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

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

Petitioners/Appellees,

v.

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

Respondents,

v.

MONTANA WELL DRILLERS ASSOCIATION,

Intervenors/Appellants,

v.

MONTANA ASSOCIATION OF REALTORS and MONTANA BUILDING INDUSTRY ASSOCIATION,

Intervenors/Appellants,

v.

MONTANA WATER COMPANY,

Intervenor.

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

BRIEF OF AMICI CURIAE BITTERROOTERS FOR PLANNING ET AL.

APPEARANCES:

Laura King
Matthew K. Bishop
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Tel: (406) 204-4852
Tel: (406) 324-8011
Email: king@westernlaw.org
Email: bishop@westernlaw.org
Attorneys for the Clark Fork Coalition
Petitioner/Appellee

Kevin Peterson
Anne W. Yates
Special Assistant Attorney General
Montana Department of Natural
Resources and Conservation
1625 Eleventh Avenue
P.O. Box 201601
Helena, MT 59620-1601
Tel: (406) 444-7074
Fax: (406) 444-2684
Email: KevinPeterson@mt.gov
Email: Ayates@mt.gov
Attorneys for DNRC
Respondent

Ryan K. Mattick
Moore, O'Connell & Refling, P.C.
601 Haggerty Lane, Suite 10
P.O. Box 1288
Bozeman, MT 59771
Tel: (406) 587-5511
Fax: (406) 587-9079
Email: mattick@qwestoffice.net
Attorney for the Montana Well Drillers Association
Intervenor/Appellant

Stephen R. Brown
Garlington, Lohn & Robinson, PLLP
350 Ryman Street
P.O. Box 7909
Missoula, MT 59807-7909
Tel: (406) 523-2500
Fax: (406) 523-2595
Email: srbrown@garlington.com
Attorney for Mountain Water Company
Intervenor

Abigail J. St. Lawrence
Bloomquist Law Firm, PC
Diamond Block, Suite 100
44 West 6th Avenue
P.O. Box 799
Helena, MT 59624-0799
Tel: (406) 602-1244
Email: astlawrence@helenalaw.com
Attorney for MARs and MBIA
Intervenor/Appellant

Jack R. Tuholske
1149 Harrison
P.O. Box 7458
Missoula, MT 59807
Tel: (406) 396-6415
Email: jtuholske@gmail.com
Attorney for Amici Bitterrooters for Planning et al.

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INTRODUCTION AND STATEMENT OF AMICI INTEREST

This case presents profound questions about the conservation of Montana's ground and surface water resources. While the precise legal issues raised by Appellants focus primarily on statutory interpretation, they are underlain by, and infused with constitutional and policy matters that strongly support affirmation of the District Court's decision. Article IX Section 3(3) of the Montana Constitution places all waters of this state in a public trust. Trusteeship imbues the Department of Natural Resources and Conservation (DNRC) with a fiduciary obligation to conserve groundwater for present and future obligations. The DNRC's 1993 Rule exempting wells from any regulatory oversight has resulted in an unsustainable, near free-for-all of subdivision and small-tract development and groundwater extraction resulting in tens of thousands of new wells in the last 20 years. The Rule is unsustainable under either statutory or constitutional norms.

The following organizations are amici in support of this brief: Bitterrooters for Planning, Bitterroot River Protective Association, Citizens for a Better Flathead, Future West, Montana Audubon, Montana Environmental Information Center, Montana Smart Growth Coalition, Northern Plains Resource Council and Stillwater Protective Association. These organizations are Montana non-profit public-benefit corporations representing well over ten thousand Montanans. They

submit this brief focusing primarily on important constitutional and policy considerations, and to rebut the stilted views presented by industry-oriented Appellants and Amici of the impacts of the exempt well regulation.

STATEMENT OF THE CASE

At issue is the District Court's Order invalidating a 1993 DNRC regulation based upon MCA § 85-2-306(3)(a) that exempted individual groundwater wells from permitting requirements, even if dozens of those wells drew water from the same aquifer. The fundamental issue before the District Court was one of statutory interpretation. The exemption statute did not apply to new wells that constituted a "combined appropriation" from the same source. MCA § 85-2-306(3)(a)(ii). In 1993, DNRC switched its previous interpretation of this statute to allow unregulated groundwater withdrawals from the same aquifer as long as the wells were not part of a physically connected system. The new Rule set the stage for the prolific use of the exemption over the last 20 years.

The District Court invalidated the 1993 Rule as contrary to the "spirit and intent" of the underlying statute, the Water Use Act. The District Court noted that the Montana Constitution required an orderly permitting process for all water withdrawals, with the burden of showing no adverse impacts placed on the permittee. Sherlock Opinion and Order ("Order") at 5-6. The 1993 exemption upended this basic constitutional premise by eliminating virtually all regulatory

oversight for a huge new class of water users: private homes in subdivisions using less than 10 acre feet per year, even if those withdrawals were part of one residential subdivision. Drawing upon Montana's "Dean" of water law, Albert Stone, Judge Sherlock found that the Constitution marked a turning point in Montana water law, ending the era of unregulated appropriations and ushering in a regulated system where all new withdrawals must not harm existing users. Additionally, the 1972 Constitution imposed a public interest requirement in water resource management because the Constitution placed all waters in state ownership for the benefit of the people. Quoting Professor Stone, Judge Sherlock noted that the state must review new uses to insure an overall public benefit, "before granting an additional franchise to use public property." Order at 7 (quoting Stone, "Montana Water Rights – A New Opportunity," 34 Mont. L. Rev. 75, 72 (1973)).

Given the clear purposes underlying Article IX, as well as the statutory command to prevent exempt wells that constitute "combined appropriations" from the same source, the District Court invalidated DNRC's 1993 exemption. The 1993 Rule created tens of thousands of permanent, unregulated groundwater withdrawals to the potential detriment of senior water right holders (who have no recourse), new agriculture uses (which must go through the permit process), and interconnected surface flows which can be impacted without DNRC oversight. The Department of Fish Wildlife and Parks, academics, NGOs, and DNRC itself

expressed the same concerns about the impact of the 1993 Rule. Order at 9-11. DNRC had even previously proposed revising the Rule as a possible solution to these problems. AR 13 at 22. Moreover, while the District Court acknowledged principles of agency deference, such principles could not overcome the Rule's inconsistency with the Constitution and the Water Use Act upon which the regulation was based. Nor could deference erase the practical considerations of uncontrolled proliferation of exempt wells in Montana.

DNRC has chosen not to appeal the decision, accepting the District Court's interim remedy of reinstating the 1987 Rule eliminating exemptions for multiple withdrawals from the same aquifer while the agency undertakes new rulemaking. Order at 13. This appeal was filed by the well-drillers and realtors who want this Court to overturn the District Court's decision and uphold the 1993 Rule.

ARGUMENT

I. Montana's Constitution and Public Trust Doctrine Support Upholding the District Court's Decision.

A. Under Article IX, Section 3(3) of the Montana Constitution, Groundwater is a Public Trust Resource.

The Montana Constitution states: "[*a*]*ll* surface, *underground*, flood, and atmospheric waters within the boundaries of the state are the *property of the state for the use of its people* . . ." Mont. Const. Art. IX, § 3(3) (emphasis added). The Constitution articulates the common law Public Trust Doctrine. This Court first

recognized the profound importance of the State's fiduciary responsibility for water and waterways and the interplay between the Public Trust Doctrine and Article IX Section 3(3) in *Montana Coalition for Stream Access v.* Curran, 210 Mont. 38, 682 P.2d 163 (Mont. 1984). Determining whether a private party could bar public recreation on a stream, this Court held: "The Constitution **and** the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters." (emphasis added); *See also Montana Coalition for Stream Access v. Hildreth*, 211 Mont 29, 35 (Mont. 1984). As discussed below, Montana's recognition of the public trust as an infusion of constitutional and common law principles is consistent with the decisions of numerous courts.

The Public Trust Doctrine is an ancient legal principle with a modern face. The United States Supreme Court and many state courts recognize the Doctrine as a vital aspect of sovereign responsibility. The Public Trust Doctrine imbues the state with a fiduciary duty to protect and conserve common pool natural resources, particularly water, for public benefit. The roots of the public trust doctrine are found in sixth-century Roman civil law. *See* J. Inst. 2.1.1. (Emperor Justinian declaring "By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea…).

The United States Supreme Court recognized the Public Trust Doctrine as a

well-known common law rule in *Illinois Central Railroad Co. v. Illinois* in 1892. 146 U.S. 387, 436 (1892). The Court established that the public trust imposes a fiduciary obligation on the state as trustee for public resources, a responsibility that trumps legislative enactments contrary to that responsibility. In *Illinois Central* the Court overturned a legislative grant of trust resources to the railroad, demonstrating the sovereign's supreme responsibility to present and future public trust resources. *Illinois Central* remains good law today. As Justice Kennedy recently stated in *PPL Montana, LLC v. Montana*: "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders." 565 U.S. ___, 29, 132 S.Ct. 1215, 1235 (2012). Montana has, and continues to interpret its constitutional provisions concerning water consistent with the public trust. *See Bitterroot River Protective Association v Bitterroot Conservation District,* 2008 MT 377 ¶ 51, 198 P.3d 219, 233.

Other State courts recognize the relationship between the Public Trust Doctrine, the protection of public rights in water and their state constitutions. *See, e.g., In re Water Use Permit Applications (Wai' Hole Ditch)*, 9 P.3d 409, 440 n.25 (Haw. 2000); *Nat'l Audubon Soc'y v. Superior Court of Alpine City (Mono Lake)*, 658 P.2d 709, 718 (Cal. 1983); *Glass v. Goeckel*, 703 N.W.2d 58, 63–64 (Mich. 2005). Since *Illinois Central*, state courts have expanded traditional concepts of the

Public Trust Doctrine. In *Mono Lake* the California Supreme Court found that the Public Trust Doctrine applies to non-navigable water resources. *Nat'l Audubon Soc'y v. Superior Court of Alpine City* (*Mono Lake*), 658 P.2d 709, 720 (Cal. 1983).

Most significantly, the Hawaii Supreme Court found that its public trust extends to all of the water in its state, including groundwater. *In re Water Use Permit Applications* (*Wai' Hole Ditch*), 9 P.3d 409, 490 (Haw. 2000). Drawing heavily from *Mono Lake*, the Hawaii court also relied upon its common law and two recent amendments to Hawaii's Constitution. The Wai'hole Ditch court explained that under these constitutional provisions, the state's doctrine "applies to all water resources without exception or distinction" and that the legislature's use of the term "water resources" has always included groundwater. *Wai'hole Ditch*, 94 P.3d at 445, 484–85 (finding that lack of evidence that groundwater in question was hydrologically connected to surface water did not pose any limitation to merits of claim). Both *Mono Lake* and *Wai Hole Ditch* demonstrate the importance of applying constitutional and public trust principles to protect ground and surface waters for present and future generations.

Montana's Constitution, like Hawaii's, includes recognition of the state Public Trust Doctrine, and applies it to groundwater. According to Article IX, Section 3 of the Montana Constitution, "[a]ll . . . *underground* . . . *waters* within

the boundaries of the state are the *property of the state for the use of its people . . .*". The phrase "property of the state for the use of its people" is a clear articulation of the Public Trust Doctrine because it recognizes the role of the state in protecting Montana's water resources for public benefit. Moreover, this language used in the Montana Constitution is similar to public trust language found in state constitutions throughout the United States. *See e.g.* HAW. CONST. art. XI, § 1. The phrase "[a]ll . . . underground . . . waters" includes groundwater within the scope of Montana's Public Trust Doctrine. Accordingly, groundwater in Montana is a public trust resource.

B. The Court's Decision to Invalidate the 1993 Rule on "Combined Appropriation" Protects Groundwater for the Public's Benefit.

The state's responsibility to protect public trust resources for the benefit of the public is a critical component of the Public Trust Doctrine. It is Montana's responsibility, therefore, to protect groundwater resources for the benefit of its citizens. Regarding "combined appropriation," DNRC's 1993 Rule has spurred a proliferation of subdivisions throughout Montana that use dozens, or hundreds, of individual domestic wells from the same aquifer, without any consideration of impacts to short and long-term water conservation. In fact, the DNRC itself estimates that there are more than 110,000 exempt wells in Montana. Matthew Brown, *Judge Strikes Down Exempt Well Rule*, Great Falls Tribune (Oct. 20, 2014, 4:57 PM), http://www.greatfallstribune.com/story/news/local/2014/10/20/judge-

strikes-montana-exempt-rule/17636109/. The vast majority of these wells have been constructed since DNRC changed the definition of "combined appropriation." Since DNRC enacted the 1993 Rule, "the number of exempt wells has skyrocketed: approximately 30,000 such wells were drilled during an eight year period from 2000 to 2008." Jeanette Alora Blize, *Unbridled Development: A Citizen's Guide to the Proliferation of Exempt Wells in Montana*, Temple University School of Environmental Design 8 (2011) (internal citations omitted), *available at* http://www.wccapa.org/wp-content/uploads/2011/06/Exempt-Wells.pdf. Of those 30,000, "75% are residential subdivisions in the Flathead, Gallatin, Bitterroot, and Lewis & Clark County." *Id.*

Appellants and their Amici ignore the simple truth that exempt well regulations have resulted in the proliferation of unregulated groundwater withdrawals associated with sprawling suburban subdivisions. Ravalli County provides perhaps the most graphic example. Between 2005 and 2015, the County approved 145 separate subdivisions totaling 2,327 lots. (See Table 1, attached hereto). Of those, only three subdivisions proposed full or partial community water systems. The overwhelming majority of developers chose the exempt well route, which is both cheaper and requires zero accountability in terms of groundwater impacts.

While Ravalli County may be the poster child for the problems caused by the 1993 Rule for exempt wells, the impacts are state-wide. The record demonstrates that the District Court had ample evidence of these problems. Gallatin County too has seen a proliferation of unregulated subdivision development using exempt wells. *See e.g.* AR 37 at 3-4 (describing major subdivision for 130 homes near Manhattan, Montana, using exempt wells); AR 30 at 9 (describing impacts from Hyalite Creek subdivision); AR 20 at ¶ 4 (describing impacts to existing rights from sixty-five unit subdivision using exempt wells); AR 17 at 6 (same); AR 23 (same). The same has occurred in rapidly developing Flathead County, where 6,000 exempt wells were drilled between 1991 and 2011. "Exempt Wells: Be Part of the Solution," Flathead Valley Chapter of Trout Unlimited, http://flatheadtu.org/?p=367 (last visited Jan. 12, 2016).

Local water protection districts are also concerned about the detrimental impacts of exempt wells on the availability of groundwater resources. For example, the Lewis and Clark Water Quality Protection District commissioned a hydrological study of groundwater depletion from the Emerald Ridge subdivision. James E. Swierc, PG, Lewis and Clark Water Quality Protection District, Emerald Ridge Area Ground Water Resource Assessment (March 2014). When planning for the subdivision began in 2003-2004, "water levels at the site were less than 100 feet below ground surface." *Id.* at p. 2. The developer assumed that the water rich

aquifer would recharge annually. *Id.* However ten years later, 28 lot owners had installed deeper replacement wells, some as deep as 700 feet, due to aquifer depletion. *Id.*

None of the appellants or amici attacking the District Court opinion address the reality of 110,000 exempt wells, of dozens of new subdivisions using the exemption, or impacts to aquifers illustrated by Emerald Ridge. While Amici Montana Association of Counties (MACo) decries a return to the 1987 Regulation that will supposedly result in "urban sprawl..." MACo Br. at 12, the opposite is true. The 1993 Rule has already created urban sprawl around Montana's major cities. Moreover, MACo's hypotheticals concerning subdivision review and family transfers ignore the on-the-ground reality of the impacts of the 1993 Rule. *Id.* at 9-11. These hypotheticals—which have no basis in the review of any actual subdivision—stand in stark contrast to the thousands of exempt wells now scattered across Montana, depleting groundwater resources without contraints. To the citizens facing groundwater shortages and infringement on their water rights due to the unfair appropriation of groundwater by large subdivision developments via exempt wells, MACo's complaints come across as out of touch. Further, MACo's claim that regulating groundwater withdrawals more carefully will result in "proliferation of noxious weeds and uncontrolled wildland fires" entirely lacks evidentiary support. MACo Br. at 12.

Amici Water Systems Council's policy arguments fare no better. It too ignores the Montana Constitution, which distinguishes Montana from the list of other states that use wide exemptions. Council Br. at 13. The Council further argues that "[A]ny legislation slowing the processing of domestic well permits would significantly impact this important industry in Montana." Council Br. at 19. Such extreme opposition to "any legislation slowing the process" bespeaks of a laissez-faire philosophy towards exploiting public resources that has no place in a state that prides itself on outstanding protection of its waters and landscape.

Under trust principles, trustees must act with institutionalized caution to preserve the corpus of the trust, lest they be found in violation of their fiduciary duty. A precautionary approach is required. The trustee here is, of course, the State. The Montana Constitution explicitly recognizes that role. *See, e.g.*, MONT. CONST. art. IX, § 3 ("All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."). Montana is not unique in this regard. Several other states have also acknowledged the role of the state in protecting public trust resources. *See, e.g.*, HAW. CONST. art. XI, § 1 ("[T]he State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources . . . ."); PA. CONST. art. I, § 27 ("The people have a

right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."). The duties of a trustee are "the highest known to the law." 76 AM. JUR. 2D Trusts § 331 (2005). As a fiduciary, the State "has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality." *Robinson Twp. of Washington Cnty. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013) (finding amendment to state oil and gas statute violated Commonwealth's duties as trustee of Pennsylvania's natural resources) (referencing RESTATEMENT (SECOND) OF TRUSTS § 174 (duty of prudence generally requires trustee to exercise ordinary skill, prudence, and caution in managing corpus of trust), § 170 (trustee has duty of loyalty to administer trust solely in beneficiary's interest and not his own), and § 232 (trustee has duty of impartiality)). This means that the State must "refrain from performing its trustee duties respecting the environment, unreasonably, including via legislative enactments or executive action." *Id.* Montana therefore has an obligation to ensure that the corpus of the trust—here, groundwater resources—is wisely used for the benefit of present and future generations of citizens.

The District Court's decision to invalidate DNRC's 1993 Rule defining the term "combined appropriation" protects Montana's groundwater resources for the public's benefit by guarding the rights of water rights holders from infringement by unregulated groundwater withdrawals on private wells for large consumptive

water users. The 1993 Rule created a massive exempt well loophole. It defined "combined appropriation" to require two or more wells or developed springs to be physically connected before needing a permit, enabling large consumptive water users, such as coal-bed methane and oil and gas developers or 100, 200, or even 500 lot subdivisions, to easily avoid the Water Use Act's permitting requirements by drilling multiple exempt wells. "Historically, the impact of [exempt] wells was negligible, but the housing boom in Montana over the last decade changed all that. Developers have seized on this exempt well loophole to cut development costs by purchasing agricultural lands and building subdivisions beyond community boundaries. They are using the exemption to supply water to entire subdivisions . . . in arid basins whose groundwater is often over-tapped. This results in lower flows in waterways and parched ranches . . . this not only impacts the availability of one of the most precious western resources—water, it also brings all the unwelcome impacts of sprawl. Blize at 8-9 (internal quotation marks and internal citations omitted).

For these reasons, DNRC's recently invalidated 1993 Rule is inconsistent with basic trust duties; trusts must be managed to preserve trust assets and to fulfill trust purposes. The corpus of the trust—here, groundwater resources—should be managed in perpetuity for the current and future beneficiaries: Montana citizens who are also water rights holders. DNRC's 1993 Rule infringed upon citizens'

water rights, which the state has a duty to protect. Moreover, the loophole allowed large consumptive water users, like subdivisions, to drill multiple exempt wells to escape monitoring and metering under the Water Use Act. This lack of oversight by the State is not in keeping with its duties as a fiduciary under the Public Trust Doctrine. Rather, it allows for overuse and abuse of the common resource. Therefore under the Public Trust Doctrine, the District Court's decision to invalidate DNRC's 1993 Rule defining the term "combined appropriation" protects Montana's groundwater resources for its citizen water rights holders. For this reason, Montana's Public Trust Doctrine supports upholding the District Court's decision.

C. DNRC's Constitutional and Public Trust Responsibilities Dictate a Precautionary Approach to Groundwater Resources in the Face of Climate Change.

Water is an essential resource for Montana's citizens. Yet, climate change poses a serious threat to state water resources. In fact, Montana has already begun to experience climate change impacts. "Average spring temperatures in the state have risen by almost four degrees Fahrenheit over the last 55 years, with winter temperatures close behind with a three degree Fahrenheit increase. Summer temperatures have also climbed just over one degree Fahrenheit." The Nature Conservancy, *Climate Change in Montana: How Can We Respond?* http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/montana/ho

wwework/climate-change-in-mt-web.pdf (citing National Agricultural Statistics Service, USDA, State Agricultural Overview – Montana (2009); United States Global Change Research Program, Global Climate Change Impacts in the United States (Cambridge University Press) (2009), *available at* http://www.globalchange.gov/publications/reports/scientific-assessments/us-impacts). Furthermore, changes in precipitation patterns have resulted in less winter snow in the Northern Rockies. *Id.* Less rainfall and decreased snowmelt, along with warmer temperatures means less water for agriculture, livestock, and other major consumptive uses.

The realities of diminishing future water resources underscore the need for a precautionary approach to groundwater management. This implicates the trustee's duty to protect the corpus of the trust for present and future uses. Water conservation is critical for Montana citizens because the availability of adequate water supplies influences all sectors of the state's economy. Additionally, Montana's lakes, reservoirs, and streams provide priceless recreational and aesthetic value. As the Montana Department of Environmental Quality has noted, "Montanans are rightfully concerned that climatic changes will affect our historic accesses to this precious resource." Montana Department of Environmental Quality, Climate Change and Water Resources: Introduction,

http://deq.mt.gov/ClimateChange/NaturalResources/Water/water.mcpx (last visited January 8, 2016).

With climate change, water scarcity could become a daily reality for Montana citizens. "Montana's climate will continue to change. The average annual temperature in [the state] is projected to increase an additional five degrees Fahrenheit over the next 30 years . . . The greatest seasonal increase will be in the summer, when average temperatures are projected to jump by more than seven degrees Fahrenheit." *Climate Change in Montana: How Can We Respond?* Further, while "[c]limate models are projecting that average annual precipitation levels will continue to trend slightly higher over the next 30 years . . . there will be a significant change in the time of year when it comes." *Id.* "On average, less rain is predicted in the summer and fall; more in the winter and spring. The continuing trend of less snow and earlier spring snowmelt could compromise the state's water resources." *Id.* Climate change will affect groundwater recharge rates. Notably, "[i]n many aquifers of the world spring recharge [will shift] towards winter, and summer recharge [will decline]." IPCC, Fourth Assessment Report: Climate Change 2007: Working Group II: Impacts, Adaptation, and Vulnerability: Groundwater 3.4.2 (2007), *available at* https://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch3s3-4-2.html. Decreased availability of water resources in summer, means decreased ability for recharge of

groundwater aquifers. Therefore, it is imperative that Montana takes a conservative approach to current water use.

Upholding the District Court's decision to invalidate the 1993 Rule for "combined appropriation" is one such conservative approach. Moreover, it is in keeping with Montana's Public Trust Doctrine duty under Article IX, Section 3(3) to protect its groundwater resources for present and future generations. DNRC's 1993 Rule requiring two or more wells or developed springs to be physically connected encouraged irresponsible and unsustainable use of state water resources by allowing large consumptive water users to appropriate groundwater without a permit by drilling multiple exempt wells. The 1993 Rule allowed such wells to avoid the requirements of the Water Use Act. This unregulated regime has promoted overconsumption of groundwater resources, while also harming current water rights holders.

Rapid population growth and increased subdivision development in Montana throughout the past two decades has strained the State's water resources, a situation exacerbated by the proliferation of exempt wells. Many lots in the new subdivision developments are served by exempt wells. For example, in Timberworks Estates in Helena Valley, the developer "chose to use exempt wells on 108 lots." Water Policy Interim Committee (WPIC) Report 2011-2012, *The Exemption: To Change or Not to Change? A Study of Water Wells Allowed*

Without a Permit 8 (Oct. 2012). This phenomenon threatens to continue if the 1993 exemption is revived. "At current rates of development, approximately 30,000 new exempt wells could be added in closed basins during the next 20 years resulting in additional 20,000 acre-feet per year of water consumed. Some of this increased consumption will be offset by reduced historic consumption for agriculture where residential development is occurring on irrigated lands. However, much of the subdivision development in closed basins is occurring on lands that were not previously irrigated. In addition, there are no guarantees that historic water rights for lands developed using exempt wells will not be sold and put to new uses." AR 14 at 1. Critically from a climate change perspective, "the use of the exemption [meant] that no analysis for legal availability [of water] or adverse effect was required." *Id.* In fact, "[o]f the more than 28,000 lots created [in the state] between July 2004 and June 2011, about two-thirds were slated to get water from exempt wells."

By contrast, the 1987 definition of the term "combined appropriation" promotes water conservation and sustainable groundwater use by keeping these wells under the purview of the Water Use Act, which requires permits for such appropriations. This prevents overconsumption, helping to secure an adequate supply of groundwater for the future. Additionally, it helps protect the water rights

of current and future water rights holders and provides greater water security in the face of the changing climate.

II. Upholding the District Court's Decision Furthers the Obligation to Protect Senior Water Rights.

Some of Amici's members hold senior water rights. As this Court has explained, groundwater withdrawals can affect surface flows; hence, the District Court invalidated a DNRC regulation that did not fully consider these impacts. *Mont. Trout Unlimited v. DNRC,* 2006 MT 72, 133 P.2d 224 (Mont. 2006). As the District Court noted, DNRC understands that senior water rights holders are concerned that "the cumulative effects of many small groundwater developments can have significant impacts in terms of reducing groundwater levels and surface water flowers over the long term, and may be creating the same types of adverse effects that the permitting system was intended to protect them against." Order at 10. Moreover, DNRC acknowledged that "[t]his concern is justified not just based on the absence of regulatory review of new development, but also because there is no effective or efficient mechanism for enforcing their senior priority dates against these junior ground water users." *Id.* Additionally, DNRC also recognized the cumulative effect of 100 exempt wells would cause the same depletion as one larger permitted well, but that in contrast to the permitted depletion, the depletions from exempt wells would be unmitigated. *See* AR 14 at 2 ("Depletions by the 100

exempt wells can [would] continue unabated during periods of water shortage, affecting surface water users . . .).

Amici Council argues that senior appropriators can simply make a call on exempt wells to protect their rights. Council Br. at 14-15. However as the District Court noted, based on Professor Albert Stone widely recognized writings on Montana water law, our 1972 Constitution and Water Use Act created a permitting system consistent with the evolution of Prior Appropriations Doctrine. Part of that new system shifted the burden to new users to show no impact to existing uses (which in Montana includes instream uses that benefit the public). Therefore, DNRC's massive loophole resulting in over 100,000 wells, free of monitoring, reporting or permitting requirements, cuts against the heart of the Constitution and the purposes underlying the Water Use Act that protect existing water rights.

CONCLUSION

The Montana Constitution and Public Trust Doctrine demand a precautionary approach to our groundwater resources. The 1993 Rule is an anathema to the principles that underlie the state's stewardship of water. The fact that DNRC did not appeal this decision underscores the need to move towards a more sustainable approach to groundwater use and subdivision development. Based on the foregoing, these eight Montana conservation and land use planning organizations urge this Court to affirm the District Court.

Dated this 13th day of January, 2016

Tuholske Law Office PC
Jack Tuholske
Attorney for Amici
Bitterrooters for Planning et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of Montana Rules of Appellate Procedure, I certify that the above document printed with a proportionately spaced Times New Roman text typeface of 14 points is double-spaced; Microsoft Word 2010; and has a word count of less than 5,000 words and does not exceed 14 pages, excluding the captions, Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

DATED this 13th day of January, 2016.

Jack Tuholske
Attorney for Amici
Bitterrooters for Planning et al.

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed with the Clerk of the Supreme Court of Montana by forwarding the original and nine copies, and duly served upon all counsel of records at the below address, via U.S. mail, first-class postage prepaid, on the 13 day of January, 2016, upon the following:

Laura King
Matthew K. Bishop
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Tel: (406) 204-4852
Tel: (406) 324-8011
Email: king@westernlaw.org
Email: bishop@westernlaw.org
Attorneys for the Clark Fork Coalition
Petitioner/Appellee

Kevin Peterson
Anne W. Yates
Special Assistant Attorney General
Montana Department of Natural
Resources and Conservation
1625 Eleventh Avenue, PO Box 201601
Helena, MT 59620-1601
Tel: (406) 444-7074
Email: KevinPeterson@mt.gov
Email: Ayates@mt.gov
Attorneys for DNRC
Respondent

Ryan K. Mattick
Moore, O'Connell & Refling, P.C.
601 Haggerty Lane, Suite 10
P.O. Box 1288
Bozeman, MT 59771
Tel: (406) 587-5511
Email: mattick@qwestoffice.net
Attorney for the Montana Well Drillers Association
Intervenor/Appellant

Stephen R. Brown
Garlington, Lohn & Robinson, PLLP
350 Ryman Street, P.O. Box 7909
Missoula, MT 59807-7909
Tel: (406) 523-2500
Email: srbrown@garlington.com
Attorney for Mountain Water Company
Intervenor

Steven Fitzpatrick
Attorney at Law
9 Third Street North
Great Falls MT 59604

Tara DePuy
Attorney at Law
P.O. Box 222
Livingston MT 59047

Abigail St. Lawrence
Bloomquist Law Firm
P. O. Box 799
Helena MT 59624

APPENDIX

TABLE 1

Ravalli County Subdivisions Preliminary Plat Approval 2005-2015		
Date	Number of Subdivisions	Number of Lots
2005	36	297
2006	41	1,686
2007	27	169
2008	6	17
2009	7	52
2010	4	21
2011	2	5
2012	6	18
2013	4	15
2014	7	36
2015	5	11
Total	***145***	***2,327***

N.B. Only three of the 145 total subdivisions proposed full or partial community water systems: (1) Legacy Ranch (509 lots, some proposed to be served by a community water system and some proposed to be served by individual wells); (2) Grantsdale Addition (181 lots, all proposed to be served by community water system); and (3) Flatiron (combination of community water and individual wells). Notably, all three of these subdivisions were proposed in 2006.

Source: Ravalli County Planning Department