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A Question of Intent: The Montana Constitution, Environmental Rights, and the MEIC Decision

Cameron Carter

Kyle Karmen

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Cameron Carter* and Kyle Karinen**

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

Preamble to the Montana Constitution

Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.

MEIC v. DEQ

I. Introduction

Montana's constitution, adopted in 1972, grants the citizens of Montana certain environmental rights. Court decisions prior to 1999 referenced the environmental provisions in various contexts, but no opinion had interpreted and applied the provisions.[1] What the environmental rights provisions in the constitution actually meant beyond lofty statements of conservation philosophy remained an open question until 1999

In October of 1999, the Montana Supreme Court decided *Montana Environmental Information Center v. Department of Environmental Quality* [2] The decision addressed whether a statutory exemption from degradation review for water well or monitoring well tests[3] violated the right to a clean and healthful environment expressed in Article II, Section 3, and protected in Article IX, Section 1, subsections (1) and (3) of the Montana Constitution. Justice Trieweiler, writing for the court,[4] addressed three issues: 1)

* J.D. expected 2002 University of Montana School of Law, Missoula, Mont.

** J.D. expected 2002 University of Montana School of Law, Missoula, Mont.

1. *See* Mont. Const. art. II, § 3, art. IX, § 1. State District Court Judge Honzel, referring to the right to a clean and healthful environment contained in Article II, section 1 of the Montana Constitution, stated: "The constitutional provisions at issue here are not merely advisory. They mean something." National Wildlife Fed'n v. Montana Dep't of State Lands, No. CDV-92-486 (D. Mont. May 28, 1993). Unfortunately, Judge Honzel never elaborated on this statement.

2. Montana Envtl. Info. Ctr. v. Department of Envtl. Quality, 988 P.2d 1236 (Mont. 1999) [hereinafter *MEIC*].

3. The exemption passed by the 1995 state legislature and codified in section 75-5-317(2)(j) of the Montana Code Annotated exempted discharges from water well or monitoring well tests from degradation review, pursuant to Montana's water nondegradation policies– specifically, Mont. Code Ann. § 75-5-303(3) (1995).

4. Justices Leaphart and Gray filed special concurrences.

did the environmental groups suing have standing to challenge the exemption;[5] 2) what level of scrutiny applies to each of the constitutional provisions;[6] and 3) what threshold showing of harm implicates the rights contained in Article II, Section 3 and Article IX, Section 1.[7]

MEIC is the first decision by the Montana Supreme Court to delineate the nature and scope of the environmental provisions contained in Montana's Constitution. Significantly, it sets out: 1) the legal standards for standing to challenge alleged violations of constitutional environmental provisions; and 2) the level of judicial scrutiny applied to alleged violations of those environmental provisions. More interesting, however, is the court's holding that Article II, Section 3 and Article IX, Section 1 are interrelated and interdependent provisions, to be scrutinized consistently

Section II of this note examines the factual and procedural background of *MEIC* Section III discusses the court's reasoning and holding on the three issues presented for review Section IV highlights the controversial aspects of the decision. Section V explains the disposition of the case and the subsequent proceedings. Section VI assesses the decision's impact, concluding the court's decision on standing is a victory for groups or individuals seeking to bring challenges based on the environmental provisions of the Montana Constitution even if the abbreviated reasoning and analysis make it difficult to draw any broad conclusions as to the decision's legacy

II. BACKGROUND

A. *Factual Background*

In 1992, a company known as Seven-Up Pete Joint Venture (SPJV) applied for a mineral exploration license pursuant to its plan to construct the McDonald Gold Mine Project, a large open pit gold mine in the upper Blackfoot River valley near the confluence of the Landers Fork and Blackfoot Rivers.[8] The Montana Department of Environmental Quality (the "Agency") granted the permit.[9] Construction of the mine required groundwater levels at the site to be lowered by a system of wells and pumps, to provide water for mining operations and prevent flooding of the mine works.[10] On June 2, 1995, SPJV submitted a revision of its work plan to the Agency, seeking approval for extended pumping of groundwater from

5. *MEIC*, 988 P.2d at 1242.

6. *Id.* at 1244.

7. *Id.*

8. *Id.* at 1237-38.

9. *Id.* at 1238.

10. *Id.* at 1239.

the bedrock aquifer underlying the mine site.[11] SPJV drilled three test wells to provide information regarding the chemistry and volume of water in the groundwater systems.[12] The revised work plan submitted by SPJV called for the groundwater pumped from the deep bedrock aquifer to be discharged into two infiltration galleries,[13] one located in the Blackfoot River alluvium, and the other in the Landers Fork River alluvium.[14]

The Agency initially approved SPJV's application for amendment of its exploration license.[15] The Agency rescinded its approval when it realized the water to be pumped from the bedrock and discharged into the Blackfoot and Landers Fork alluvia contained constituents, particularly arsenic, at greater concentrations than existed in the receiving water.[16] After the rescission, the Agency agreed to SPJV's proposal that areas of the Landers Fork and Blackfoot alluvia serve as "mixing zones"[17] in order to bring the test well discharges into compliance with existing water quality standards.[18]

The waters of both rivers are classified as "high quality" waters pursuant to the statutory requirements of section 75-5-301 of the Montana Code Annotated ("MCA"). Under the same chapter, section 75-5-303 (the "Nondegradation Policy") prohibits degradation of high quality waters unless the proposed degrading activity is reviewed by the Agency, and the party seeking approval for degrading activity demonstrates by a preponderance of the evidence that:

> a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; and
> b) the proposed project will result in important economic or social development and that the benefit of the development

11. *Id.*

12. *Id.*

13. Infiltration galleries are basically long trenches. Br. of Resp. Agency at 3, *MEIC*, 988 P.2d 1236 (Mont. 1999) (No. 97-455), *available at* http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1220.

14. *MEIC*, 988 P.2d at 1238. The term "alluvium" refers to the porous gravel of the river valley floor. *See* Mont. Code. Ann. § 84-2-203 (1997).

15. *MEIC*, 988 P.2d at 1238.

16. *Id.*

17. A "mixing zone" is defined as an area established in a permit or final decision on nondegradation issued by the department where water quality standards may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board. MONT. CODE ANN. § 75-5-103(18) (1997).

18. The Montana water quality standard for protection of health from arsenic is .018 mg/l. *See* Montana Water Quality Act, MONT. CODE ANN. § 75-5-301 (1997).

> exceeds the costs to society of allowing degradation of high-quality waters; and
> c) existing and anticipated use of state waters will be fully protected; and
> d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity [19]

The Nondegradation Policy further exempts from review certain activities listed in section 75-5-317, MCA (1995).[20] In particular, the 1995 legislature added section 75-5-317(2)(j) (hereinafter Degradation Review Waiver), an exemption for "discharges of water from water well or monitoring well tests, conducted in accordance with department-approved water quality protection practices."[21]

Officials at the Agency determined the mixing zone in the Blackfoot alluvial aquifer could extend 5,000 feet downhill from the Blackfoot infiltration gallery, and the Landers Fork mixing zone could extend 4,000 feet from its infiltration gallery [22] The Agency estimated that arsenic would dilute to meet water quality standards when the discharged water traveled 2,000 feet from the Blackfoot infiltration gallery, and 1,500 feet from the Landers Fork infiltration gallery [23] The existing arsenic level in the groundwater of the Blackfoot and Landers Fork alluvia near the test well discharge is no more than .003 milligrams per liter (mg/l).[24] After the Agency authorized the test well discharges, pumping began on July 25, 1995, and continued until November 8, 1995.[25] By October 11, 1995, monitoring data was available regarding the discharged water and its effect on the surface water of the two rivers.[26] In the 1995 tests, levels of arsenic at the wellheads ranged from .016 to .056 mg/l.[27] Due to chemical changes caused by exposure to the atmosphere, the levels of arsenic in the water as it entered the infiltration galleries fell between .015 to .020 mg/l.[28] The high-

19. MONT. CODE ANN. § 75-5-303(3) (1999).

20. MONT. CODE ANN. § 75-5-303(2) (1999).

21. MONT. CODE ANN. § 75-5-317(2)(j) (1997). Amendments in 1990 specified that the subsection exempted "discharges of water to *ground water* " MONT. CODE ANN. § 75-5-317(2)(j) (1999) (emphasis added).

22. *See MEIC*, 988 P.2d at 1238.

23. *Id.*

24. *Id.*

25. Br. of Appellant Groups at 5, *MEIC*, 988 P.2d 1236 (1999)(No. 97-455), *available at* http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1220.

26. *MEIC*, 988 P.2d at 1239.

27. *Id.*

28. *Id.*

est concentration of arsenic leaving either infiltration gallery was .009 mg/l.[29] The Agency then authorized pump tests for the summers of 1996 and 1997.[30]

B. *Procedural Background*

On October 6, 1995, three environmental interest groups (the "Groups"), the Montana Environmental Information Center, the Clark Fork Pend-Oreille Coalition, and Women's Voices for the Earth filed suit against the Agency.[31] The Groups alleged damage from the discharge of polluted water into the Blackfoot and Landers Fork Rivers.[32] On motion for summary judgment, they sought a writ of mandamus compelling the Agency to comply with the Nondegradation Policy. In particular, the Groups sought a ruling that if the Agency relied on an exemption in the Degradation Review Waiver to excuse their lack of conformity with the Nondegradation Policy, the Degradation Review Waiver was void because it violated Article IX, Section 1, subsections 1 and 3 of the Montana Constitution.[33] Article IX, Section 1(1) provides, "The state and each person shall maintain and improve a clean and healthful environment for present and future generations." Article IX, Section 1(3) provides, "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." In support of their motion for summary judgment, the Groups introduced expert testimony to establish that the United States Environmental Protection Agency had not only classified arsenic as a carcinogen known to cause skin cancer in humans, but had also found an association between internal cancer and arsenic intake in humans.[34] The Groups' expert also concluded the Agency had not adequately considered the public health risks associated with the discharge of arsenic into the rivers.[35] Given the carcinogenic nature of arsenic, the well test discharges were not "insignificant" as contemplated under the Degradation Review Waiver.[36]

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29. *Id.* at 1240.

30. The 1997 well test discharges were not part of the litigation reviewed by the court. Appellants' Rep. Br. at 3, *MEIC*, 988 P.2d 1236 (1999)(No. 97-455), *available at* http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1220.

31. *MEIC*, 988 P.2d at 1239. SPJV was granted leave to intervene shortly after the Groups filed suit against the Agency.

32. *Id.*

33. *Id.* at 1237.

34. *Id.* at 1239.

35. *Id.*

36. *Id.*

The Groups further argued the Degradation Review Waiver violated the fundamental environmental rights contained in Article II, Section 3, and Article IX, Section 1, and so required the court to strictly scrutinize the Degradation Review Waiver.[37] Article II, Section 3 of the Montana Constitution enumerates the inalienable rights of Montana citizens. It provides in pertinent part, "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment "[38] In order to justify abridgement of the Groups' fundamental constitutional rights, strict scrutiny would require the government to demonstrate: 1) a compelling state interest for the dangerous exemption in the Degradation Review Waiver; 2) that the Degradation Review Waiver was closely tailored to accomplish only that interest; and 3) the Degradation Review Waiver provided the least onerous path available to accomplish the government's goal.[39]

The Agency also sought summary judgment. It highlighted testimony showing arsenic levels were diluted to the level existing in the groundwater a short distance from the point of discharge.[40] The Agency argued this fact established that the discharges were non-significant and exempt from the review requirements in subsection 3 of the Nondegradation Policy.[41] Therefore, the Groups were not able to demonstrate a violation of their constitutional rights, and strict scrutiny of the Degradation Review Waiver was not required.[42] Additionally, because the Groups were not able to demonstrate injury in fact, they lacked standing to challenge the Degradation Review Waiver.[43]

The district court ruled that Article II, Section 3 provides a fundamental right to a clean and healthy environment.[44] Judge Sherlock interpreted the Groups' challenge of the Degradation Review Waiver as an "as-applied" challenge because the Groups did not argue the exemption statute was unconstitutional in every possible application.[45] Furthermore, the Groups had to prove an actual injury before strict scrutiny of the exemption statute could be applied.[46] The court ruled the Groups had not proven an actual injury had occurred because: 1) the Groups had not demonstrated

37. *Id.* at 1240.

38. MONT. CONST. art. II, § 3.

39. *MEIC*, 988 P.2d at 1240.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1241.

45. *Id.*

46. *Id.*

the discharges from the mixing zones (as opposed to discharges at the well heads) violated water quality standards; 2) there was no showing of a significant change to the water quality on the surface of either river; and 3) there was no demonstration that the waters of either river were so affected so as to threaten public health or violate water quality standards to the extent there was a significant impact on either river.[47] Following these rulings, the district court granted summary judgment for the Agency.[48]

III. Issues and Holding

On appeal, the Groups argued the exemption contained in the Degradation Review Waiver was an unconstitutional exclusion from the nondegradation review process required by the Nondegradation Policy because degradation was inevitable in certain instances.[49] They also argued the constitutional environmental protections were intended to be prophylactic, and therefore the district court erred in refusing to apply strict scrutiny without a showing of risk to human or environmental health.[50] The Groups contended an existing Agency administrative rule classified as significant any discharges with carcinogenic concentrations greater than the carcinogenic concentrations contained in the receiving water.[51] Because of the rule, the only demonstration of harm necessary was that the levels of arsenic, a known carcinogen, at the point of discharge from the well heads were greater than those in the receiving water.[52]

In response, the Agency argued the Groups had not demonstrated even a threatened injury since arsenic levels diluted to the levels contained in the

47. *Id.*

48. *Id.*

49. *Id.* This is particularly relevant given the massive amount of discharge present in this case and the likely cumulative effects of arsenic contained in the discharge. Appellants' Br. at 6-8, *MEIC*, 988 P.2d 1236 (1999) (No. 97-455), *available at* http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-1220.

50. *Id.*

51. Mont. Admin. R. 17.30.715 (1999), entitled "Criteria for Determining Nonsignificant Changes in Water Quality," provides in pertinent part:

> (1) The following criteria will be used to determine whether certain activities or classes of activities will result in non-significant changes in existing water quality due to their low potential to affect human health or the environment. These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant. Except as provided in (2) of this rule, changes in existing surface or ground water quality resulting for the activities that meet all the criteria listed below are non-significant, and are not required to undergo review under § 75-5-303 MCA:
>
> (b) discharges containing carcinogenic parameters less than or equal to the concentrations of those parameters in the receiving water.

52. *MEIC*, 988 P.2d at 1241.

receiving water a mere fifty feet from the mixing zones and, hence, the Groups lacked standing to challenge the Degradation Review Waiver.[53] Moreover, the constitutional provisions in question were intended to prohibit only discharges that render the receiving water unclean or unhealthy, not discharges that merely carry unhealthy or unclean materials.[54]

From these arguments, the Montana Supreme Court found two primary issues to review– 1) whether the Groups had standing to challenge the constitutionality of the Degradation Review Waiver; and if so, 2) whether the statute implicated either the inalienable right to a clean and healthful environment contained in Article II, Section 3, or the environmental protections of Article IX, Section 1 of the Montana Constitution.[55] By necessity, the court also decided a third issue — the threshold showing of harm needed to implicate the constitutional environmental provisions at issue. This decision on the threshold showing of harm was necessary to determine if the statute implicated Article II, Section 3, or Article IX, Section 1.

A. *Standing Analysis*

To determine the applicable standing requirements in this case, the Montana Supreme Court looked to the two-prong test previously employed in *Gryczan v Montana.*[56] Under *Gryczan*, standing is established when: 1) the complaining party clearly alleges past, present, or threatened injury to a property or civil right; and 2) the alleged injury can be distinguished from the injury to the public generally, although not necessarily exclusively to the complaining party [57]

In *Gryczan*, six homosexuals challenged the constitutionality of section 45-5-505, MCA, which criminalized consensual sex between adults of the same gender. Plaintiffs alleged the statute violated the privacy provision in Article II, Section 10 of the Montana Constitution when applied to consensual, private, same gender sexual conduct between adults. The State argued plaintiffs did not have standing because they could not show an "injury in fact," and no such injury existed absent even a threat of prosecution under the contested statute.[58] The Montana Supreme Court rejected this argument as inconsistent with prior decisions of both the Montana and United States Supreme Courts. The Montana Supreme Court cited *Babbitt v United Farm Workers*, which acknowledged that "the existence of a

53. *Id.* at 1242.

54. *Id.*

55. *Id.*

56. Gryczan v. Montana, 942 P.2d 112 (Mont. 1997).

57. *MEIC*, 988 P.2d at 1242.

58. *Gryczan*, 942 P.2d at 117.

criminal law aimed specifically at one group of citizens, the enforcement of which has not been disavowed by the state, creates a fear of prosecution sufficient to confer standing unless there are other circumstances which make that fear 'imaginary' or 'wholly speculative.'"[59]

Because the State had not disavowed any enforcement intention, the Montana Supreme Court found the plaintiffs had valid reasons to fear prosecution, satisfying the first prong of the standing requirement.[60] The second standing prong was also satisfied because the psychological injuries suffered by the plaintiffs due to the very existence of the statute affected the plaintiffs in a way particular to them as homosexuals.[61] Nor did the general public suffer any injury under the statute because the statute did not criminalize sexual conduct between heterosexuals.[62]

Applying the *Gryczan* test, the *MEIC* court looked to *Missoula City-County Air Pollution Control Board v. Board of Environmental Review*, where a local air pollution board challenged the state board's decision to allow Stone Container, a paper mill outside of Missoula, to increase the amount of pollutants emitted from a recovery boiler at its kraft pulp mill.[63] The *Air Pollution* court found the local board was a "person" within the statutory definition of the word.[64] Holding that standing existed for anyone who breathed the air in an airshed where pollution controls were being challenged, the court found the local board, acting as a pollution control advocate for citizens of the Missoula airshed, had "the equivalent of a personal stake" in preventing pollution.[65] Chief Justice Turnage further noted that "in the same way as a citizen of the Missoula airshed is more particularly affected by the State Board's acts than is a citizen of another area, the interest of the local board is distinguishable from and greater than the interest of the public generally"[66] The *Air Pollution* court made clear potential economic injury is an injury to a property right sufficient to establish standing.[67]

The *MEIC* court chose to address the second prong of the *Gryczan* test first. Justice Trieweiler analogized *Air Pollution* to the facts before the

59. *Id.* at 114 (citing Babbitt v. United Farm Workers, 442 U.S. 289, 298 (1979)).

60. *Id.*

61. *Id.* at 120.

62. *Id.*

63. Missoula City-County Air Pollution Control Bd. v. Board of Envtl. Review, 937 P.2d 463, 465 (Mont. 1997).

64. *Id.* at 467-68.

65. *Id.* at 467 ("[I]t is clear to this court that a citizen of Missoula, as one who breathes the air into which Stone Container is expelling pollutants, would have standing to bring this action.").

66. *Id.*

67. *Id.* at 468.

court, finding the Groups had satisfied the second prong of the standing requirement because the Groups were concerned with water quality issues, and had members who allegedly floated, fished, hunted, viewed wildlife[68] and consumed the water of the Landers Fork and Blackfoot Rivers.[69] In this way, the environmental interest groups' concern with water quality issues on the two rivers was deemed equivalent to the City-County Air Pollution Board's concern with pollution in the Missoula airshed. The Groups' claim of having members who utilized the rivers and the surrounding environs was enough to find the interest of the Groups in this case distinguishable from and greater than the general public's interests in the rivers.

The *MEIC* court never applied the first prong of the standing test, stating only:

> Based on these criteria, we conclude that the allegations in the Plaintiffs' complaint which are uncontroverted, establish their standing to challenge conduct which has an arguably adverse impact on the area in the headwaters of the Blackfoot River in which they fish and otherwise recreate, and which is a source of water which many of them consume.[70]

From this language, it appears the court found that plaintiffs had clearly *alleged* harm, and therefore satisfied the first prong of the standing requirement.

Having found standing for the Groups to bring their case, the court then addressed whether the Groups had demonstrated sufficient harm to implicate their constitutional rights and to trigger strict scrutiny of the statute.[71]

B. *Level of Scrutiny*

1. *Determination of a Fundamental Right*

To determine the level of scrutiny to be applied to alleged infringement of the environmental provisions, the *MEIC* court first had to examine the nature of the rights contained in those provisions. To determine the nature of the Article II's rights, the court relied on two previous decisions that set out applicable standards. In *Butte Community Union v Lewis,* the court held a right is fundamental if it is contained within Montana's Declaration of Rights, or if it is a right without which other constitutionally guaranteed rights would have little meaning.[72] *Butte Community Union* con-

68. *MEIC*, 988 P.2d at 1237.

69. *Id.* at 1243.

70. *Id.*

71. *Id.*

72. Butte Community Union v. Lewis, 712 P.2d 1309, 1311 (Mont. 1986) (citing *In re C.H.*, 683

cerned Article XII, Section 3(3) of the Montana Constitution, which states, "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society." At issue in *Butte Community Union* were proposed state laws that would have excluded able-bodied persons of certain ages without dependent minor children from receiving general welfare assistance for basic necessities.[73] Because the Montana Constitution's Declaration of Rights does not expressly provide a right to welfare, the court held it was not a fundamental right.[74]

Later, in *Wadsworth v. Montana*, the court held the right to pursue life's basic necessities is a fundamental right, expressed in the Declaration of Rights.[75] Consequently, the most stringent standard of review, strict scrutiny, is imposed when the action challenged interferes with the exercise of a fundamental right or discriminates against a suspect class.[76] The plaintiff in *Wadsworth* was a Department of Revenue employee discharged for noncompliance with newly implemented conflict of interest rules prohibiting Department of Revenue employees from engaging in outside employment.[77] Because the rules implicated the inalienable right to pursue life's basic necessities found in the Montana Constitution's Declaration of Rights, the *Wadsworth* court held the opportunity to pursue employment is a fundamental right and therefore applied strict scrutiny to the rule.[78] Because the State's action in enforcing the rule was unconstitutional under this level of scrutiny, the employee was wrongfully discharged from his job.[79]

2. *The Inalienable Right to a Clean and Healthful Environment of Article II, Section 3*

Consistent with *Butte Community Union*, the *MEIC* court found the right to a clean and healthful environment is a fundamental right because it is contained in the Declaration of Rights in Article II, Section 3 of the Montana Constitution.[80] According to *Wadsworth*, any action that interferes

P.2d 931, 940 (Mont. 1984)); *see also MEIC*, 988 P.2d at 1245 (adopting the *Butte Community Union* standard).

73. *Butte Community Union*, 712 P.2d at 1310.

74. *Id.* at 1312.

75. Wadsworth v. Montana, 911 P.2d 1165, 1174 (Mont. 1996).

76. *Id.*

77. *Id.* at 1167-68.

78. *Id.* at 1174.

79. *Id.* at 1175.

80. *MEIC*, 988 P.2d at 1246.

with or infringes on a fundamental right is subject to strict scrutiny [81] Therefore, any statute or rule that implicates the inalienable right to a clean and healthful environment is subject to strict scrutiny [82] After completing the analysis of the right to a clean and healthful environment, the court turned to an analysis of the environmental rights contained in Article IX, Section 1.

3. *The Environmental Rights Provisions of Article IX, Section 1*

The rights in Article IX, Section 1 are not generally subject to a strict scrutiny analysis because they are not contained in the Declaration of Rights.[83] The rights provided in Article IX would normally be subject to "middle-tier" scrutiny, which applies when a constitutionally protected interest is implicated.[84] The State must demonstrate that its classification is reasonable, and that its interest in classifying is more important than the people's interest in obtaining the constitutional benefit.[85] In *General Agriculture Corporation v Moore*, the court set forth its guiding principle of constitutional interpretation, stating:

> [T]he prime effort or fundamental purpose in construing a constitutional provision, is to ascertain and to give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished and proper regard given to the evils, if any, sought to be prevented or remedied.[86]

Based on this principle of constitutional interpretation and its reading of the transcripts of the 1972 Constitutional Convention, the *MEIC* court concluded that "the nature of the environmental rights provided for by Article II and IX cannot be interpreted separately [as] it was the delegates' intention that the two provisions compliment each other, and be applied in tandem."[87] The court thus determined that the framers intended the environmental rights guaranteed by Article II, Section 3 and the rights provided for in Article IX, Section 1 to be interrelated and interdependent.[88] The court further held the two articles must be scrutinized consistently [89] Therefore, state or private action that implicates either constitutional provi-

81. *Id.* at 1245.

82. *Id.* at 1246.

83. *Id.*

84. *Id.*

85. *Id* at 1245 (citing *Butte Community Union*, 712 P.2d at 1314).

86. General Agric. Corp. v. Moore, 534 P.2d 859, 864 (Mont. 1975).

87. *MEIC*, 988 P.2d at 1246.

88. *Id.*

89. *Id.*

sion will be strictly scrutinized.[90]

After determining the fundamental nature of the environmental rights contained in Article II, Section 3 and Article IX, Section 1, the court turned its attention to the showing necessary to implicate those rights and trigger strict scrutiny.[91]

C. *Threshold Showing of Harm*

The Agency and SPJV contended actual danger to human or environmental health must be demonstrated before strict scrutiny review is triggered.[92] The Groups relied on an Agency rule[93] to make a showing of harm.[94] This administrative rule sets out the criteria to determine what constitutes a non-significant change in existing water quality Discharges containing carcinogen levels at concentrations less than or equal to carcinogen levels in the receiving water are non-significant.[95] Discharges containing carcinogen levels greater than those in the receiving water are deemed significant. The EPA classifies arsenic as a carcinogen.[96] The background level of arsenic in the Landers Fork and Blackfoot alluvia is .003 mg/l.[97] Test well discharges contained arsenic concentrations of up to .009 mg/l.[98] The Groups claimed that because the test well discharges contained arsenic at concentrations three times higher than the background level of arsenic, degradation occurred in violation of the Montana Constitution.[99] This degradation was sufficient to trigger strict scrutiny of the blanket exemption of well tests permitted by the Degradation Review Waiver.[100]

Addressing the Groups' contention that this level of degradation was sufficient harm to trigger strict scrutiny review, the court once more relied on the transcripts of the 1972 Montana Constitutional Convention and the principles of constitutional interpretation set out in *General Agriculture*.[101] The debate among the delegates over the inclusion of the "clean and healthful" language highlights the clear and unequivocal intent to make the provi-

90. *Id.*

91. *Id.*

92. *Id.* at 1244.

93. MONT. ADMIN. R. 17.30.715(1)(b) (1999). At the time the suit was filed, this rule was codified at MONT. ADMIN. R. 16.20.712(1)(b) (1995).

94. *MEIC*, 988 P.2d at 1240.

95. *See* MONT. ADMIN. R. 17.30.715 (1999), set forth *supra* note 51.

96. *MEIC*, 988 P.2d at 1239.

97. *Id.* at 1240.

98. *Id.*

99. *Id.*

100. *Id.* at 1240-41.

101. *Id.* at 1244-48.

sions as strong as they could be.[102] The transcripts revealed, "[O]ur intent was to permit *no degradation* from the present environment and affirmatively require enhancement of what we have now."[103]

After a fairly extensive review of the Constitutional Convention transcripts, particularly of the Natural Resources and Agricultural Committee responsible for reporting Article IX, Section 1, the court concluded that the delegates' intention was to provide language and protections which are both anticipatory and preventive.[104] Justice Trieweiler wrote:

> The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked.[105]

Accordingly, the court found the district court erred in ruling the environmental rights of Article II and Article IX were not implicated absent proof that public health was threatened or water quality standards were so affected to significantly impact either river.[106] Because the Agency had concluded in its own rule that discharges containing carcinogen levels greater than those contained in receiving water have a significant impact and are usually subject to nondegradation review required by the Nondegradation Policy,[107] the Groups' demonstration that the well tests added arsenic to the environment in greater concentrations than were present in the receiving water clearly implicated their constitutional right to a clean and healthful environment, as well as the right to be free from unreasonable degradation of the environment.[108]

The court further noted that the Nondegradation Policy's review process fulfilled the legislature's duties set forth in Article IX, Section 1. However, because the activities listed in the Degradation Review Waiver were arbitrarily excluded from nondegradation review "without regard to the nature or volume of the substances being discharged," the degradation waiver violated the constitutional rights guaranteed by Article II, Section 3 and Article IX, Section 1.[109]

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102. *Id.* at 1248.

103. *Id.* at 1247 (quoting comments of Delegate McNeil, *Montana Constitutional Convention*, Vol. IV at 1205 (1972) (emphasis added)).

104. *Id.* at 1249.

105. *Id.*

106. *Id.*

107. MONT. ADMIN. R. 17.30.715 (1995).

108. *MEIC*, 988 P.2d at 1249.

109. *Id.*

D. *Remand Instructions*

This decision was not the final disposition of the case. The judgment of the district court was reversed, and the case remanded with instructions to render a decision consistent with the court's opinion.[110] Specifically, to lower court was instructed to strictly scrutinize the Degradation Review Waiver for a determination of whether there was a compelling state interest for the enactment of that statute based on the criteria set out in *Montana v. Wadsworth*.[111]

E. *The Special Concurrences*

Justice Leaphart filed a special concurrence in the case.[112] It highlights many of the inconsistencies of the majority opinion. The most glaring inconsistency is how to interpret the court's holding that "we will apply strict scrutiny to state *or private action* which implicates either constitutional provision."[113] Questioning this broad statement, Justice Leaphart raised two issues. First, he noted that private action was not before the court as the subject of the appeal.[114] He reminded the majority that strict scrutiny analysis requires the *state* to demonstrate a compelling interest for its action and to closely tailor its action to effectuate that interest with the least onerous path that can be taken to achieve the state's objective.[115] Private action does not lend itself to this analysis, and for this reason Justice Leaphart concluded this statement is best considered dictum.[116]

The second issue addressed by Justice Leaphart was whether the majority correctly interpreted the Groups' challenge as "as applied," or whether it was more properly interpreted as a facial challenge.[117] Justice Leaphart questioned the court's conclusion that:

> to the extent § 75-5-317(j), MCA (1995), arbitrarily excludes certain "activities" from nondegradation review without regard to the nature or volume of the substances being discharged, it violates those environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Our holding is limited to § 75-5-317(2)(j),

110. *Id.*

111. *Id.*

112. *Id.* at 1250 (Leaphart, J., concurring). Chief Justice Turnage joined in this special concurrence.

113. *Id.* at 1246 (emphasis added).

114. *Id.* at 1250 (Leaphart, J., concurring).

115. *Id.* (emphasis added).

116. *Id.* Justice Gray filed a separate special concurrence to join Justice Leaphart's opinion solely on the "private action" issue. *Id.* at 1251 (Gray, J., concurring).

117. *Id.* at 1250 (Leaphart, J., concurring).

> MCA (1995), as applied to the facts of this case. We have not been asked to and do not hold that this section facially implicates constitutional rights.[118]

According to Justice Leaphart, the constitutional infirmity of the Degradation Review Waiver was not limited to the facts of the case at hand, but in the creation of a blanket exception to nondegradation review for discharges from water well or monitoring well tests without regard to the harm caused by those tests, or the potentially degrading effect those discharges may have on the surrounding or recipient environment.[119] The possibility that some discharges will not harm the environment does not justify exemption from review by the state. Excluding water well discharges from review makes it impossible for the state to "prevent unreasonable depletion and degradation of natural resources" as required by the constitution.[120] For this reason, Justice Leaphart concluded this case should have been interpreted as a facial challenge.[121]

IV DISCUSSION

The *MEIC* decision is undoubtedly important. Unfortunately, it is not as precise as one would hope given that importance. This section will discuss the court's holding on standing, the facial challenge versus "as-applied" challenge distinction, the private action issue, and analyze the doctrine of self-execution and its importance in applying constitutional provisions. It will also address the nature of affirmative rights, as well as attempt to explain the importance of the interrelation and interdependence of Article II, Section 3 and Article IX, Section 1.

A. *Standing*

The standing doctrine is a jurisprudential concept of justiciability formulated to limit access to courts by requiring a determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[122] At its simplest, the standing doctrine determines the proper party to bring suit.[123] As noted above, the court used the two-prong standing test derived from *Gryczan v Montana*. The test for standing stated in *Gryczan* and adopted by the *MEIC* requires that 1) the complaining party

118. *Id.* at 1249.

119. *Id.* at 1250 (Leaphart, J., concurring).

120. *Id.* (quoting MONT. CONST. art. IX, § 1(3)).

121. *Id.*

122. Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of Ohio Forestry*, 21 PUB. LAND & RESOURCES L. REV. 81, 82 (2000).

123. *Id.* at 83.

must clearly allege past, present, or threatened injury to a *property or civil right*; and 2) the alleged injury must be distinguished from the injury to the public generally, but the injury need not be exclusive to the complaining party [124] In *MEIC*, the court first addressed the second prong of the test and found it satisfied. However, the court did not apply the first prong of the test. Instead, the court cited the *Air Pollution* opinion[125] as an example of a case where it had applied both prongs of the standing test. In that case, the court found a sufficient injury to the local board's property rights because it would be forced to incur expenses to monitor, collect, and analyze pollution data, and to develop a regulatory response which would ensure Missoula air quality met minimum federal standards in the face of increased pollution emanating from Stone Container.[126]

The lack of analysis regarding the first prong poses some interesting questions. Although the court found the *MEIC* Groups had standing, it is unclear whether the court found standing existed based on potential economic injury (an injury to a property right), or whether standing was based on a potential injury to a civil right, i.e. the rights found in Article II, Section 3 or Article IX, Section 1. The court's analogy to *Air Pollution* implies that standing was based on potential economic injury However, the court made no findings of threatened economic injury in *MEIC*. Further, the condition leading to a finding of potential economic injury in *Air Pollution* was not present in *MEIC*. The local board in *Air Pollution* was legally obligated to develop a regulatory response to increased pollution. The environmental organizations in *MEIC* had no legal obligations to their members or to the public at large to monitor, analyze, or collect pollution data or develop any regulatory response to pollution in the rivers, so it is difficult to discern a comparable threat of economic injury in the two cases.

The remaining possibility is that standing was based on a threatened injury to a civil right, as was the injury alleged by the *Gryczan* plaintiffs. In *Gryczan*, the civil right at stake was the constitutionally protected right to privacy In *MEIC*, the court again made no findings to indicate which civil right or rights were threatened. The lack of clarity on this point gives rise to uncertainty as to whether a future plaintiff alleging an injury to the fundamental environmental rights guaranteed in Article II, Section 3 or Article IX, Section 1 will have standing on the strength of that allegation alone, or if more is needed.

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124. *MEIC*, 988 P.2d at 1242 (emphasis added).

125. *Id.* at 1242-43 (citing *Air Pollution*, 937 P.2d at 467-68).

126. *Air Pollution*, 937 P.2d at 468.

B. *The Self-execution Doctrine*

At no point in the opinion does the *MEIC* court engage in any analysis of whether the constitutional provisions in question are self-executing. This is a critical oversight because the provisions by their nature invite a discussion of self-execution. By virtue of the ultimate holding in the case, it appears the court assumed the provisions to be self-executing. However, the complete silence on such an important aspect of constitutional interpretation makes such an assumption problematic.

Generally, a self-executing constitutional provision can be defined as one that 1) is able to operate without any further legislation, and 2) is assumed to be in operation from the moment of its passage.[127] A non-self-executing provision is exactly the opposite – it needs supplemental legislation in order to be effective, or it assumes the existence of certain legislative machinery necessary for carrying out its mandate.[128] Most importantly, the issue of self-execution goes directly to the issue of separation of powers. If a provision is found to be self-executing, a legislature is necessarily limited to enacting laws that are in "harmony with the constitution and further the exercise of the constitutional right and make it more available."[129] If a constitutional provision is found to be non-self-executing, the legislature must act for the provision to become operative. At the point of non-self-execution, separation of powers becomes relevant. Because the non-self executing constitutional provision needs legislative action to become operative, it follows that a degree of deference should be afforded by the judiciary to a legislative act or agency decision that purports to conform to the provision's intent.[130]

This model of constitutional interpretation seems particularly relevant to the following facts that were before the *MEIC* court: 1) the 1972 Constitution was adopted and had provisions aimed at protecting the environment included in it; 2) the legislature amended the Montana Water Quality Act with reference to the constitutional provisions;[131] 3) the legislature later enacted an exemption to the Montana Water Quality Act for certain activities including water well or monitoring well tests; 4) the state agency charged with issuing permits under the exemption statute did so for a mining company; 5) the mining company then conducted tests under the auspices of that permit. If the mining company's activities are challenged and the challenging party invokes the constitutional environmental provisions, an analy-

127. 16 AM. JUR. 2D *Constitutional Law* § 98 (1998).

128. *Id.* at § 99.

129. *Id.* at § 101.

130. *Id.* at § 261.

131. Montana Water Quality Act, MONT. CODE ANN. §§ 75-5-101 to 75-5-705 (1995).

sis of whether the provisions are self-executing seems appropriate because the legislature's interpretation of the Montana Constitution is directly at issue.

1. *Self-Execution In Montana*

The court's seminal opinion on the nature of self-executing rights is found in *Montana ex rel. Stafford v. Fox-Great Falls Theatre*.[132] In *Stafford*, the court ultimately refused to declare games of chance illegal despite a constitutional prohibition, because the legislature had not fulfilled its constitutional mandate to enact laws prohibiting such activities.[133] The court reasoned the judiciary is charged with interpreting all existing laws, and to do more would "usurp" the respective role of the legislature.[134] On its face, *MEIC* appears to impliedly overturn *Stafford*. However, the facts of *Stafford* were fundamentally different than those of *MEIC*. First, the constitutional background detailing the debate around the anti-lottery provisions was not nearly as extensive as the 1972 Constitutional Convention transcripts detailing the debate surrounding the environmental provisions. Quite simply, the *Stafford* court could not compare the intent behind the constitutional provisions to the language ultimately adopted. Second, *Stafford* was a case where the legislature had not acted at all, whereas the *MEIC* decision had a specific legislative action to provide context. Third, the Montana legislature has a long history of looking the other way when it comes to extractive industries, especially mining interests.[135] Lastly, the court disposed of the *MEIC* case cautiously, with a remand to the district court for a determination of the existence of a compelling state interest to exclude well water discharges from nondegradation review

In light of the factual differences between *Stafford* and *MEIC*, the court acted prudently and cautiously However, the court's silence on the important and critical point of self-execution versus non-self-execution ultimately lessens the clarity of the opinion for future application, even though

132. Montana *ex rel.* Stafford v. Fox-Great Falls Theatre Corp., 132 P.2d 689 (Mont. 1942).

133. *Id.* at 703. The 1889 Montana Constitution's prohibition stated, "The legislature shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state." MONT. CONST. of 1889, art. XIX, § 2.

134. *Stafford*, 132 P.2d at 703.

135. *See generally* JERRE C. MURPHY, THE COMICAL HISTORY OF MONTANA – A SERIOUS STORY FOR FREE PEOPLE – BEING AN ACCOUNT OF THE CONQUEST OF AMERICA'S TREASURE STATE BY ALIEN CORPORATE COMBINE, THE CONFISCATION OF ITS RESOURCES, THE SUBJUGATION OF ITS PEOPLE, AND THE CORRUPTION OF FREE GOVERNMENT TO THE USES OF LAWLESS ENTERPRISE AND ORGANIZED GREED EMPLOYED IN "BIG BUSINESS" (E.L. Schofield Pub. 1912); JOSEPH KINSEY HOWARD, MONTANA, HIGH, WIDE AND HANDSOME (University of Nebraska Press 1959); K. ROSS TOOLE, MONTANA: AN UNCOMMON LAND (University of Oklahoma Press 1959); Harry W. Fritz, *The 1972 Constitutional Convention in a Contemporary Context*, 51 MONT. L. REV. 270 (1990).

Stafford was decided under the previous constitution. Further, the lack of self-execution discussion makes the opinion vulnerable to criticism because the *Stafford* opinion does exist and does, on its face, appear to be contrary to the court's holding in *MEIC*

While *Stafford* addressed self-execution under the prior state constitution, the first case to address the issue of self-execution after the adoption of the 1972 constitution was *General Agriculture Corporation v Moore*.[136] In *General Agriculture*, the court addressed the constitutional water rights provisions, finding three of the subsections self-executing, even though the fourth subsection contained a mandate for legislative action.[137]

Although *MEIC* was the first time the Montana Supreme Court addressed the Montana Constitution's environmental provisions in a substantive matter, it was not the first time the legal community in Montana had considered the provisions. The issue of self-execution in relation to the environmental rights provisions in Article II, Section 3 and Article IX, Section 1 has been discussed at length on three occasions prior to *MEIC* [138] The commentators came to different opinions about the self-executing nature of the rights. However, given the dearth of Montana case law on the matter, their conclusions as to each of the provisions at issue in *MEIC* are worth considering.

a. *Self-Execution and the Inalienable Right to a Clean and Healthful Environment of Article II, Section 3*

Legal scholars have reached different conclusions on the self-executing nature of the "clean and healthful" provision contained in Article II, Section 3. Generally, constitutional provisions in bills of rights are presumed to be self-executing.[139] Courts may be inclined to interpret provisions as self-executing rather than requiring implementing legislation to give judicial significance to the provisions. If not treated as self-executing, the legislature would have the power to ignore and practically nullify the

136. General Agric. Corp. v. Moore, 534 P.2d 859, 862 (Mont. 1975).

137. *Id.* ("We construe Article IX, Section 3(1) of the 1972 Constitution as not only reaffirming the public policy of the 1889 Constitution but also as recognizing and confirming all rights acquired under that Constitution and the implementing statutes enacted thereunder. Construed in this context, Article IX, Section 3, with the exception of subdivision (4), is self-executing."); *see also* discussion, *infra* part IV.B.3.

138. *See* Carl W Tobias and Daniel N. McLean, *The Effect of the Environmental Policy Acts on Pre-Existing Agency Authority*, 41 MONT. L. REV. 177 (1980); John L. Horwich, *Montana s Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?* 57 MONT. L. REV. 323 (1996); Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219 (1994).

139. 16 AM. JUR. 2D *Constitutional Law* § 98 (1998).

directions of the fundamental law [140] Because the framers' included the clean and healthful provision in the Bill of Rights section of the Montana Constitution, it is self-executing. This conclusion is bolstered by the clear intent and understanding of the framers.[141] This last concept, that it is within the discretion of those who adopt a constitution to make some of its provisions self-executing, was cited by the court with approval in *General Agriculture*.[142]

One scholar in particular challenges the conclusion that the "clean and healthful" provision of Article II, Section 3 is self-executing on the following two grounds: 1) the provision cannot be construed as self-executing because the words "clean" and "healthful" are vague; and 2) the provision provides no instruction as to remedy or enforcement.[143] Absent any definitional standards to employ, a court should seek "refuge" in a finding of non-self-execution as other state courts have when interpreting similar constitutional provisions.[144] In this manner, courts will err on the better side of judicial restraint and not cross separation of powers boundaries.[145]

This analytical model seems unnecessarily confusing. Some of the neighboring clauses in Article II, Section 3 use words like "lives" and "liberties" that have a clear legal meaning, and some do not. In addition to the right to a clean and healthful environment, other provisions in the Bill of Rights utilizing words like "safety" and "happiness" could also be deemed legally ambiguous. If those rights that have a clear legal meaning are self-executing and those that do not are non-self-executing, then this model of analysis would render the majority of the inalienable rights in the Montana Constitution merely aspirational. This model deems some rights contained in the inalienable rights clause truly inalienable, while other rights are not, despite their location in the same section of the constitution, or even the same sentence.

The remaining questions to be answered are whether the term "clean

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140. *Id.* at § 100.

141. *Proceedings of the Montana Constitutional Convention* 5067-68 (1972). Delegate Dahood was specifically responding to a question from Delegate Robinson that expressed her worry the provision might need complete legislative implementation to make it effective. Delegate Dahood responded, "[C]onstitutions are based on the premise that they are presumed to be self-executing particularly within the bill of rights. If the language appears to be prohibitory and mandatory, as this particular section is intended to be, then in that event, the courts interpreting the particular section are bound by that particular presumption and they must assume in that situation that it is self-executing." *Id.*

142. *General Agric.*, 534 P.2d at 862 (citing 16 C.J.S. Constitutional Law § 48).

143. *See* Horwich, 57 MONT. L. REV. 323, 362 An example of a non-self-executing provision is Article VIII, Section 10 in the Montana Constitution: "The legislature shall by law limit the debt of counties, cities, towns and all other local government entities." *Id.* at 335.

144. *Id.* at 362-63.

145. *Id.* at 365.

and healthful" is so vague as to defy judicial enforcement, and whose definitions will suffice when giving effect to the inalienable right to a clean and healthful environment. The *MEIC* court did not endeavor to provide a precise definition of its own. Instead, the court began at the beginning, with a thorough examination of the Constitutional Convention transcripts. The opinion cited to the debate by members of the Natural Resources and Agricultural Committee over the inclusion of the modifying adjectives "clean and healthful" to "environment."[146] All committee members wanted the strongest environmental protection possible. The concern was that adding "clean and healthful" would allow degradation. As Delegate McNeil noted, "We did not want the Supreme Court of this state or the Legislature to be able to say that the environment, as we know it now, can be degraded to a healthful environment."[147] The delegates did not wish to allow polluters the ability to "parade in some doctors who could say that if a person can walk around with four pounds of arsenic in his lungs or SO2 gas in his lungs and wasn't dead, that that would be a healthful environment."[148] The court also cited Delegate McNeil's later comments that the committee's "intention was to permit no degradation from the present environment "[149] Although Delegate McNeil's comments were made specifically in reference to Article IX, Section 1, the language for Article II, Section 3 was taken directly from Article IX. The right provided in Article II was intended to balance the duty mandated by Article IX.[150] By relying on the Constitutional Convention transcripts, the court acknowledged and clarified that it is the framers of the constitution who defined "clean and healthful," and no further definition was necessary Thus, it is hard to see why the definition of clean and healthful provided by the framers cannot function as a baseline definition.

The term "clean and healthful" is defined by the framers of the constitution in such a manner that it is not so ambiguous to preclude judicial enforcement. Indeed, the definition provided is more than adequate to guide judicial application of the environmental right. This, combined with its location in the Bill of Rights, leads to the conclusion the Article II, Section 3 right to a clean and healthful environment is self-executing.

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146. *See MEIC*, 988 P.2d at 1246.

147. *Id.* at 1247 (quoting comments of Delegate McNeil).

148. *Id.* at 1246.

149. *Id.* at 1247.

150. *Montana Constitutional Convention*, Vol. V at 1639 (1972)("[I]t seems to me that we are providing here, though, a clear intent. It does present the right of every person. And we ve already talked about the duties of persons, and it's nice to balance it with this right.") (Comments of Delegate Burkhart).

b. *Self-Execution and the Environmental Rights of Article IX, Section 1(1) and (3)*

A determination of the self-executing nature of the environmental provisions in Article IX, Section 1 is not as clear. Article IX, Section 1 states in its entirety:

> 1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> 2) The legislature shall provide for the administration and enforcement of this duty
> 3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[151]

Unlike Article II, Section 3, the right found in Article IX, Section 1(1) is followed by a command to the legislature in Section 1(2) to provide for the maintenance and improvement of a clean and healthful environment.[152] Additionally, Article IX, Section 1(3) clearly calls for legislative action, albeit in the context of providing remedies. Initially, these provisions would seem to be classically non-self-executing because they command legislative action.

However, some scholars who have examined Article IX, Section 1 have arrived at the conclusion Article IX, section 1(1) is self-executing, and Article IX, section 1(2) is merely supplementary [153] Like the court's opinion in *MEIC*, the conclusion that Article IX, section 1(1) is self-executing relies both on the Constitutional Convention records and the holding of *General Agriculture*.

The court's ruling in *General Agriculture* is not as supportive of self-execution as the Constitutional Convention transcripts. The court's primary holding in that case was that three of the four sections of the water rights provisions in Article IX, Section 3 are self-executing.[154] The first subsec-

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151. MONT. CONST. art. IX, § 1.

152. One of the criticisms of *MEIC* is the court's failure to even cite Article IX, Section 1(2). *See generally* John L. Horwich, *MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269 (2001).

153. *See* Tobias and McLean, *supra* note 138, at 259.

154. *General Agric.*, 534 P.2d at 862 (construing Article IX, Section 3 of the 1972 Montana Constitution). Article IX, Section 3 provides in its entirety:

> (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connec-

tion of Article IX, section 3 confirms existing water rights, the second defines future appropriations as public uses, and the third claims dominion over all water within state boundaries. The fourth is a command to the legislature. The court found the first three sections are self-executing and the fourth, which seems to refer to the rights mentioned in the first three, to be non-self-executing.[155] By analogy, because Article IX, Sections 1(1) and (2) follow the same pattern, they also are self-executing and non-self-executing respectively The weakness of this argument is that the fourth subsection of Article IX, Section 3 is not specifically dedicated to the first three.[156] Indeed, it could stand on its own without the preceding provisions. That is clearly not the case with Article IX, Section 1(2) – which can only be understood in conjunction with Section 1(1).

One Montana scholar concluded Section 1(2) is integral to Section 1(1), and not supplementary [157] His support for this contention relies on a parsing of the text of Section 1(2). One must construe the word "administration" as a supplementary mandate to Section 1(1), and interpret "enforcement" to signal a mandate integral to Section 1(1).[158] Because an integral mandate exists, it should control.[159] The primary foothold for this argument appears to be identical to the argument forwarded against Article II, Section 3 self-execution: the terms "clean and healthful" are vague, and there is no proper guiding principle for a court to define them. For a court to define them in the absence of legislative guidance clearly abridges the separation of powers between the judicial and legislative branches due to the integral legislative command in Section 1(2).

However, the convention records support the contention that Article IX, Section 1 is self-executing. The idea that Article IX, Section 1(2) could be interpreted as a grant of exclusive authority over section 1(1) was raised, and dismissed, in the Natural Resource committee.[160] In debating a right-

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tion therewith, and sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

MONT. CONST. art. IX, § 3.

155. *General Agric.*, 534 P.2d at 862.

156. *See* MONT. CONST. art. IX, § 3, set forth *supra* note 154.

157. *See* Horwich, *supra* note 143, at 366.

158. *Id.*

159. *Id.*

160. *Proceedings of the Montana Constitutional Convention* 3859 (1972).

to-sue provision, Delegate Cross stated, "Section two does not add anything positive in terms of environmental protection. The danger in section two is that it can be construed to exclusively delegate such authority [over the environment] to the legislature and this would even exclude the courts."[161]

To forward the opinion Article IX, Section 1 is not self-executing ignores the guiding principles of constitutional interpretation used by the Montana Supreme Court in deciding *MEIC*, and further ignores the court's following statement in *General Agriculture*:

> A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it *operative*. The fact that a right granted by a constitutional provision in question may be better or further protected by supplementary legislation does not in itself prevent the provision from being self-executing [162]

This interpretation also demands turning a blind eye to the express intent of the Constitutional Convention delegates, which make clear the provision was to be self-executing. Moreover, the argument Article IX, Section 1 is not self-executing renders the environmental provisions of Article IX, Section 1 subject to the whims of the legislature, a situation the Constitutional Convention delegates specifically sought to avoid.

The *MEIC* opinion only makes passing reference to Article IX, Section 1(3).[163] Unlike Section 1(1), Section 1(3) specifically directs the legislature to provide remedies that will ensure a clean and healthful environment. Unlike Sections 1(1) and 1(2), this third subsection imposes a duty to act on the legislature, and gives that body a clear directive in the same clause. This is an explicit legislative mandate, and is therefore not self-executing.

It is important to note that *MEIC* was not a case of "pure" self-execution as was *Stafford*. "Pure" self-execution refers to cases where there is a constitutional mandate requiring legislative action that the legislature has ignored. *MEIC* was a case where the legislature had acted. Whether the environmental provisions are self-executing had little impact on the final decision of the court. No matter what the self-executing nature of the environmental provisions, the implicit reasoning of the decision indicates the legislature's actions did not satisfy the constitutional commandments contained in the environmental provisions. In the end, the court's neglect of self-execution is confusing. Clearly, there is authority in both case law and

161. *Id.* at 3860-61.

162. *General Agric. Corp.*, 534 P.2d at 862 (citing 16 C.J.S. Constitutional Law § 48) (emphasis added).

163. The court mentions freedom from "unreasonable degradation" in its conclusion, but not in its ultimate holding. *See MEIC*, 988 P.2d at 1249.

the Constitutional Convention transcripts to support a finding that the environmental provisions of Article II and Article IX are self-executing. While it is within the discretion of a state's supreme judicial authority to decide what is relevant to a holding and what is not, the clear implication of separation of powers present in *MEIC* demanded at least an acknowledgment of the self-execution doctrine.

c. *The Importance of the Interrelation and Interdependence of Article II, Section 3 and Article IX, Sections 1(1) and (3)*

As mentioned above, the *MEIC* court did not discuss Article IX, Section 1(3) in any depth. This lack of discussion could leave a reader of the opinion with the impression that this provision was not particularly relevant to the court's decision. However, Article IX, Section 1(3) is a one of the most crucial elements of the opinion. This provision provides the definition of "clean and healthful," as well as the standard by which degradation is measured. The language of the Article IX, Section 1(3) specifies that *any* degradation of the environmental life support system or natural resources renders the system or resource unclean and unhealthful. The constitutional right to a clean and healthful environment and the right to be free from degradation of the environment were both implicated when SPJV's activities added arsenic to a body of water in greater concentration than existed prior to SPJV's activities.[164] The court concluded it was the framers' intent to construe the environmental rights of Article II, Section 3 and Article IX, Section 1 as complementary fundamental rights to be applied in tandem. According Article IX, Section 1 fundamental right status is consistent with the standard articulated in *Butte Community Union* and adopted by the court in *MEIC* that a right is fundamental if it is a "right 'without which other constitutionally guaranteed rights would have little meaning.'"[165] Moreover, and perhaps more importantly, interpreting the environmental provisions to be interrelated and interdependent in this manner is consistent with the express intent of the framers to provide the strongest environmental protection possible.[166]

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164. *MEIC* 988 P.2d at 1249. It is important to note the language of the opinion states "unreasonable degradation." It is clear from the Constitutional Convention transcripts that "unreasonable" modifies depletion only, and not degradation. *Montana Constitutional Convention*, Vol. II at 555 (1972).

165. *MEIC*, 988 P.2d at 1245 (quoting *Butte Community Union*, 712 P.2d at 1311 (quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984))).

166. *See Montana Constitutional Convention*, Vol. IV, at 1209 (1972) (comments of Delegate McNeil).

2. *Judicial Restraint and the Nature of Affirmative Rights*

If rights are defined in an affirmative manner, they are notoriously hard to interpret if it is unclear what common assumptions stand behind their inclusion in a constitution.[167] In *Lochner v. New York*, the United States Supreme Court examined a New York law that restricted bakery employees from working more than sixty hours in a week.[168] The majority struck down the law on grounds that it interfered with "the liberty of person or the right of free contract," which was protected under the Fourteenth Amendment liberty interest's auspices.[169] The *Lochner* majority felt that even though the law had been enacted democratically, the state's police power to safeguard the health of the populace had to have limits.[170] The court felt those limits had been reached in *Lochner* when an individual's common law freedom to contract was unreasonably restricted.[171] However, it is important to note that the *Lochner* Court did not and could not point to any statutory or explicit constitutional provision that guarded an individual's right to freedom of contract. The majority relied on case law that indicated the freedom to contract was included implicitly in the liberty interest of the Fourteenth Amendment.[172] In his dissent, Justice Holmes chastised the majority for their lack of restraint, and accused the majority of substituting their own economic ideas for those of the New York legislature[173] while ignoring the standard of review that had prevailed to date for state laws under federal constitutional review [174]

Commentators who have examined affirmative social rights have concluded post-*Lochner* judicial deference is perfectly appropriate in some cases, but not all. One commentator argues that state protection of private property, even when couched in affirmative terms, has been historically interpreted as a prohibition against abridging that right because state protection of private property is a historic underlying assumption – a baseline from which courts examine the common law [175] The protection of private

167. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888-89 (1987).

168. Lochner v. New York, 198 U.S. 45, 46 (1905).

169. *Id.* at 57.

170. *Id.* at 58.

171. *Id.* at 57-58.

172. *Id.* at 53. The specific case that stands for the proposition that the freedom to contract can be found in the underlying principles of the Fourteenth Amendment's protection of liberty is Allgeyer v. Louisiana, 165 U.S. 578 (1897). In *Allgeyer*, the court pointed to the inalienable right to pursue an occupation and held that the freedom to contract was a necessary part of that pursuit. *Allgeyer*, 165 U.S. at 589.

173. *Lochner*, 198 U.S. at 73.

174. *Id.* at 72-73. Justice Holmes called for judicial action only when statutes are "plainly, palpably, beyond all question, inconsistent with the Constitution of the United States." *Id.*

175. *See* Sunstein, *supra* note 167.

property is contrasted with the relative unwillingness of courts to intervene when a state is unwilling to provide welfare services. Because welfare is a more recent concept and more controversial, it is likely courts feel less sure about intervening and forcing a state to take action.

In rejecting affirmative rights, most courts rely on the post-*Lochner*-era interpretative model,[176] which results in less judicial activity If in certain cases, like a constitutional right to welfare, the strain on the judiciary would be enormous and the decisions extremely complex, then judicial neutrality and inaction can be appropriate.[177] In other cases, where a model of interpretation allowing judicial restraint that defines neutrality "in terms of the perpetuation of current practice," then continued reliance on judicial neutrality is questionable.[178]

The right to a clean and healthful environment found in the Article II's Declaration of Rights is an affirmative right. That is, the text of the Montana Constitution makes a statement of entitlement, not prohibition. Contrast Article II, Section 3 ("All persons are born free and have the right to a clean and healthful environment.") with Article II, Section 7 ("No law shall be passed impairing the freedom of speech or expression."). The latter is clearly a prohibition against any legislative or administrative action, while the former is somewhat vague. It seems to guarantee a clean and healthful environment, but without a specific context. By definition, affirmative rights do not have defined limits. Without reference to secondary materials, the text of the provision offers no definition for exactly what might be included in that right, nor does it offer much guidance to the government as to what it is empowered to do to protect or abridge the right. Due to this lack of guidance, issues of judicial deference and judicial restraint arise as disputes involving affirmative rights find their way into a courtroom. Much like the questions regarding provisions that may or may not be self-executing, defining affirmative rights usually involves balancing separation of powers among the three branches of government. Each branch of the government has their own version of how the rights should be interpreted and, in the end, it is the judiciary that must decide which version will carry the day

One of the primary criticisms leveled at the *MEIC* decision is that the

176. *Id.* The *Lochner* model is best understood in a historical sense by the words of Justice Black, "The doctrine that prevailed in *Lochner* and like case – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

177. Sunstein, *supra* note 167, at 915-16.

178. *Id.* at 918-19.

court engaged in *Lochner*ization[179] in that it created a new substantive right out of thin air and overruled the Degradation Waiver because it disagreed with the State's decision to allow SPJV to mine gold. Critics of the court's holdings in *MEIC* believe the court gave too much force to a previously uninterpreted constitutional right and insufficient deference to the legislature's efforts at crafting natural resource policy

This criticism is unfounded. Like the freedom to contract, the United States Supreme Court found in the underlying principles of the Fourteenth Amendment certain common law principles which apply to environmental pollution. This allows the affirmative right to a clean and healthful environment to be interpreted with ease, because the common assumptions standing behind its inclusion in the constitution are clear. Specifically, the common law doctrine of public nuisance[180] is relevant in this context, as it has provided the foundation for many of the 20th century's environmental laws.[181] In *MEIC,* the environmental Groups alleged the discharge of arsenic into the rivers threatened their recreation activities and sources of drinking water. More recent interpretations of public nuisance have sounded a theme that strikes close to what the environmental groups in *MEIC* alleged. "A public nuisance is an unreasonable interference with a right common to the general public."[182] In addition to the issue of common assumptions, interpretation of the affirmative "clean and healthful" right is also clarified by the clear intent of the framers to provide the strongest environmental protections possible and allow no environmental degradation.

Justice Trieweiler placed the *MEIC* opinion within a framework that is conservative by post-*Lochner* standards in its application of the environmental provisions found in Article II, Section 3 and Article IX, Section 1. First, the decision abides by the well-defined constitutional mandate for a separation of powers.[183] The *MEIC* holding might be read to implicate that

179. "Lochnerize – to examine and strike down economic legislation under the guise of enforcing the Due Process clause " BLACK'S LAW DICTIONARY 951 (7th ed. 1999). Also important to note is that the *Lochner* decision itself was struck down 32 years later by *West Coast Hotels v. Parrish*, 300 U.S. 379 (1937). In *West Coast Hotels*, the majority noted the lack of express Constitutional protection for the freedom to contract. *West Coast Hotels*, 300 U.S. at 391. According to Chief Justice Hughes, because the freedom to contract was not express and instead found in the shadow of another provision, the natural logical step is to recognize that the Constitution does not recognize an absolute and uncontrollable liberty. *Id.*

180. "Public nuisances were common law crimes that involved offenses against public property or that endangered the health or property of large numbers of people." ROBERT V PERCIVAL ET AL., ENVIRONMENTAL REGULATION 73 (2d ed.1996).

181. *Id.* at 71.

182. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1995).

183. Article III, Section 1 of the Montana Constitution provides:

> The power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No person or person charged with the exercise

separation because the court seems to be substituting its own opinion for that of the legislature and the administrative agency However, because the court limits its holding to the arbitrary exclusion of degradation review for the well tests based on the Degradation Review Waiver,[184] it does not tread squarely on legislative or administrative turf. Faced with two conflicting legal provisions and the alleged infringement of fundamental constitutional rights, the court chose to invoke its powers of review Additionally, in its final disposition of the case, the court makes clear its willingness to uphold the legislature's view that the Nondegradation Policy was a reasonable interpretation of the Montana constitutional provisions.[185]

Second, rather than substitute the court's opinion as to what the rights mean, the members of the court deferred to the framers of the constitution. The lengthy and frequent citations to the records of the Constitutional Convention illustrate this point. The holding in *MEIC* is clearly derived from the intent of the Constitutional Convention delegates and not the court's own ideology In this sense, the *MEIC* holding is an example of judicial restraint, far from an example of *Lochner*izing.

Like the issue of self-execution, the court did not discuss the issue of affirmative rights. One possible reason might be the strong likelihood that the district court's decision on a compelling state interest would be appealed again. A second appeal involving the issue of compelling state interest would have provided an opportunity to fully discuss the nature of the rights in question with a more complete factual background. Despite this missed opportunity, the opinion still develops a model for how the constitutional rights will be interpreted after *MEIC*. The intent of the framers will be the predominant factor in cases of constitutional construciton, and it seems unlikely the court will freely interject its own opinions as to the substance of constitutional provisions.

C. *Challenging a Constitutional Right – The Facial vs. "As-applied" Distinction*

The Groups presented their case as an "as-applied" legal challenge,[186] and both the district court and the Montana Supreme Court addressed it as

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of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

184. The court also did not address the issue of how Article IX, Section 3 is to be read. This provision states that the legislature shall protect the environment from "unreasonable depletion and degradation." MONT. CONST. art. IX, § 3. It seems clear from the court's later analysis that they believe the term unreasonable modifies only depletion, but they do not say so explicitly. *See MEIC*, 988 P.2d at 1231.

185. *MEIC,* 988 P.2d at 1249.

186. An as-applied challenge is a "claim that a statute is unconstitutional on the facts of a particu-

such. The majority opinion explicitly states its ruling in as-applied terminology: "Our holding is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts in this case. We have not been asked to and do not hold that this section facially implicates constitutional rights."[187]

However, in the same paragraph, the majority said it is the "arbitrary" exclusion of well tests from the degradation review required by Nondegradation Policy that violated the constitution's environmental provisions. This language implies the court found the degradation exemption of Degradation Review Waiver facially invalid.[188] Put another way, it was not the specific activities of SPJV the court found unconstitutional. Rather, it was the legislative enactment of the degradation review waivers that was unconstitutional because those waivers arbitrarily excluded certain activities. This contradiction is further evidenced by the remand instructions, which order the district court to determine if a compelling state interest justified the enactment of the Degradation Review Waiver.[189] If the Groups' challenge and the court's analysis were truly as-applied, the inquiry should focus on the permit issued to SPJV by the Agency, and not on the statute's enactment. Unless the legislature enacted the degradation exemption specifically for SPJV, however, under the court's reasoning it would follow that the statute would always be unconstitutional.

Justice Leaphart discussed the contradiction between the court's characterization of the case as an "as applied" challenge and the facial challenge language of the holding in his concurrence, and decided the court struck down the law as facially unconstitutional whether acknowledged as such or not. This contradiction leaves a burning question unanswered. Was it the exemption statute itself, or the application of the statute by the Agency to SPJV's activities that was to be strictly scrutinized by the district court on remand?

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lar case or to a particular party." BLACK'S LAW DICTIONARY 223 (7th ed. 1999). This is to be differentiated from a facial challenge, which claims that a statute always operates unconstitutionally. *See id.*

187. *MEIC*, 988 P.2d at 1249.

188. The groups stated they were bringing an "as-applied" challenge, even though the language used in the complaint specifically implicated a facial challenge. *MEIC*, 988 P.2d at 1237 ("Plaintiffs alleged that to the extent § 75-5-317(2)(j), MCA (1995) allows discharges of water from watering well or monitoring well tests, which degrade high quality waters without review pursuant to Montana's nondegradation policy found at § 75-5-303, that statute is void for a violation of Article IX, Section 1(1) and (3) of the Montana Constitution."). Facial language is also used later in the opinion: "Plaintiffs contend the provisions of the [well test degradation waiver] amendment must be strictly scrutinized for not only a compelling state interest, but also to assure that the amendment is closely tailored to effectuate the government's interest by the least onerous path available. " *Id.* at 1241. The acceptance of the Groups' characterization of the nature of the challenge is troubling because it indicates the majority neglected to analyze the substance of the Groups' complaint.

189. *MEIC*, 988 P.2d at 1249.

D *Compelling State Interest For Private Action*

The Court's ultimate holding is unusual because it concluded private actions are also included under the umbrella of strict scrutiny [190] This part of the holding *seems* to rely on the language of Article IX, Section 1, which includes a mandate for both the state and "each person" to maintain and improve the environment.[191] The court offers no guidance on how to apply the strict scrutiny standard of "compelling state interest" to a private action. The issue of private action was not before *MEIC* court, and it is best to consider the private action language dictum. However, the court's recent ruling in *Cape-France Enterprises v Estate of Peed*[192] makes it clear the

190. *MEIC*, 988 P.2d at 1246. As stated previously, strict scrutiny requires a narrowly tailored compelling state interest in order to justify an infringement of a fundamental right. Montana v. Pastos, 887 P.2d 199 (1994). Missing from the discussion in *Pastos* is any mention of *expressio unius est exclusio alterius*, a doctrine of textual interpretation which assumes that a term specifically mentioned in one clause and not in others is presumed to be left out by design.

Of the 35 rights enumerated in Article II of the Montana Constitution and declared fundamental by the court in *In re C.H.*, 683 P.2d 931, 940 (1984), the only provision that mentions the standard of compelling state interest is Section 10: "Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10. By assigning the same level of review to all the rights in Article II despite one section specifically having the standard mentioned in its text, the court has created a redundancy which to date it has not addressed.

191. "Seems" is the key word here. With respect to private action the majority s opinion is problematic at best. The first two pages or so of the "Constitutional Analysis" section of the opinion are devoted to a history of the court's case law on strict scrutiny. *MEIC*, 988 P.2d at 1244-46. Paragraph 64 begins with a statement indicating the court will apply strict scrutiny to Article IX, Section 1 because of its relation to Article II, Section 3. *Id.* at 1246. Then, for the first time, the court brings up private action: "However, we conclude that the right to a clean and healthful environment guaranteed by Article II, Section 3, and those provided for in Article IX, Section 1 were intended by the constitution's framers to be interrelated and interdependent and that state or private action which implicates either, must be scrutinized consistently." *Id.*

The court then announces strict scrutiny will apply to both state and private action. *Id.* Nowhere in the opinion was the issue of private action raised or discussed before this point. The briefs before the court were void of any mention of private action. The court offers no reason for including private action and no support for its inclusion that it should be analyzed in the same light as state action. The lone possible source for this conclusion is a statement of Delegate McNeil that is cited *later* in the opinion. *See id.* at 1247 However, Delegate McNeil speaks only to private property, not private action. *Id.*

192. 29 P.3d 1011 (Mont. 2001). In *Cape-France*, the court was faced with a land purchase contract between two private parties that dealt with privately-owned land. A condition of the deal was the ability to subdivide the property post-sale. However, the ability to subdivide was clouded because of possible groundwater contamination that only became evident during the process. The deal was further complicated because the only way to determine whether the land was contaminated would have required the seller to drill a test well, which in turn might have further compounded any existing groundwater contamination and exposed seller to liability for the clean-up. The court held that the seller could be released from the contractual obligations on grounds of impossibility or impractability. In the alternative, the court then held that the protections in Article II, Section 3 and Article IX, Section 1 would not have allowed a court to mandate performance of the contract because to do so would have potentially caused "significant degradation of uncontaminated aquifers" and posed "serious public health risks." *Cape-France*, 29 P.3d at 1017. Additionally, the court added "the law's interest in enforcing a contract for a land sale between two private parties" fell short of the compelling state interest needed to survive

court is interested in expanding *MEIC's* approach to private action.

E. *MEIC As A Predictive Model*

The Montana Supreme Court has been presented with only two opportunities to consider these provisions, but has not rendered a decision as of the writing of this note in one case[193] and only cursorily addressed the issue of private action in dictum in *Cape-France.* Despite the absence of subsequent interpretation, several aspects of the opinion provide useful guidance.

The most important aspect is the declaration that the right to a clean and healthful environment is a fundamental right. Because that right is fundamental, any state action implicating the right is subject to strict scrutiny Strict scrutiny is the highest level of judicial scrutiny, and one that is rarely satisfied. State action implicating a fundamental right must advance a compelling state interest, and must be tailored as narrowly as possible to avoid interference with the right. It is clear from the factual background and the nature of the court's holdings that minimal levels of degradation are necessary to implicate constitutional environmental rights and trigger strict scrutiny of the state action permitting the degradation.

Additionally, the relaxed standing requirements adopted by the court allow easier access to the courts, particularly for interest groups who allege an injury particular to them, but not necessarily exclusive to them. It is apparent from the court's reasoning that clear and supportable allegations of economic injury will satisfy the first prong of the standing test used by the *MEIC* court. It is less clear whether allegations based solely on the environmental rights contained in Article II, section 3 and Article IX, section 1 will support standing. However, the Groups in *MEIC* alleged injury to those rights, and the court considered their claim. Justice Treiweiler took particular care to emphasize that the environmental provisions are "both anticipatory and preventative."[194] Because of this anticipatory nature, it appears the court will allow mere allegations of infringement of environmental rights to satisfy the first prong of the standing test. However, until further decisions address this issue, prudent practitioners should endeavor to make supportable allegations of economic injury if possible.

The language implying a constitutional right of action against non-state actors is presently unworkable as dictum unsupported by any analysis, reasoning, or prior precedent in Montana constitutional jurisprudence. The

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strict scrutiny. *Id.* Now-Chief Justice Gray "strenuously dissented" citing both the sua sponte nature of the majority's endeavor and the unnecessary nature of invoking the constitutional provisions when the majority's ruling hinged on basic contract law principles. *Id.* at 1025.

193. Respondent's Brief at 18-19, *Montana v. Boyer*, No. 00-183 (2001).

194. *MEIC*, 988 P.2d at 1249.

private action statement is somewhat troubling. Application of the strict scrutiny standard to private actions which implicate the fundamental right to a clean and healthful environment creates the potential for conflict with other fundamental rights. The clause of the constitution that grants the right to a clean and healthful environment also grants the right to acquire, possess, and protect property [195] As construed in *MEIC*, the right to a clean and healthful environment could conflict with the right to private property A homeowner seeking to build an addition provides a good illustration of the potential conflict. The construction may create minor runoff and affect a nearby creek. In Montana building construction requires a permit and city approval of the building plan.[196] Normally, permits and licenses are required to head off nuisance litigation[197] and should be granted by the permitting agency, within the bounds of the agency's reasonable discretion.[198] One question that remains to be answered is whether *MEIC* now requires the existence of a compelling state interest for a state agency to grant a simple building permit when environmental quality may be impacted by the construction.[199]

However, four of seven Justices joined in the private action holding. The three concurring justices who addressed the private action issue did not dismiss private action as unworkable, but rather dismissed private action as an issue not before the *MEIC* court, and one better addressed "another day "[200] This perhaps indicates a willingness to entertain future challenges to private action based on the environmental provisions. In a recent oral argument before the Montana Supreme Court, Assistant Attorney General Mark Mattioli responded affirmatively to Justices Treiweiler and Nelson's inquiry as to whether the State believed Article IX, Section 1(1) applied to private action.[201] Given the apparent attitude of the court, a clear standard to scrutinize private action implicating the environmental provisions may be forthcoming.

Perhaps the most unique aspect of the decision is the court's holding that Article II, Section 3 and Article IX, Section 1 are interrelated and interdependent provisions to be scrutinized consistently It appears from the fi-

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195. MONT. CONST. art. II, § 3.

196. *See* MONT. CODE ANN. § 50-6-106 (1999).

197. 53 C.J.S. *Licenses* § 3 (1987).

198. *Id.* at § 38.

199. Justice Rice echoed these same concerns in his concurring opinion in *Cape-France*. *See Cape-France,* 29 P.3d at 1022. (Rice, J., concurring). However, storm water runoff associated with construction activity is now regulated under the MPDES general permit. MONT. CODE. ANN. § 75-5-401(c).

200. *MEIC*, 988 P.2d at 1250 (Leaphart, J., concurring).

201. Assistant Attorney General Mark Mattioli, Oral Argument, Montana Supreme Court (Apr. 20, 2001), *Montana v. Boyer* No. 00-183 (2001).

nal outcome of the case that Article IX, Section 1 provides the definition and standard for "clean and healthful" as well as "degradation." At the least, minimal degradation may be constitutionally impermissible. This stringent standard is consistent with the intent behind the environmental provisions to provide the strongest protection possible.

V Disposition

The case was remanded to the district court with instructions to strictly scrutinize whether the degradation exemption for water well tests was justified by a compelling state interest under the *Wadsworth* criteria.[202] As mentioned previously the remand instructions were unclear, and potentially problematic. The district court, however, never had a chance determine the meaning of the remand instructions. After the decision was issued on October 20, 1999, the case was mooted by political action. On November 3, 1998, Montana voters passed Initiative 137 ("I-137"), which banned the only feasible mining method for the SPJV project.[203] On remand, the district court ruled that because the only feasible method of operating the SPJV McDonald Gold Mine was banned, the passage of I-137 rendered the issue of the well tests moot.[204] In its dismissal order the district court also noted that although SPJV filed suit to have I-137 overturned, the well tests were deemed complete by SPJV [205] The court held the passage of the initiative, combined with SPJV's admission that well tests would not be repeated under any circumstances, rendered the compelling state interest analysis unnecessary [206]

SPJV subsequently filed suit challenging the constitutionality of I-137, and in the alternative, asserting a takings claim against the state as a result of I-137 [207] Both actions are still pending as of the date of publication of this note.

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202. *MEIC*, 988 P.2d at 1249.

203. Now codified, the initiative reads:

> (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2).
>
> (2) A mine described in this section *operating* on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

Mont. Code Ann. § 82-4-390 (1999)(emphasis added).

204. Montana Envtl. Info. Ctr v. Dep't of Envtl. Quality, No. BDV 95-1184, 2000 MontLaw 1432 (1st Jud. Dist.)(2000).

205. *Id.*

206. *Id.*

207. *See* Seven-Up Pete Venture v. State of Montana, No. BDV 2000-250, 2000 MontLaw 2898 (1st Jud. Dist.)(2000).

The Montana legislature also responded to the *MEIC* decision. During the 2001 legislative session, two bills were introduced that took direct aim at the court's ruling. Ultimately tabled in the Natural Resources Committee by one vote, Senate Bill 463 proposed to add a second clause to Article II, Section 3, that would have allowed the legislature to "balance" the inalienable rights enumerated in the current version of the constitution.[208] House Bill 200, also tabled in committee, proposed to allow the legislature to overrule decisions of the Montana Supreme Court on state constitutional issues.[209] The legislature's response to the *MEIC* opinion reinforces the belief that the effect of *MEIC* will be to give environmental groups a powerful tool to challenge polluting activities.

VI. CONCLUSION

The Montana Supreme Court's decision in *MEIC* is the first decision to interpret and apply the state constitution's environmental provisions. Although abbreviated reasoning and analysis tend to undercut its precedential value, at a minimum *MEIC* illuminates some important points. First, interest groups apparently have standing to sue based on an alleged violation of constitutional environmental rights. Second, the rights recognized in Article II, Section 3, and Article IX, Sections 1(1) and 1(3) are fundamental interdependent rights to be construed consistently Finally, the court will look to the framers' intent in future cases requiring construction of constitutional provisions. Although the opinion is not as definitive as one might hope, it is likely the court will have the opportunity to revisit its holdings in the near future.

208. S.B. 463, 2001 Leg. Session (Mont. 2001), *available at* http://laws.leg.state.mt.us:8000/laws01/plsql/LAW0200W$.startup. Specifically, the proposed amendment to the constitution would have read: "It is the legislature, which in fulfilling its responsibilities, may balance these rights, and the balance determined by the legislature shall be valid unless determined to be unreasonable." *Id.*, *see also Defining clean* MISSOULIAN, Feb. 15, 2001, at A1.

209. H.B. 200, 2001 Leg. Session (Mont. 2001), *available at* http://laws.leg.state.mt.us:8000/laws01/plsql/LAW0200W$.startup; *see also Other Bills Try to Limit Supreme Court*, THE MONTANA LAWYER, Jan. 2001, at 6.