AMICUS CURIAE BRIEF OF THE MONTANA LEAGUE OF CITES AND TOWNS, SUPPORTING APPELLEES

The Montana League of Cities and Towns ("MLCT"), by leave of Court granted on motion, respectfully submits this brief amicus curiae in support of Appellees.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

MLCT adopts the Statement of the Case submitted by Appellee Clark Fork Coalition. The following facts illustrate the importance of the issue presented in this case to Montana municipalities.

Montana municipalities are water users, water providers, and water regulators. Many of the earliest diversion rights in Montana belong to cities and towns. For example, the City of Bozeman has filed claims in the Water Court adjudication for rights in Lyman Creek with a priority date of September 1, 1864, Sourdough Creek with a priority date of September 30, 1866, and Hyalite Creek with a priority date of July 3, 1866. The rule at issue in this case, by encouraging residential development without requiring a water permit, jeopardizes Montana cities' and towns' continued ability to exercise their historic water rights in the order of priority to which they are constitutionally entitled.

Exempt wells for domestic use have proliferated since 1991, when, coincidentally, the Legislature reduced the flow threshold for exempt wells. *See* C.A. Sime, *Public Water, Private Rights: All Are Not Equally Protected When The*

State Allows Some To Divert Small Quantities Of Ground Water Outside The Permitting System, 75 Mont. L. Rev. 237, 246-47 (2014) (hereafter "Public Water") (Nearly 19-fold increase in number of exempt wells in western Montana between 2004 and 2010; between 2004 and 2011, of 28,000 residential subdivision lots created, 18,700, or 67%, are served by exempt wells; DNRC expects an additional 53,000 exempt domestic wells by 2030 under current legal rules).

Montana municipalities are the primary providers of drinking water for Montana citizens. Of the ten largest communities in Montana, only Missoula does not supply domestic uses from a city-owned water utility.[1] The vast majority of Montana businesses large and small receive water for business and industrial uses from municipal water systems.

Montana municipalities are among the major point-source dischargers into Montana rivers and streams. The Department of Environmental Quality ("DEQ") administers a discharge regulation program, covering municipalities as well as private entities that limit the Total Maximum Daily Loads ("TMDLs") of various harmful substances that may be found in Montana surface waters before a discharger must implement limitation strategies that often include expensive treatment options. The DEQ program distinguishes between point sources, such as municipal treatment plans, and non-point sources, such as the thousands of

[1] As the Court is aware, the Montana Fourth Judicial District Court has ruled that the public interest would be served by Missoula acquiring Mountain Water Co. through eminent domain.

individual septic systems that accompany exempt wells, that may contribute to the release of harmful substances to surface water that cannot be traced to a single identifiable source. *See* § 75-1-103(29), MCA, (defining "point source" to mean "a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.") DEQ has no effective program for regulating non-point sources that contribute to the TMDL of a substance in a particular surface water. *See* § 75-5-703(6), MCA (incorporating TMDL enforcement into discharge permitting for point sources); *id*. at (8) (Providing voluntary program for reduction of non-point source discharges for substances subject to a TMDL). When a non-point source contributes to exceeding a TMDL, commonly point sources are required to further reduce their discharges to make up for the non-point source discharge.

ARGUMENT

I. The Present Rule Unfairly Burdens Montana's Cities And Towns.

A. Unpermitted Exempt Wells Threaten The Interests Of Municipalities As Senior Water Users.

It seems to be common ground among the parties and amici in this case that in 1973, when the Legislature adopted the exempt well statute, found at § 85-2-306 (3)(a)(iii), MCA, its intention was to streamline the process for acquiring a groundwater right for uses that were then considered de minimis. *See* Montana

DNRC Declaratory Ruling on Exempt Wells (August 2012) at 11 (hereafter "Declaratory Ruling"). It also seems clear that nearly fifteen years later, when the Legislature amended the statute to require permitting when two wells were a "combined appropriation" that individually did not appropriate 100 gallons per minute, but collectively exceeded that limit, it acted in recognition that allowing such "combined appropriations," without requiring the completion of the full permitting process, created a loophole that was threatening the ability of senior water right holders to protect their rights against unpermitted uses that collectively were not de minimis at all. *Id.* at 12. When the 1991 Legislature further restricted the exempt well rule by eliminating from the exempt well exception any well that produced more than 35 GPM or more than a total of ten acre-feet per year, it was further tightening the exempt well permitting exception, at least in part to protect senior users. *Id.* at 16.

A comparison of the statutory procedures for acquiring a permit for a non-exempt groundwater well, perfecting a water right in an exempt well, and the process a senior user must follow to call an exempt well user, shows why protection from exempt well users is so important for senior users. An applicant for a new permit has the burden of proof with respect to the factors that govern the permitting process. Under § 85-2-311(1)(a-h), MCA, the applicant for a new permit must show that water is both legally and physically available, senior rights,

including water reservations awarded to municipalities, will not suffer adverse effects, the appropriation works are adequate, the proposed use is beneficial, the applicant has the right to use the surface estate on which the water is to be put to use, the water quality of senior rights will not be adversely affected, the use will substantially comply with water classification, and the proposed use will not adversely affect the ability of a senior right holder to meet effluent limits. Not only does the applicant bear the burden of proof, but senior right holders must be given notice of the application and an opportunity to object. If a senior user makes a sufficient objection, DNRC must hold a contested case hearing before issuing the permit, and either the applicant or an objector may seek judicial review of DNRC's decision under the Montana Administrative Procedures Act (hereafter "MAPA"). Sections 85-2-310, 2-4-702, MCA.

As explained in the briefs of other parties, the process for securing a water right for an exempt well is a comparative breeze. No prior review by DNRC or any other agency occurs. A person simply drills a well, provides DNRC with a well log showing the well's production does not exceed the statutory limits, and DNRC, with no exercise of discretion, must issue a certificate of water right. *See* § 85-2-306, MCA. No notice to senior water users is required, and even if it were, senior water users have no right to object, no right to a hearing, and no right to judicial review under MAPA.

A senior water user may, at least in theory, place a call on a junior exempt well user. However, possibly insurmountable practical problems may prevent the senior from successfully enforcing the call. One makes a call on junior users in the same water source by actually contacting all junior users on the source and notifying them that the calling party (1) is senior in priority, (2) is not receiving all water to which the senior is entitled, and (3) demands that all juniors cease, in order of priority, uses until the senior user receives the water to which the senior is entitled. *See* H. Thigpen, Staff Attorney to Montana Legislative Water Quality Interim Committee, Memorandum on "Ground Water, exempt wells, and enforcing water rights through call," at 2 (August 30, 2011), *viewed at* http://leg.mt.gov/content/Committees/Interim/2011-2012/Water-Policy/Staff-Reports/ground-water-calls.pdf (hereafter "Thigpen memo").[2] If the junior users fail to comply with the call, the senior may apply for relief to the district court, which, if it finds for the senior, may assign a water commissioner to enforce the senior's right, or enter an injunction, or both.

Significant roadblocks may serve to prevent the senior from enforcing a call against a domestic exempt well. First, the futile call doctrine may prevent the senior from enforcement. A call may be deemed futile and denied enforcement if

[2] During the early years of the litigation before the Court in this case, DNRC and Appellees agreed to dismiss the case without prejudice so that DNRC could pursue rulemaking. The rulemaking was delayed while the Legislature's Water Policy Interim Committee could study the exempt well issue. The Thigpen memo was prepared as a part of those WPIC studies.

the junior users can show that the call, even if enforced, would not cause water to reach the senior user. Thigpen memo at 2-4, *citing, inter alia*, *Irion v. Hyde*, 105 P.2d 666, 674 (Mont. 1940). Second, it is practically impossible to identify which wells in a residential subdivision are likely to produce useful water for the senior, and a court would likely be ill-inclined to order a blanket shutdown of all domestic wells in a subdivision, leaving dozens or even hundreds of families without a potable water source. Third, a call will only be enforced when the senior is actually not receiving all the water to which it is entitled, making timing of the call significant, and creating problems if the senior's water shortage is intermittent. Thigpen memo at 5-7; *see also* Public Water at 248 and n. 95.

The connection between ground water sources drawn on by exempt wells and surface water sources is now firmly established in Montana law. *Montana Trout Unlimited v Montana DNRC,* 2006 MT 72, ¶¶41-43, 331 Mont. 483, 495-96, 133 P.3d 224, 232. Montana municipalities have senior rights for their municipal water systems in both ground and surface water. A proliferation of unpermitted exempt wells can adversely affect both kinds of municipal rights, either by drawing down aquifers in which municipal ground water rights exist or by reducing groundwater migration to surface waters in which municipalities hold rights.

The permitting process, if applied, would alleviate a lot of these problems by requiring the appropriator to prove that the new groundwater appropriation would

not cause adverse effects on senior rights. *See* § 85-2-311, MCA. Appropriately, the burden to establish lack of adverse effect in the permitting process falls on the applicant. If a well is allowed into production without a permit, the burden to show adverse effect shifts to the senior water right holders, and as noted above, may well be practically unattainable. Exempt wells are the only significant examples of large scale un-reviewed water development in Montana. For exempt wells, the appropriator shoulders no demonstrative burden at all before the well is put into production. Instead, the senior user, who was there before, sometimes long before, the exempt well user came on the scene, and has likely established property and business reliance interests, sometimes for generations, must shoulder the burden of showing that the exempt well causes adverse effect, and the court must take the additional step of enjoining the junior, who may suffer substantially if the well is shut down. All of this may have been appropriate if the 1973 Legislature was correct in its assumption that exempt wells were and would remain practically de minimis. That assumption, however, does not hold in Montana today. DNRC's conclusion that the existing rule accurately reflects legislative intent and is necessary to effectuate the exempt well statute is simply incorrect.

B. Exempt Wells And Individual Septic Systems Go Together. Since Exempt Wells Require No Permit, When Such Wells Proliferate The Water Treatment Burdens On Municipalities Become More Difficult And More Expensive To Bear.

The Montana Department of Environmental Quality ("DEQ") regulates discharges of harmful substances into Montana surface waters. Some discharges are attributed to both municipal water treatment plants and individual septic systems. For example, DEQ has determined that with regard to Nitrogen, municipal and individual septic discharges in the Prickly Pear Creek drainage are virtually identical, with 21% of manmade discharges coming from municipal systems and 20% coming from individual septic systems. *See* Montana DEQ, *Framework Water Quality Restoration Plan and Total Maximum Daily Loads (TMDLs) For Lake Helena Watershed Planning Area,* Volume II Final Report Appendix A at A-83, Table 8-6 (Aug. 31, 2006), *viewed at* http://deq.mt.gov/wqinfo/tmdl/finalreports.mcpx. However, because of the different ways in which point sources, such as municipal water treatment plants, and non-point sources, such as individual septic systems, are treated by the TMDL regulatory program, the restoration plan for Nitrogen in Prickly Pear Creek will require the Helena and East Helena treatment plants to phase in reductions in Nitrogen of 92% and 98%, respectively, while the total load from individual septic systems will be reduced by only 0.5%. *Id.* at A-86, Table 8-8.

One result of this disparity is that as the number of individual septic systems continues to increase, more of the burden of attaining TMDL values for Nitrogen in Prickly Pear Creek will fall on the municipal or other public water treatment

systems. Consider the Prickly Pear Creek drainage once again. The current Nitrogen load is 186.1 tons, and the goal is to reduce that load by 80%. Although individual septic is meant to contribute only a 0.5% reduction in its current contribution to the 186.1 ton load, if substantially more individual septic systems are built with the increasing number of exempt wells being drilled, it will be impossible to achieve even that 0.5% reduction, and municipalities and other point sources will have to make up the difference if the 80% reduction is to be achieved, or risk DEQ denial of renewal of their discharge permits. *Id.*

One effective way of reducing non-point discharges is by converting subdivisions on individual septic to municipal or community water supply and wastewater treatment. However, connecting residential households on individual septic systems and exempt wells comes at a significant cost. Among other costs, new sewer and water mains must be constructed and extended to the neighborhood. Because of their magnitude, these costs cannot be recouped on a dollar for dollar basis against the residents of the subdivision. The result is that either city taxpayers pay a substantial portion of the costs to fix a problem the City did not create, or funds must be raised through some combination of user fee increases, local government tax dollars, and funds from a dwindling pool of federal grant funds.

If the exempt wells that went with the individual septic systems had been required to meet the permitting requirements of § 85-2-311, MCA, the applicants would have been required to prove by a preponderance of evidence that the well would not adversely affect "the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4." *Id.,* at (1)(h). The Legislature found in 1991 that "government policies and programs should focus on preventing ground water contamination and supply depletion […]." Section 85-2-902(1)(e), MCA. This was the same legislative session in which it reduced the threshold for exempting groundwater wells from permitting. DNRC did not consider this policy when it adopted the 1993 definition of "combined appropriation," nor did it consider the policy in reaching its Declaratory Ruling.

The shift in responsibility for meeting TMDL violations caused by individual septic systems is not inevitable. It flows directly from DNRC's choice to adopt a definition of "combined appropriation" that encourages developers to provide subdivision water from individual exempt wells and subdivision sanitation from individual septic systems.

II. The DNRC Declaratory Ruling Is Internally Inconsistent And Incorrect.

The issue that the Appellees presented in the Petition for Declaratory Ruling is whether the 1993 definition of "combined appropriation" is consistent with

legislative intent and reasonably necessary to effectuate the purpose of the statute. *See* § 2-4-305(6), MCA. The Declaratory Ruling assumed, on the basis of no statutory language, that the primary objective of the exemption found in §85-2-306, MCA, from permitting for wells producing less than 100, and now 35, gallons per minute was to provide a streamlined process for putting into place small water uses ***for irrigated agriculture***. Needless to say, no such limitation or emphasis appears in the text of the statute. The statute is in no sense ambiguous or unclear with respect to the question of what uses are covered. It refers to groundwater without limitation as to the purpose of the appropriation.

The Declaratory Ruling refers to the legislative history of the 1987 amendments to the statute. The Declaratory Ruling concedes that the history is sparse, but concludes from the fact that the only testimony referred to irrigation that the Legislature was primarily concerned with irrigation when it reduced the limitation from 100 gallons per minute to 35 gallons per minute and 10 acre-feet per year. This approach is erroneous for two reasons. First, since the statute is not ambiguous, resorting to legislative history as an aid to interpretation is unlawful. *Sheridan Electric Co-op v. Montana-Dakota Utilities*, 2014 MT 332, ¶ 27, 377 Mont. 296, 340 P.3d 529, 533. Second, even if the limited legislative history can be relied on to suggest that some legislators were focused on irrigation, the result sought by the Declaratory Ruling can only be reached by inserting an irrigation

limitation into the statute, which is forbidden. *See* § 1-2-101, MCA. ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.")

There is simply no evidence that the 1991 Montana Legislature, when it reduced the limits in the exempt well statute, thought that it had solved the exempt well problem with respect to irrigation and was prompting DNRC to change its administrative definition of "combined appropriation" to make it easy for developers to provide domestic water to subdivisions without getting a permit. Remember, the whole premise of the exempt well, as the Declaratory Ruling acknowledges, was to provide a streamlined process for the acquisition of groundwater rights in de minimis amounts not likely to adversely affect senior rights. By suddenly changing the definition to treat wells as "combined" only if physically connected, DNRC gave a strong incentive to developers to engage in a practice of designing subdivisions in which lot owners would drill individual exempt wells, so the acquisition of domestic water for all of the parcels is virtually guaranteed to adversely affect senior users, such as municipalities.

The Declaratory Ruling is also internally inconsistent. DNRC first finds that the existing rule requiring wells to be physically connected to be considered a "combined appropriation" is consistent with statutory law and reasonably

necessary to effectuate the statute. Virtually in its next breath, DNRC states that despite its validity, the present rule needs to be replaced with a regulation that deletes the requirement that wells be physically connected to be considered "combined." With all due respect to DNRC, both premises cannot be true. A physical connection requirement cannot be both reasonably necessary to effectuate the statute and inadequate for current conditions.

The MAPA subjects agency declaratory rulings to the same judicial review provided for contested cases in Title 2, Chapter 4, Part 7of Montana Code Annotated. Under § 2-4-704(2), MCA, a court may overturn an agency action that is based on an error of law. In this case, for the reasons demonstrated above, the District Court properly overturned DNRC's Order.

III. The Department Did Not Respect The Rights Of The Public To Participate In The Adoption Of The Current Exempt Well Rule.

The Department of Natural Resources and Conservation conducted two rulemaking proceedings on the subject of exempt wells within a six-year period from 1987 to 2003. In 1987, the Department adopted a version of Admin. R. Mont. 36.12.101(13) that denied the benefit of the exempt well permitting exception when more than one well was drilled into an aquifer as part of the same development and the wells cumulatively produced more than 100 gpm, regardless of whether the wells are connected to one another. Six years later, the Department reversed field 180 degrees, adopting a new version of the definition of "combined

appropriation" that in effect required permitting only if the wells were physically connected to each other. In neither rulemaking did the Department hold an in-person rulemaking hearing. *See* Mont. Admin. Register, September 11, 1987 at 1560.[3]

This Court has recognized the connection between the rulemaking procedures set forth in the MAPA and the constitutional right of the public to participate in governmental decisions as provided by law. *State v. Vainio,* 2001 MT 220, ¶ 26, 306 Mont. 439, 35 P.3d 948 (MAPA implements the constitutional right of the public to participate with respect to rulemaking). Ironically, Appellants Montana Association of Realtors and Montana Building Industry Association argue in their combined brief that it was the District Court and not the Department that denied the public's constitutional right to participate. They reason that the District Court's Order overturning the 1993 rule directed the Department to re-adopt the 1987 rule, making a new rulemaking futile and denying the public the right to comment. The argument is ironic on several levels. First, the Department adopted both the 1987 and 1993 rules without a hearing. Second, the Department at least partially atoned for these errors by providing more opportunity than MAPA requires for public participation in the Declaratory Ruling Petition.

[3] The current version of MAPA requires an agency to hold a rulemaking hearing whenever the matter is of significant interest to the public. *See* § 2-4-302(4), MCA (2015). This requirement was added in 1997, and therefore was not binding on DNRC at the time the rule changes at issue here occurred. 1997 Mont. Laws, Ch. 489. Prior to 1997, the decision to hold a hearing was vested in the agency's discretion. Given the strong public interest in this issue, and the absence of any explanation in the administrative record of any explanation for the failure to hold a hearing, DNRC abused its discretion in adopting the rule without a hearing.

Declaratory Ruling at 1-2 (finding matter of significant interest to the public, ordering notice by publication on the DNRC website and ads in daily newspapers in addition to mailed notice to persons listed on DNRC's interested parties and rulemaking list).

The Realtors' and Builders' arguments should be rejected. First, they mischaracterize the district court's order. The court below did not direct DNRC to adopt the 1987 rule permanently. Rather, it reinstated the 1987 order on an interim basis and directed DNRC to conduct further rulemaking to adopt a new Combined Well definition by rule, so long as DNRC did not re-adopt the illegal 1993 rule. Order on Judicial Review at 13 (Mont. First Jud. Dist., Oct. 17, 2014) (recognizing desirability of rulemaking taking into account DNRC's expertise, and directing DNRC to initiate rulemaking consistent with the court's order). It was fully within the court's power to invalidate the rule, and can scarcely have been unlawful for the court to order DNRC to respect its ruling by not re-adopting the rule the court had just invalidated. *See* § 2-4-305(6), MCA, (rule not valid if inconsistent with legislative intent). DNRC then published notice of its intent to adopt a new rule that differed from the 1987 rule. Mont. Admin. Register, Notices 36-22-175, 36-22-176 (8/22/2013, 1/30/2014). Although DNRC has withdrawn these notices because of opposition from the Legislative Environmental Quality Council, the fact remains that DNRC intended to conduct a full-blown rulemaking, and published

notice of its intent to receive public comment and hold a public hearing. The same unfortunately cannot be said of the rulemaking that adopted the rule under challenge in this case. *See* Admin. R. Mont. 36.2.701(1) (DNRC rule providing: "Participation of the public is to be provided for, encouraged, and assisted to the fullest extent practicable consistent with other requirements of state law and the rights and requirements of individual privacy. The major objectives of such participation include responsiveness of governmental actions to public concerns and priorities, and improved public understanding of official programs and actions.")

CONCLUSION

The Court should affirm the District Court's judgment.

REPECTFULLY SUBMITTED this 15th day of January, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont. R.App.P., I certify that the *Amicus Curiae* Brief of the Montana League of Cities and Towns Supporting Appellees is double spaced, is a proportionately spaced 14-point Times New Roman typeface, and contains less than 5,000 words.

_____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the following on the _____ day of January, 2016, by U.S. Mail, first-class mail, postage prepaid:

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