: Montana Trout Unlimited v.  
Montana DNRC and the 2007 Legislative Amendments that  
Followed***

Starting in 2006, water law in Montana underwent enormous changes impacting the way Montana's water right permitting system operates. First, in 2006, the Montana Supreme Court decided *Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation*.<sup>85</sup> This decision changed the way water rights were administered in Montana by recognizing groundwater and surface water as connected and restricting the allocation of water right permits in closed basins.<sup>86</sup> Then, in 2007, the Montana Legislature instituted amendments to Montana's water law statutes to address this Montana Supreme Court opinion. This decision, coupled with the legislative amendments, set in motion a new method of administering water rights in Montana, ultimately influencing the way Montana grows.

In the *Montana Trout Unlimited* case, Trout Unlimited filed suit against DNRC for failure to appropriately take into consideration whether groundwater permits were immediately or directly connected to surface water.<sup>87</sup> The suit arose out of a basin closure,<sup>88</sup> during which DNRC was required to evaluate "new applications for groundwater that [were] 'immediately or directly connected' to [the]

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<sup>85</sup> Mont. Trout Unlimited v. Mont. Dep't of Natural Res. and Conservation, 133 P.3d 224 (Mont. 2006).

<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at 226–27.

<sup>88</sup> The closed basin at issue was the Upper Missouri River basin. See *id.* at 226.

. . . surface water” of the basin.<sup>89</sup> DNRC interpreted the statutory language to mean “a groundwater well could not pull surface water directly from a stream or other source of surface water.”<sup>90</sup> Trout Unlimited argued this definition failed to take into account less obvious connections between groundwater and surface water, such as the influence that proposed prestream capture rights would have on tributaries to the main surface water source.<sup>91</sup> The Montana Supreme Court concluded that prestream capture of tributary groundwater impacts surface flows.<sup>92</sup> As a result, the Court held DNRC’s interpretation of the law was insufficient to provide the required statutory protections of Montana’s basin closure laws.<sup>93</sup> This case solidified protections for senior water right holders, specifically those in closed basin areas.<sup>94</sup> Following the case, since DNRC had no means to mitigate groundwater depletions, it essentially stopped processing new applications.<sup>95</sup>

In response to the Montana Supreme Court’s decision in *Montana Trout Unlimited* and DNRC’s inability to process applications, the Montana Legislature made changes to Montana’s water laws related to allocation in closed basins. The legislature’s goal was to find a way to allow new permit applications to be reviewed and approved without interfering with senior water rights.<sup>96</sup> The new legislation provided a “bucket-for-bucket” means of allocating water,<sup>97</sup> requiring a mitigation plan for any depletions a new water right application might cause to existing water rights.<sup>98</sup> These mitigation plans require those requesting new groundwater allocations, in a closed basin, to buy existing rights and change the purchased water right to the newly proposed use (if possible) or retire the rights to allow for the new allocation (placing the purchaser at the back of the water right line).<sup>99</sup>

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<sup>89</sup> *Id.* This requirement comes from Montana’s basin closure laws. The statutes do not define what “immediately or directly connected” means. MONT. CODE ANN. §§ 85-2-342, 85-2-343 (2011).

<sup>90</sup> *Mont. Trout Unlimited*, 133 P.3d at 227.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 232.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 232; Ziemer et al., *supra* note 10, at 51.

<sup>95</sup> Ziemer et al., *supra* note 10, at 51.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 52.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

These decisions solidified the concept that surface water and groundwater are to be managed conjunctively and require a means to mitigate some negative impacts on existing water right holders.<sup>100</sup> These changes are for the better in terms of conjunctive management but have also created some issues and less positive incentives.

There are a few good changes to emerge from these developments in the law. The changes set forth a clearer path towards what is required of certain proposed groundwater allocations. They also force those who want new allocations of water in closed basin areas to find a way to reallocate already allocated water rather than to continue to draw new water (which probably does not exist) from the system. Instead of placing a greater burden on Montana's water system, the changes attempt to provide some relief. Also, the changes recognize the hydrologic connectivity between surface water and groundwater. Recognizing this connection can help to change and shape Montana's system in a more sustainable way because Montana can no longer ignore the effects one might have on the other. These steps are small, but they are an attempt to move Montana in a more sustainable direction in its use of water, and in turn, a more sustainable direction in its growth.

Despite this progress, there are still some issues in need of attention. As the court concluded in the *Montana Trout Unlimited* case, groundwater flows have been proven to affect surface water flows.<sup>101</sup> Such effects can occur through permitted groundwater withdrawal or through exempt wells.<sup>102</sup> The new developments in the law catch uses that require permits but do not deal with the issue of exempt wells. Exempt wells can still be installed in these areas because they do not require a water right per se.<sup>103</sup> These developments in the law have created an incentive for those dividing land to utilize exempt wells because they do not have to deal with the increasingly complicated water rights permitting system. And, as

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<sup>100</sup> See generally *Mont. Trout Unlimited v. Mont. Dep't of Natural Res. & Conservation*, 133 P.3d 224 (Mont. 2006); H.B. 831, 2007 Leg. 60th Sess. (Mont. 2007); MONT. CODE ANN. § 85-2-311 (2011); Matthew Hibbs, *Interpreting the Basin Closure Law in Montana: The Permissibility of Prestream Capture*, 29 PUB. LAND & RESOURCES L. REV. 195 (2008).

<sup>101</sup> *Mont. Trout Unlimited*, 133 P.3d at 232.

<sup>102</sup> *Id.*

<sup>103</sup> MONT. CODE ANN. § 85-2-360; MARTIN, *supra* note 48; see WATER RIGHTS IN MONTANA, *supra* note 3, at 25–27.



stated previously, exempt wells require more land, which in turn encourages sprawl.

### ***B. Issues Affecting Rural Growth***

Exempt wells are an issue mainly concentrated in rural growth. Those dividing land in rural areas rely on exempt wells for more or less free and fast access to water for their newly divided parcels.<sup>104</sup> By using exempt wells, individuals dividing land do not have to deal with the water rights process, which can be complicated and take years. It allows those dividing land to set their lines for division and go through the somewhat simpler exempt well process because the purchasers of the new parcels are required to deal with well installation. Therefore, those individuals dividing land are moving away from installing systems that require a water right and moving towards exempt wells. This alteration changes the way land divisions are occurring and the amount of land being used for those divisions. Instead of concentrating development, development is sprawling because the installation of exempt wells requires more land than the installation of community or public water systems.

In Lewis and Clark County,<sup>105</sup> a shift has occurred from utilizing community water systems to utilizing exempt wells for subdivisions.<sup>106</sup> For example, the Timber Works Estates subdivision changed its plans from installing a public water system to installing exempt wells likely because the process to obtain a water right for the subdivision was too arduous.<sup>107</sup> When the subdivision was originally submitted to Lewis and Clark County in August 2007, as Aspen Spring Estates, it included a public water system.<sup>108</sup> After its original approval, the subdivision was halted and was later resubmitted in August 2011 with a significant change to its water system.<sup>109</sup> The subdivision was renamed Timber Works Estates and no longer

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<sup>104</sup> Davis, *supra* note 1, at 2.

<sup>105</sup> Lewis and Clark County is within the Missouri River basin, the closed basin subject area of the *Montana Trout Unlimited* case.

<sup>106</sup> Declaration of Christal Ness, Permit Coordinator, Lewis and Clark County (Mar. 29, 2012) (on file with the author).

<sup>107</sup> See generally and compare CDM, *Introduction to ENVIRONMENTAL ASSESSMENT FOR ASPEN SPRINGS ESTATES* (Jan. 14, 2008) (on file with the author), with CASNE & ASSOCS., *Introduction to ENVIRONMENTAL ASSESSMENT FOR TIMBER WORKS ESTATE* (Aug. 1, 2011) (on file with the author).

<sup>108</sup> CDM, *supra* note 107.

<sup>109</sup> Compare CDM, *supra* note 107, with CASNE & ASSOCS., *supra* note 107.

included a public water system.<sup>110</sup> The engineer and the developer most likely decided to switch the design because the process with DNRC was too complicated. Luckily for the developer, the number of lots being developed did not change because another exception under Montana law regarding waste-water systems allows for a decrease in acreage from the required one-acre lot size.<sup>111</sup> Now, instead of two permitted wells drawing on the aquifer, which is already in danger because it is a closed basin, there will be over one hundred new exempt wells drawing on the aquifer.<sup>112</sup> Typically subdivisions cannot maintain the same number of lots when switching from a community or public water system to exempt wells and must resort to increasing the overall size of the development and continuing to add to the sprawling growth in Montana. Currently, Lewis and Clark County does not see many subdivision applications proposing to install community or public water systems.<sup>113</sup> Therefore, as more subdivisions propose exempt wells, development is pushed further and further away from town and sustainability.

Hope is not completely lost; there are ways that counties or rural local governments can attempt to combat the problem of over-utilization of exempt wells. Local governments can require subdivisions of a certain number of parcels to provide community or public water systems. The Water Policy Interim Committee, a joint bipartisan committee composed of Montana legislators,<sup>114</sup> has recommended subdivisions over thirty lots be required to install public water and waste-water systems.<sup>115</sup> However, this may push growth into areas that have not adopted such regulations or may lead to many small divisions of land. These rural growth issues affect Montana's water supply as a whole and control the state's growth issues.

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<sup>110</sup> CASNE & ASSOCS., *supra* note 107.

<sup>111</sup> MONT. ADMIN. R. 17.36.340(1)(a) (2012); *compare* CDM, *supra* note 107, with CASNE & ASSOCS., *supra* note 107.

<sup>112</sup> *Compare* CDM, *supra* note 107, with CASNE & ASSOCS., *supra* note 107.

<sup>113</sup> Ness, *supra* note 106.

<sup>114</sup> *Water Policy Interim Committee 2007–2008*, MONT. LEGISLATURE, [http://leg.mt.gov/css/Committees/Interim/2007\\_2008/water\\_policy/default.asp](http://leg.mt.gov/css/Committees/Interim/2007_2008/water_policy/default.asp) (last modified Jun. 10, 2013). The Committee was authorized to “conduct an interim study on surface water/groundwater interaction, exempt wells, water quality and water quantity, and other water related issues.” *Id.*

<sup>115</sup> WATER POLICY INTERIM COMM., *supra* note 66. More solutions are discussed below in the recommendations section of this paper. *See infra* Part VI.

### ***C. Municipal Issues***

Exempt wells are not only causing water and growth problems in rural areas, they are causing issues for municipalities as well. Exempt wells are driving development away from municipalities into areas where there is enough land to accommodate the minimum lot size for exempt wells, placing more pressure on Montana's water and further steering the growth of the state.<sup>116</sup>

Municipalities are similar to any other water rights holder; a municipality can only take as much water as it has been allocated under its water right permit(s).<sup>117</sup> Therefore, when a permit held by a municipality reaches capacity, the municipality must apply for additional water rights. Reaching capacity may require a municipality to produce a mitigation plan, which could require the municipality to attempt to find water rights in the area to change or retire.

This issue is exemplified by the city of Manhattan, Montana. In 2005, Manhattan, a small town in rural Montana, applied for a new groundwater permit to gain additional water rights for an annexation.<sup>118</sup> Manhattan's water right application was challenged by senior water right holders, and at the time of the challenge, the city did not see the need for mitigation.<sup>119</sup> After going back and forth trying to settle the dispute for approximately two years, the two sides reached an agreement where Manhattan would go through the change process and utilize existing water rights for the annexation.<sup>120</sup> However, even after an agreement was reached with the senior water rights holders, Manhattan still had to finish its process with DNRC.<sup>121</sup> The initial DNRC process resulted in a denial; the denial was appealed to district court, prolonging Manhattan's water right process even further.<sup>122</sup> Eventually, DNRC conditionally approved Manhattan's application; the approval was very similar to the agreement Manhattan reached with the senior water rights holders.<sup>123</sup> However, even with the approval of both DNRC and the senior water

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<sup>116</sup> Davis, *supra* note 1, at 2–3.

<sup>117</sup> MONT. CODE ANN. § 7-13-4405 (2011); GETCHES, *supra* note 2, at 78–79, 107.

<sup>118</sup> Ziemer et al., *supra* note 10, at 66.

<sup>119</sup> *Id.* at 66–67.

<sup>120</sup> *Id.* at 67.

<sup>121</sup> *Id.* at 67–68.

<sup>122</sup> *Id.* at 68.

<sup>123</sup> *Id.*

right holders, Manhattan's water right did not come to fruition.<sup>124</sup> The holder of the water right Manhattan planned to change, to satisfy the requested increase in water, changed its mind, killing Manhattan's pending water right.<sup>125</sup> The water right holder was concerned about going through the change process with DNRC because of the complicated and lengthy process Manhattan had already been through.<sup>126</sup> After many years and large amounts of money, Manhattan was back at the drawing board.<sup>127</sup>

Manhattan's trouble is just one example of the issues that municipalities might encounter in the process of acquiring a water right. Issues like this dissuade developers from developing in cities, enticing them to move out into rural areas where they have the ability to utilize exempt wells in their developments and avoid dealing with the complications of DNRC's permitting process. This push towards growth outside municipal areas fosters sprawl.

#### ***D. A Plea from the Public to Change: Petition to Amend a Provision Regarding Exempt Wells***

Montana has created an incentive for people dividing land to utilize exempt wells over community and public wells.<sup>128</sup> This is a concern that emanates throughout the state.<sup>129</sup> The problem of exempt wells has become such an issue in Montana that a group of senior water right holders petitioned DNRC to change its interpretation of what constitutes a combined appropriation for an exempt well under Montana's administrative rules.<sup>130</sup>

In its basic form, the petition to DNRC argues that the determination of what constitutes a combined appropriation for an exempt well is an "arbitrary interpretation."<sup>131</sup> Currently, the exempt well provision cannot be used for a combined appropriation from the same source by two or more wells exceeding the thirty-five gallon per minute or ten acre-feet per year limitation.<sup>132</sup> This boils down to the fact that if a combined appropriation well exceeds more than the

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<sup>124</sup> Ziemer et al., *supra* note 10, at 68–69.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 69.

<sup>127</sup> *Id.*

<sup>128</sup> MARTIN, *supra* note 48, at 1–2.

<sup>129</sup> See Chandler et al., *supra* note 62.

<sup>130</sup> See *id.* at 1–2.

<sup>131</sup> See *id.*

<sup>132</sup> *Id.* at 1.

exempt well limitation, it requires a water right permit. DNRC defines combined appropriations as those systems physically connected through piping.<sup>133</sup> The petitioners argued that this interpretation is arbitrary because it overlooks all the wells coming from a single subdivision, which act as a combined draw on an aquifer.<sup>134</sup> However, since those wells are not physically connected, DNRC considers them each individually exempt. This petition was ultimately denied by DNRC in 2010 after a long administrative hearing process, which included a public hearing.<sup>135</sup> The ruling, by the acting administration of the water resources division of DNRC, justified DNRC's interpretation of combined appropriations by concluding that its interpretation followed the law and was therefore not arbitrary.<sup>136</sup>

This petition was not the first of its kind.<sup>137</sup> In 2006, the Gallatin County Commission petitioned DNRC to amend the same rule.<sup>138</sup> Not surprisingly, that petition was subsequently denied by DNRC.<sup>139</sup>

Even with so many people and facts against the continuation of the procedures surrounding exempt wells, these wells continue to be administered in the same manner. Recent occurrences have made exempt wells more readily utilized, not only placing more stress onto Montana's aquifers but also on its land system and growth. By allowing the term "combined" to apply only to physically connected allocations, many large subdivisions are able to thrive off of exempt wells, eating up unnecessary amounts of land and water in the state. This inefficient use of exempt wells is negatively affecting the way Montana's growth occurs. DNRC needs to strongly consider changing its interpretation of what constitutes a combined appropriation as was requested. Ruling in such a manner would improve some of the problems regarding exempt wells by removing the threat that subdivisions with a large number of lots have on the water supply and growth of Montana.

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<sup>133</sup> MONT. ADMIN. R. 36.12.101(13) (2011); Chandler et al., *supra* note 62, at 2.

<sup>134</sup> Chandler et al., *supra* note 62, at 2–3.

<sup>135</sup> Order Denying Request to Amend Rule 36.12.101(13) (Mont. Dep't of Natural Res. Aug. 30, 2010), *available at* [http://www.dnrc.mt.gov/wrd/declaratory\\_ruling/order\\_denying\\_rule\\_making.pdf](http://www.dnrc.mt.gov/wrd/declaratory_ruling/order_denying_rule_making.pdf).

<sup>136</sup> *Id.*

<sup>137</sup> See Gallatin County Comm'n, *supra* note 63.

<sup>138</sup> *Id.*

<sup>139</sup> Revised Order of Denial (Mont. Dep't of Natural Res. & Conservation Feb. 20, 2007), *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) (attached as exhibit five to Chandler et al, *supra* note 62).

Montana's growth is shaped through its water and land use laws. These laws have created some rural and municipal growth issues and have even caused some water right holders to petition for reform. However, the attempts to change Montana's water laws for the better have not succeeded, and these rural and municipal issues will only continue to grow without changes in the law. Without such changes, exempt wells will continue to be encouraged, and with every exempt well, more land is eaten up and development is pushed further and further away from municipalities and sustainability. Montana needs to look within its own policies and the policies of other states to try and affect a change towards sustainability.

## V

### COMPARISON WITH OREGON'S CURRENT SYSTEM

Oregon has long been at the forefront of both land development regulations and water resource conservation. Oregon recognizes, through its statutes and administrative rules, that land and water are connected, and Oregon has created tools to deal with the effects one might have on the other.<sup>140</sup> Oregon has created statewide planning goals for each resource (land and water), which overlap and create a system leading towards sustainability. Montana could learn from some of the tools Oregon is using to control its exempt well issues.

#### *A. Oregon's Statewide Goals*

Oregon has established eight "statewide water resource management" topics<sup>141</sup> and nineteen "statewide planning goals."<sup>142</sup> While the water topics directly relate to water, there are many planning goals relating to water and its interplay with land and land development.<sup>143</sup>

Goal Two, entitled "Land Use Planning," requires that local governments throughout the State of Oregon adopt comprehensive plans.<sup>144</sup> These comprehensive plans must incorporate the identification of issues and problems as well as address the water

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<sup>140</sup> OR. ADMIN. R. 690-005-0020 (2012).

<sup>141</sup> OR. ADMIN. R. 690-410-0010 to -0080.

<sup>142</sup> OR ADMIN. R. 660-015-0000(1)-(14), -0005; -0010(1)-(4).

<sup>143</sup> See OR. DEP'T OF LAND CONSERVATION & DEV., OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES (Mar. 12, 2010), available at [http://www.oregon.gov/LCD/docs/goals/compilation\\_of\\_statewide\\_planning\\_goals.pdf](http://www.oregon.gov/LCD/docs/goals/compilation_of_statewide_planning_goals.pdf).

<sup>144</sup> OR. ADMIN. R. 660-015-0000(2) (Goal 2: Land Use Planning in OREGON'S STATEWIDE PLANNING GOALS & GUIDELINES, *supra* note 143).

resources associated with them.<sup>145</sup> Additionally, Goal Five, entitled “Natural Resources, Scenic and Historic Areas, and Open Spaces,” requires an inventory of water resources with a goal to protect Oregon’s natural resources.<sup>146</sup> Also, Goal Six, entitled “Air, Water, and Land Resource Quality,” has a “goal [t]o maintain and improve the quality of the air, water and land resources of the state.”<sup>147</sup> These goals show the integration of water into land development. Importantly, land use plans cannot be approved without complying with these goals, and since all governments in Oregon are tasked to comply with the goals, water is always considered in Oregon’s land use development and planning.

Similarly, in Montana, water must be considered. Montana requires that the quality and quantity of water be investigated during a land division.<sup>148</sup> However, the integration is not as profound as in Oregon. Oregon goes beyond Montana with the quality and depth of its goals and requirements. In Oregon, not only are land use plans required to comply with the state’s goals, but also any new uses of water (surface or groundwater) must comply with the statewide planning goals.<sup>149</sup> Oregon’s requirements attempt to thoroughly integrate the effects water has on land development and lead Oregon towards a sustainable future.

### ***B. Oregon’s Water Rights System***

Similar to Montana, Oregon is a prior appropriation state.<sup>150</sup> Prior appropriation, as described above, requires a beneficial use, and Oregon recognizes a number of beneficial uses listed in its statutes.<sup>151</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> OR. ADMIN. R. 660-015-0000(5) (Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces in OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES, *supra* note 143).

<sup>147</sup> OR. ADMIN. R. 660-015-0000(6) (Goal 6: Air, Water, and Land Resource Quality in OREGON’S STATEWIDE PLANNING GOALS & GUIDELINES, *supra* note 143).

<sup>148</sup> See MONT. CODE ANN. § 76-3-622 (2011) (describing requirements for proof of water in a subdivision application). If a division of land is exempt from subdivision review, it still must go through the water rights permit process or the exempt wells process as noted above. See *infra* Part I.

<sup>149</sup> OR. ADMIN. R. 690-410-0070(2)(i).

<sup>150</sup> Janet C. Neuman, *Oregon*, in 4 WATERS AND WATER RIGHTS at 1 (Robert E. Beck & Amy K. Kelly eds., LexisNexis, 3d ed. 2009).

<sup>151</sup> OR. REV. STAT. § 536.300 (2012). The list is illustrative, not exclusive. See *Benz v. Water Res. Comm’n* 764 P.2d 594 (Or. Ct. App. 1988). These beneficial uses include “existing and contemplated needs and uses of water for domestic, municipal, irrigation,

Oregon administers its system through a permit system, which is overseen by the Oregon Water Resources Department.<sup>152</sup>

Oregon's permit system is similar to other permit systems, including Montana's. First, an application must be submitted and reviewed by staff.<sup>153</sup> If the requirements of the statute are met, the permit is approved.<sup>154</sup> If the permit is contested a hearing is held.<sup>155</sup> Anyone can challenge a water right application (permit) in Oregon; this includes other water right holders and the public generally.<sup>156</sup> If approved, in order for the right to be official it must be proven (put to beneficial use).<sup>157</sup> Any changes in a water right require an approval from the state.<sup>158</sup>

Oregon regulates its water basin by basin.<sup>159</sup> Each basin is distinct and has different restrictions for what new permits may be considered.<sup>160</sup> This is different from Montana. Montana only treats a basin differently once the basin has water quality or quantity issues.<sup>161</sup>

Also, Oregon can declare critical groundwater areas, which are similar to Montana's closed basins and controlled groundwater areas.<sup>162</sup> These areas restrict water use because the groundwater pumping exceeds the long-term natural replenishment of water in the area.<sup>163</sup> Different from Montana, these areas restrict use as a whole and if contested can have preferences for some water uses over others (regardless of priority date).<sup>164</sup> In addition to the critical groundwater

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power development, industrial, mining, recreation, wildlife, and fish life uses and for pollution abatement." OR. REV. STAT. § 536.300.

<sup>152</sup> OR. WATER RES. DEP'T, AN INTRODUCTION TO OREGON'S WATER LAWS: WATER RIGHTS IN OREGON 3 (Centennial ed. 2009) [hereinafter WATER RIGHTS IN OREGON], available at [http://www.oregon.gov/owrd/pubs/docs/centennial\\_aquabook.pdf](http://www.oregon.gov/owrd/pubs/docs/centennial_aquabook.pdf); Neuman, *supra* note 150.

<sup>153</sup> OR. ADMIN. R. 690-310-0040 to -0140; Neuman, *supra* note 150, at 5.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 17-18.

<sup>157</sup> OR. REV. STAT. § 537.230 (2011); Neuman, *supra* note 150, at 6.

<sup>158</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 29-31.

<sup>159</sup> *Id.* at 11-13.

<sup>160</sup> *Id.*

<sup>161</sup> WATER RIGHTS IN MONTANA, *supra* note 3, at 46-50.

<sup>162</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 12; WATER RIGHTS IN MONTANA, *supra* note 3, at 42-50.

<sup>163</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 12.

<sup>164</sup> *Id.* at 12; OR. REV. STAT. § 537.742(2) (2011) (describing the various uses that might be weighted, such as municipal or residential uses, and other corrective measures that might be taken in a contested critical groundwater area).



areas, Oregon also manages groundwater limited areas.<sup>165</sup> These areas have limited access to new water rights, only allowing new water rights for a few designated uses depending on the area.<sup>166</sup>

Oregon's administration of its water rights, while similar to Montana's, has more restrictive methods for regulating water. These controls appear to set Oregon up to maintain a healthier water-related future than Montana.

### *C. Oregon's Exempt Wells*

The most important comparison between Montana and Oregon involves exempt wells. Oregon, like Montana, has exceptions to the requirement to obtain a permit for groundwater allocation.<sup>167</sup> Oregon's exceptions include domestic uses up to fifteen thousand gallons of water per day, lawn watering up to a one half acre, small industrial or commercial uses up to five thousand gallons of water per day, and stock watering.<sup>168</sup>

Just like Montana, Oregon has its own share of issues with the allocation of water through exemptions. For example, in 2009, a bill, which attempted to reduce the amount of water per day for exempt wells from 15,000 gallons per day to 1,000 gallons per day, failed in the Oregon Legislature.<sup>169</sup> However, with these issues, Oregon, unlike Montana, has attempted to use other tools to deal with exempt wells. Oregon is paying special attention to special groundwater areas. For example, Oregon instituted a one-year pilot program in 2008, Neighborhood Groundwater Network, to teach people how to better manage their consumption.<sup>170</sup> This tool attempts to move Oregon in a more sustainable direction through supervision of the state's water and public education. Currently, no equivalent to this program exists in Montana.

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<sup>165</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 12–13; *see* OR. ADMIN. R. 690-502-0170 to -0260 (2012).

<sup>166</sup> WATER RIGHTS IN OREGON, *supra* note 152, at 12–13; *see* OR. ADMIN. R. 690-502-0170 to -0260.

<sup>167</sup> OR. REV. STAT. § 537.545; Neuman, *supra* note 150, at 3.

<sup>168</sup> OR. REV. STAT. § 537.545; Neuman, *supra* note 150, at 3.

<sup>169</sup> Laura A. Schroder et al., *Domestic Groundwater Exemptions Competing: Uses Put Pressure on Western Water Right Requirements, but Constitutional Right to Life May Trump Prior Appropriation Doctrine*, 47 WILLAMETTE L. REV. 405, 419–20 (2011).

<sup>170</sup> OR. WATER RES. DEP'T, *Neighborhood Groundwater Network*, [http://www.oregon.gov/owrd/pages/GW/NGWN\\_homepage.aspx](http://www.oregon.gov/owrd/pages/GW/NGWN_homepage.aspx) (last visited Sept. 2, 2013).

Overall, Montana and Oregon have some similarities in the way their water law systems function. However, while Oregon is trying to utilize new tools to combat the problem of exempt wells, Montana has stayed close to stagnant through the negation of some positive attempts with negative results. While every state has success with different methods, Montana may be able to learn from Oregon, especially from Oregon's implementation of a community outreach program to help people live more sustainably and Oregon's basin-by-basin regulation that is tailored to the needs of each basin.

## VI

### **THE SITUATION: TOOLS TO UTILIZE FOR A SUSTAINABLE FUTURE**

Montana needs to find a way to cope with exempt wells and the continuing negative effects these wells have on Montana's growth and water supply. Exempt wells are not only affecting the amount of water necessary for future generations, but are also affecting the way Montana is growing by encouraging sprawl. Montana will continue to lose the appeal and charm it currently has if it continues to be taken advantage of in this manner, especially when there are tools that might help Montana curb this problem in the future.

A good starting point for Montana may be to implement a program similar to Oregon's community education program. While not an enforceable action, it does create awareness and begins to make people conscious of the issues and changes that need to be made. Public education is a step in the right direction. Increased awareness might help dividers of land choose not to utilize exempt wells, which would help with growth issues.

Oregon's system of basin-by-basin water regulation provides another possible tool for Montana to utilize in the future. By regulating basin-by-basin, Montana could tailor its groundwater requirements depending on the needs of each basin. This would create a more sustainable means of regulating water. By using this system, water right permits would reflect the basin's ability to undertake additional allocation, which would then be reflected in the growth pattern of the area. However, this would not solve the issue of exempt wells because exempt wells could still be permitted unless specifically prohibited by a basin. But, if the regulations in some basins chose to prohibit or restrict the use of exempt wells, it would still be beneficial to the state, even if such a requirement were not required statewide. Basin-by-basin allocation would at least tailor the

regulation of water in some way, which could lead to more sustainable growth.

The petition submitted to DNRC by concerned water rights holders provides another feasible opportunity for the state to move towards change. By changing its interpretation of combined appropriation, the state could capture all of the large multi-parcel divisions of land and leave the smaller developments alone. If the interpretation changed, either through the agency, the courts, or the legislature, it would have to be narrowly tailored to provide a balance with the original goals of exempt wells. While Montana might not be ready to get rid of its exempt wells altogether, it can take steps like this to move away from the overutilization of exempt wells.

Additionally, Montana can begin to mitigate the ill-effects of its exempt wells by following the Water Policy Interim Committee's recommendation that once land divisions reach a certain number of lots, community or public water systems are required. This would create a threshold limit for land divisions, but it could create additional problems by creating a lot of smaller subdivisions that continue to use exempt wells. Additionally, in cases when land is being divided into larger parcels (i.e., twenty acres), it might be cost prohibitive to install a community or public water system in developments with a large number of lots. This requirement would need to be implemented throughout the state to allow for consistent regulation and tailored to encourage sustainable growth.

Another idea is for Montana to institute a system of recording and reporting for exempt wells. Currently, after receipt of a certificate of right for an exempt well, there are no additional checks on its use. While these exempt wells go unmonitored, more exempt wells are being installed, placing additional pressure on the water system. If Montana instituted a system where exempt well owners were required to record and report their usage, it would provide a check on the system. While this type of system might not directly affect growth, it will at least provide additional data for how much pressure is being placed on Montana's water system and where additional measures need to be taken. It could lead to closures of basins or institution of controlled groundwater areas, which could curb growth slightly by making it harder to obtain water rights and force those dividing land to create sustainable land divisions. Still, this might not affect exempt wells unless the steps taken include a requirement to limit exempt wells in these controlled areas.

Montana could also consider monitoring exempt wells in closed basin areas. These areas have enough pressure from existing allocations of water withdraw and do not need the additional impacts of additional exempt wells. While permits in closed basins are monitored for implications to senior water right holders, exempt wells are not. Monitoring exempt wells would disincentivize the use of exempt wells in problem areas, hopefully slowing sprawl and placing less of a strain on the water system. However, this would only be required for certain areas with previously determined issues and would only be a step in fixing the problems exempt wells have on growth.

These tools are just some of the many that could be further developed into workable strategies for Montana, but they will take time and both legislative and public input to fully come to fruition. The Water Policy Interim Committee and DNRC are great places to start, but the state needs to commit to a change and engage the public in how to do it. Exempt wells are creating water and growth problems in Montana, the effects of which are being felt now and may only get worse.

Montana has fostered an environment where exempt wells are being over-utilized. Exempt wells are being used in land division as a loophole from the current requirements to obtain a permitted allocation of water. By using exempt wells, individuals dividing land need more square footage to create the same number of lots they could create with the bonus density provided by community and public water systems. The requirement for additional land pushes divisions of land further and further away from cities and increases the size of the lots created, essentially driving an unsustainable growth pattern for Montana. Completely removing exempt wells is not the answer, but there are other tools Montana can utilize to take back control. Land and water are always going to be connected. The State of Montana needs to make changes to recognize that connection between land and water, plan for the future, and focus on the Montana it wants its future generations to enjoy.

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#### *Author Note*

The author wrote this Article in early 2012. Since the penning of this Article, the Montana Legislature and DNRC adopted some changes affecting water rights. The Montana Legislature passed

Senate Bill 346 which created “stream depletion zones” or areas within closed basins where “as a result of a 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 a minute.”<sup>171</sup> These zones decrease the maximum amount of water pumped by an exempt well from thirty-five gallons a minute (not to exceed ten acre-feet per year) to twenty gallons a minute (not to exceed two acre-feet per year).<sup>172</sup> Additionally, the Montana Legislature passed two bills, which allow a water right holder to make small changes to his or her water right or temporarily lease his or her water right without going through the entire change process.<sup>173</sup> The Water Policy Interim Committee has, at the direction of the legislature, put forward additional information regarding the effects of exempt wells.<sup>174</sup> DNRC updated its permitting process in hopes of creating a simpler, faster, and cheaper permitting process for obtaining water rights.<sup>175</sup> To accomplish this, DNRC changed its forms, added an optional pre-application process, removed duplicative submission requirements, and began completing portions of the required technical analysis in-house.<sup>176</sup> These changes are just a few of the changes enacted since this article was written. For more information, please visit DNRC’s website and the Montana Legislature’s website.<sup>177</sup> These small steps

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<sup>171</sup> S.B. 346, 2013 Leg., 63rd Sess. (Mont. 2013); MONT. CODE ANN. § 85-2-102(22) (2013).

<sup>172</sup> S.B. 346, 2013 Leg., 63rd Sess. (Mont. 2013); MONT. CODE ANN. § 85-2-306(3)(iii)-(iv) (2013).

<sup>173</sup> H.B. 106, 2013 Leg., 63rd Sess. (Mont. 2013) (allowing a water right holder to petition to modify a condition or reduce a water right without going through a change process); H.B. 37, 2013 Leg., 63rd Sess. (Mont. 2013) (allowing for a temporary lease process of water rights).

<sup>174</sup> See JOE KOLMAN, THE EXEMPTION TO CHANGE OR NOT TO CHANGE?: A STUDY OF WATER WELLS ALLOWED WITHOUT A PERMIT, A REPORT TO THE 63RD LEGISLATURE BY THE WATER POLICY INTERIM COMMITTEE (Oct. 2012), available at <http://leg.mt.gov/content/Publications/Environmental/2013-exempt-wells.pdf>.

<sup>175</sup> Millie Heffner, Water Rights Bureau Chief, Dep’t of Natural Res. & Conservation, Presentation at 13th Annual Montana Water Law Conference: DNRC Permits and Change Authorizations (Sept. 17, 2013) (notes on file with author).

<sup>176</sup> *Id.*; See generally DNRC Water Resources Division, MONTANA.GOV, <http://dnrc.mt.gov/wrd/default.asp> (last visited Sept. 30, 2013).

<sup>177</sup> See generally DNRC Water Resources Division, *supra* note 176; *Building a Better Montana*, MONTANA LEGIS., <http://leg.mt.gov/css/Default.asp> (last modified, Aug. 22, 2013).

are a start in the right direction, providing some hope Montana is ready to move forward towards a more sustainable future.