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The Montana Constitution and the Right to a Clean and Healthful Environment

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ENVIRONMENT

THE MONTANA CONSTITUTION AND THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT*

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I. INTRODUCTION******

Montana is blessed with a rich and varied terrain that has attracted and shaped an equally rich and varied community of people. We cannot talk about Montana—her history, her character, her environment, her constitution—without devoting considerable attention to the mountains, the rivers, the plains, the forests, and, of course, the skies that form the land within the politically established boundaries of the state. In turn, we must focus on the essential elements characterizing the people that inhabit Montana and call this land home.

This year Montanans celebrate one hundred years of statehood. It is serendipitous that this centennial year brings a wealth of anthologies full of the work of Montana writers.[1] Many of Mon-

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**** The views expressed in this article are the authors' own and do not necessarily represent the views of the Montana Environmental Quality Council or the Montana Department of Health and Environmental Sciences.

1. *See, e.g.*, THE LAST BEST PLACE: A MONTANA ANTHOLOGY (W. Kittredge & A. Smith ed. 1988); MONTANA SPACES (W. Kittredge ed. 1988) [hereinafter MONTANA SPACES].

tana's writers, who also have national reputations, have helped to define and characterize the land and the people of Montana. Pointing out how these writers have helped to shape Montana's definition of itself, William Kittredge has noted that "Montana has had a long run of luck with writers,"[2] who each has placed his or her own individual imprimatur on the state's self-identity. A sampling of these retrospective and prospective views of Montana offers a sound foundation for understanding what we are about today and what our constitution means. Why does the Montana Constitution contain repeated references to the right to have and the responsibility to ensure a clean and healthful environment for present and future generations? What has been the effect of these provisions? Have Montana's political institutions, and more fundamentally, Montana's people responded fully to these ringing declarations? What is the future of these mandates?

This year marks the twentieth anniversary of the contemporary environmental movement that began on Earth Day in 1970[3] and that also clearly shaped the environmental provisions of Montana's constitution. Both the environmental movement and the Montana Constitution are nearly twenty years old—old enough to be held at least somewhat accountable for their successes and failures. An examination of the conflicting values of Montanans that underlie realization of the environmental goals and requirements reflected in the Montana Constitution helps to evaluate these successes and failures. Again, one can best understand these values by reading and hearing the stories of Montanans beginning with the relatively unknown traditions of the twelve Indian tribes,[4] following with Montana history classics,[5] and continuing on with the lively and compelling literature collected in the centennial anthologies.

The values and the history of Montanans inextricably form the framework for the central references to the environment in the Montana Constitution. The first statement affirming Montanans' commitment to the environment occurs in the preamble to the constitution. Although not commonly considered in evaluations of the environmental provisions of the constitution, the preamble

2. Kittredge, *Foreword* to MONTANA SPACES, *supra* note 1, at xiii.

3. *See* Commoner, *A Reporter at Large—The Environment*, NEW YORKER (June 15, 1987).

4. The tribes are the Assiniboine, Sioux, Northern Cheyenne, Crow, Blackfeet, Flathead, Salish, Kalispell, Kootenai, Gros Ventre, Chippewa-Cree, and Pend d'Oreille.

5. A good sampling of Montana's history classics would include: HOWARD, MONTANA: HIGH, WIDE AND HANDSOME (1943); MALONE & ROEDER, MONTANA: A HISTORY OF TWO CENTURIES (1976); and TOOLE, MONTANA: AN UNCOMMON LAND (1959).

demonstrates the preeminent concern for the environment, as represented by statements concerning the quality of life:

> 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.[6]

This stirring affirmation that prefaces our constitution gives such significance to improving and maintaining the quality of life in Montana that it emphasizes these goals even over such fundamental tenets as liberty and equality of opportunity.

Again similarly giving premiere importance to a healthful environment, the first key constitutional provision, the declaration of rights, places the right to a clean and healthful environment ahead of such rights as freedoms of religion, assembly, and speech. Article II, section 3 states that "all persons are born free and have certain inalienable rights," which "include the right to a clean and healthful environment."[7]

Finally, the constitutional convention delegates, and subsequently the people of Montana, devoted a full article to the environment and the state's natural resources.[8] Section 1 of article IX states that Montana "and each person shall maintain and improve a clean and healthful environment . . . for present and future generations."[9] Section 2 provides that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed" and points to the checkered history of mining in Montana and some of the problems caused by it.[10] Section 3 demonstrates the fundamental importance of water to Montanans by affirming all existing rights to the beneficial use of water, and granting all waters within the state as property of the state for the use of its people.[11] Lastly, section 4 encourages identification and protection of cultural resources,[12] and section 5, amended into the constitution in 1976, establishes the coal severance tax trust fund.[13]

Overlying and undergirding these fundamental and resounding statements on the environment and natural resources are the cen-

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6. MONT. CONST. preamble.
7. MONT. CONST. art. II, § 3.
8. MONT. CONST. art. IX.
9. MONT. CONST. art. IX, § 1.
10. MONT. CONST. art. IX, § 2.
11. MONT. CONST. art. IX, § 3.
12. MONT. CONST. art. IX, § 4.
13. Sections 4 and 5 of article 9 were not central to environmental debate at the constitutional convention and are not discussed further in this article.

tral and sometimes conflicting values of a rugged frontier individualism versus protection of the environment. Throughout history and certainly into the present, Montanans have lived the results of these conflicts and dichotomies in character and values. And to a large extent, the land and the environment that is Montana produces these conflicts. Montanans are a fiercely independent lot, hardy, self-sufficient, and desiring maximum personal freedom. More often than not, this desire for maximum personal freedom runs head-on into the concern for maintaining and improving the beauty and quality of the environment that brings people to Montana and compels them to stay in this state, although earning a living here almost always is difficult. The convention delegates' debates certainly evidenced the colliding values of individual freedom versus the environment—a conflict that continues to impede the full implementation of the constitutional mandates described earlier. This law review article will examine the outcomes of this tension. Not surprisingly, the results are mixed. While some significant progress has been made to control pollution and even to improve Montana's environment, in certain more fundamental respects the people of Montana have failed to realize the individual commitment necessary to fulfill the resounding promises of 1972.

II. Constitutional Convention Discussion

In the late 1960s, promoters of a call for a constitutional convention cited the compelling need for stronger constitutional provisions to ensure environmental protection.[14] The Montana Constitutional Convention Commission, which prepared background materials for convention delegates, stressed the citizen's right to a healthful environment as a priority issue.[15] Moreover, the problem posed for convention delegates was indicative of forthcoming debates:

> That there is continuing degradation of the environment is scarcely debated. The solutions proposed for the problem are highly debatable, intensely political issues affecting all manner of private interests—consumer as well as corporate—in an effort to recast the mold of that elusive but crucial "public interest."[16]

The delegate proposals on environmental issues ranged from

14. League of Women Voters of Montana, A Better Constitution for Better Government 5 (1969).

15. Montana Constitutional Convention Commission, *Study No. 10—Bill of Rights* 250 (1971).

16. *Id.* at 278.

proposals to protect existing water rights to proposals emphasizing the public's right to a quality environment.[17] Most of the proposals were debated at length by the Committee on Natural Resources and Agriculture and developed into committee proposals for consideration by all convention delegates. The floor debates on the committee proposals provide helpful indications of the Montana values and ethics at stake in the crafting of the constitutional provisions on the environment.

A. The Article IX Provisions

As noted earlier, Article IX consists of five sections, four of which were developed at the convention. The following analysis is limited to the first three sections, which were the center of convention debate.

1. Article IX, section 1

Article IX, section 1 describes fundamental environmental improvement directives. Clause (1) of section 1 directs the state and the people to "maintain and improve a clean and healthful environment for present and future generations."[18] Both the Natural Resources and Agriculture Committee[19] and the full convention strongly supported this mandate, although debates occurred over the need to attach adjectives to describe the desired environment.[20] The voice vote on this clause,[21] after extended debate on

17. Delegate proposals addressing environmental concerns include the following: Delegate Proposal No. 1—Establishing Public Policy on Environmental Quality; Delegate Proposal No. 2—Providing for Water Rights; Delegate Proposal No. 12—Protecting the Environment; Delegate Proposal No. 20—Providing a Public Policy of a Quality Environment; Delegate Proposal No. 21— Guaranteeing an Individual's Right to a Quality Environment; Delegate Proposal No. 48—Providing for Water Rights; Delegate Proposal No. 83—Providing for Acquisition of Historic Sites; Delegate Proposal No. 96—Irrigation and Water Rights; Delegate Proposal No. 114—Public Sightliness and Good Order; Delegate Proposal No. 127—Providing for Water Rights; Delegate Proposal No. 132—Environmental Rights; and Delegate Proposal No. 162— Environment as Public Trust. *See generally* Delegate Proposals, *reprinted in* I MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 75-332 (1972)[hereinafter TRANSCRIPTS].

18. MONT. CONST. art. IX, § 1(1).

19. In fact, the Committee's minority report supported an additional and concluding section to the article that would enable a Montana resident to undertake legal enforcement proceedings against a government agency charged with environmental protection responsibilities. Natural Resource and Agriculture Committe: Minority Proposal, § 4, *reprinted in* II TRANSCRIPTS, *supra* note 17, at 561.

20. Although the Natural Resources Committee did not include the phrase "clean and healthful," the convention delegates, after considerable discussion, added the phrase in late floor action. *See* V TRANSCRIPTS, *supra* note 17, at 1249-51.

21. *Id.* at 1251.

amendments, is perhaps the strongest indication of the root support that existed for ensuring a clean and healthful environment well into Montana's future.

Delegates drafted clauses (2) and (3) to ensure an affirmative legislative role in accomplishing the duty described in clause (1). Clause (2) requires the legislature to administer and implement this fundamental duty. Again, the committee clearly supported constitutional establishment of this duty and convention debate did not address this potential issue. Instead, the debate centered on whether a constitution needs to enumerate the details of implementation.[22] Clause (3) adds an additional obligation requiring the legislature to ensure that adequate remedies are available to protect the environmental life-support system and to prevent unreasonable depletion and degradation of natural resources. This duty also was firmly supported by the committee and full convention, even though some wording may have been derived from a prior proposal to establish a public trust in the environment.[23]

Statements by Delegates C. Louise Cross, chairperson of the committee and committee minority representative, and Charles B. McNeil, committee member and committee majority representative, demonstrate that the disagreements were not on the fundamental duties imposed by section 1.[24] Instead, their differences focused on the degree to which the article needed additional provisions implementing those duties. Delegate McNeil summarized the majority position: "[T]he temptation to legislate in the Constitution was resisted and confidence reposed in the Legislature."[25]

Other disagreements occurred on provisions that are not now included in section 1. In particular, delegates defeated proposals to attach public-trust responsibilities and to add a public right-to-sue provision.[26] In regard to creating a constitutional public trust in the environment, Delegate McNeil stated:

> The majority [of the Natural Resources and Agriculture Commit-

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22. *See, e.g.*, IV TRANSCRIPTS, supra note 17, at 1200.

23. *Id.* at 1201.

24. *Id.* at 1199-1200.

25. *Id.* at 1200.

26. For public-trust initiatives, see I TRANSCRIPTS, *supra* note 17, at 96, 308-09 (Delegate Proposals Nos. 12 and 162); and proposed amendment by Delegate Jerome J. Cate, IV TRANSCRIPTS, *supra* note 17, at 1214. For citizen right-to-sue initiatives, see I TRANSCRIPTS, *supra* note 17, at 75, 96, 108, 308-09 (Delegate Proposals Nos. 1, 12, 21, and 162); and V TRANSCRIPTS, *supra* note 17, at 1229 (proposed amendment by Delegate Mae Nan Robinson), *id.* at 1241-42 (proposed amendment by Delegate Arlyne Reichert),; and *id.* at 1251 (proposed amendment by Delegate C. Louise Cross).

tee] felt it unnecessary to have the state hold in trust all land, including, of course, privately owned real property, for the benefit of all the people of the state in order to accomplish the protection of our environment. In addition, the majority felt it unwise to experiment by incorporating into the Constitution, a "public trust" which was not clearly defined to the committee . . . .[27]

On the convention floor, the resistance to a combined public trust/citizen's right-to-sue-the-state amendment[28] included comments that such proposals are "a departure from our traditional notions of private property"[29] and would be "the last nail in the coffin" for private property owners.[30] These arguments prevailed, with the amendment failing by a fifty-eight to thirty-four vote.[31]

Convention delegates, including the majority of the natural resources committee, thought it unnecessary to establish a citizen's right to sue based on environmental degradation alone. For example, Delegate McNeil said, "The [committee] majority concluded that Montana's present law providing for class action . . . is adequate."[32] Delegate McNeil also reassured delegates that clause (3) provides ample protection by requiring the legislature to develop adequate remedies to ensure that the environment is not degraded or unreasonably depleted.[33] These arguments were effective in persuading convention delegates to reject three citizen's suit amendments presented on the convention floor, although each failed by narrow margins.[34]

In summary, article IX, section 1 reflects a strong convention commitment to a constitutional duty to protect the environment. While the public-trust discussion suggested a desire for a stronger statement of duty, the disagreements focused on whether constitutional tools (i.e., directives to the legislature, establishment of a citizen's right to sue) should be specified to ensure the duty is fulfilled.

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27. IV TRANSCRIPTS, *supra* note 17, at 1201.

28. The amendment, submitted by Delegate Cate, proposed substituting the following language for what is now clause (1):

> The State of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust and the right to protect and enforce it by appropriate legal proceedings against the trustees.

IV TRANSCRIPTS, *supra* note 17, at 1214.

29. *Id.* at 1216 (statement of Delegate McNeil).

30. V TRANSCRIPTS, *supra* note 17, at 1224 (statement of Delegate Brazier).

31. *Id.* at 1228.

32. IV TRANSCRIPTS, *supra* note 17, at 1201.

33. *Id.*

34. For a list of those amendments see *supra* note 26. The amendments proposed by Delegates Robinson, Reichert, and Cross failed by votes of 51-43, 47-43, and 46-44, respectively. V TRANSCRIPTS, *supra* note 17, at 1241, 1246, 1254.

2. Article IX, section 2

Article IX, section 2 documents the reaction of convention delegates to effects of mining in Montana, particularly the strip mining of coal in the eastern counties.[35] The section states that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed" and requires the legislature to set effective reclamation requirements and standards.[36] As opposed to section 1, some delegates questioned whether this section was needed at all. In debating an amendment offered by Delegate Delaney to delete the section entirely,[37] the delegates argued that clause (3) of section 1[38] already addressed reclamation concerns and that the legislature should address land reclamation, thus ensuring a dynamic balancing of interests with changing times.[39] The amendment represented a clear minority position, however, failing by a vote of sixty to thirty-three.[40] The section's broad applicability to all natural resources, including agricultural activity, hard-rock mining and strip mining, also concerned some delegates.[41]

The most-discussed aspect of this section concerned the level to which reclamation should be undertaken. The Committee on Natural Resources and Agriculture proposed that the land "be reclaimed to as good a condition or use as prior to the disturbance."[42] Several delegates were apprehensive that this requirement might in many instances be impossible to fulfill. Two amendments added on the convention floor revised the section so that the reclamation standard was to a beneficial and productive use.[43] But subsequent convention discussion documents that even this standard concerned convention delegates. The eventual compromise, as depicted in the present language, requires the legislature to develop effective reclamation requirements and standards.[44]

Subsections (2) and (3) were added by general election in

35. *See, e.g.*, V TRANSCRIPTS, *supra* note 17, at 1276 (statement of Delegate Cross).

36. MONT. CONST. art. IX, § 2(3).

37. V TRANSCRIPTS, *supra* note 17, at 1278.

38. Subsection (3) requires the legislature to provide adequate remedies to prevent unreasonable depletion of natural resources. MONT. CONST. art. IX, § 1(3).

39. *See* IV TRANSCRIPTS, *supra* note 17, at 1278-79 (statements of Delegates Delaney and Joyce).

40. *Id.* at 1291.

41. *See, e.g., id.* at 1279 (statement of Delegate Ask).

42. The text of the majority proposal is reprinted in II TRANSCRIPTS, *supra* note 17, at 552.

43. *See* V TRANSCRIPTS, *supra* note 17, at 1292 (amendment offered by Delegate Ask), and *id.* at 1299 (amendment offered by Delegate Cate).

44. MONT. CONST. art. IX, § 2(1).

1974.[45] These provisions create a constitutional trust funded by the extraction of natural resources. The intended eventual use of the trust money is not fully clear, although a 1989 Montana Supreme Court decision indicated that interest proceeds from the trust could be used for a broad variety of state programs.[46]

3. *Article IX, section 3*

Section 3 integrates Montana's traditional water right perspectives with concerns about preserving water for Montana's future. The convention delegates acknowledged the fundamental importance of water several times and acted firmly to make major expansions to the existing constitutional law. Delegate McNeil indicated this as follows:

> Your committee feels that water rights are of crucial importance to the past history and future development of the State of Montana. For this reason, the committee feels justified in expanding the present constitutional section, which relates solely to the use of water, to include provisions for the protection of the waters of the state for use by its people.[47]

Clause (1) recognizes and confirms all rights to beneficial uses of water. As stated by Delegate Davis, "The whole purpose . . . is to establish . . . that all existing water rights are recognized and confirmed—so no one will get any idea that we're trying to take away any vested or existing rights."[48]

Clause (2) has been preserved from the 1889 Constitution.[49] As with the first clause, convention testimony indicates a desire to encourage certainty for property owners' water rights. Moreover, the clause preserves years of interpretive case law.[50]

Clause (3) was novel to many convention delegates because it asserted state ownership of water within Montana for use of the people. Some delegates were concerned about possible loss of prop-

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45. The 1974 Legislature directed that the proposed constitutional amendments be presented for public vote. 1974 Mont. Laws 117.

46. Butte-Silver Bow Local Gov't v. State, 235 Mont. 398, 768 P.2d 327 (1989).

47. V TRANSCRIPTS, *supra* note 17, at 1301.

48. *Id.* at 1302.

49. The 1889 Constitution provided:

> The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall held to be a public use.

MONT. CONST. of 1889, art. III, § 15.

50. V TRANSCRIPTS, *supra* note 17, at 1301 (statement of Delegate McNeil).

erty rights in water. However, such fears were calmed by discussion emphasizing that water would still be subject to appropriation for beneficial use as provided by law and that such appropriations would be protectable property rights.[51]

Delegates also focused on the need to protect Montana's interests from downstream states. Echoing the view of some delegates, Delegate McNeil stated:

> The value [the committee] foresee[s] is that, if the state can say it owns the water, at least it can stand in court and in an adjudication with a downstream state or with the federal government and say, "We own it, so therefore we've got a right to talk about it and defend it."[52]

What is now clause (4), requiring centralized records of water rights, was adopted to help document Montana's water use against downstream interests.[53] Delegates voted to enact this clause despite concerns about vesting such responsibility with a state bureaucracy,[54] and despite a statement by at least one delegate who felt that policies concerning record-keeping should be left to the purview of the legislature.[55]

As with article IX, section 1, the provisions and amendments that failed provide interesting perspective on convention thinking. One of the Natural Resources and Agriculture Committee's proposed provisions would have allowed appropriation rights for instream uses.[56] The provision not only defined beneficial uses to include a variety of instream and diversionary uses but also specified that a diversion is not required to obtain a water right for these uses. The proposed provision also authorized the legislature to determine a method for establishing nondiversionary water rights and their relative priorities. Some touted the provision as meeting the needs of traditional agricultural interests by allowing recreationists to obtain a water right under terms specified by the legislature, thereby enabling Montana to defend more water from downstream water interests.[57] However, the provision died after extended discussion about possible dangers created for traditional

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51. *Id.*

52. *Id.* at 1307.

53. *Cf. id.* at 1315 (statement of Delegate McNeil).

54. An amendment introduced by Delegate Grace C. Bates was added during floor discussion that emphasized the importance of local records as well. *See id.* at 1350.

55. V TRANSCRIPTS, *supra* note 17, at 1349 (statement of Delegate Berg).

56. Natural Resource and Agriculture Committe: Majority Proposal, § 4, *reprinted in* II TRANSCRIPTS, *supra* note 17, at 552-53.

57. V TRANSCRIPTS, *supra* note 17, at 1312 (statement of Delegate McNeil).

uses if recreational water rights were allowed.[58]

Another clause the Natural Resources and Agriculture Committee suggested was to give constitutional status for priority of appropriation law, except to allow denial of appropriations when in the public interest.[59] First, the public interest language was rejected as a drafting mistake.[60] Then, because the remaining language would make the provision a strict rule that could in some instances be too severe,[61] the provision failed on a voice vote.[62]

While the water-rights section did not achieve a clear balance on private property right and public values, consensus on one common goal seemed apparent. As Delegate Davis expressed early in the convention discussion: "I think the sense of this whole article [sic] is to protect Montana water, to make a strong statement that we own our water, and protect it for the future use of our state and our people from downstream appropriation.[63]

B. Article II, section 3

In revising the 1889 constitutional declaration of rights, the 1972 convention added three new inalienable rights that related to the environment, basic necessities, and health.[64] Significantly, the very first right on the revised list of rights is the right to a clean and healthful environment. Added as an amendment on the convention floor, the provision was offered as an appropriate balance to the duty placed on the state and its citizens by the adoption of article IX.[65] After discussion emphasizing that the clause does not provide an independent citizens' right to sue,[66] the amendment passed by a seventy-nine to seven vote.[67]

The convention added a concluding statement emphasizing that the enjoyment of these inalienable rights also imposes corresponding responsibilities on all persons. As Bill of Rights Committee Delegate Monroe stated: "The committee felt that the inclusion of such a statement does not infringe or impair the rights granted in the declaration of rights, but only accords a tone of re-

58. *Id.* at 1322-40.
59. Natural Resource and Agriculture Committe: Majority Proposal, § 5, *reprinted in* II TRANSCRIPTS, *supra* note 17, at 553.
60. V TRANSCRIPTS, *supra* note 17, at 1347.
61. *Id.* at 1347-48 (statement of Delegate Swanberg).
62. *Id.* at 1348.
63. *Id.* at 1309.
64. *See* MONT. CONST. art. II, § 3.
65. V TRANSCRIPTS, *supra* note 17, at 1637.
66. *Id.* at 1638.
67. *Id.* at 1640.

sponsibility in their exercise."[68]

Although enacted subsequent to article IX, this provision, guaranteeing the right to a clean and healthful environment and asserting corresponding responsibilities, perhaps more than any other, establishes the foundation for Montana's constitutional environmental protections.

C. *Summary*

The convention discussion confirms that Montana's constitutional provisions on the environment are designed, first and foremost, to ensure a clean and healthful environment for Montanans now and into the future. However, the discussion also emphasizes other concerns that Montanans have about private values, which include the right to use Montana's resources reasonably and the protection of user rights to Montana's most important resource—water. The resulting blend perhaps explains why Montana's post-constitutional developments display erratic efforts at environmental protection.

III. Post-Constitutional Developments

Since 1972 Montana has made several efforts to promote a clean and healthful environment. Generally, however, such efforts have given minimal attention to citizen duties beyond that of compliance with applicable regulatory requirements. Moreover, in many instances, federal activities have spurred state efforts.

For example, the federal Clean Air Act,[69] the federal Water Pollution Control Act Amendments of 1972,[70] the federal Safe Drinking Water Act,[71] the Resource Conservation and Recovery Act of 1976,[72] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[73] all provide legal foundations for several state programs that attempt to meet federal

68. *Id.* at 1637.

69. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

70. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)). The act made major amendments to existing water quality laws that included establishment of a permit system for point discharges: the National Pollutant Discharge Elimination System.

71. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f to 300j-11(1988)).

72. Pub. L. No. 94-580. 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6939 (1988)).

73. Pub. L. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of titles 26, 33, 42, and 69 U.S.C., including 42 U.S.C. §§ 9601-9675 (1988)).

mandates as well as achieve state constitutional requirements. Montana's law in these areas,[74] along with state agency attainment of primary responsibility for implementing the federal mandates, is significant. Moreover, in some instances, state regulation extends beyond federal mandates addressing issues of unique significance.[75] Yet, in other areas, Montana has been reluctant to extend such regulation beyond federal minimum requirements.[76] These programs deserve thorough discussion, but a clear assessment of Montana's aggressiveness in implementing the constitutional directives is difficult given the overlying federal direction.

In other areas, the state has moved on its own, offering insight on how Montanans are independently applying the constitution to current problems. These initiatives, as illustrated below, echo the continuing interplay between efforts to enhance public or community values and efforts to protect private property interests.

A. Implementation of the Montana Environmental Policy Act

Since the 1972 convention, the Montana Environmental Policy Act (MEPA) has served as the principal basis for ensuring comprehensive environmental review of state actions.[77] Passed in 1971—one year before the Constitutional Convention—MEPA declares an environmental policy that served as a model for the convention delegates:

> [I]t is the continuing policy of the state of Montana, in cooperation with the federal government and local governments and other concerned public and private organizations, to use all prac-

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74. Montana's air-quality laws are codified at MONT. CODE ANN. Title 75, chapter 2 (1989); its water quality laws are codified at MONT. CODE ANN. Title 75, chapter 5 (1989); its hazardous waste management laws are codified at MONT. CODE ANN. §§ 75-10-401 to -451 (1989); and its CERCLA implementation laws are codified at MONT. CODE ANN. §§ 75-10-601 to -628 (1989).

75. Examples include: (1) Montana's regulation of open burning (*see* ADMIN. R. MONT. 16.8.1301-16.8-1308 (1989); (2) Montana's establishment of a nondegradation policy for Montana's water sources (*see* MONT. CODE ANN. § 75-5-303 (1989)); (3) Montana's authorization of county ordinances prohibiting the sale and distribution of phosphorus compounds (*see* MONT. CODE ANN. § 75-7-411 (1989)); and (4) the Comprehensive Environmental Cleanup and Responsibility Act, which enables state cleanup of hazardous waste at sites not on the federal "Superfund" National Priority List (*see* MONT. CODE ANN. §§ 75-10-701 to -724 (1989)).

76. Examples include: (1) MONT. CODE ANN. § 75-10-405 (1989), which states that the Department of Health and Environmental Sciences "may not adopt rules more restrictive than those promulgated by the federal government under the [federal] Resource Conservation and Recovery Act of 1976," with some limited exceptions; and (2) ADMIN. R. MONT. 16.8.820 (1989), which lessens the effect of otherwise stricter ambient air quality standards for contributors of pollutants who exceeded the standards during 1985.

77. 1971 Mont. Laws 238 (codified at MONT. CODE ANN. § 75-1-301 to -324 (1989)).

ticable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.[78]

Generally, MEPA directs all state agencies to consider environmental attributes and problems in their day-to-day activities and decisionmaking.[79] Two specific issues demonstrate the values tug-of-war associated with MEPA.

1. *The Substantive versus Procedural Debate*

Since the early 1970s, debate has continued over whether MEPA can be a basis for attaching environmental requirements that go beyond the regulatory (i.e., permitting or licensing) statute. The answer is still unclear.

Montana Wilderness Association v. Board of Health and Environmental Sciences,[80] commonly referred to as *Beaver Creek II*, frequently is cited for the proposition that MEPA is only a procedural statute. In that case, the Montana Supreme Court addressed the issue of whether the removal of sanitary restrictions for the proposed Beaver Creek South subdivision in Gallatin County by the Montana Department of Health and Environmental Sciences (DHES) required an environmental impact statement.

In *Beaver Creek II*, the DHES, according to the plaintiff, did not comply with MEPA when it failed to conduct and write an adequate environmental impact statement (EIS) on its proposed action to issue a certificate under the Sanitation in Subdivisions Act[81] removing the sanitary restrictions on property in Gallatin County known as the Beaver Creek South subdivision. Prior to issuance of the certificate, the Montana Wilderness Association filed suit for an injunction with the district court, arguing that the EIS was inadequate and, therefore, in violation of MEPA.[82] The district court agreed, triggering an appeal to the supreme court.[83]

In an unusual series of events, the Montana Supreme Court

78. MONT. CODE ANN. § 75-1-103(1) (1989).

79. *See* MONT. CODE ANN. § 75-1-201(1)(b) (1989). The complete subsection is often overlooked because of the in-depth attention given to subsections (iii)(A)-(E), which set forth the threshold requirements for environmental impact statements.

80. 171 Mont. 477, 559 P.2d 1157 (1976) [hereinafter *Beaver Creek II*].

81. 1973 Mont. Laws 509 (codified as amended in MONT. CODE ANN. tit. 76, ch. 4 (1989)).

82. *Beaver Creek II*, 171 Mont. at 482-85, 559 P.2d at 1159-60.

83. *Id.* at 482, 559 P.2d at 1159-60.

initially affirmed the district court, holding that the EIS was procedurally inadequate because of its failure to consider the full range of environmental factors required by MEPA.[84] However, about five months later, the court reconsidered its decision and completely reversed its holding. Moreover, the court held that the DHES may only consider criteria directly relating to its regulatory functions under the Sanitation in Subdivisions Act, which includes sewage, solid waste, and water supply, for example.[85] To go beyond these areas, the court reasoned, was impermissible, because such Department efforts would conflict with the legislative policy of local control under the Montana Subdivision and Platting Act. The court also observed that "[n]owhere in the MEPA is found any regulatory language."[86]

Beaver Creek II has been cited as the basis for a procedural interpretation of MEPA. That is, MEPA is a process to ensure environmental concerns are considered but which does not require that a project be modified to minimize environmental impacts. Condemning the decision, Justice Haswell, in his dissent, stated, "The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control."[87] While the merits of this argument can be discussed at length, the issue has remained unsettled throughout the 1980s, perhaps most significantly illustrated by a district court decision in 1985. In *Cabinet Resource Group v. Department of State Lands*,[88] the court addressed whether the Montana Department of State Lands could require mitigation of impacts to wildlife from a proposed hard-rock mine. Because authority for such mitigation is not specified under the metal mine reclamation statutes[89]—the permitting statutes—the department was unwilling to attach wildlife mitigation requirements.[90] The plaintiffs argued that MEPA provides substantive authority to impose these mitigation requirements, and

84. *Id.* at 486-516, 559 P.2d at 1161-77 (Haswell, J., dissenting).

85. *Id.* at 485, 559 P.2d at 1161. The Department of Health and Environmental Sciences regulates subdivisions for sanitation purposes under the Sanitation in Subdivisions Act.

86. *Id.* at 486, 559 P.2d at 1161.

87. *Id.* (Haswell, J., dissenting).

88. Cabinet Resource Group v. Department of State Lands, No. 43194 (Mont. 1st Judicial Dist. Sept. 29, 1982)(opinion on motions for partial summary judgment) [hereinafter *Cabinet Resource Group*].

89. MONT. CODE ANN. tit. 82, ch. 4, pt. 3 (1989).

90. *Cabinet Resource Group*, *supra* note 88, at 6.

the district court endorsed this interpretation.[91]

The Montana Supreme Court never addressed the district court decision. Moreover, the potential significance of the decision diminished during the 1980s because of the emergence of MEPA as a process by which agreements on substance can be reached. Rather than litigate potential MEPA issues, parties in many instances have re-examined probable project impacts during the MEPA analysis and reached agreement on mitigation measures that reduce the adverse impacts of the proposed project. Thus, both private property objectives and public interest objectives can be met regardless of the substantive or procedural nature of MEPA.

2. Review for Significant Effects Arguably Has Substantive Implications

The most attention-getting aspect of MEPA is its requirement that any major state action must be reviewed for its effect on the quality of the human environment.[92] If the effect is significant, an EIS is normally required.

In the 1970s and early 1980s, environmental review involved either preparation of a preliminary environmental review (PER)[93] or an EIS if significant effects were anticipated. In the mid-1980s, the Department of State Lands initiated an expanded PER approach to certain hard-rock mine operations.[94] The expanded PER was more issue-specific—thereby requiring less time to prepare. However, the Department of State Lands used the expanded PER only for mine-permit applications having relatively limited significant effects. Also, the expanded PER did not come under the formal time frames required for an EIS, and the agency rather than the applicant paid for the expanded PER.[95]

This practice, while paralleling certain federal agency practices and having some support under federal case law, evoked concern because it circumvented established channels for public participation through the EIS process. Moreover, the expanded PER

91. *Id.*

92. MONT. CODE ANN. § 75-1-201(1)(b)(iii) (1989).

93. A preliminary environmental review (PER), in theory, was to be used to determine if an environmental impact statement (EIS) was necessary for any major state action. In practice, a PER was generally not prepared if the need for an EIS was clear. Thus, PERs became a vehicle for documenting the absence of significant effects.

94. One of the first expanded PERs was prepared in 1985 by the Department of State Lands for the KoKa mine in northwestern Montana.

95. MONT. CODE ANN. §§ 75-1-202, -203 (1989). Fees may be assessed only for preparation of an environmental impact statement.

was not contemplated under existing MEPA rules. Nonetheless, the practice was continued in an agency effort to streamline environmental review for hard-rock mine applicants.

In 1985 the Environmental Quality Council (EQC)[96] undertook a three-year effort to develop revised and updated MEPA rules.[97] The expanded PER, which is now called a mitigated environmental assessment to conform with federal usage under the National Environmental Policy Act,[98] became a major discussion topic during this period. Public interest groups expressed strong reservations to this shortcut to environmental review and requested specific amendments that would ensure opportunities for public involvement in the environmental assessment (EA). The EQC itself indicated mixed support for the mitigated EA, with at least one member expressing reservations.[99]

The executive branch agencies supported general mitigated EA language, pointing out the need for agency discretion in environmental review.[100] However, continued opposition by public interest representatives during formal rulemaking spurred some change. The agencies, in final amendments, revised the public review requirement for mitigated EAs to require adequate notice and opportunity for comment and public hearing.[101]

The evolution of mitigated EAs in Montana illustrates both private property rights and public interest themes. In its final form, the mitigated EA rule lessens the harshness of MEPA review for persons proposing projects with effects that are significant but which may be mitigated. However, because agencies must adhere to standards allowing public participation and comment to the EAs, the public interest objectives of MEPA and the Montana Constitution are also respected.

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96. The Environmental Quality Council is a 13-member bipartisan council created with the enactment of MEPA. A legislative-branch entity, its duties include overseeing and providing recommendations to the legislature concerning agency implementation of MEPA and other environmental laws. *See* MONT. CODE ANN. §§ 5-16-101 to -105, 75-1-301 to -324 (1989).

97. The EQC effort involved development of "model" rules for consideration by the executive branch agencies. The agencies made some revisions and adopted the rules in late 1988 and early 1989.

98. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321 to 4370a (1988)).

99. *Minutes of the Montana Environmental Quality Council* 13 (Jan. 29, 1988) (testimony of Thomas M. France, a council member).

100. *See Minutes of the Environmental Quality Council* 7 (Apr. 8, 1988) (testimony of Brace Hayden, a council member and advisor to Governor Ted Schwinden on natural resource issues).

101. *See, e.g.*, ADMIN. R. MONT. 16.2.629(4) (1989). The MEPA rules of the executive branch agencies are largely identical.

B. *The Mining Laws*

Another regulatory scheme illustrative of the balancing act between the public interest and protection of private property rights is that covering the mining of precious metals. Clearly Montana's hard-rock mining heritage, checkered as it is, had a great influence on the adoption of strong constitutional mandates for a clean and healthful environment. This heritage also contributed significantly to the strong provisions of article IX, section 2, requiring that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed."[102]

Even more noteworthy was the climate of tension surrounding the future of mining in Montana—both of coal and of hard-rock minerals—that existed at the time of the constitutional convention. In the early 1970s, Montana lay poised at the edge of massive development of her coal resources, which some viewed with great anticipation of wealth for the state but others viewed with a sense of impending doom for a cherished way of life. And the Anaconda Company, with its history of unbridled clout and economic lifeblood for the communities of Butte, Anaconda, and Great Falls, maintained its dominance of the hard-rock mining industry.[103] The love/hate relationship that characterized Montanans' feelings for that company, and the industry as a whole, has been well documented.[104]

The regulation of coal mining and of hard-rock mining that implemented the constitutional provisions of article IX took two divergent paths. Perhaps because the coal industry had less historical and political influence, and because the extent of projected coal development alarmed even its boosters, the legislature treated the coal industry more harshly than it had treated the Anaconda Company. The "Montana Strip and Underground Mine Reclamation Act" (Strip Mine Act), adopted by the legislature in 1973, broke new ground by requiring that coal-mined land be reclaimed to its original contours, with native vegetative species, and to its original purposes.[105] The Strip Mine Act was the first specific response to the new constitutional mandates on the environment,

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102. MONT. CONST. art. IX, § 2.

103. MONTANANS FOR QUALITY TELEVISION, *K. Ross Toole's Montana*, pt. V (1985) (available on video cassette).

104. *See* MALONE & ROEDER, MONTANA: A HISTORY OF TWO CENTURIES (1976), HOWARD, MONTANA: HIGH, WIDE AND HANDSOME (1943); TOOLE, MONTANA: AN UNCOMMON LAND (1959).

105. 1973 Mont. Laws 325 (codified as amended at MONT. CODE ANN. tit. 42, pt. 2 (1989)).

and it represented a forceful response indeed. The law contained unprecedented and specific language stating that, in fact, certain areas of the state should not be mined, for example, because of their "ecological fragility." The Strip Mine Act later became a model for the federal "Surface Mining Control and Reclamation Act of 1977 (SMCRA)."[106] Although its provisions were amended in 1979 to conform to SMCRA, and again in 1981 to soften the requirement for revegetation as well as to eliminate the "ecological fragility" sections, the Strip Mine Act still represents one of the cornerstones of the legislature's early commitment to stringent implementation of the new constitution.

The regulation of hard-rock mining, on the other hand, has taken a more meandering route toward implementation of the constitution. The Hard Rock Mining Reclamation Act (Hard Rock Act), which still governs the permitting of hard-rock mines in Montana, was actually enacted in 1971.[107] Perhaps because the attention of the legislature was more focused on coal, and also because the Hard Rock Act was developed before enactment of the new constitution, the Hard Rock Act remains less restrictive than the coal strip- mine laws. While the Hard Rock Act requires the reclamation of disturbed lands for large mines, it contains significant exemptions for "small-miners" who operate on less than five acres, remove less than 36,500 tons of earth a year, and meet certain other requirements.[108] "Small miners" are not required to reclaim the land they mine; until late 1989 a small miner was required only to file an affidavit promising not to pollute state waters and to protect human and animal life around the mine.

Although the 1989 Legislature adopted new reclamation and bonding requirements for small-miners who engage in placer or dredge mining, or who use cyanide in their operations,[109] several commentators have contended that the small-miner exclusion represents a significant departure from the constitutional provisions requiring the reclamation of *all* lands disturbed by the taking of natural resources.[110] This contention has yet to be tested in court, however.

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106. Pub. L. No. 95-87, 91 Stat. 445-532 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1988)).

107. 1971 Mont. Laws 252 (codified at MONT. CODE ANN. § 82-4-301 to -362 (1989)).

108. *See* MONT. CODE ANN. §§ 82-4-303(14), -305 (1989).

109. The 1989 Montana Legislature passed two laws that present additional requirements for small miners engaged in placer mining or in using cyanide chemicals. *See* 1989 Mont. Laws 346-47.

110. *See, e.g., Minutes of the House Natural Resources Committee* 6 (Feb. 17, 1989) (testimony of Jim Jensen, representing the Montana Environmental Information Center).

The Hard Rock Act also contains strict confidentiality provisions that are missing from the Stip Mine Act, reflecting both the differences in the hard-rock and coal markets and the strong hard-rock mining heritage that has historically allowed mining companies to keep their processes and plans secret. Over the years, these confidentiality provisions have often been roadblocks to citizens trying to gain information about proposed or actual mines. However, the mining industry has continued to convince the legislature that confidentiality is necessary for the industry to maintain its competitive edge, both within the industry and in the international market. Some citizens have argued that these confidentiality provisions in fact violate other aspects of the Montana Constitution governing a citizen's right to know.[111] To date their arguments have not prevailed.

Until very recently no application for a permit to mine under the Hard Rock Act has been denied. This is significant because the law does not prohibit on mining in certain environmentally sensitive areas, unlike the Strip Mine Act. For many years, the 1971 Hard Rock Act remained essentially unchanged from its pre-constitutional enactment in 1971. However, in recent years, the legislature has tightened the law to reflect the markedly increased activity in the hard-rock arena and the potentially disruptive techniques for remining tailings and milling ores. Most of these additional restrictions were developed in cooperation with the mining industry and with its support.

All in all, the history of the laws regulating the hard-rock mining industry reflects a desire on the part of Montanans to hold on to the colorful and feisty mining heritage that characterizes the state while attempting to ensure that the abuses of that heritage are not revisited on the environment. The Upper Clark Fork River, the nation's largest Superfund site and a result of mining abuses of the past, serves as an ever-present reminder of the need for continued vigilance.

C. The 1973 Water Use Act and Subsequent Revisions

Water is an essential and precious resource for Montanans. Because of its fundamental value, the strong and continuing legislative response to the major 1972 constitutional expansion of the water-rights section should not be startling.

Legislative activity began only one year after the convention

111. MONT. CONST. art. II, § 9.

with the passage of the Montana Water Use Act.[112] This new law initiated several new and major undertakings, including: 1) a water-rights adjudication process; 2) an administrative-permit system as the means of obtaining a post-July 1, 1973 water right; and 3) a water-reservation system that enables governments to reserve water for existing and future beneficial uses, including those requiring instream flows.[113]

These undertakings mark the beginning of a stimulating period of innovations in water policy—a period dotted with changes accommodating both private property values and public values. All were driven by a common desire to ensure protections from downstream threats.

1. The Water-Rights Adjudication

The water-rights adjudication established under the 1973 Water Use Act[114] directly addressed the declaration in article IX, section 3(3), confirming all existing rights. This system marked the first extensive effort to quantify and place into common records all pre-1973 water rights in Montana. Yet, by 1977, it had not resulted in any decrees. Moreover, Ted J. Doney, the director of the Montana Department of Natural Resources, estimated that the entire adjudication would "take over 100 years to complete"[115] if funding continued at 1977 levels. Therefore, House Joint Resolution No. 81, adopted by the 1977 Legislature, authorized a special interim committee, later named the Subcommittee on Water Rights, to study the issue. The Subcommittee's recommendations,[116] accepted by the 1979 Legislature, included: (1) substantial revisions to the adjudication process, including the creation of a system of water courts; and (2) explicit direction to expedite and facilitate the adjudication of existing water rights.[117]

Federal and state courts have upheld the new process as adequate on its face.[118] However, questions concerning both the structure and operation of Montana's adjudication process have generated considerable controversy. In mid-1985, for example, litigation

112. 1973 Mont. Laws 452 (codified as amended at MONT. CODE ANN. § 85-2-101 to -807 (1989)).

113. *Id.* at §§ 1 to -25.

114. *Id.* at §§ 6 to -15.

115. H.J.R. No. 81, 45th Leg. (1977), *reprinted in* 1977 Mont. Laws Appendix at 2120.

116. *See generally* SUBCOMMITTEE ON WATER RIGHTS, DETERMINATION OF EXISTING WATER RIGHTS (1978).

117. 1979 Mont. Laws 697.

118. Arizona v. San Carlos Apache Tribe, 463 U.S. 463 (1983); State *ex. rel.* Greely v. Confederated Salish & Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985).

brought by the Montana Department of Fish, Wildlife and Parks resulted in a stipulated agreement among various parties, including the Montana Water Courts and the Montana Department of Natural Resources and Conservation (DNRC). More recently, the Montana Supreme Court has issued three opinions concerning the adjudication process,[119] the most controversial one finding that the Supreme Court itself—not the DNRC or the Water Courts—has authority to adopt rules concerning the DNRC's water-rights verification functions.[120]

This activity led to a major legislative re-examination of the adjudication process in 1988 involving an independent assessment of the process.[121] The legislative finding was a general vote of confidence for the existing process, although a significant number of bills modifying it were proposed and, after substantial amendments, enacted by the legislature.[122] Nonetheless, concerns remain about the ability of the process to fulfill the federal McCarran Amendment[123] as well as state and federal constitutional requirements.[124]

The practical aspect of this controversy is disturbing. Nearly everyone agrees that more certainty concerning water rights is in Montana's best interest. But, if the legal concerns have merit, our existing system may be incapable of delivering accurate or defensible water rights.

2. *Water Permitting System*

The water permitting system provided a new institutional mechanism for cataloguing post-July 1, 1973, water uses while also protecting existing water rights. When enacted in 1973, an applicant could obtain a permit under the following conditions: (a) "un-

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119. *In re Department of Natural Resources & Conservation*, 226 Mont. 221, 740 P.2d 1096 (1985); McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986); and *In re* Sage Creek Drainage Area, 234 Mont. 243, 763 P.2d 644 (1988).

120. *In re Department of Natural Resources & Conservation*, 226 Mont. at 236, 740 P.2d at 1105.

121. The legislature allocated $75,000 to the Water Policy Committee for this purpose. A Colorado law firm was hired to evaluate the process and report to the committee. *See* Saunders, Snyder, Ross & Dickson, P.C., Report to the Water Policy Committee on the Water Rights Adjudication Process (Oct. 1988).

122. *See* 1989 Mont. Laws 426, 586, 604, 605. The laws were the outgrowth of the Water Policy Committee's evaluation of the water rights adjudication process.

123. Under the McCarran Amendment, 43 U.S.C. 666 (1988), states may determine federal and Indian water rights in a general stream adjudication. Subsequent litigation has reinforced this authority if the state process is adequate. *See, e.g., supra* note 118.

124. *See, e.g., Minutes of the Water Policy Committee* 10, Attachment A (Sept. 8, 1989) (testimony of Richard Aldrich, Field Solicitor, U.S. Department of the Interior).

appropriated waters" are "in the source of supply"; (b) "the [water] rights of a prior appropriator will not be adversely affected"; (c) "the proposed means of diversion or construction are adequate"; (d) "the use of water is a beneficial use"; and (e) "the proposed use will not interfere unreasonably with other planned [water] uses or developments for which a permit has been issued or for which water has been reserved."[125]

As the 1980s approached, threats of increased water demands from energy development, both in- and out-of-state, prompted bans on water exports and coal-slurry uses. Both of these bans were questioned constitutionally.[126] Thus, in 1983, the Montana Legislature directed an interim study committee—the Select Committee on Water Marketing—to examine and possibly revamp Montana's water law to ensure adequate protections were in place and to examine potentials for water marketing.[127]

Other developments also influenced events during this period. First, in 1982, the United States Supreme Court struck down a Nebraska statute that severely restricted interstate water transfers.[128] However, the Court left some opportunity for state regulation of water transfers, particularly if the regulation is based on conservation grounds. During the same period, South Dakota agreed to sell water from the Oahe Reservoir, a Missouri river mainstem reservoir in central South Dakota, to Energy Transportation Systems, Inc. (ETSI) for coal-slurry purposes. This agreement evoked both concern and interest in potentials for marketing water in Montana. Shortly thereafter, in Montana, the Montana Supreme Court delivered two stream-access opinions, commonly referred to as *Curran* and *Hildreth*,[129] which documented a public trust in water.

Strongly influenced by these events, the Select Committee responded by producing House Bill 680,[130] which promoted both public interest and private property values. To protect Montana water users from out-of-state water interests, for example, the committee installed new public interest criteria in Montana's per-

125. 1973 Mont. Laws 452, § 21. These criteria are now reflected in MONT. CODE ANN. § 85-2-311(1)(a)-(e) (1989). Similar criteria are inserted in MONT. CODE ANN. § 85-2-402 (1989), the change in appropriation right statute.

126. SELECT COMMITTEE ON WATER MARKETING, REPORT OF THE SELECT COMMITTEE ON WATER MARKETING TO THE 49TH LEGISLATURE, V-9 to V-13 (1985).

127. 1983 Mont. Laws 706, § 4.

128. Sporhase v. State *ex. rel.* Nebraska, 458 U.S. 941 (1982).

129. Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984). A subsequent and related case is Galt v. Montana Dep't of Fish, Wildlife & Parks, 225 Mont. 142, 731 P.2d 912 (1987).

130. The bill, with minor amendments, was enacted in 1985 Mont. Laws 573.

mitting and change in appropriation rights statute that apply to *any* proposed out-of-state water use. The criteria, which were drafted to meet the constitutional concerns expressed in *Sporhase v. State ex. rel. Nebraska*,[131] require that the proposed use not be contrary to water conservation in Montana and not otherwise detrimental to the public welfare of the citizens of the State of Montana.[132]

In addition, only the DNRC may appropriate water for interbasin transport or in instances in which the appropriation would result in the consumption of "4,000 acre-feet a year" and "5.5 cubic feet" of water per second.[133] The DNRC may then lease the water to private parties although the DNRC may not lease more than an aggregate of "50,000 acre-feet" of water without further legislative approval.[134] Environmental review under MEPA and possibly the Major Facility Siting Act is also required.[135]

The new public-interest criteria and leasing program addressed both private and public values. In addition, several water-management directives were integrated into House Bill 680 to promote a long-term water policy that keeps Montana's house in order. These directives included an expedited water reservation effort, a more active state water plan, a healthy water research program, and a comprehensive water data system.[136]

Why did this major bill pass virtually unanimously? The answer may be that once again a common goal—protection from downstream threats—was achieved. In addition, the public protections are inserted in places less likely to infringe on private property interests. Most notably, the protections generally do not affect smaller, instate water transactions whether they are by permit or change in appropriation right. While the threshold for public-interest review was lowered from 10,000 acre-feet or 15 cubic feet per second to 4,000 acre-feet and 5.5 cubic feet per second, the new value still exempts the vast majority of Montana's water rights.

3. *The Water-Reservation System*

Montana's water-reservation statute[137] allows governments to

131. 458 U.S. 941 (1982).

132. MONT. CODE ANN. §§ 85-2-311(3), -402(5) (1989).

133. MONT. CODE ANN. § 85-2-310 (1989). Six basins covering the State of Montana are named for purposes of the interstate transfer restriction.

134. *See* MONT. CODE ANN. § 85-2-141(4) (1989).

135. MONT. CODE ANN. § 85-2-141(6) (1989).

136. These concerns were also addressed by the Select Committee's bill. *See* 1985 Mont. Laws 573, §§ 17, 18, 20.

137. MONT. CODE ANN. § 85-2-316 (1989).

reserve water for existing or *future* beneficial uses.[138] While extensive technical amendments have been made since 1973, the overall goal of the statute—to put Montana in a position to defend future uses of water from present downstream threats—remains intact. Under this statute, water reservations have been established in the Yellowstone river basin and are being developed for the Clark Fork, Upper Missouri, and Lower Missouri river basins.

Since 1973, the water-reservation statute has been the principal tool for establishing possible instream-flow entitlements. From an instream-flow perspective, the statute has a glaring weakness; it provides *very* junior priority dates. A series of droughts in the 1980s pointed to the need for early priority dates if critical stream flows are to be maintained.

The reality of the 1988 drought—one of the worst ever—was further fueled by the decision in *In re Dearborn Drainage Area*, commonly referred to as the *Bean Lake* decision.[139] In *Bean Lake*, the Montana Supreme Court held what many recreationists feared—that to establish a pre-July 1, 1973, water right the water-right holder must have made a diversion (unless the legislature specifically provides otherwise, as illustrated by legislative authorization of "Murphy rights" on certain blue-ribbon trout streams).[140] The same logic may limit potentials for obtaining an instream right with a pre-July 1, 1973 priority date through a change in appropriation right proceeding.

While the courts were processing *Bean Lake*, the DNRC examined instream-flow protection strategies in its state water- planning process.[141] That study resulted in submittal of a water- leasing bill (House Bill 707) to the Montana Legislature.[142] The bill proposed to authorize the leasing of pre-July 1, 1973, appropriation rights by one entity: the Montana Department of Fish, Wildlife, and Parks.[143] In an additional effort to calm fears of water-right

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138. *Id.* Existing uses generally involve instream beneficial uses.

139. *In re* Dearborn Drainage Area, 234 Mont. 331, 766 P.2d 228 (1988) (known as the *Bean Lake* decision).

140. "Murphy rights" were a result of legislation authorizing the Montana Department of Fish, Wildlife and Parks to establish instream rights on blue ribbon trout streams. *See* 1969 Mont. Laws 345 (the Murphy Rights statute was codified as REV. CODES MONT. § 89-801 (Supp. 1969)). With passage of the 1973 Water Use Act, 1973 Mont. Laws 452, opportunity for establishing Murphy rights was extinguished by repeal of the statute.

141. MONT. CODE ANN. § 85-1-203 (1989). The state water planning process involves examination of topics relevant to Montana's water management. Instream flow protection was discussed during the 1987-1988 planning cycle, and a water leasing bill was recommended.

142. H.B. 707, 51st Leg., § 4 (1989) (introduced bill).

143. *Id.* at § 4.

holders, the bill proposed that leasing occur in no more than ten stream reaches and that leases have a maximum duration of ten years.[144]

Although the House of Representatives passed the water-leasing bill, it was stalled in the Senate, largely by agricultural interests fearful of the threats associated with competing instream rights.[145] After apparent defeat on the Senate floor, instream-flow advocates threatened to sue based on the already-articulated public-trust doctrine. Then, in an eleventh-hour move, spurred by moderate agriculture interests, the Senate reconsidered a revised bill. In a matter of minutes, both the Senate and House passed the bill.

The resulting law illustrates how tangled the mixing of private property values and public interest values can become.[146] Montana now allows the leasing of pre-July 1, 1973 water rights for instream flows. But the protections for private property values are numerous. For example, the act and any lease entered into under the act terminate in four years; the number of stream reaches where leasing may occur has been reduced to five; and Fish and Game Commission approval is required for any leasing by the Department of Fish Wildlife and Parks.

Skeptics might question whether Montana is truly implementing public values into its prior-appropriation laws. The debates that characterized the 1989 Legislature certainly illustrate the strong value dichotomies existent in the water arena when common goals do not exist. Instead of presenting a unified front against downstream threats, these interests faced off on the use of critical, scarce water supplies in Montana. This issue remains ripe for a fundamental debate on the strength of article IX, section 3(3), the source of Montana's public-trust doctrine suggested in *Galt v. Montana Department of Fish, Wildlife and Parks*.[147]

The three undertakings initiated in 1973—the water rights adjudication process, the permitting process, and the water- reservations process—have all worked to protect both private and public

144. *Id.* at § 5.

145. *See, e.g., Minutes of the Senate Agriculture, Livestock, and Irrigation Committee* 9, exhibit 15 (Mar. 15, 1989) (testimony of Ronald F. Waterman, representing the Montana Stockgrowers' Association, the Montana Cattlemen's Association, and the Montana Association of State Grazing Districts).

146. 1989 Mont. Laws 658. This session law is reflected in the temporary sections of Montana Code Annotated 85-2-402, 404, 436, 437 (1989).

147. 225 Mont. 142, 731 P.2d 912 (1987). Some commentators also suggest extra-constitutional origins for the public-trust doctrine. *See, e.g.*, Thorson, Brown, & Desmond, *Forging Public Rights in Montana's Waters*, 6 PUB. LAND L. REV. 1 (1985).

values in water. Admittedly, the extent to which these processes have created an adequate balance of private and public values might be debated. Nonetheless, the fact that public values are firmly reflected in Montana's present prior- appropriation laws is significant, because the water-rights arena is where private property rights are asserted most strongly.

D. Land Use Laws

Although Montana leads several states in many aspects of environmental regulation, particularly that of large-scale resource extraction and major-facility siting, its overall regulation of land-use practices lags far behind many states. This less restrictive regulatory atmosphere surrounds the subdivision of land as well as many agricultural and silvicultural practices. Because individuals rather than the large, corporate, extractive industries engage in many of these activities, the legislature and regulatory agencies give them less regulatory scrutiny. Yet their cumulative effect on the environment of Montana often has had greater negative impact than the sometimes feared "smokestack industries." Many of these impacts result from hard-to-pinpoint "nonpoint sources" of contamination and from small but numerous point sources. While some efforts have been attempted to regulate these activities, they have been largely ineffective, even counterproductive. Some recent legislative attempts, however, have yet to be tested either by adequate resource monitoring or time.[148]

Montana's laws regulating the subdivision of land illustrate these assertions. Prior to 1973, legislation had directed the Department of Health to review the water supply and sewage systems for subdivisions smaller than five acres.[149] Some of Montana's earliest statutes also contained provisions relating to platting and surveying. Other early provisions gave requirements for monuments and for dedication of portions of subdivided land for parks and playgrounds.[150] Until 1973, however, no legislation existed in Montana that purported to deal either systematically or comprehensively with the adverse environmental and social effects of subdivision development.[151]

Following the adoption of the 1972 Constitution, the legislature enacted the Montana Subdivision and Platting Act[152] to regu-

148. *See* 1989 Mont. Laws 423, 668.
149. 1967 Mont. Laws 197, §§ 148-152.
150. REV. CODES MONT. tit. 11, ch. 6 (1947).
151. Goetz, *Recent Developments in Land Use Law*, 38 MONT. L. REV. 97, 99 (1977).
152. 1973 Mont. Laws 500 (currently the Subdivision and Platting Act is codified at

late subdivisions and "require development [of land] in harmony with the natural environment."[153] Applying to land divided into parcels of ten or fewer acres, the act's innovations included requiring an environmental assessment and local-government review and approval prior to subdividing land. In addition, the act required all local governments to adopt subdivision regulations that met or exceeded model state regulations.

The 1973 Legislature correspondingly adopted a more comprehensive approach to the Department of Health and Environmental Sciences' review of subdivisions, thus establishing the dual system of subdivision regulation that still exists today. The Sanitation in Subdivisions Act was expanded to protect the quality of water "for other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife" and to include the regulation of solid-waste disposal as well.[154]

In 1974 and 1975, the legislature amended the Subdivision and Platting Act and the Sanitation in Subdivisions Act in several important respects. These amendments responded to the fever pitch of development occurring in many Montana valleys and pristine areas causing significant concern among policy makers.[155] Although that alarm was not strong enough to convince the legislature to enact the comprehensive land-use law introduced by the Environmental Quality Council in 1975, fierce legislative battles and painstaking compromise led to what conservationists believed were significant strengthening amendments to the subdivision laws. These included the expansion of the laws to cover parcels of less than 20 acres, adoption of eight public- interest criteria for use by local governments in evaluating subdivisions, and the extension of Department of Health and Environmental Sciences authority over divisions of land previously created through the use of occasional sale or family- conveyance exemptions.

Both the Subdivision and Platting Act and the Sanitation in Subdivisions Act have undergone relatively minor changes since 1975.[156] But the lofty purposes and high-minded goals of those acts, which so closely resemble the themes running through the

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MONT. CODE ANN. tit. 76, ch. 3, pt. 1 (1989)).

153. MONT. CODE ANN. § 76-3-102 (1989).

154. MONT. CODE ANN. § 76-4-104 (1989).

155. MONTANA ENVIRONMENTAL QUALITY COUNCIL, LAND USE POLICY STUDY, 9-17 (1974).

156. SUBCOMMITTEE ON SUBDIVISION LAWS, MONTANA'S SUBDIVISION LAWS: PROBLEMS AND PROSPECTS (1978); MONTANA ENVIRONMENTAL QUALITY COUNCIL, ANNUAL REPORT TENTH EDITION: RESEARCH TOPICS 15-32 (1987). Both of these documents provide a comprehensive history and analysis of Montana's subdivision laws.

1972 environmental provisions of the constitution, have been woefully unrealized. Several legislative studies, executive- branch critiques, public-interest-group exposes, law-review articles, and other treatises have documented the ineffectiveness of Montana's subdivision laws. In fact, many commentators assert that the Subdivision and Platting Act has had the exact opposite effect of its intended purposes. By creating a process that is vague, uncertain, costly, and tedious for developers, the legislature and implementing local government officials unwittingly encouraged subdividers to develop elaborate schemes to evade the law. As a result, a significant majority of subdivisions never receive local-government review. The vast numbers of twenty-acre parcels are good for little more than growing weeds, and unplanned subdivisions stretch communities to provide services.

Although the Sanitation in Subdivisions Act arguably has been more effective, because it covers those parcels under twenty acres in size that are exempt from the Subdivision and Platting Act (e.g. the occasional sale and family conveyance), several critics have charged that it fails to take into account the cumulative effect of subdivisions in an area that is environmentally sensitive or is experiencing rapid economic growth. These subdivisions considered by themselves may be environmentally sound, but when evaluated for their cumulative effect on an ecological system, may be devastating. This trend has been most acutely evidenced in the Flathead Basin. Critics, and even the Department of Health and Environmental Sciences, also have noted that adequate enforcement of the law is difficult given limited personnel and enforcement remedies.

Since enactment of the subdivision acts, nearly every legislative session has been a battle ground for efforts to modify the subdivision laws, both to make them less restrictive and to close perceived loopholes. After sixteen years, a political and environmental stalemate reigns in the arena of subdivision regulation.

The legislature came closest to resolving this deadlock in 1987 with the introduction of House Bill 809. This bill represented the best efforts of the Environmental Quality Council and numerous interested and affected individuals and groups who had labored over two years to develop a comprehensive evaluation and reworking of Montana's subdivision laws. Introduced with high hopes for success, House Bill 809 provided review for all divisions of land while attempting to eliminate the feared subjectivity of "applause meter" effects of the Subdivision and Platting Act. Although the bill represented painstaking efforts to achieve consensus, it was de-

feated through the efforts of several interest groups who adhered to the ever-present political axiom that the enemy that is known is preferable to the perceived enemy that is unknown. In the 1989 session and until recently, efforts to improve Montana's subdivision laws have been largely abandoned.[157]

Regulation of forest practices mirrors the disappointing record of subdivision regulation. However, some recent legislative efforts in the forest-practices arena may bear fruit.[158] In addition, recent legislative initiatives related to the control of the unwise use of pesticides and fertilizers in agriculture may decrease pollution in this area, too, if adequate resources are devoted to their implementation.

Lack of public awareness of the environmental threats posed by many small, non-point polluters plus a lack of individual and corporate environmental commitment to a clean and healthful environment have resulted in a failure of today's reality to match 1972's expectations in these areas particularly. The reasons for this more disappointing record again reflect the competing values of Montanans, and the sense that use and abuse of Montana's more renewable resources (e.g. our soil and our watersheds) through subdivision, silviculture, and agriculture do not constitute the threat that is perceived from extractive industries. But in reality, cumulative overuse of these renewable resources may lead to an effective "mining" of them.

E. Summary of Post-Constitutional Trends

The cursory review given in this presentation to the post-constitutional enactment and interpretation of four areas of environmental policy leads to several observations for Montana's future. While the people of Montana, through their elected representatives, have largely heeded the warnings of the likes of K. Ross Toole and others, who exhorted them to beware of the modern counterparts to Marcus Daly and William Clark, they have been less willing to be wary of the effects of their own actions on the environment. Although the record on MEPA, mining regulation,

157. An estimated 31,000 gallons of gasoline and diesel fuel leaked from underground storage tanks associated with unregulated development on the property of the Church Universal and Triumphant in Park County. Dennison, *CUT Fuel Leak Estimated at 31,000 Gallons*, Missoulian, Apr. 17, 1990, at 1, col. 5. This leak and associated development by the Church Universal and Triumphant and its members have stimulated revived interest in reforming Montana's subdivision laws.

158. For a comprehensive review of forest practices regulation, see the ENVIRONMENTAL QUALITY COUNCIL, HOUSE JOINT RESOLUTION 49: FOREST PRACTICES AND WATERSHED EFFECTS: (Dec. 1988).

water rights, and land use is mixed, on balance, laws now largely regulate the activities of large corporations engaged in resource extraction. Therefore, environmental regulation of large-scale polluters more closely fulfills the 1972 constitutional mandates of preserving a clean and healthful environment for the large rather than smaller polluters. The remaining sections of this paper will examine where these trends take us and what is necessary to realize fully Montana's constitutional goals.

IV. What do these Trends suggest as Next Steps?

It is probably too early to tell fully whether Montana has made reasonable progress in implementing the environmental directives established by the 1972 convention. Certainly, additional institutional efforts are needed to ensure that Montana's environment is clean and healthful for future generations. In particular, our efforts at addressing cumulative effects—as discussed in the section on land use—are unimpressive.[159] Moreover, a national trend toward pollution prevention appears about to emerge.[160] Like other states, Montana has focused on controlling rather than preventing pollution and needs to look more at the front end of the pollution stream.

However, these positive initiatives may be difficult to realize without a stronger citizen commitment. As stressed earlier, the 1972 Constitution directed the state *and* each person to work to maintain and improve a clean and healthful environment—not just the large extractive industries.

A. Encourage Actions That Prevent Rather Than React to Pollution

Montana's post-convention history is replete with efforts to remedy or respond to pollution. Evidencing the "response" approach to environmental degradation, the 1989 Legislature enacted a bill strengthening Montana's mini-Superfund law.[161] This law facilitates state cleanup of hazardous-waste sites the federal

159. Another recent example concerns oil and gas development along the North Fork of the Flathead River. A recent Montana Supreme Court decision documents the need for careful thought in evaluating potential cumulative effects of oil and gas development. North Fork Preservation Ass'n v. Department of State Lands, ___ Mont. ___, 778 P.2d 862 (1989).

160. *See* Reilly, *Pollution Prevention: An Environmental Goal for the 90s*, EPA Journal Jan./Feb. 1990, at 4; Commoner, *A Reporter At Large (The Environment*, The New Yorker, June 15, 1987, at 46-71; and Kriz, *An Ounce of Prevention*, Nat'l Journal, Aug. 19, 1989, at 2093.

161. 1989 Mont. Laws 709.

Superfund program fails to address. Bills authorizing a petroleum-tank-cleanup fund for underground-storage-tank leaks[162] and a bill funding several cleanup projects from state grant programs[163] are also indicative of the legislature's "responding" to rather than attempting to prevent pollution.

Unfortunately, our post-convention history evidences limited efforts at preventing—as opposed to controlling—pollution. For example, recycling bills and initiatives have failed repeatedly as solid- and hazardous-waste production continues to climb.[164] In addition, increasing pollution of our waters remains a significant problem, and maintenance of reasonable air quality is a growing concern.

Nonetheless, on some environmental fronts Montana is anticipating rather than reacting to problems. The recent enactment of the Agricultural Chemical Groundwater Protection Act is one example.[165] By initiating groundwater monitoring and requiring management plans for several agricultural chemicals, Montana will finally be addressing what may become a serious problem throughout the state. The benefits of this approach are both economic and environmental. Groundwater is an extremely valuable resource for virtually every economic activity and, once polluted, it is extremely costly to either restore its quality or find alternative supplies. Thus, it makes sense to prevent its contamination, regardless of perspective or values.

Preventive approaches could have similar benefits in other areas. By preventing pollution of our surface waters and destruction of our watersheds, long-term (and sometimes short-term) benefits may accrue for citizens from all perspectives.

B. Consider Cumulative Impacts in Making Environmental Decisions

Montana's environmental laws in virtually every area allow some exemption for the smaller polluter, developer, or user. In many instances, the exemptions are provided for good reasons. When the impacts of several exempted activities are added together, however, the consequences can be negative. In some areas, tools are available to address cumulative impacts. For example,

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162. 1989 Mont. Laws 384.

163. H.B. 775, 51st Leg. (1989). An appropriations bill provided funding for several projects from the Reclamation and Development Grants Program.

164. Examples include: Mont. Initiative 87 (1980), Mont. Initiative 113 (1988), S.B. 69, 45th Leg. (1977), H.B. 790, 46th Leg. (1979), and H.B. 899, 49th Leg. (1985).

165. 1989 Mont. Laws 668.

water may be closed to additional appropriation in highly appropriated basins or subbasins.[166] Similarly, under Montana's air-quality laws, additional emissions may be precluded or severely restricted if ambient-air standards would be exceeded in an airshed.[167] At the local-government level, cities and counties can address certain cumulative impacts through zoning and by developing master plans for subdivisions.[168] However, local citizens have often resisted exercise of these tools.

In a general context, projects reviewed under the Montana Environmental Policy Act (MEPA) also undergo an examination for known cumulative impacts. As stated in the MEPA rules:

> 'Cumulative impact' means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.[169]

The mitigated environmental assessment must consider cumulative impacts to the extent necessary to determine the significance and complexity of the proposed action and to mitigate the significant effects.[170] The environmental impact statement must contain discussion of cumulative impacts.[171] The difficulty lies in how to apply this cumulative analysis to the project decision. While MEPA rules require consideration of cumulative impacts as a guide in decision-making, the rules do not necessarily require mitigation for cumulative impacts.[172] Ideally, the result is mitigation of the cumulative impact in a manner agreeable to the developer, regulator, and affected parties.

Thus, Montana law contains certain limited tools for addressing cumulative impacts. Too often, however, the tools are used only when crisis is reached. In other instances, tools are not added until after the crisis.[173] Certainly fine-tuning would be helpful and,

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166. MONT. CODE ANN. § 85-2-319 (1989).

167. ADMIN. R. MONT. tit. 16, ch. 8, subch. 8 (1989).

168. *See* MONT. CODE ANN. tit. 76 ch. 2, pts. 2 & 3 (1989); MONT CODE ANN. § 76-1-606 (1989).

169. *See e.g.*, ADMIN. R. MONT. 16.2.625(7) (1989).

170. *See e.g.*, ADMIN. R. MONT. 16.2.628 (1989).

171. *See e.g.*, ADMIN. R. MONT. 16.2.632 (1989).

172. At issue is the extent to which MEPA may be used as the basis for substantive requirements on the project.

173. Some commentators would assert agricultural chemicals and groundwater as an

in some instances, a comprehensive advance look might help determine what new tools are desirable.

Nonetheless, as the concluding section will make clear, Montanans must be ready and willing to implement curbs and restrictions on previously acceptable activity. Tools without the commitment to use them are of little use.

C. Inspire a Realization of the "People Duty" in the Constitution

This article has evaluated how Montana's institutions have responded to the environmental provisions of Montana's constitution. But perhaps more fundamentally, the *people* of Montana must evaluate their individual and collective response to those provisions. In the preamble, the declaration of rights, and article IX, the people's duty, along with their corresponding rights, is highlighted. That duty is more obvious in the declaration of rights and in article IX. For example, the declaration of rights recognizes the "corresponding responsibilities" of "[a]ll *persons*" to the enjoyment of the right "to a clean and healthful environment."[174] Similarly, article IX requires that "[t]he state and *each person* shall maintain and improve a clean and healthful environment . . . for present and future generations."[175] While the courts, the legislature, and executive agencies must institutionally respond to the environmental mandates of the constitution, the constitution calls out the *people* to respond as well. The will and commitment of the *people* in regard to the environment and the constitution must then translate into the political will necessary to respond institutionally to both.

The Montana Constitution is both a legal and a moral document. As Professor Charles Wilkinson has asserted, "constitutions are far more than interpretations in judicial proceedings. They are philosophical and moral statements, they embody the state of mind of a people."[176] These sorts of statements are heady stuff for a law-review article, but they are worthy of following up with an examination of the role the people can play toward implementation of the constitution.

From the perspective of the legislative branch of government, Montana's political institutions are stretched nearly to the limit in

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example of a post-crisis response. *See supra*, note 165.

174. MONT. CONST. art. II, § 3 (emphasis added).

175. MONT. CONST. art. IX, § 1(1) (emphasis added).

176. Address by Charles Wilkinson, 29th Montana Wilderness Association Convention (Dec. 5, 1987) (reprinted in WILD MONTANA (Mar. 1988)).

responding to the kinds of environmental problems facing the state. Montana communities face overwhelming financial drains to more efficiently and safely dispose of solid waste, develop and maintain safe drinking water and sewage systems, and otherwise protect the public health under new federal and state regulations that will be enforced the 1990s. And Montana lags far behind the national average in personal economic growth. Space and distance—Montana's enemy and asset—make it nearly impossible for Montana's institutions to respond economically to the environmental challenges ahead. Yet Montana's environmental groups have focused nearly all their efforts on these institutions.

Instead it may be time for those conservationists and for Montana citizens to focus on ourselves. Montanans have always known an environmental ethic. That ethic is clear in the stories of the first native American inhabitants, in the literature referenced earlier, and in the constitution. A person cannot live in Montana without possessing at least a shred of it. The land that is Montana shapes it. Redeveloping, refining, internalizing that ethic into a life of stewardship and connectedness represents the real prospect for full realization of the constitutional environmental mandates for Montanans.

Where can Montanans look for guidance in accomplishing this rather amorphous and lofty call? First, we can look to the wealth of Montana writers the centennial year celebrated. Struggles to adapt to a call for a renewed environmental ethic are not new. One can find an outstanding model in Ivan Doig's *Dancing at the Rascal Fair*.[177] The book recounts the story of two friends who come from Scotland to find a new life in Montana. Robert Burns Barclay and Angus McCaskill settle in "Two Medicine Country" on the Rocky Mountain Front to raise sheep and families amid the beautiful and harsh Montana environment. Although the book is primarily a story of the uncertainties of friendship and love, it also recounts a compelling example of early Montanans' need and struggle to adapt to the changes and limits to the environment. When the sheepherders and cattle ranchers of "Scotch Heaven" are first told of the need to limit the number of animals on the range, they are dumbfounded and outraged at this attack on the freedom that brought them to the land. When Stanley Meixell, the new forest ranger on the scene, tells them that they can use the land, but not use it to death, these early Montanans are skeptical. But eventually, most of them accept and respect these limits. The

177. DOIG, DANCING AT THE RASCAL FAIR 227-46 (1987).

successful ones incorporate this reluctantly received concept of stewardship into their daily lives.

In addition, Montanans can look to the words and actions of early conservationists. The likes of John Muir, Aldo Leopold, Bob Marshall, Theodore Roosevelt, Rachel Carson, and others surely helped to provide the impetus that eventually led to the adoption of the strong environmental provisions of the constitutions.[178] Now they can be rediscovered to help instill the need for personal and collective changes in our lives that will make the real difference in whether constitutional mandates are fulfilled.

A recent edition of the *EPA Journal* provides a good sampling of the views of national policy-makers and academics on the imperative for an environmental ethic to solve today's almost overwhelming environmental problems.[179] The words of former EPA Administrator Lee Thomas sum up the views of many:

> We have to recognize that each of us is responsible for the quality of the environment we all live in, and our personal actions affect environment[al] quality, for better or worse. This recognition of individual responsibility must then lead to real changes in individual, family, community, and business behavior. In other words, our environmental ethic must begin to express itself not only in federal and state law, but also in subtle but profound changes in the ways we live our daily lives.[180]

Perhaps the very first words of the Montana Constitution provide the inspiration for the changes that each Montanan must make in order to realize fully the promise for a clean and healthful environment for present and future generations. In the preamble, the path is clearly marked:

> 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.[181]

These words reflect a spiritual grounding on the part of the delegates to the constitutional convention—a grounding that one also finds in the early native-American creation stories, in the words and life of John Muir, and in the words and lives of other early

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178. FOX, THE AMERICAN CONSERVATION MOVEMENT: JOHN MUIR AND HIS LEGACY (1985).

179. *An Environmental Ethic: Has It Taken Hold?* 14 EPA JOURNAL, July/Aug. 1988, at 1.

180. Thomas, *Speaking Frankly*, 14 EPA JOURNAL, July/Aug. 1988, at 8-9.

181. MONT. CONST. preamble.

conservationists. They call for a sense of covenant and compassionate stewardship with the earth and with each living being, including fellow humans. While traditional western religions and more specifically American Jewish and Christian churches of the eighteenth, nineteenth, and early twentieth century have done little to contribute to this need for a spiritual grounding in environmental stewardship, contemporary theologians,[182] including several notable Montanans,[183] have recently reversed that trend. People seeking to plant the seeds of a spirituality that has existed all along but became obscured by our contemporary society are rediscovering some of the early Christian mystics, like Julian of Norwich and Francis of Assisi, the writings of the nineteenth-century transcendentalists, and Buddhist, Tsaoist, and Essene texts. That spiritual incorporation of stewardship need not be specific to any one religion or to organized religion at all. Rather, it constitutes a recognition that the states of the natural environments in which people live reflect the state of the human spirit. We all find ourselves in the environments we deserve, reflecting our values and our beliefs.[184]

No better testament to the competing values that shape Montana and Montanans, and to the optimism that leads one to believe that the heady and inspiring words of the constitution can be fulfilled through renewed commitment and spiritual energy, can be found but in these words by the writer Glenn Law:

> In Montana you have to make your own luck. Milk and honey for the mind don't nourish the body. You can't eat the scenery. There are only so many ways to make a living here and few of them result in material wealth. You can't expect much from a country that plays its hand close and never really shows all its cards. But when it has a hold on you, you find a way to get what you need.
>
> Because the climate is harsh, the geography unforgiving, and the economy often Spartan, it's natural to assume that living in Montana is hard.
>
> "You gotta be tough to live in Montana."
>
> You hear it time and time again. But the quality of life in Montana is high and has nothing to do with the standard of living. Just as the thin soil resists domestication, so the space is comfortable and fertile for the spirit.

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182. Prominent theologians who have emphasized environmental stewardship include Matthew Fox, Wendell Berry, John Cobb, Walter Brueggeman.

183. Montana theologians concerned about environmental stewardship include Wesley Granville-Michaelson and John Hart.

184. Meeker, *Wisdom and Wilderness*, CREATION May-June 1988, at 24.

The economy has a way of driving out the less committed. The climate takes its toll on the less captivated. But you don't have to be tough to live where the air is clean, water pure, and it will be a cold day in hell before a nuclear reactor moves in next door. It is comfortable living where your spirit and space can reach to the horizon or linger along a trout stream. Living in Montana is easy.

Leaving it is hard.[185]

185. Law, *More Than Skin Deep*, MONTANA SPACES, *supra* note 1, at 47.