Water Justice Under the Big Sky: Locating a Human Right to Water in Montana Law

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WATER JUSTICE UNDER THE BIG SKY: LOCATING A HUMAN RIGHT TO WATER IN MONTANA LAW

Abigail R. Brown

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I. INTRODUCTION

Similar to other businesses and residences in the [Town of Shelby], [we are] experiencing a water shortage due to low levels of water at the nearby reservoir. . . . Cities around the state have deployed mitigation efforts amid the abnormal-to-severe drought that’s blanketed Montana. Polson shut off water to 77 residents on Monday to allow its reserves to fill again, while Bozeman issued water use restrictions in mid-July to keep resources in balance with usage needs; both cities have declared a drought emergency.\(^1\)

We’re not trying to be Chicken Little running around like the sky is falling, because it’s not. It’s just that this is an exceptional year. We’re just trying to get people to be a little more proactive in taking care of what they’ve got so we don’t end up with a major problem.\(^2\)

These are not scenes from a futuristic science fiction movie; these descriptions came from July and August 2021 newspaper articles recounting instances of water shortages around Montana. The communities identified are but a handful of those in Montana that declared drought emergencies and mandated water conservation measures for residential water uses. Shortages in these communities are newsworthy because they are not communities that regularly experience water scarcity. Unfortunately, many of Montana’s rural communities where residents regularly struggle to obtain clean, potable water do not make the headlines because they are not located near popular tourist locations, or they are home to low-income or Indigenous populations, whose tribulations often go unnoticed by mainstream media outlets.

In Montana, the water policies and laws necessary to realize a human right to water are underdeveloped. The disconnect may be traced,

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in part, to confusion over the relationship between the “first in time, first in right” concept of priority\textsuperscript{3} and the idea of a “domestic preference.”\textsuperscript{4} This disconnect can be remedied with attention to Montana’s Constitution, which, by design, guarantees Montana citizens some of the most sweeping individual rights\textsuperscript{5} and the strongest environmental protections in the United States.\textsuperscript{6} Included in Montana’s constitutional declaration of rights are a right to individual human dignity and a right to a clean and healthful environment.\textsuperscript{7} The Montana Supreme Court has held that pursuant to these rights, the state has an affirmative obligation to protect the environment “for present and future generations,” and that the state legislature must “provide adequate remedies for the protection of the environmental life support system from degradation and . . . to prevent unreasonable depletion and degradation of natural resources.”\textsuperscript{8}

This article posits that a human right to water is critical to fulfilling Montana’s constitutional rights to individual human dignity and to a clean and healthful environment. This article advances in five parts. First, the article provides background information on water scarcity in Montana communities. Second, the article examines Montana’s current legal framework governing water rights, including an overview of the prior

\begin{itemize}
\item \textsuperscript{3} Mont. Code. Ann. § 85-2-401(1) (2021). “First in time is first in right” is the central tenant of the prior appropriation doctrine. Under this doctrine an appropriator’s right to divert water from a particular source is based on when the beneficial use of water for a particular purpose first began. Those whose use began earlier in time have primacy over those whose use began later in time. Irwin v. Phillips, 5 Cal. 140, 146–47 (Cal. 1855).
\item \textsuperscript{4} Generally, under the prior appropriation doctrine, all beneficial uses of water are treated the same, ranked only by priority of who diverted water first. However, in jurisdictions that recognize a “domestic preference,” there is an exception to strict priority rules. These jurisdictions prioritize domestic or natural uses of water (i.e., household water for drinking, cooking, sanitation, and supplying water for stock) over other types of water uses, regardless of which use began first. See generally Robert E. Beck, Use Preferences for Water, 76 N.D. L. Rev. 753 (2000).
\item \textsuperscript{7} Mont. Const. art. II, §§ 3, 4.
\item \textsuperscript{8} Mont. Const. art. IX, §§ 1(1), (3); see Walker v. State, 68 P.3d 872, 883 (Mont. 2003) (“We have repeatedly recognized the rights found in Montana’s Declaration of Rights as being ‘fundamental,’ meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.”).
\end{itemize}
appropriation doctrine. Third, the article contemplates the international perspective on the human rights to dignity and to water. Fourth, the article explores Montana’s coordinate constitutional rights to individual dignity and a clean and healthful environmental. Fifth, the article harmonizes these constitutional provisions with the prior appropriation doctrine and concludes that Montana’s legal framework supports a human right to water.

II. BACKGROUND: WATER SCARCITY IN MONTANA’S COMMUNITIES

Water—or more precisely the lack of water—has been a central focus of wars and politics since the dawn of humankind in the ancient civilizations of Mesopotamia, Egypt, and China. Today, water scarcity dominates news cycles at global, national, and regional crisis levels, and Montana is no exception.9


Water scarcity does not have a universally accepted definition,\(^{11}\) but is generally considered to be the “inadequate or inequitable access to clean, safe and affordable water for drinking, cooking, and sanitation and hygiene.”\(^{12}\) Water scarcity is not necessarily only climate-driven or hydrologic in nature, but also may result from “short-sighted policies, such as the over-allocation of water use licenses in a catchment or the excessive expansion of irrigation areas with free or cheap water for farmers.”\(^{13}\) Water scarcity issues may arise even in areas with plenty of water “where there is no legal or institutional arrangement in place to improve access, or if the required infrastructure does not exist or is not functional.”\(^{14}\)

While the warming climate and changing hydrologic cycle certainly impact the availability of water in Montana,\(^{15}\) the state suffers from outdated policies that allow minimally regulated, expansive irrigation with cheap or free water using inefficient irrigation systems often diverted under very senior water right priorities.\(^{16}\) At the same time, the state’s policies concerning appropriations for domestic water also are outdated, as they tend to lump most domestic uses into a single category rather than distinguishing among, for example: domestic appropriations of small amounts of water for basic human survival; development of domestic water for subdivisions and ranchettes using exempt wells as a workaround to the more stringent permitting; and municipal water use to


\(^{12}\) Christine Martin et. al., *Our Relationship to Water and Experience of Water Insecurity among Apsáalooke (Crow Indian) People, Montana*, 18 INT. J. ENVIRON. RES. PUB. HEALTH 582, 582 (2021).

\(^{13}\) FAO Water Reports, *supra* note 11, § 2.2.

\(^{14}\) *Id.*


\(^{16}\) *Id.* at 33, 37 (discussing Montana’s need for updated assessments of statewide water use, which requires investments in staff, infrastructure, and technology).
serve domestic water needs in Montana’s growing urban areas.\textsuperscript{17} As Montana’s population continues to grow,\textsuperscript{18} competition for use of existing water resources will intensify.\textsuperscript{19} Without clear statewide water policies and legislation, this competition will inevitably find its way to the courts, as well-resourced water users seek to ensure stability in their water sources. Unfortunately, when competition for water is resolved in the courts, Montanans who regularly experience water scarcity are left out of consideration due in part to lack of financial resources to fund protracted litigation.

To suggest to the casual observer that Montana communities experience water insecurity creates cognitive dissonance because Montana has an abundance of water resources as a headwaters state.\textsuperscript{20} Common images of Montana include blue ribbon trout streams, crystal clear mountain lakes, and acres of irrigated farmland abutting snow-capped mountains.\textsuperscript{21} And yet, many of Montana’s rural, low-income, and Indigenous communities experience water insecurity due to a lack of access to clean, affordable drinking water.\textsuperscript{22} Similar to other states and nations, Montana’s rural, low-income, and Indigenous communities are

\textsuperscript{17} See, e.g., Letter From Karen Knudsen, Executive Director of the Clark Fork Coalition, to the Members of the Water Policy Interim Committee, \textit{Exempt Well} (Jan. 9, 2018), http://clarkfork.org/wp-content/uploads/2021/02/CFC-Exempt-Well-Policy-Letter-New-1-9-18.pdf [https://perma.cc/J4GK-CWQ8] (outlining the Clark Fork Coalition’s efforts to close the “exempt well loophole” that allows for unfettered development using exempt wells, while also acknowledging that exempt wells are an appropriate mechanism for farmers, ranchers, and families to use small amounts of water).

\textsuperscript{18} Mont. Dep’t of Commerce Cens. & Econ. Info. Ctr., \textit{Population}, https://ceic.mt.gov/People-and-Housing/Population [https://perma.cc/3GHE-3WME] (last visited Apr. 4, 2022) (showing Montana’s population increased by 1.0% from 2019 to 2020 with some cities growing as much as 9.0% over the same period).

\textsuperscript{19} See F.J. Trelease, \textit{Preferences to the Use of Water}, 27 ROCKY MOUNTAIN L. REV. 133, 158–59 (1955) (discussing the inherent tension between competing water users on the same source and the recognition that regardless of the mechanism used, when water is taken from one beneficial use and moved to another, a loss occurs).


\textsuperscript{21} See generally id. (utilizing photographs of abundant water sources throughout the 2015 State Water Plan document).

the most vulnerable to the negative impacts of water scarcity. Rural communities are particularly vulnerable to negative impacts of water scarcity because their communities’ economies are often dependent on natural resources, such as agricultural production or ranching, both of which are water-intensive operations.

These rural areas are where the tension between a human right to water and the prior appropriation doctrine is most evident. A 2008 study conducted on behalf of the Montana Department of Natural Resources and Conservation found that irrigation accounts for 96% of all commercial uses of Montana’s water resources. Notably, “Montana’s irrigation systems, as a whole, are among the least efficient in the West, withdrawing much more water from streams and aquifers than irrigated crops require.” Additionally, these large-scale agricultural uses are often operating under senior water rights facilitated, in part, by federal policies encouraging settlement and reclamation of the Western states. In the same watersheds, domestic water uses are often either junior in priority to the irrigation uses or operate without an enforceable priority date because they are small groundwater developments that are exempt from statutory filing and permitting requirements.

23. Much of the factual inquiry in this article centers on communities in Indian county, where both Indian and non-Indian Montanans often reside. See 18 U.S.C. § 1151 (defining “Indian country”). While discussions of federal Indian law, tribal sovereignty, and federal Indian reserved water rights are beyond the scope of this article, discussion of water scarcity in Indian county is apropos because Indigenous people are citizens and residents of the states in which they live, and most of the (sparse) data related to water scarcity in Montana is in the context of Indian Country. See Matthew L.M. Fletcher, States and Their American Indian Citizens, 41 AM. INDIAN L. REV. 319, 319 (2017) (“While the federal government has a special trust relationship with Indians and Indian nations, Indian people are also citizens and residents of the states in which they live. Thus, states have obligations to Indians as well.”).


26. See generally Donald J. Pisani, Federal Reclamation and the American West in the Twentieth Century, 77 AGRIC. HISTORY 391, 391–419 (2003) (describing the evolution of federal reclamation policies, including the Bureau of Reclamation’s policies that encouraged settlement of Western states through artificial irrigation as early as the 1890s).

The policy debate over exempt wells has ebbed and flowed in Montana since its genesis in the 1970s and is still unresolved.\(^28\) One of the early reasons advanced to exempt non-diversionary domestic and small groundwater developments from filing and permitting requirements was the recognition of access to water as a fundamental human right.\(^29\) Opponents of exempt wells decry that senior water users will be injured by unchecked groundwater well development and employ a “death by 1,000 cuts” argument, citing as evidence the proliferation of subdivision and ranchettes on the outskirts of cities.\(^30\) However, some of these opponents do not categorically oppose all exempt groundwater wells, acknowledging that they are an appropriate mechanism for farmers, ranchers, and Montana families to obtain small amounts of water outside the lengthy and expensive permitting process.\(^31\) Proponents of exempt groundwater wells assert that subjecting small groundwater developments to the costly and strenuous permitting process would unfairly burden small agricultural producers and individuals who rely on domestic wells for household use.\(^32\)

With the continuous influx of new residents to Montana—many seeking refuge from larger cities and the perceived peace of mind that

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28. Water Policy Interim Committee, *The Exemption at 45: A Study of Groundwater Wells Exempt From Permitting*, Mont. Legis. Serv. Div. 17 (Sept. 2018), https://leg.mt.gov/content/Committees/Interim/2017-2018/Water-Policy/Meetings/ExemptWellReport-FINAL.pdf [https://perma.cc/9P9L-NJYH] (summarizing the 45-year history of exempt wells in Montana, including legislative, administrative, and judicial decisions, and concluding that additional information is needed to fully address the impact of the exemption of the enforcement of the state’s priority system of water rights) [hereinafter The Exemption at 45].


30. Carolyn A. Sime, *Public Water, Private Rights: All Are Not Equally Protected When the State Allows Some to Divert Small Quantities of Ground Water Outside the Permitting System*, 75 Mont. L. Rev. 237, 272 (2014) (in-depth review of small groundwater developments that are exempt from permitting requirements); see, e.g., *Clark Fork Coal*, 380 P.3d at 512 (Rice, J., dissenting).


living in the Treasure State brings— the debate about how to manage exempt wells will certainly continue in future legislative sessions. In a 2010 memorandum concerning exempt groundwater wells, a staff attorney for the Montana Legislature reported to the interim water policy committee that

[d]uring a call for water by a senior appropriator, all junior water right uses are supposed to be curtailed according to their priority, but the public health crisis that may result from curtailing domestic or municipal water use may create a de facto priority for [domestic and municipal] uses even if they are junior to other uses.  

As demonstrated by this statement, the needs of all Montanans are not served by policies that protect unregulated and inefficient uses of water for irrigation to the detriment of domestic water users simply because the irrigation use predated the domestic use. Moreover, as discussed herein, the prior appropriation doctrine does not prohibit adoption of policies that promote preference of uses, particularly when the preference is intended to meet basic human health and safety needs.

III. MONTANA’S PRIOR APPROPRIATION DOCTRINE AND DOMESTIC PREFERENCE

A. Prior Appropriation in Montana

In Montana, water rights are usufructuary rights, meaning that water right holders may have the legal right to use and derive benefit from the use of water, but the water itself is owned by the state. Article IX. § 3 of the 1972 Montana Constitution declares all surface, underground, flood, and atmospheric waters within its boundaries to be the property of the state, for the use of its people and subject to appropriation for

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34. Boiling It Down, supra note 29, at 41–42 (emphasis added).
35. See, e.g., Albert W. Stone, Montana Water Rights – A New Opportunity, 34 MONT. L. REV. 57 (1973) (discussing the lack of certainty in Montana’s water right records, including inflated notices of appropriations).
beneficial uses provided by law. Upon enactment, this constitutional provision confirmed all then-existing beneficial uses of water and affirmed that the use of water appropriated for beneficial use is a public use. The provision directed the Montana Legislature to establish a mechanism for the administration, control, and regulation of water rights, as well as a system of centralized records.

In allocating water within this framework, Montana follows the prior appropriation doctrine. Under this doctrine, an appropriator’s right to divert water from a particular source is based on when the use of water for a particular purpose first began. Those whose use began earlier in time have primacy over those whose uses began later in time ("first in time is first in right"). Although Montana has followed the prior appropriation doctrine since territorial times, the doctrine was not officially codified until the passage of the Montana Water Use Act in 1973.

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37. Mont. Const. art. IX, §3(3); see Gen. Agric. Corp. v. Moore, 534 P.2d 859, 862 (1975) (holding that Article IX, § 3(1)–(3) of the Montana Constitution are self-executing).

38. Mont. Const. art. IX, § 3(1). “Existing rights” are not defined or further addressed in the Constitution; however, the Water Use Act defines “existing right” or “existing water right” as “a right to the use of water that would be protected under the law as it existed prior to July 1, 1973.” Mont. Code Ann. § 85-2-102(13). The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law. Id. After July 1, 1973, water could only be appropriated by applying for a permit from the Montana Department of Natural Resources & Conservation. A notable exception to the permitting process is appropriations of groundwater that divert less than 35 gallons per minute up to 10 acre-feet per year. Mont. Code Ann. § 85-2-306.

39. Mont. Const. art. IX, § 3(2); see Gen. Agric. Corp., 534 P.2d at 862 ("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.").

40. Mont. Const. art. IX, § 3(4).

41. Mettler v. Ames Realty Co., 201 P. 702, 707 (Mont. 1921) (holding "[T]he doctrine of appropriation was born of the necessities of this state and its people; and that it was intended to be permanent in its character, exclusive in its operation, and to fix the status of water rights in this commonwealth."). In 1921, the Montana Supreme Court specifically rejected both the riparian doctrine and the California doctrine.


43. Id.; see G.S. Weber et al., Case and Materials on Water Law 74–78 (10th ed. 2020).

The foundational principles of the prior appropriation doctrine are
distinct from the other dominant water allocation systems in the United
States: the riparian doctrine and the California doctrine. Under the riparian
dctrine, the right to use water is incidental to ownership of land adjacent
to a water source.\textsuperscript{45} Originally, under the natural flow theory, a landowner
was entitled to have water levels maintained, subject only to use for strictly
domestic purposes.\textsuperscript{46} The strict limitations of the natural flow theory
ultimately gave way to the reasonable use theory, under which each
riparian water user has an equal right to make reasonable use of the water
source, subject to other riparian users making reasonable use of the same
source.\textsuperscript{47} The California doctrine is a hybrid system that recognized both
riparian rights and appropriative rights.\textsuperscript{48} With limited exceptions, riparian
rights as a class are senior in priority to all appropriative rights; in
jurisdictions that follow the California doctrine, all use of water is limited
to reasonable use for the beneficial purpose served.\textsuperscript{49}

Although the riparian and California doctrines promote equity in
allocation of riparian rights, the prior appropriation doctrine is different
because of the emphasis placed on the timing of an appropriation. In
contrast to riparian allocation, the prior appropriation system favors the
earliest appropriator by assigning them a senior right, enforceable against
all junior water users who came after them.\textsuperscript{50} This senior user may take the
entire stream to the exclusion of junior users if needed to satisfy the senior
right’s beneficial use.\textsuperscript{51} Said another way, a senior appropriator is entitled
to fully satisfy their needs before a junior appropriator is entitled to use
any water.\textsuperscript{52} Under the classic rules of prior appropriation, all beneficial

\begin{thebibliography}{99}
\item Mettler, 201 P. at 703.
\item Harris v. Brooks, 283 S.W.2d 129, 132–33 (Ark. 1955).
\item Id. at 133; United States v. Willow River Power Co., 324 U.S. 499, 505 (1945).
\item See El Dorado Irrigation Dist. v. State Water Res. Control Bd., 48 Cal. Rptr. 3d 468, 486 (Cal. Ct. App. 2006) (describing California’s hybrid system of
water rights and the rule of priority).
\item See, e.g., CAL. CONST. art. X, § 2; see United States v. State Water
\item Chennat Gopalakrishnan, The Doctrine of Prior Appropriation and
\item Mettler v. Ames Realty Co., 201 P. 702, 704 (Mont. 1921).
\item Kelly v. Teton Prairie LLC, 376 P.3d 143, 146 (Mont. 2016).
\end{thebibliography}
uses are entitled to water in order of their relative priorities, without preference for one type of use over any other type of use. However, in many states, the rule of priority has always been balanced by the presence of certain use preferences—in particular, a preference for domestic uses.

B. Domestic Preference: An Exception to the Rule of Priority

When water is plentiful and sufficient to satisfy all demands on the source, the rules of priority do not matter because no competition exists among the relative water users. However, when the demands on a water source are greater than the amount of water available for appropriation, the rule of priority is triggered. Thus, during shortages, only those water users with the most senior priorities are able to divert water for beneficial uses. And yet, it is during these times of water scarcity that the recognition of a human right to water is most critical.

Indeed, the majority of Western states that follow the appropriative doctrine have carved out exceptions to strict enforcement of priorities, with most of the exceptions related to exempting small domestic or livestock uses from the state’s requirements for permitting or

53. In re Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396, 399 (Mont. 2002). Beneficial use is defined broadly and includes, but is not limited to, the use of water for the benefit of the appropriator, other persons, or the public for “agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.” MONT. CODE. ANN. § 85-2-102(4)(a) (subsection 4 contains several other examples of beneficial use, including the use of water as part of an instream water lease, aquifer mitigation and recharge, and aquifer storage and recovery).

54. Beck, supra note 4, at 754.

adjudication, or both.\textsuperscript{56} For example, Colorado,\textsuperscript{57} California,\textsuperscript{58} Oregon,\textsuperscript{59} Idaho,\textsuperscript{60} Texas,\textsuperscript{61} and Nebraska,\textsuperscript{62} have all adopted constitutional or statutory iterations of a “domestic preference,” which prioritizes water used for domestic purposes above all other beneficial uses. Some states similarly recognize the authority of the state to “reorder” the priorities of water rights in order to serve the public interest.\textsuperscript{63}

In Montana, like other Western states, the definition of “beneficial use” has evolved over time to reflect societal values. For example, it was not until 2002 that instream uses of water were explicitly recognized as a beneficial use.\textsuperscript{64} Moreover, while Montana is often assumed to be a strict

\begin{itemize}
\item See Nathan Bracken, Exempt Well Issues in the West, 40 ENV’T L. 141, 145 (2010) (survey of Western states’ statutory and regulatory treatment of exempt wells concluding that all member states except Utah and California exempt certain groundwater uses from regulatory or adjudicative procedures). See generally Trelease, supra note 19, at 143–58 (early survey of the Western states’ treatment of preference of use); see generally Beck, supra note 4.
\item Colo. Const. art. XVI, § 6 (“Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose.”).
\item Cal. Water Code Ann. § 106 (2021) (“It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.”); Deetz v. Carter, 43 Cal. Rptr. 321, 323 (Cal. App. Dist. Ct. App. 1965) (explaining the domestic preference includes water for sustenance of human beings, for household conveniences, and for barnyard animals, but not for livestock raised for profit).
\item Or. Rev. Stat. Ann. § 540.140 (2021) (“[T]he water for domestic purposes shall, subject to such limitations as may be prescribed by law, have the preference over those claiming such water for any other purpose.”).
\item Idaho Const. art. XV, § 3 (“[T] hose using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose.”).
\item Tex. Water Code Ann. § 11.024(1) (2021) (“[T] he appropriation of water for domestic and municipal uses shall be and remain superior to the rights of the state to appropriate the same for all other purposes.”).
\item In re Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396, 404, 407 (Mont. 2002).
\end{itemize}
prior appropriation state that does not recognize preference among uses, a broader review of Montana’s water policies and laws challenge this assumption. As noted above, small water uses for domestic purposes regularly have been exempted from permitting requirements and forfeiture laws. Likewise, in basins closed to new water permits and in controlled groundwater areas, new appropriations for small domestic uses are exempted from such closures. These examples underscore a de facto recognition of the importance of small domestic use in Montana, a reality that has not yet been squarely confronted by Montana courts.

C. Montana’s Legal Authority to Recognize a Domestic Preference: Reconsidering Mettler

Historically, decisions of Montana courts were interpreted as rejecting the domestic preference, but a closer look at the relevant cases suggests that the courts have not yet directly addressed the issue. In particular, the 1921 case Mettler v. Ames Realty Company is widely cited for the proposition that the Montana Supreme Court has specifically rejected the concept of a domestic preference. In Mettler, the plaintiff was a riparian landowner who used the waters of Prickly Pear Creek for household and livestock purposes. The defendant was an agricultural water user who held an appropriative water right to divert Prickly Pear Creek water for irrigation. Litigation was sparked when the defendant changed its point of diversion to a location upstream of the plaintiff’s property, diverting so much of the water during the irrigation season that the plaintiff was left without water. The plaintiff alleged injury resulting from the defendant’s changed point of diversion and agricultural diversion, even though the plaintiff did not claim an appropriative right to the waters of Prickly Pear Creek. The plaintiff asserted that even though she was not entitled to have the water of Prickly Pear Creek flow down through her land under an appropriative water right, she was entitled to assert the common-law doctrine of riparian rights since she was a riparian

65. Mont. Code Ann. § 85-2-306 (describing those uses exempt from permitting requirements, which includes small domestic uses); Mont. Code Ann. § 85-2-222(5) (confirming that failure to file for an exempt right for non-diversionary domestic or stock uses does not result in forfeiture of an existing water right).


68. Id. at 703.
landowner. The issue before the Mettler Court was considered one of first impression—whether Montana followed the California doctrine, recognizing both riparian and appropriative rights, or a strict appropriation doctrine.

In contrasting the core principles of the appropriation doctrine with those of the rejected riparian doctrine, the Mettler Court stated that “the one first in time is first in right without reference to the so-called natural and artificial uses.” Because “natural uses” include household and domestic use, drinking water, and watering livestock, as compared to “artificial uses” such as irrigation and industry, this statement is typically offered as a rejection of domestic preference. However, upon closer examination, the Mettler Court’s statement does not support such a categorical rejection of domestic preference.

First, the Mettler Court was focused on affirming the prior appropriation doctrine and rejecting the concept of riparian rights. It reviewed its precedent and concluded that the phrase or terms associated with the riparian doctrine had been discussed in dictum with enough regularity to create confusion as to whether Montana recognized both appropriative and common law riparian rights. Following an acknowledgement of the unclear precedent, the Mettler Court analyzed in detail the public policy of the State of Montana and the legislation set forth by the Territory of Montana. It concluded that public policy and legislation clearly contemplated that water rights would be governed exclusively by the prior appropriation doctrine, stating:

It is submitted that the policy established by the measures above is irreconcilable with the application of the doctrine of riparian rights even in the modified form in which that doctrine now prevails in the states adhering to the California rule; that our Constitution and statutes proceed upon the theory that artificial irrigation is absolutely necessary to the successful cultivation of large areas of land within the state; that the doctrine of appropriation was born of the necessities of this state and its people; and that it was intended to be permanent in its character,

69. Id.
70. Id. at 706.
71. Id. at 707.
72. Id. at 703.
73. Id. at 706.
exclusive in its operation, and to fix the status of water
rights in this commonwealth.\textsuperscript{74}

Ultimately, the \textit{Mettler} Court unequivocally held that “the common-law
d doctrine of riparian rights has never prevailed in Montana since the
enactment of the Bannack Statutes in 1865; that it is unsuited to the
conditions here.”\textsuperscript{75}

Second, categorizing domestic use versus other types of use was
not at issue in the case, nor did the \textit{Mettler} Court specifically examine the
scope of a preference for natural uses in the context of appropriative rather
than riparian rights. The bulk of the \textit{Mettler} Court’s discussion on
categories of uses, including domestic use, was in its description of the
foundational principles of the riparian doctrine, placing the plaintiff’s
allegations in context.\textsuperscript{76} After this description, the \textit{Mettler}
Court systematically explored the tenets of the California doctrine and the
appropriative doctrine, only mentioning types of water uses as part of
illustrative lists of beneficial uses.\textsuperscript{77} At no point did the \textit{Mettler}
Court examine the scope of a domestic preference (or any other preference) in
the context of the appropriative doctrine.

Finally, the \textit{Mettler} Court did not examine any potential
distinctions between the entire category of “natural uses” and the
subcategory of water for health and safety. As previously noted, the issue
before the \textit{Mettler} Court was whether Montana followed the prior
appropriation doctrine or the hybrid California doctrine when allocating
water for irrigation and other beneficial purposes.\textsuperscript{78} Similarly, the \textit{Mettler}
Court did not assess allocation of various categories of water use or
subcategories of water uses. “Natural uses” of water were discussed only
in the context of a description of the common law principles of the riparian
doctrine.\textsuperscript{79}

Since \textit{Mettler}, Montana courts have not yet been squarely
presented with the question of whether state law elevates water for health
and safety over a strict priority system. A 2002 Montana Supreme Court
case, \textit{In re Deadman’s Basin Water Users Association}\textsuperscript{80} (“\textit{deadman’s
Basin}”), is sometimes cited for the proposition that Montana courts have
recently rejected the concept of a domestic preference. However, this case

\textsuperscript{74} \textit{Id. at} 707.
\textsuperscript{75} \textit{Id. at} 708.
\textsuperscript{76} \textit{Id. at} 703.
\textsuperscript{77} \textit{Id. at} 704–06.
\textsuperscript{78} \textit{Id. at} 706.
\textsuperscript{79} \textit{Id. at} 703.
\textsuperscript{80} 40 P.3d 387, 390–91 (Mont. 2002).
does not support such a proposition because it is fundamentally about contract interpretation rather than appropriative principles. *Deadman’s Basin* concerned apportionment of water stored in a state water project reservoir pursuant to a water right held by the state that is sold to water users under standardized water purchase contracts.\(^{81}\) When a state water project reservoir reached critically low levels, the district court ordered that any remaining stored water was to be used for domestic, municipal, stock, and wildlife uses, and prohibited irrigation of crops until the reservoir levels stabilized.\(^{82}\) The *Deadman’s Basin* Court held that the district court could not sua sponte make a priority determination between domestic and irrigation water consumption because all water users in question were bound by the terms of their water purchase contracts, which did not express preference for different categories of water uses.\(^{83}\) Instead, the plain language of the water purchase contracts expressly provided that, in the event of a water shortage, all contract water users were required to reduce their water diversions on a prorated basis, regardless of the characteristic of the use.\(^{84}\) The *Deadman’s Basin* Court was simply enforcing these contract terms, and the issue of domestic preference under general state law was not at issue.\(^{85}\) As a result, the case is not relevant to the question of whether Montana generally recognizes a domestic preference or human right to water.

In sum, neither *Mettler* nor *Deadman’s Basin* stand for the sweeping proposition that Montana law does not recognize a preference for domestic use, and neither case addressed the issue of water use required to protect human health and safety. In fact, contrary to the idea that *Mettler* or *Deadman’s Basin* preclude a human right to water, the primacy of water for domestic use is inherently ingrained in Montana’s water policies and court decisions. Initially, the Water Use Act included a process for issuing permits for new water uses, but specifically exempted “groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons a minute.”\(^{86}\) While the exempt flow rate has now decreased to 35 gallons per minute and the maximum volume is capped at 10 acre-feet per year, these small

\(^{81}\) Id. at 389.
\(^{82}\) Id. at 388–89.
\(^{83}\) Id. at 389.
\(^{84}\) Id.
\(^{85}\) Id.
\(^{86}\) The Exemption at 45, *supra* note 28, at 35.
groundwater developments are still exempt from the permitting system.\textsuperscript{87} Appropriators of these small groundwater developments are not required to meet the permitting requirements that include a showing that water is physically and legally available for appropriation vis-à-vis existing rights on the source.\textsuperscript{88}

In the 1980s, during water right claim filing, Montana exempted non-diversionary livestock and individual domestic uses from the mandatory filing requirements,\textsuperscript{89} and therefore these types of water uses were not subject to forfeiture for failure to file a claim.\textsuperscript{90} Little has been written about the rationale behind this exemption; however, courts have remarked that because of Montana’s agricultural history, non-diversionary stock and domestic uses were accepted as in accordance with the prior appropriation system and were not discussed because they do not create issues that result in litigation.\textsuperscript{91} Likewise, in 2013, when the Montana Legislature reopened the statement of claim filing for these previously exempt rights, it reiterated that failure to file a statement of claim would not result in forfeiture of the right.\textsuperscript{92} These legislative exemptions from permitting and filing requirements created a de facto domestic preference because the exemptions place these small water uses outside the priority system. When a use of water is outside the priority system, that use cannot be curtailed in times of shortage to satisfy a more senior right because it may not be identified within the decree being enforced.\textsuperscript{93} Similarly, it may be impractical for a senior water user to curtail an exempt water use when

\begin{itemize}
\item \textsuperscript{87} \textit{Mont. Code Ann.} § 85-2-306(3)(a)(iii). For an in-depth analysis of small groundwater developments that are exempt from the Montana permitting system, see generally Sime, \textit{supra} note 30.
\item \textsuperscript{88} The Exemption at 45, \textit{supra} note 28, at 20; \textit{see also} To Change or Not to Change, \textit{supra} note 32, at 7 (summarizing the permit system and how physical and legal availability are determined).
\item \textsuperscript{89} \textit{Mont. Code Ann.} § 85-2-222(1).
\item \textsuperscript{90} \textit{Id.} § 85-2-226 (failure to file a statement of claim resulted in presumption of abandonment).
\item \textsuperscript{91} \textit{See, e.g.}, In re Adjudication of the Existing Rights to the Use of All the Water, 55 P.3d 396, 402–03, 404 (Mont. 2002).
\item \textsuperscript{92} \textit{Mont. Code Ann.} § 85-2-222(5).
\item \textsuperscript{93} \textit{Id.} § 85-2-406 (statute governing enforcement of water rights, which assumes that the water uses being enforced have a corresponding water right number that can be tabulated).
\end{itemize}
the the hydrological connection between the senior water use and the exempt water use is undefined. 94

These exemptions from the priority system reflect an inherent recognition by Montana that small domestic uses are different from other water uses. However, under the priority system at present, the exempt water users have no recourse against other water users—juniors or seniors—if their water supply is reduced or stopped in times of shortage because they have no effective priority date, or their priority is so junior as to be insufficient to restore their water supply. 95 Yet, there are express elements of Montana’s water law that do protect these users, including Montana’s Constitution, which imposes on the state an obligation to take action to protect individual human dignity and to ensure a clean and healthful environment.

IV. A MATTER OF DIGNITY AND THE HUMAN RIGHT TO WATER: AN INTERNATIONAL FRAMEWORK

Human rights are considered those innate rights held by every human being simply by virtue of being alive; they are inherent rights not granted by any state. 96 There are many different human rights, from the most fundamental right to life, to the rights to food, education, work, health, and liberty. 97 Human rights may be positive (imposing a duty on a

94. To Change or Not to Change, supra note 32, at 16–19, 22–25 (summarizing Montana law regarding enforcing priorities by “making a call,” and outlining the challenges of enforcing a call against an exempt well, including the challenge of calling a domestic well that would result in the lack of drinking water for people. Note that if an exempt use is registered in the state’s centralized database, then these water users are still subject to call by a senior water user in times of shortage, although the call may be entirely impractical).

95. See Mettler v. Ames Realty Co., 201 P. 702, 703 (Mont. 1921) (thus, like the plaintiff in Mettler, if these domestic users find themselves on a dry creek when a large agricultural user diverts the entire flow of the creek upstream from them, their exempt domestic use does not provide them with a cause of action under current Montana law).

96. Rights granted by the constitutions and laws of states are civil rights and, unlike human rights, can vary greatly from one country to another. In the United States, citizens have civil rights derived from the U.S. Constitution, including the right to free speech, due process, equal protection, self-incrimination, and freedom from discrimination, to name a few. See generally Civil Right, BLACK’S LAW DICTIONARY (11th ed. 2019).

state to act), negative (prohibiting a state from interfering), or both.\textsuperscript{98} This section examines two emerging human rights, which are often framed as both positive and negative human rights—the rights to dignity and to water\textsuperscript{99}—and explores the connection between those rights in the context of international law. The following section then applies these concepts in the context of Montana water law.

\textit{A. The International Human Right to Dignity}

Human dignity is the recognition of the intrinsic worth of each person because of their humanness.\textsuperscript{100} As such, each person is worthy of respect and value simply because they are human.\textsuperscript{101} The recognition of human dignity as a basis for law emerged from the devastation of World War II and is premised on the belief “that there is a higher law of humanity (derived from rules of ‘natural law’ that are based on an understanding of the essential nature of humans), and those who violate it may be properly tried and punished.”\textsuperscript{102}

In 1945, the United Nations was formed in response to the human suffering brought on by the two world wars, and it was founded on a belief in fundamental human rights, and that the inherent dignity and worth of humankind deserved equal protection.\textsuperscript{103} The Preamble to the United Nations’ Universal Declaration on Human Rights (“UNDHR”) begins: “Whereas recognition of the inherent dignity and of the equal and

\footnotesize
\begin{itemize}
  \item On October 8, 2021, the United Nations Human Rights Council passed Resolution 48/13, recognizing, for the first time, the human right to a healthy and sustainable environment. This newly recognized human right is not addressed herein, as this article was in its final stages at the time of the resolution’s passage. See \textit{Access to a Healthy Environment, Declared a Human Right by UN Rights Council}, UN NEWS (Oct. 8, 2021), https://news.un.org/en/story/2021/10/1102582 [https://perma.cc/JYT8-GGQZ].
  \item \textit{Id.}
\end{itemize}
inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” with the first enumerated human right being that of human dignity.104

Individual states emerging from the inhumanity of World War II also expressly recognized the dignity of humankind. For example, West Germany’s 1949 Constitution contained a dignity clause (“The dignity of man shall be inviolable”) that developed

in response to the Nazi regime’s treatment of Jewish people (as well as homosexuals, Gypsies, persons with disabilities, and political opponents). These “inferior” people (so-called “useless eaters”) were not merely denied equal protection of the laws. The government placed them in concentration camps and used them for slave labor. Medical experiments were performed on them. They were persecuted and killed. They were viewed and treated as subhuman, without any dignity.105

While the concept of a right to human dignity is a central concept of international documents such as the United Nations Charter,106 the UNHDR, and in the constitutions of many nations,107 the contours of a legal “right to human dignity” are still emerging.108

Recognition of human dignity is more than simply ensuring groups of people are not denied equal protection of the laws. When the citizens of a state expressly ratify a constitution that includes a right to human dignity, those citizens are obligating their government to take affirmative actions that will guarantee all citizens the tools and resources necessary to live a life of dignity. Among those resources necessary to live in dignity is access to clean, affordable water. As discussed in the next section, Montana’s Constitution is explicit in its recognition of a right to human dignity, though interpretation and application of the right in Montana jurisprudence is still limited.

104. UDHR, supra note 97, at art. I (stating “All human beings are born free and equal in dignity and rights.”).
108. For an in-depth discussion of the role of human dignity in the development of human rights adjudication, which is beyond the scope of this article, see Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EUR. J. INT’L L. 655 (2008).
B. The International Human Right to Water

The concept of a human right to water is grounded in the indisputable fact that, without water, human life cannot be sustained. International instruments have implicitly recognized a human right to water for decades.\footnote{109} However, it was not until 2002 that the United Nations Committee of Economic, Social and Cultural Rights explicitly stated that the right to water is a fundamental human right in what is commonly known as General Comment No. 15.\footnote{110}

General Comment No. 15 begins by stating: “The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”\footnote{111} It goes on to state that the human right to water must be “adequate for human dignity, life and health,” and broadly interpreted to recognize water as a social and cultural good, not simply an economic good, in a way that is sustainable to “ensure the right can be realized for present and future generations.”\footnote{112} While what constitutes the adequacy of water to sustain a human right is a fact-dependent inquiry, there are universally applicable factors that must be met in all circumstances: (1) the water supply must be sufficient for each person for continuous personal and domestic use; (2) the available water must be clean and safe for personal, domestic use; and (3) water, water facilities, and water services must be physically and economically accessible to all, including marginalized or vulnerable populations, without discrimination.\footnote{113}

General Comment No. 15 expresses the human right to water as both positive and negative obligations of the state, under three broad categories: (1) obligations to respect by refraining from interfering with the enjoyment of the right to water; (2) obligations to protect by preventing third parties (i.e., individuals, groups, corporations or other entities) from interfering with the enjoyment of the right to water; and (3) obligations to fulfill by facilitating, promoting, and providing the right to water to all

\footnote{109} See generally Qureshi, supra note 98, at 147–53 (discussing explicit and implicit inclusion of a human right to water in international instruments).


\footnote{111} Id. ¶ 1.

\footnote{112} Id. ¶ 11 (emphasis in original text).

\footnote{113} Id. ¶ 12.
individuals and communities, particularly those who are unable to realize the right independently.114

In addition to defining the human right to water, identifying the obligations of states to fully realize the right, and implementing violations for breach of those obligations, General Comment No. 15 also provides a framework for implementation of the human right to water.115 As discussed at length in Dr. Qureshi’s article, The Emerging Human Right to Water in International and Domestic Law, which explores the details of General Comment No. 15,

[the implementation of the right to water needs the allocation of resources, reference to the right in the legal system, enabling local authorities, and political will. Moreover, a complete multilayered system has to be defined transparently to involve state machinery. The most crucial features of implementing a right to water include four indispensable factors, which are legislation, accountability, community, and monitoring.116

Notably, the human right to water has been interpreted to be a right that states may progressively develop consistent with available resources.117 However, this requirement seems at odds with the urgency and nature of a fundamental human right—and insufficient to accomplish any meaningful protection of a resource like water that continues to diminish with inaction while the global population rises.

On July 28, 2010, eight years after General Comment No. 15 defined the human right to water, the United Nations General Assembly passed Resolution 64/292 and formally recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”; further, it called upon the international community to increase “efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.”118 Since Resolution 64/292 was adopted, the United Nations Human Rights Council affirmed the human right to water as legally binding on member

114. General Comment No. 15, supra note 110, ¶¶ 20–29; see also Qureshi, supra note 98, at 158–60.
115. General Comment No. 15, supra note 110, ¶¶ 45–59.
116. Qureshi, supra note 98, at 162 (internal citations omitted).
117. General Comment No. 15, supra note 110, ¶ 52.
states and derived from the right to an adequate standard of living.\textsuperscript{119} Despite the reality that water is necessary for life, the United Nations’ recognition of a human right to water, and the United States’ status as a member of the United Nations, recognition of the human right to water in the United States has not yet materialized.

\textbf{C. A Human Right to Water in the United States? It’s Complicated}

Unlike the international community, the United States does not recognize a human right to water, having repeatedly disassociated itself from any consensus of United Nations’ member states that either attempts to define the human right to water or obligates states to fulfill a human right to water.\textsuperscript{120} This official stance is despite the United States’ informal statements recognizing the importance of meeting basic needs for water and sanitation, and espousing a commitment to addressing global challenges relating to access to safe drinking water and sanitation.\textsuperscript{121}

Given the United States’ reluctance to recognize a human right to water at a federal level, citizens must turn to their individual state constitutions for legal authority to recognize a human right to water. There are only two states in the union with constitutions that mention a right to clean water: Pennsylvania\textsuperscript{122} and Massachusetts.\textsuperscript{123} The provisions were adopted in 1971 and 1972, respectively. Both states, located in the eastern


\textsuperscript{122} PENN. CONST. art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

\textsuperscript{123} MASS. CONST. art. XCVII (“The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.”).
part of the nation, follow the riparian doctrine of water law and their constitutional rights to clean water are undeveloped. The only Western state that follows the doctrine of prior appropriation that recognizes a human right to water is California—though California’s right to water was addressed legislatively, not through a constitutional amendment.

Montana has an opportunity to join these states in leading the development of a human right to water. As discussed in the following section, existing constitutional rights to human dignity and to a clean and healthful environment provides Montana with a strong foundation on which to recognize a human right to water.

V. CONSTITUTIONAL RIGHTS TO DIGNITY AND TO A CLEAN AND HEALTHFUL ENVIRONMENT EQUATE TO A HUMAN RIGHT TO WATER IN MONTANA

Montana’s constitutional right to individual dignity is legally adequate to support the recognition of a human right to water. However, courts have been reluctant to interpret the dignity clause as an independent fundamental right and instead construe the dignity clause to strengthen other constitutional rights. As such, the dignity clause can expand the constitutional right to a clean and healthful environment to support the recognition of a human right to water in Montana.

The Montana Supreme Court has “repeatedly recognized the rights found in Montana’s Declaration of Rights as being ‘fundamental,’ meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.” Montana’s Declaration of Rights is found in Article II of the Constitution, which begins with a preamble that was intended to be different from any other state constitution expressing a reverence and pride for the land, and goes on to include the right to a clean and healthful environment and to individual dignity. The constitutional delegates intended for the Declaration of Rights to be the

130. Mont. Const. art. II, §§ 3, 4 (clean and healthful environment and individual dignity, respectively).
“finest, most expansive declaration of individual rights enacted by any state of the United States.”

A. Montana’s Human Right to Individual Dignity

Article II of the Montana Constitution contains the Bill of Rights that were affirmatively granted to Montana’s citizens upon ratification in 1972. Section 4, entitled Individual Dignity, was unanimously adopted during the 1972 Constitutional Convention and provides:

Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Montana’s dignity clause is unique among the 50 states, in that it both expressly creates an inalienable right to human dignity and imposes an affirmative obligation on the state and private parties not to discriminate against any person. The Montana Supreme Court has recognized that the dignity clause protects against two types of unequal treatment: (1) unequal treatment contrary to a person’s innate dignity, and (2) unequal treatment based on a protected classification under the law. Only two other states—Louisiana and Illinois—refer to human dignity in their constitutions. However, unlike Montana’s dignity provision, neither Illinois’s nor Louisiana’s dignity clauses are considered self-executing or an affirmative obligation on the state. Instead, Illinois’s dignity provision has been construed as an expression of public policy, and not an operative

132. Id. at 1642–46 (committee report and discussion), 2933–34 (adoption of section).
133. MONT. CONST. art. II, § 4.
part of the constitution.\textsuperscript{137} Louisiana’s dignity clause has been construed as a prohibition (i.e., what the state cannot do) rather than an affirmative obligation of the state.\textsuperscript{138}

Montana’s dignity clause was borrowed, almost verbatim, from Puerto Rico’s 1951 Constitution,\textsuperscript{139} which included as part of its Bill of Rights a right to human dignity and prohibition on discrimination.\textsuperscript{140} The Puerto Rico Constitution was written between 1951 and 1952, and drew from many comparative sources, including international sources such as the Universal Declaration of Human Rights.\textsuperscript{141} Unfortunately, the Montana Supreme Court has rarely cross-referenced or compared Puerto Rican jurisprudence around its dignity clause. However, when considering how Montana might further develop its own dignity clause, it is instructive that Puerto Rican courts have “emphasized statements by drafters to the effect that the right to human dignity was the foundational and most important element of that Bill of Rights, one from which all others could be inferred even if they had not been express.”\textsuperscript{142}

Montana’s dignity clause includes an affirmative obligation on the state not to discriminate against any person on account of culture or social origin or condition. The Montana Supreme Court has not interpreted “culture” or “social origin,” but has stated that “social condition” relates to one’s economic status or rank in society, and the type of discrimination which is sought to be prohibited by the Constitution is, for example, that

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  \item \textsuperscript{140} P.R. CONST. art. II, § 1 (“The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas. Both the laws and the system of public education shall embody these principles of essential human equality.”).
  \item \textsuperscript{141} Fernós, \textit{supra} note 139, at 190 (citing ANTONIO FERNOS-ISERN, \textit{ORIGINAL INTENT IN THE CONSTITUTION OF PUERTO RICO: NOTES AND COMMENTS SUBMITTED TO THE CONGRESS OF THE UNITED STATES} 8 (2d ed. 2002)); see Clifford & Huff, \textit{supra} note 134, at 321–24.
  \item \textsuperscript{142} Jackson, \textit{supra} note 98, at 24–25, 37–49; see also Fernós, \textit{supra} note 139, at 198–99.
\end{itemize}
\end{footnotesize}
type of discrimination which results solely because one is poor.”

Comments to the Bill of Rights proposal at the 1972 Constitutional Convention also provide insight as to the intent of the delegates. Importantly, the Bill of Rights Committee explained:

‘Culture’ was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. ‘Social origin or condition’ was included to cover discriminations based on status of income and standard of living.

The dignity clause has been cited most often as the state’s equivalent of the Fourteenth Amendment to the United States Constitution, both of which guarantee equal protection of the law to every person. The dignity clause has also been interpreted by courts to expand upon Montana’s right to privacy in the context of a person’s right to dignity in dying. For instance, in Baxter v. State, a district court held a mentally competent, terminally ill patient had a right to die with dignity, and that the homicide statues were unconstitutional as applied to the patient’s physician who aided in the dying by prescribing a lethal dose of medication. This case was appealed to the Montana Supreme Court, and, in his dissent, Justice Nelson argued that the dignity clause stood on its own merits, noting that the first clause, “[t]he dignity of the human being is inviolable,” is a free-standing, self-executing right, akin to the “inviolable” right to a jury trial; he also argued that the first clause was separate from the second clause, which provided for equal protection. Further, Justice Nelson argued that the dignity clause cannot be so narrowly interpreted that its mandate is fulfilled simply by prohibiting discrimination or providing for equal

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146.  Baxter v. State, 224 P.3d 1211, 1214 (Mont. 2009) (The Montana Supreme Court declined to reach the constitutional question and, instead, upheld the district court’s decision on statutory grounds; but see Id. at 1223–31 (Nelson, J., specially concurring to affirm the district court on the constitutional issue).
147.  Id. at 1227 (Nelson, J., specially concurring) (the second clause says: “No person shall be denied the equal protection of the laws.”).
protection; rather, “[T]he Dignity Clause broadly prohibits any law or act that infringes upon our inviolable dignity as human beings.”

The dignity clause protects against both the unequal treatment of a person based on their innate human dignity and unequal treatment of the law for similarly situated individuals. In the context of a human right to water, the question becomes whether an individual’s innate dignity is jeopardized by a lack of access to clean, affordable water.

B. Montana’s Right to a Clean and Healthful Environment

The right to a “clean and healthful environment” is mentioned twice in Montana’s 1972 Constitution, first in Article II, the Bill of Rights, and again in Article IX, which specifically addresses Natural Resources and the Environment. These provisions were intended by the constitutional delegates to complement each other and are applied in tandem, so they will be discussed together herein. Article II, § 3 of the Montana Constitution states:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Article IX, § 1 further states:

148. Id.
151. Mont. Env’t Info. Ctr. v. Dep’t of Env’t Quality, 988 P.2d 1236, 1246 (Mont. 1999); Const. Convention Vol. 5, supra note 5, at 1638 (delegation discussing that an individual right to a clean and healthful environment was not added in Article IX because individual rights were properly addressed in Article II).
152. Mont. Const., art. II, § 3 (the majority of § 3 was retained from Montana’s original 1899 Constitution with a few substantive changes, including the addition of: (a) the right to pursue life’s necessities as a statement of principle; (b) the right to seek health; and (c) the right to a clean and healthful environment, as well as recognition in the final sentence that with these individual rights come corresponding individual responsibilities). See Const. Convention Vol. 5, supra note 5, 1637–38.
Protection and improvement. (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.153

With respect to Article IX, § 1, there was consensus among the 1972 constitutional delegates that they intended this provision to be “the strongest constitutional environmental section of any existing state constitution[,]”154 and to “permit no degradation from the present environment of Montana and affirmatively require enhancement of what we have now.”155 To achieve this intention, the wording of Article IX, § 1 of the Montana Constitution was subject to significant debate during the Convention, particularly as to whether the addition of the adjectives “clean and healthful” to the word “environment” strengthened the environmental protections.156 During the vigorous discussion, the delegates also clarified that the term “environmental life-support system” found in Article II, § 1(3) was “all-encompassing, including but not limited to air, water and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded.”157

Twenty-five years after ratification of the 1972 Constitution, the interdependence of these two constitutional provisions was addressed by the Montana Supreme Court for the first time. In Montana Environmental Information Center v. Montana Department of Environmental Quality158 (“MEIC”), the Court held that the right to a clean and healthful environment is a fundamental right because Article II, § 3 and Article IX, § 1 must be applied and interpreted together. The MEIC Court determined that the constitutional delegates intended for Article II, § 3 and Article IX, § 1 to be read and interpreted interdependently, and that the rights provided for in Article IX were also subject to strict scrutiny, despite not being

153. MONT. CONST., art. IX, § 1.
155. Id. at 1200, 1205.
156. Id. at 1199–251.
157. Id. at 1201.
158. 988 P.2d 1236, 1246, 1248–49 [hereinafter MEIC].
found in Montana’s Declaration of Rights.\textsuperscript{159} The MEJC Court elaborated that Montanans’ fundamental right to a “clean and healthful environment” provides protections that are “both anticipatory and preventative,” and that the Montana Legislature is obligated by Article IX, § 1(3) “to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.”\textsuperscript{160} Recent case law confirms that the Montana Legislature has an ongoing obligation to adopt legislation that will further its constitutional mandate to provide adequate remedies that will prevent unreasonable degradation of natural resources. In \textit{Park County Environmental Council v. Montana Department of Environmental Quality},\textsuperscript{161} the Montana Supreme Court held that a statute which prohibited an award of equitable remedies was unconstitutional under Article II, § 3 and Article IX, § 1 of the Montana Constitution. The \textit{Park County} Court noted that “adequate remedies” to protect the environment must include equitable remedies because, unlike an award of monetary damages, equitable remedies can “avert harms that would have otherwise arisen.”\textsuperscript{162}

In \textit{Clark Fork Coalition v. Montana Department of Natural Resources and Conservation},\textsuperscript{163} the Montana Supreme Court again addressed what may constitute an “adequate remedy” to prevent environmental harm, but this time in the context of the Montana Water Use Act. The \textit{Clark Fork Coalition} Court held that the Water Use Act “need not [be] view[ed] in isolation” of other environmental protection statutes,\textsuperscript{164} noting that the Water Use Act was distinguishable from other environmental statutes because its primary purpose was not “implementing, satisfying, or tailoring it to its environmental protection duty” under these constitutional provisions.\textsuperscript{165} Notably, in her dissent, Justice McKinnon argued that the Court’s opinion erroneously assumed the Montana Legislature intended the overseeing agencies to have \textit{mutually exclusive} roles in protecting the constitutional right to a clean and healthful environment,\textsuperscript{166} noting that in some instances preservation of water quality in a particular source may be appropriate, even if such a decision conflicted with the rule of priority.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{159} \textit{Id.} at 1246, 1249.
\item \textsuperscript{160} \textit{Id.} at 1243, 1249.
\item \textsuperscript{161} 477 P.3d 288, 292, 310–11 (Mont. 2020).
\item \textsuperscript{162} \textit{Id.} at 304.
\item \textsuperscript{163} 481 P.3d 198, 217.
\item \textsuperscript{164} \textit{Id.} at 223.
\item \textsuperscript{165} \textit{Id.} at 218–19.
\item \textsuperscript{166} \textit{Id.} at 224 (McKinnon, J., dissenting) (emphasis in original).
\item \textsuperscript{167} \textit{Id.} at 225.
\end{itemize}
While recent case law further clarifies the legislative obligations in meeting constitutional duties concerning a clean and healthful environment, it also makes clear there is ample room for the Montana Legislature to further articulate how different agencies charged with environmental oversight might coordinate to recognize a human right to water.

VI. A BLUEPRINT FOR RECOGNIZING A HUMAN RIGHT TO WATER IN MONTANA

Harmonizing Montana’s constitutional rights to human dignity and to a clean and healthful environment with the prior appropriation doctrine lays the foundation for a legally recognizable human right to water. Montana’s dignity clause, standing alone, is ample authority to support a human right to water because that right is the first building block to recognizing all other human rights. 168 When the dignity clause is considered alongside the constitutional right to a clean and healthful environment, there can be no doubt that Montana values the right of its citizens to access water needed to sustain human life. However, these provisions have not been enforced through litigation, or through focused application by the legislature, and so these rights have lain dormant. It is time for Montana policymakers to enact legislation that recognizes a human right to water. Such legislation would implement the de facto domestic preference and give meaning to Montana’s constitutional rights to dignity and a clean and healthful environment.

Because Montana historically imported much of its water law from the California Civil Code, 169 it is useful to take a closer look at California’s legislatively recognized human right to water. In 2012, California explicitly recognized the human right to water in Cal. Water Code § 106, which states in relevant part:

(a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.

(b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising,

168. See generally General Comment No. 15, supra note 110.
adopting, or establishing policies, regulations, and grant
criteria when those policies, regulations, and criteria are
pertinent to the uses of water described in this section.170

Although California’s human right to water contains some inherent limits, the statute has resulted in significant gains in protecting drinking water supplies for disadvantaged communities.171 Of note for Montana, California’s code provides two important pieces: (1) it defines a human right to water narrowly, as that amount adequate for drinking, cooking, and sanitation; and (2) it specifically directs “all relevant state agencies” to consider the policy.

Defining the human right to water narrowly is beneficial because it distinguishes a domestic use that protects water necessary to sustain life from municipal use or large-scale water uses for subdivisions and development projects.172 Additionally, by specifically directing all relevant state agencies to consider the policy, any uncertainty as to which state agencies must be responsible for ensuring adequate remedies to protect environmental resources is resolved.173 The latter requirement that all agencies consider the policy is obvious—if water is necessary for life, then a lack of water impacts all aspects of governmental affairs, including but not limited to housing, health, commerce, agriculture, and natural resource protections.

In considering these two aspects of California’s codification of a human right to water, Montana’s recognition of the human right to water

170. CAL. WATER CODE § 106.3.

171. See Adopting the Human Right to Water as a Core Value and Directing its Implementation in Water Board Programs and Activities, Res. No. 2016-0010, California State Water Resources Control Board, Resolution (2016); Adopting the Human Right to Water as a Core Value and Directing its Implementation in Water Board Programs and Activities, Res. No. R5-2016-0018, California Regional Water Quality Control Board, Central Valley Region (2016); see also, e.g., Debi Ores, Thirsty for Justice: The Fight for Safe Drinking Water, 25 HASTINGS ENV’T L.J. 101 (2019) (describing the advances made via California’s human right to water statute as well as work yet to be done).

172. See Clark Fork Coal. v. Tubbs, 380 P.3d 771, 776, 783 (Mont. 2017) (a senior water right collation argued that small scale domestic uses, when combined, injured the senior uses).

173. See, e.g., Clark Fork Coal. v. Dep’t Nat. Res. & Conservation, 481 P.3d 198, 224–26 (McKinnon, J., dissenting) (arguing that the majority opinion erred in “assum[ing] our Constitution and legislature, by enacting the [Water Use Act] and [Water Quality Act], intended that the overseeing agencies, the DNRC and MDEQ, were to have mutually exclusive responsibilities in their roles of protecting Montanans’ constitutional right to a clean and healthful environment.”) (emphasis added).
should be grounded in the Montana Constitution. Relying on international
discourse that acknowledges a human right to water is a precursor to all
other human rights, the Montana Legislature should strengthen the
definition of the human right to water by asserting that, in Montana, the
right to water is not just a policy decision, but is instead a constitutionally
recognized right pursuant to the individual right to dignity found in Article
II, § 4. Moreover, as discussed in case law interpreting Montana’s right to
a clean and healthful environment, the Montana Legislature is obligated to
provide adequate remedies to protect Montana’s natural systems and
environmental life systems. It is undeniable that recognizing a human right
to water is fundamental to protecting all other environmental life systems
because, without water, there is no life. Burgeoning international discourse
on the international human right to a clean and healthy environment will
only inform and underscore that Montana’s Constitution supports the
recognition of a human right to water.

This legislative approach is consistent with trends in Western
states that have modified the prior appropriation doctrine to meet con-
temporary concerns, such as the need to acknowledge a domestic
preference for water. It is also consistent with Montana’s existing statutes
that carve out several exceptions to the rule of priority, such as small
groundwater developments exempt from permitting and the no-forfeiture
rule for failure to file a statement of claim on instream domestic and stock
uses. By recognizing that a human right to water in Montana is grounded
in its Constitution and tasking all relevant agencies with its
implementation, the Montana Legislature would empower those state
agencies with a mechanism to acknowledge small water uses necessary to
maintain health and safety of Montanans, without sacrificing those
agencies’ ability to limit or regulate larger-scale land developments or
irresponsible municipal growth.

VII. CONCLUSION

When the well runs dry, we know the value of water.

Montana is nearing completion of its decades-long statewide
adjudication of water rights, and policymakers are beginning to
contemplate how to administer Montana’s waters for the benefit of all its

174. See Resolution 48/13: The Human Right to a Clean, Healthy and
Sustainable Environment, UNITED NATIONS HUMAN RIGHTS COUNCIL (Oct. 8, 2021),

175. Most often attributed to Benjamin Franklin.
citizens. Simultaneously, these policymakers are grappling with explosive population growth, unprecedented and expanding drought, aging water systems, and growing water insecurity in many of Montana’s most vulnerable communities. Such stressors highlight the need to modernize Montana’s water policy in a way that balances the century-old prior appropriation system of administering water rights with the contemporary stressors that threaten Montanans’ ways of life.

As discussed herein, a human right to water is already implicitly protected by Montana’s constitutional rights of individual dignity and a clean and healthy environment. However, interpretation of those provisions by the courts cannot wait for a well-resourced litigant to bring a lawsuit, particularly since the communities that would most benefit from recognition of a human right to water—those currently experiencing water scarcity—generally lack sufficient resources to bring such a lawsuit. Before the well runs dry, it is time for the Montana Legislature to formally acknowledge the value of water as the most basic of human rights and amend the Water Use Act to codify a human right to water.