

**TESTIMONY BEFORE THE HOUSE NATURAL RESOURCES
COMMITTEE**

HOUSE BILL NO. 831

**Utility Solutions, LLC
Don MacIntyre
March 23, 2007**

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WATER LAWS IN CLOSED BASINS; DEFINING TERMS IN WATER USE LAWS; AMENDING REQUIREMENTS FOR AN APPLICATION TO APPROPRIATE GROUND WATER IN A CLOSED BASIN; PROVIDING THAT CERTAIN APPLICATIONS TO APPROPRIATE SURFACE WATER ARE EXEMPT FROM CLOSED BASIN REQUIREMENTS; PROVIDING REQUIREMENTS FOR HYDROGEOLOGIC ASSESSMENTS, MITIGATION PLANS, AND AQUIFER RECHARGE PLANS; PROVIDING MINIMUM WATER QUALITY STANDARDS FOR CERTAIN DISCHARGES OF EFFLUENT; REQUIRING THAT PREVIOUSLY APPROVED PLANS THAT WERE NOT LOCATED IN THE CLARK FORK BASIN MUST MEET CERTAIN CRITERIA; REQUIRING THAT DATA BE SUBMITTED TO THE BUREAU OF MINES AND GEOLOGY; PROVIDING FOR RULEMAKING; PROVIDING FOR A CASE STUDY AND REQUIREMENTS FOR PARTICIPATION IN THE CASE STUDY; RECOGNIZING AND CONFIRMING EXISTING APPROPRIATION RIGHTS IN CERTAIN INSTANCES; PROVIDING AN APPROPRIATION; AMENDING SECTIONS 85-2-102, 85-2-302, 85-2-311, 85-2-329, 85-2-330, 85-2-336, 85-2-337, 85-2-340, 85-2-341, 85-2-342, 85-2-343, 85-2-344, 85-2-402, AND 85-2-506, MCA; DIRECTING THE AMENDMENT OF ARM 36.12.101 AND 36.12.120; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND APPLICABILITY DATES."

Testimony

My name is Don MacIntyre. I represent Utility Solutions, LLC. I appear at this hearing to oppose HB 831. Utility Solutions favors legislation that gives effect to basic principles of the prior appropriation doctrine, in short any new use that does not adversely affect prior appropriators should be encouraged. Utility Solutions opposes legislation that attempts to control growth through the enactment of water laws. Utility Solutions opposes legislation that places impracticable procedures on parties where the procedures are not necessary to afford protections to existing users. Utility Solutions opposes legislation that act as a barrier to economic development and drives good paying jobs and job opportunities from Montana to its neighboring states.

Utility Solutions is concerned that HB 831, regardless of the well-intentioned concerns of the sponsor and the legislative staff, may have unintended consequences that create economic and procedural hurdles that will frustrate an already difficult administrative process to the point that no water-related development can take place in the closed basins in Montana.

Utility Solutions does support a legislative study of the issues presented in the bill in order to come back to the next legislative session with a bill in which all the unintended consequences have been more fully developed and addressed.

Utility Solutions objections to HB 831 are with the ambiguous processes created by the bill which appears in large part to be unworkable or at least to be very difficult to manage, the unknown but clearly high costs in order to comply with the bill, including unknown costs to objectors to participate in such undefined proceedings, and the fairness issue of limiting the right to appropriate water for a municipal use in a closed basin. The prior appropriation system was a practical doctrine for practical persons arising out of mining operations throughout the West. This bill substitutes a one size fits all for hydrologic settings that vary from place to place and patterns of existing use that vary from place to place. What is required to integrate the water supply for a coal fired stream plant on a stream is not the same as those procedures to integrate a use that for example consumes only 25 gpm.

Utility Solutions agrees with the testimony of the objectors who have addressed the process and economic issue. I would like to briefly address the fairness issue.

I have practiced water law in Montana since 1973. I was an adjunct professor of law at the University of Montana for ten years teaching the water law course. It is my testimony that the limiting of the right to acquire a municipal use to incorporated cities and towns reverses over a century of prior appropriation law in Montana in which entities other than incorporated cities and towns were treated the same for purposes of providing water for municipal use. House Bill 831 arbitrarily differentiates between municipal use service providers in closed basins.

In each amended section of House Bill 831 relative to a closed basin, the law is being changed to provide that the basin closure provisions do not apply to use by a municipality. The term municipality has been defined in House Bill 831 as meaning "an incorporated city or town organized and incorporated under Title 7, chapter 2. The fact of the matter is that entities both public and private, other than incorporated cities and towns, have served the municipal needs of the citizens of Montana. From large urban centers such as Missoula to rural communities such as Absarokee municipal needs have been served by other than by incorporated cities or towns. The municipal need is the same regardless of what entity serves the need. As such basin closure laws should treat municipal needs in a nondiscriminatory manner.

Attached is a legal analysis documenting the historical treatment of municipal use in Montana.

LEGAL ANALYSIS OF MUNICIPAL USE IN MONTANA

The term "municipal use" appears in the statutory definition of beneficial use. Pursuant to MCA § 85-2-102(2), a beneficial use is "a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, **municipal**, power, and recreational uses." (Emphasis added). This statutory definition applies, "unless the context requires otherwise, in this chapter." MCA § 85-2-102. Because "this chapter" includes not only the DNRC's authority over new water use permits and changes of water rights, *see* MCA § 85-2-310 *et. seq.*, but also the Water Court's authority over all existing water rights, *see* MCA § 85-2-212 *et. seq.*, it follows that this statutory declaration of a "municipal use" reflects a legislative declaration that the term has the same meaning for the Water Court as it does for the DNRC. Accordingly, as the Water Court's authority is over those appropriations that are protected under the law as it existed on July 1, 1973, MCA § 85-2-102(10), the meaning of municipal use for the purposes of the DNRC's authority must be coincident with the meaning of the term at common law.

A. Municipal Use Prior to July 1, 1973.

There is no common law principle of the prior appropriation doctrine that requires an appropriator to be of a specific status or character in order to appropriate water for any beneficial use. A water use is "irrigation" where an appropriator intends to divert and supply water to crops requiring an additional water supply, whether or not that appropriator has ever irrigated before and whether or not that appropriator intends to make a living with such irrigation. Likewise, a corporation that intends to divert water and wash ore for the production of minerals will only seek to appropriate water for mining purposes, regardless of whether the articles of incorporation of that entity limit the authorized business purposes to other businesses. Whatever the significance of those articles may be for the ongoing rights of shareholders within that corporation, these articles by themselves do not mean that the use proposed (washing ore) is not for mining.

The prior appropriation doctrine has recognized that the municipal status of a use does not turn exclusively on the character or status of the appropriator. The "appropriation of water for a municipal use by public water districts, cities, and public utility corporations

contemplates such public uses for the benefit of the citizenry as fire protection, sprinkling of streets, watering of parks, and use in public buildings, as well as personal use of individual citizens in connection with their business establishments as well as their homes and lawns.” *Hutchins, Water Right Laws in the Nineteen Western States*, Vol. 1, p 532. Accordingly, it is not the character of the appropriator that designates the use. Rather it is the inherently public character of the use itself that that defines a municipal appropriation.

The legislature has confirmed this central understanding. As late as 1999, well after the enactment of the basin closure statutes, the legislature confirmed that municipal uses are not defined by the character of the appropriator. Pursuant to MCA § 85-2-227(4), a “water right claimed for municipal use” from a source classified under specific water quality designations by the DEQ is subject to a specific standard of abandonment, as “such a claim by a city, town, or **other public or private entity** that operates a public water supply system” warrants special standards. (Emphasis added). When the legislature intends to confine any particular use of water to only political subdivisions of the State of Montana, it knows how to say so. *Compare* MCA § 85-2-316(1) (“The state, any political subdivision or agency of the state, or the United States or any agency of the United States may apply to the department to acquire a state water reservation.”)

The records of the statements of claim filed with the Water Court reflect this necessary emphasis. As is plain from the Water Court records, many municipal uses have been perfected within Montana by entities that are not cities or towns. The DNRC has provided for these appropriations, and understands that these municipal appropriations are not limited to cities and towns. The Claims Examination Manual prepared by the DNRC with the Water Court expressly directs the reviewer to “describe the municipal system” by reference to whether it is a “community water supply, homeowners association, city, etc.”

The DNRC treatment of existing water rights answers to the central purposes of arranging beneficial uses into discrete categories. The common law did not characterize various beneficial uses within certain categories out of some undefined need for a tidy accounting. Instead, these categories provide for the appropriate administration of that water right and define the reach of appropriators’ vested rights to maintenance of the stream conditions.

Virtually all categories of beneficial uses can be unbundled in a way that identifies the constituent demands that make up that appropriation. For example, a domestic use is a product of the cooking, cleaning, plant watering, lawn and garden, and cleaning water requirements that create demand under that use. Notwithstanding the fact that domestic demand is necessarily a product of these separable water requirements, no water right for a domestic use breaks out separate flow rates and volumes for each such constituent components, as the law simply does not contemplate that each of these constituent uses will be separately administered. Thus, while every appropriator is prohibited from diverting more water than the flow rate authorized in his decree or from diverting more water than he actually requires at any given time, *Gans & Klein Investment Co. v. Sanford*, 91 Mont. 512, 8 P.2d 808 (1932); *Custer v. Missoula Public Service Co.*, 91 Mont. 136, 6 P.2d 131 (1931), it is equally clear that this rule applies to the entire collective demand under the water right. A water commissioner or the appropriator are simply not required to independently police flow rates for the constituent demands subsumed with in a domestic use.

In the exact same way, although a municipal use is a product of the commercial, industrial, domestic, and irrigation uses it satisfies, the designation of the entire collection of such constituent uses as "municipal" reflects the fact that the flow rates required for these constituent demands are not meant to be separately administered. It is enough for a municipal appropriator and a water commissioner to know that the flow rate for all the uses under the appropriation is not being exceeded at the point of diversion, and that actual collective demand under all such uses at any given time is not exceeded, without any attendant need to police flow rates and demands separately under all the constituent elements making up a municipal use.

In the same way, the common law's designation of classes of beneficial uses serves to define other appropriators' vested rights to maintenance of the stream conditions as of the time of their appropriation. These rights to maintenance of the stream conditions are at center stage in any change of water right proceeding, as it is these rights inuring in each appropriation that are threatened by any change of water rights. *See Brennan v. Jones*, 101 Mont. 550, 55 P.2d 697 (1936). A change of water right includes changes in the purpose of use, and of course a change in the purpose of use occurs when the category of use shifts amongst the common law categories codified in the definition of beneficial use. *See MCA §*

85-2-102(2); *see also* MCA § 85-2-102(4) (a change in appropriation water right means, *inter alia*, “a change in the purpose of use”). Accordingly, a designation of “municipal use” means that a shift in the collection of uses that make up that appropriation is not by itself a change in the purpose of use. In this way, a characterization of an appropriation as municipal defines for all subsequent users the nature of their rights to maintenance of the stream conditions as against this municipal appropriator.

Under the approach identified in HB 831, there can be two identical uses, one being designated “municipal”, and one being designated “multiple domestic, multiple commercial, multiple industrial, firefighting, recreational, and irrigation of parks,” depending on whether a city or town is the appropriator. As both uses of water are in fact identical, both uses of water will create the same patterns of diversion and the same pattern of return flows from those diversions regardless of who owns the underlying system. As a result, distinguishing between cities on the one hand and all others on the other hand apparently insists that whenever an appropriator is not a city or town, a appropriator changes a water right whenever the constituent demands within his appropriation vary from those anticipated at the time of his appropriation, and all such appropriators must administer their water rights according to the constituent demands that otherwise constitute a municipal use. As both uses are in fact identical, however, such a distinction does not bear any rational relationship to the purpose of characterizing beneficial uses. Consequently, any such distinction denies the equal protection of the law. *See McKany v. State*, 268 Mont. 137, 885 P.2d 515 (1994); *Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988) (distinctions that do not rationally relate to the purpose of a statute are unconstitutional as they violate the requirements of equal protection).

B. Relevance of Status of Municipal Uses Prior to July 1, 1973.

In addition to the fact that the legislature referred to a “municipal” use in a statute applicable to both the DNRC and the Water Court, *see discussion, supra*, it is otherwise clear that the permit and change of water right authorities of the DNRC are deliberately and consciously part of the Water Court’s mission. Each of the tasks assigned to the Water Court and the DNRC are an answer to the Constitution’s demand for the “administration, control, and regulation of water rights” and “a system of centralized

records” of those water rights. Mont. Const., Art. IX, §3(4). Given the integrated character of these authorities and proceedings, a water use not reflected by a decreed right, a water use permit, or an authorization to change is, unless it is excepted from the adjudication, not only an illegal use, but necessarily the most junior water right in the basin, and accordingly that use can be summarily administered by a water commissioner. Thus, if municipal uses cannot arise from appropriations made by entities other than cities and towns, it follows that all such uses are unlawful and subject to summary administration unless and until those appropriators secure a change of water right authority from the DNRC.

At common law, the administration of water rights was continually frustrated because there was no single proceeding in which all affected users could be heard on the scope and validity of each appropriation from an interrelated source of supply. As a result, the decrees entered by courts under this common law system could not be administered as against those users not party or successors to parties in the former action *State ex. re. Reeder v. District Court*, 100 Mont. 376, 47 P.2d 653 (1935); *State ex. rel. McKnight v. District Court*, 111 Mont. 520, 111 P.2d 292 (1941). Moreover, these other users were entitled to be heard on the scope and extent of the water rights putatively adjudicated in the former action, and consequently sections of Montana’s rivers were adjudicated and readjudicated as additional users were affected by the diversions under the decreed rights. See Stone, Are There Any Adjudicated Streams in Montana?, 19 Mont.L.Rev. 19 (1957); Stone, The Long County on Dempsey: No Final Decision in Water Right Adjudication, 31 Mont.L.Rev. 1 (1969).

Accordingly, the legislature provided for Montana’s first general adjudication to determine all of Montana’s existing water rights in a single proceeding. See MCA § 85-2-201 *et. seq.* Because the decrees entered under a general adjudication bind all claimants to water supplies out of any interrelated water source, the Water Court’s decrees will provide for the administration of water rights in a comprehensive way. See *State Dept. of Ecology v. Acquella*, 100 Wash2d 651, 674 P.2d 160 (1983) (purpose of general adjudication is to provide for administration of water rights by fixing the incidents of all appropriations from any interrelated source of supply).

Having answered the constitutional edict to clean up the past, Montana simultaneously took measures to assure that these same problems would not continue to besiege the system. As a result, the Montana Water Use Act requires that all new appropriation be documented by a water use permit or a certificate of water right, the terms of which fix the incidents of those appropriations for purposes of administration. *See* MCA § 85-2-301 *et. seq.* Accordingly, the DNRC prevents the problems afflicting the old procedures from contaminating new appropriations by demarcating the scope and extent of each new appropriation in proceedings in which any affected user has an opportunity to be heard.

The legislature otherwise acted to preserve the administration of water rights even when any water right should thereafter be changed. At common law, a water right that had been changed in its point of diversion, place of use, and/or purpose of use could no longer be administered by a water commissioner, precisely because the changed water right had different incidents than those provided for in the old decree. Because the measure of the water commissioner's authority is the terms of the decree itself, changed water rights frustrated the administration of priorities on any source of supply. *Allen v. Wampler*, 143 Mont. 486, 392 P.2d 82 (1964). Consequently, the legislature enacted a requirement that any change of water right be evidenced by an authorization to change the water right issued by the DNRC. *See* MCA § 85-2-402. As a result, the terms of that authorization to change continue to define the incidents of that changed appropriation for the purposes of administration.

Given this integrated structure, the terms and concepts employed in one part of the system must be echoed in the others. As a result, what is a municipal use at common law must be a municipal use for the purposes of the DNRC's new permit and change of water right authorities. Were that not true, a municipal use that existed prior to July 1, 1973, the effective date of the Montana Water Use Act, may become unlawful on July 1, 1973, without a change of water right authorization. After all, a change of water right can be defined by comparing the incidents of each use as they are currently exercised with the use as set forth in any decree or permit. Accordingly, a more restrictive definition of municipal after July 1, 1973 necessarily outlaws some appropriations of water made prior to July 1, 1973.

C. The DNRC's Interpretation of Municipal Use.

Since the inception of the Montana Water Use Act, the DNRC has until the enactment of the Rule consistently applied the reach and meaning of the term "municipal" in accordance with the common law meaning of this term. Accordingly, the DNRC has issued numerous water use permits to entities that are not cities or towns for municipal purposes. Thus, for over thirty years, the DNRC has recognized that the inherently public nature of municipal appropriations is often reflected by appropriations by those that are not cities or towns.

For example, apart for the use of the water for inherently public purposes such as firefighting and the irrigation of parks and other public places, the DNRC's treatment of municipal use implicitly also acknowledges that the public incidents that mark a municipal appropriation can arise where the proposed use reflects that the underlying facilities are being dedicated to the public use of serving development within some particular service area. In this respect, the municipal use characterization closely tracks with Montana's system of regulating public utilities. Pursuant to Mont. Code Ann. § 69-3-101, a public utility includes "every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court" that furnishes "water for business, manufacturing, [and} household use, Mont. Code Ann. § 69-3-101(1)(e), except for such privately owned and operated water, sewer, or combination systems that do not service the public." Mont. Code Ann. § 69-3-101(2)(a).

Consequently, where the use of water is more than a number of uses co-owning common diversion works and sharing the expenses, the underlying use becomes inherently public. *See Sherlock v. Greaves*, 106 Mont. 206, 76 P.2d 87 (1938) (water systems become clothed with a public interest where they are used in a manner that makes them of public consequence, and that depends on the extent and character of the underlying use). Where one devotes his water supply to such a public use, or to a use significant enough that the public has an interest in that use, he in effect grants to the public an interest in that system, and consequently he must submit to regulation by the PSC. *Great N. Util. Co. v. PSC*, 86 Mont. 180, 293 P. 294 (1930).

Water and sewer districts share the same central attributes of devoting a water supply to demand within particular service areas, as these entities are now the typical manner in

which governments form and organize publicly owned water and sewer systems. See MCA § 7-13-2201 *et. seq.* As the purpose of these water and sewer districts is solely to provide a water supply and wastewater treatment for demand within its jurisdictional boundaries, such uses share the inherently public character of public utilities generally.

As the DNRC recently noted, the construction of a term made by the DNRC in the course of exercising its quasi-judicial authority over new water use permits has the force of law. See DNRC Answer Brief to Petitioners' Opening Brief, Faust et. al. v. DNRC, Cause No. BDV-2005-443 (First Judicial District). As a result, under the DNRC's reasoning as set forth in Cause No. BDV-2005-443, it is arbitrary and capricious for this agency to renounce its settled interpretation without some principled explanation for such a radical departure from the principles it has underscored for some thirty years. For over thirty years, the DNRC has embraced the common law rule that municipal uses are simply uses of water for collective purposes that reflect inherently public purposes. Moreover, for over thirty years, the DNRC has never suggested that these public incidents must be manifested solely by the status of the appropriator being a city or town.

D. Relevance of Basin Closure.

Utility Solutions, LLC is aware that the various parties have suggested to the DNRC that the term "municipal use" as used in the basin closure laws should be construed more narrowly, for unspecified reasons, for the purposes of this statute than would otherwise be true for other purposes in the Montana Water Use Act. Pursuant to MCA § 85-2-343(2)(c), the basin closure otherwise applicable to new uses in the Upper Missouri does not apply to "an application for a permit to appropriate water for domestic, municipal, or stock use."

There is nothing in the Montana Water Use Act, however, that remotely suggests that the exact same term should have a different meaning for the purposes of MCA § 85-2-343 that it has for any other purpose. Indeed, this position is wholly at odds with well-settled principles of statutory construction.

The Upper Missouri River Basin Closure statute was enacted in 1993. When the legislature enacts a statute, it is presumed that the legislature acted with full knowledge of the law on a subject, and with full awareness of the construction a statutory term has been given. *Ross v. City of Great Falls*, 1998 MT 276, ¶17, ¶19, 291 Mont. 377, 967 P.2d 1103,

Baetis v. Department of Revenue, 2004 MT 17, ¶24, 319 Mont. 292, 83 P.3d 1278. This “rule applies not only to Acts previously construed by the Courts, but has equal application to statutes previously construed by the executive or administrative department of the government. (Citations omitted).” *Hovey v. Dept. or Revenue*, 203 Mont. 27, 33, 659 P.2d 280, 284.

Accordingly, the legislature was deemed aware in 1993 at that the time it enacted the Basin Closure statute that the DNRC had accorded a “municipal use” a construction that went well beyond appropriations by cities and towns. *See discussion, supra*. As a result, under these well-settled principles of statutory construction, the term “municipal use” as used in the basin closure laws must be construed to have the same meaning as that employed by the DNRC prior to this date. Indeed, this construction is otherwise reaffirmed by the 1999 enactment of MCA § 85-2-227(4). This statute expressly confirms that the legislature understands that municipal use is not confined to cities and towns. *See discussion, supra*.

For all these reasons, the meaning of a municipal use within the basin closure statute under well-accepted principles of statutory construction must be deemed to have the same meaning this term is accorded under other sections of the Montana Water Use Act. Moreover, these principles mean that the term municipal use as used in the basin closure as well as other sections of the Montana Water Use Act does not mean such only uses by cities and towns, as the DNRC had not construed a municipal use in such confining way prior to the enactment of the basin closure laws. As the legislature is deemed to adopt the meaning accorded a term by an administrative agency when the legislature uses the same term in a statute, the meaning of municipal use simply is not limited to only those water uses by cities or towns.