

Laura A. Schroeder, Therese A. Ure, and Sarah R. Liljefelt<sup>†</sup>

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<sup>†</sup> Laura A. Schroeder, J.D. is the owner of Schroeder Law Offices, P.C., a water law firm with offices in Portland, Oregon and Reno, Nevada, and with attorneys licensed in Oregon, Washington, Idaho and Nevada. Laura represents individuals, businesses, municipalities and quasi-municipal organizations in water right transactions, acquisitions, contracts, easements, dam removal/replacement, well share and water conveyance agreements, adjudications, permitting, extensions, transfers, certification, regulatory compliance and litigation before state administrative bodies, and State and Federal trial and appellate courts. Laura is also an

Therese A. Ure, J.D. is the managing attorney in Schroeder Law Offices' Reno, Nevada office. Coming from a farming background, Therese has focused her law practice in water rights and public lands laws. These areas include agriculture water use permitting, extensions, transfers; groundwater interference and connection, critical and limited areas; special patron rights and responsibilities, public lands (easements, permitting uses and grazing permits BLM, USFS, and compliance issues), agri-business litigation. Therese earned her J.D. from Valparaiso University School of Law in 2006. She is a member of both the Oregon and Nevada State and Federal Courts, and is a member of the Ninth Circuit Court of Appeals

Sarah R. Liljefelt, J.D. is an associate attorney in Schroeder Law Offices' Portland, Oregon office. She graduated cum laude from the Western School of Law of Lewis & Clark College in June, 2010, and is licensed to practice law in Oregon. Sarah's interests include valuation of water rights, water transfers and marketing, litigation, and federal regulatory compliance.

1. See, ADAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:30 (2010).

Prior Appropriation Doctrine requires would-be appropriators to obtain a permit for water use prior to any diversion or withdrawal.

Despite these basic tenets of western water law, many domestic and stock water uses of groundwater are declared exempt from water permitting codes of western states. But now, times are changing! The tides have begun to turn, and at least one tribunal has held that allowing domestic and stock water exemptions is contrary to the Prior Appropriation Doctrine itself and that permitting should be required for these traditional, exempt uses. Pressure for such decisions is caused by increasing demand and competition for groundwater resources. On the other side of the argument are those who claim exemptions are unnecessary because the Constitution's "Right to Life"<sup>2</sup> trumps any restriction on access to water for human needs.

Many state constitutions acknowledge that all men are by nature free and equal and have certain inalienable rights, including the right to defend life, to own property and to pursue safety and happiness. It may be implied from these constitutional provisions that a man's "inalienable rights" include the ability to obtain those things upon which basic survival is based, i.e., water. Arguably then, water use provided by domestic exemptions from permitting requirements under the Prior Appropriation Doctrine could be deemed required by an implied right that living beings have to access water for domestic purposes. But is this right to water for human consumption automatic in all instances, or is a balance needed whereby some restrictions are implemented?

This paper examines the Human Right to Water in the context of the Prior Appropriation Doctrine in the western United States. Section II explains the current state of exempt uses of groundwater in selected western states and the challenges created by exempt uses. Section III explores the trends in western water law, including demographic shifts, changes in types of water uses and the effects on groundwater uses. Section IV considers the international Right to Water, and state constitutional bases for the Right to Life and its implications on water laws in the West. Section V concludes that although the law in this area is still somewhat undefined, the international Right to Water and national Right to Life could stand in the way of states as they try to limit or eliminate domestic exempt groundwater uses.

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2. U.S. CONST. amend. V and XIV. The "right to life" referred to here is the United States Constitution's "right to life, liberty and property" under the Due Process Clauses of the Fifth and Fourteenth Amendments.





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requirements associated with groundwater appropriation.<sup>18</sup> Under the program, residential developments, with an overall density equal to or less than one resident per ten acres and a minimum of six homes, are exempt so long as the amount of water withdrawn in total does not exceed 1,200 gallons of water per day.<sup>19</sup>

Idaho: In Idaho, certain "domestic purposes" are exempt. These include the use of water for homes, organizational camps, public campgrounds, livestock and for any other purpose connected to those uses, including irrigation of up to one-half acre of land, so long as the total use does not exceed 13,000 gallons of water each day.<sup>20</sup> This does not include water for multiple ownership subdivisions.<sup>21</sup>

The opening and excavation of, and withdrawal from, wells for domestic purposes are exempt from permitting requirements.<sup>22</sup> Domestic wells are also exempt from water department fees.

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and, upon receipt of the application, the State Engineer “shall” issue a permit for the use<sup>30</sup>.



Department.<sup>45</sup> Generally, exempt domestic groundwater uses are not assigned priority dates. However, if it is necessary for the Oregon Water Resources Department to regulate the use or distribution of groundwater as between the permitted and exempt users, then the Department issues a priority date for the exempt use based on the well log for the exempt well, or other evidence from the well owner that evidences when water use first began.<sup>46</sup> In this way, exempt groundwater uses may be regulated along with permitted and certificated uses.

In times of declared drought, the Oregon Water Resources Commission has the power to grant preference to rights for human consumption “[n]otwithstanding the priority of water rights.”<sup>47</sup> Therefore, if a severe drought forces the regulation of competing uses, domestic uses for human consumption should prevail, including domestic exempt groundwater uses, despite competing senior interests.

The Oregon Water Resources Commission designates Critical Groundwater Areas, and this designation may affect the regulation of domestic exempt groundwater uses. Critical Groundwater Areas are designated if the groundwater levels in the area are declining or have declined extensively, there is a pattern of substantial well interference between wells within the area, the groundwater supply is being overdrawn, groundwater temperatures have been altered, or water quality is declining or is reasonably expected to decline.<sup>48</sup> If a Critical Groundwater Area is designated, then the Commission may regulate all wells, including an exempt well, and may even order discontinuance of a well under certain circumstances.<sup>49</sup>

Washington: In Washington, the priority date for a permitted groundwater right is the date the application was filed with the

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45. OR. REV. STAT. § 537.150(2).

46. *Id.* at § 537.545(4).

47. *Id.* at § 536.750(1)(c). Note that when proposed uses of water are in “mutually exclusive conflict” or when there is an insufficient amount of water in the source to support both uses, Oregon has a preference statute that directs the Oregon Water Resources Department to give preference to appropriations for human consumption over all other uses, and then for livestock consumption over all other uses. OR. REV. STAT. § 536.310(12). Note that the other western states with similar preference provisions include California, Colorado, Alaska, and Idaho, *discuss supra*.

48. OR. REV. STAT. § 537.730(1). Additional reasons for designating a Critical Groundwater Area are listed in the statute.

49. *Id.* at § 537.775(1).





public and private uses.<sup>59</sup> Thus, the Idaho Supreme Court has held that the ability to reorganize priority dates based on the preference of domestic uses over all others can only be accomplished if “just compensation” is paid to the senior owners who are deprived of their property rights in water.<sup>60</sup>

Where a domestic use of groundwater is exempt under Idaho’s water code, a delivery call by a senior right holder will not be effective against the domestic use, regardless of the date of priority. The exception to this rule is where a holder of an exempt domestic water right is suffering material injury and makes a delivery call against the holder of another exempt domestic water right.<sup>62</sup> In that situation, the call against the domestic user will be effective.

In addition to the “first in time, first in right” principle, Idaho’s groundwater use is also tempered by the reasonable use principle. The water code states that the “first in time, first in right” principle shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.<sup>63</sup> Therefore, uses may also be regulated by their degrees of reasonableness as determined by the Department of Water Resources.

New Mexico: In New Mexico, all groundwater uses require permitting. However, the State Engineer does not have the discretion to deny a permit for a domestic groundwater use that meets certain requirements.<sup>64</sup> The state statute reads: “Upon the filing of each application . . . the state engineer shall issue a permit to the applicant to use the underground waters applied for.”<sup>65</sup> Because domestic wells are subject to permitting requirements, the date of priority is established by the date on which the permit application was filed.

New Mexico has enacted statutes that allow for Domestic Well

59. *Id.* The section of the Idaho Constitution that deals with takings of private property for public and private use is Article I, § 14.

60. *Basinger v. Taylor*, 164 P. 522, 523 (1917).

61. Idaho Administrative Procedures Act (“I.D.A.P.A.”) § 37.03.11.20.11 available at <http://adm.idaho.gov/adminrules/rules/idapa37/0311.pdf>.

62. *Id.*

63. IDAHO CODE ANN. § 42-226 (West 1987).

64. N.M. STAT. ANN. § 72-12-1.1 (West 2003) See also *supra*, notes 24-27 and accompanying text.

65. *Id.* (emphasis added).

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states to recognize the connection between surface and groundwater resources when permitting new appropriations to the degree of connection.<sup>73</sup> Now recognizing this connection, some states have created rules to regulate the hydrologic connection of groundwater and surface water as one source, thus regulating both surface and ground water rights under one system.

The western United States is an arid region and water resources are scarce. Surface water rights were the first to be developed by western settlers,<sup>74</sup> and today surface waters are generally fully

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difficulty in regulating groundwater resources in the face of continued growth of exempt groundwater uses. This section discusses the challenges created by exempt domestic groundwater uses in certain states.

#### A. The Potential Effects of Exempt Groundwater Wells

One author reports that the policy behind exempting domestic uses is the belief that exempt uses are *de minimis*.<sup>78</sup> However this policy is undercut by the sheer number of domestic exempt wells in existence and the number being drilled every year: there are more than a million exempt domestic wells in the West and tens of thousands more being drilled each year.<sup>79</sup> Even if domestic exempt wells do not substantially impact governance of water resources in the present, they have the potential to do so in the future as their numbers increase.

Settlement across the United States typically occurs in clusters; thus exempt domestic wells are also clustered. This close proximity creates a greater impact on fellow users from pumping and on the particular groundwater sources. When combined, there is the very real potential for exempt well uses to constitute a very large withdrawal.<sup>80</sup>

Currently, domestic uses account for a very small percentage of all water used in the United States, and in the West. However, as land uses change, domestic exempt uses have the ability to quickly multiply. In the West, traditionally rural farmland is being converted to residential and other types of land at alarming rates.<sup>81</sup> Additionally, in the West, landowners are able to sever water rights from generally appurtenant land.<sup>82</sup> The fact that water rights may be severed from the

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uses from 15,000 gallons per day to 1,000 gallons per day.<sup>97</sup> Although the measure did not pass, it is another example of states beginning to recognize that exempt uses could significantly affect water resources in total and attempting to limit exempt uses.

#### IV. THE RIGHT TO WATER: INTERNATIONAL AND DOMESTIC PERSPECTIVES

Internationally, there is no constitution that lays out human rights. Thus, international conferences are held between countries, and representatives try to reach consensus about what rights, if any, are fundamental to all human beings. Although not always enforceable, these fundamental human rights work as guideposts for government action. If governments do not try to protect fundamental rights within their countries, then other governments may look on those countries as uncooperative and aid organizations may refuse to fund the uncooperative governments' projects.

##### A. The Human Right to Water on an International Level

In 1948, the United Nations passed the Universal Declaration of Human Rights. Article 3 declared: "Everyone has a right to life, liberty and security of person."<sup>98</sup> Additionally, Article 25 provided: "Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food."<sup>99</sup> Arguably, the right to life and the right to a healthy standard of living include the right to water.

In 1997, the United Nations adopted the Convention on the Law of Non-Navigable Uses of International Watercourses.<sup>100</sup> The substance of the convention centers on five points: "[T]he idea of a human right to water, the principle of equitable and reasonable utilization, the obligation not to cause significant harm to other shares in the watercourse, the principle of sharing information related to the

97. H.B. 2859, 75th Leg. (Or. 2009), available at <http://www.leg.state.or.us/09reginfo/hb2800.dir/hb2859.intro.pdf>.

98. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

99. *Id.*

100. U.N. Convention on the Law of the Non-navigational Uses of Int'l Watercourses, G.A. Res. 51/229, U.N. Doc. A/RES/51/229 (July 8, 1997).



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watercourse, and methods of mediation.<sup>101</sup>

The Convention did not receive enough votes to become law. However, it is argued that the Convention was merely attempting to codify already-existing customary international law, which is binding on countries.<sup>102</sup> The recognition of customary law in the international context paves the way for future law and policy on the inherent right to water for life.

In 2000, the United Nations Committee on Economic, Social and Cultural Rights declared that the right to safe drinking water and water for sanitation are essential to a person's right to health.<sup>103</sup> In 2002, the Committee recognized that the right to water was an independent right, stating in General Comment 15 that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival."<sup>104</sup> Thus, countries have the obligation to provide their citizens with enough water to prevent dehydration or disease.<sup>105</sup>

Recently, the United Nations adopted the United Nations Resolution on the Human Right to Water and Sanitation.<sup>106</sup> The resolution was passed by 122 votes in favor, and 41 against. Notably, Canada, the United States, the United Kingdom and Australia abstained from the vote.<sup>107</sup> The Resolution recognizes "the right to

101. Russell Mason, Natural Law, THE HARVARD POLITICAL REV. (Apr. 2, 2009), <http://hpronline.org/beyond-borders/natural-law/>.

102. *Id.*

103. WORLD HEALTH ORG. [WHO], THE RIGHT TO WATER 8 (2003), available at [www2.ohchr.org/english/issues/water/docs/Right\\_to\\_Water.pdf](http://www2.ohchr.org/english/issues/water/docs/Right_to_Water.pdf).

104. *Id.*

105. *Id.* at 9.

106. G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (July 28, 2010).

107. Press Release, Security Council, General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation, U.N. Press Release GA/10967 (July 28, 2010), available at <http://www.un.org/News/Press/docs/2010/ga10967>.

The delegate for the United States expressed the country's support of finding solutions to global water issues, but felt that the text of the Resolution fell short because it acknowledged a right to water and sanitation which had not existed previously without "formulating, articulating and upholding universal rights." Additionally, the delegate expressed that the Assembly had not yet considered the full legal implications of declaring a human right to water.<sup>108</sup>

The delegate for Canada expressed the country's concern that the Resolution declared a right to water and sanitation without defining the scope of that right.<sup>109</sup> Because there was no consensus on that issue, Canada abstained from the vote.

The delegate for the United Kingdom explained that the government was abstaining because there was not sufficient legal basis for declaring the rights to water and sanitation as free-

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.without due process of law.<sup>118</sup> The Montana Constitution provides: “All persons are born equally free, and have certain natural, essential and inalienable rights, among which may be reckoned the right to enjoying and protecting lives and liberties . . . .”<sup>119</sup>”

But what does this “right to life” mean? Surely the most basic meaning must be the right to sustain one’s own life. It follows from this line of reasoning that a person must be able to obtain those things essential for sustaining life. Water is the most essential ingredient for life, as one cannot live without water for more than a few days. In addition to drinking water, one must be able to grow food, also an essential requirement for life. Finally, basic sanitation is implied by a right to life because without basic sanitation one may become ill and die. Therefore, it appears that any grant of the right to life impliedly grants water for drinking, food production, and sanitation purposes.

What obligations does the right to life, and thus right to water, place on the government? Does the right to life require that the government treat and deliver water to each citizen free of cost, or at a reasonable cost? Does it require an exemption from paying water treatment and delivery fees if an individual cannot afford to pay? These questions have not been answered, and any attempt to define the right to water in the United States to include free treatment and delivery would be mere speculation.

At least one state has passed a law providing for the right to water. The California Public Utilities Code states that access to an adequate supply of healthful water is a basic necessity for human life, and shall be made available to all residents of California at an affordable cost.<sup>120</sup> Thus California has defined the right to water to require water be made available by the state government at an affordable cost.

It is interesting to note the interplay between the right to water and domestic exempt groundwater uses. Most states have defined what constitutes a “domestic use” of water.<sup>121</sup> Most states also recognize the “right to life.” Because domestic uses of water are essential to life, these domestic uses could be held to be protected by state constitutions and the United States Constitution. Therefore, the right to life may trump prior appropriation concerns about priority of

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118. WASH. CONST. art. I, § 3 (1889).

119. WASH. CONST. art. I, § 3 (1889).

120. CAL. PUB. UTIL. CODE § 739.8(a) (2009).

121. See footnotes 4-34 and accompanying text.

