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60th Montana Legislature

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TO: Water Policy Committee

FROM: Greg Petesch GP

RE: Growing Communities Doctrine

The "Growing Communities Doctrine" is a doctrine that gives special consideration to municipal water suppliers within the prior appropriation system for administering water rights. The Doctrine appears to contain two primary elements. It gives municipal water suppliers more time to perfect their water rights by allowing the rights to be held for future needs and therefore allowing more time to put the water to beneficial use. In addition, the Doctrine usually exempts municipal water rights from loss through nonuse. The combination of these two elements allow a municipal water supplier to hold a priority date for a water right in anticipation of reasonably foreseeable future needs in the municipality without the risk of loss of the water right. The doctrine is based upon prior case law and has been codified in some states, such as Idaho.

The case that is most often cited as embodying the growing communities doctrine is City and County of Denver v. Sheriff, 96 P.2d 836 (Colo. 1939). In that case, the city of Denver built a water pipeline system that allowed it to bring water to the city from the western side of the continental divide. The system's capacity was considerably greater than Denver's then-current water needs. The excess capacity was intended for future growth. The District Court placed restrictions on the city's appropriation of water. The city challenged the restrictions. The Colorado Supreme Court noted that the application of water to a beneficial use is essential to a completed appropriation. Compliance with other aspects of the law concerning the establishment of a water right constitute only an inchoate or incomplete right or interest. The Court noted that in order for an appropriation to have a priority dating from the time of commencement of the diversion system, the beneficial use of the water must take place within a reasonable time from that date. What constitutes reasonable time depends upon the facts and circumstances involved with each case. The Court discussed the distinctions between a municipal water right and an agricultural water right. The Court stated that in establishing a beneficial use of water under a municipal water right the factors were not as simple and were more numerous than the application of water to 160 acres of land used for agricultural purposes. The Court noted that a specified tract of land does not increase is size, but populations do, and in short periods of time. With that flexibility in mind it was prudent on the part of the city to obtain appropriations of water that would satisfy the needs resulting from a normal increase in population within a reasonable period of time. In agricultural pursuits, the beneficial use is limited to the needs of

the land. In a municipal situation the beneficial use is limited to the needs of the present consumers with a reasonable expectation of an increase in the number of consumers as a normal condition. The city could lease the unneeded water to agricultural users until the water was needed for city purposes.

Montana has not explicitly adopted the Growing Communities Doctrine. However, there are Montana statutes that encompass portions of the doctrine by giving special consideration to municipal water rights. For example, section 85-2-316, MCA, authorizes political subdivisions to seek state water reservations for future beneficial uses. However, a state water reservation may not adversely affect any rights in existence at the time that the reservation is granted. In addition, section 85-2-227, MCA, contains a presumption against the abandonment of a water right claimed for municipal use.

Section 85-2-102, MCA, defines "beneficial use" of water as including municipal use and defines a "municipality" as an incorporated city or town organized and incorporated under Title 7, chapter 2, MCA. Section 85-2-317, MCA, which restricts permits to appropriate ground water in excess of 3,000 acre-feet per year, contains an exemption for appropriations by municipalities for municipal use and for appropriations for public water supplies, as defined in section 75-6-102, MCA.

Several closed basin statutes also give special treatment to municipal water rights. Section 85-2-330, MCA, provides that in the Teton River Basin, permits remain available for the use of surface water by or for a municipality. Section 85-2-341, MCA, contains an identical provision for the Jefferson River Basin and the Madison River Basin as do section 85-2-343, MCA, for the Missouri River Basin and section 85-2-344, MCA, for the Bitterroot River Subbasin. Section 85-2-605, MCA, concerning the Yellowstone River Basin explicitly directed the Department of Natural Resources and Conservation to extend the duration of eight municipal water reservations until those reservations are perfected or revoked.

There are several other Montana statutes that address municipal water supplies. Title 7, chapter 13, part 44, MCA, gives cities and towns the power to secure a supply of water for the use of the city or town or its inhabitants. Section 7-13-4402, MCA, provides that a city or town council has the power to secure a supply of water for the use of the city or town or its inhabitants. That section is the basic grant of power that allows cities to engage in the water business and charge for water and services provided. Leischner v. Knight, 135 Mont. 109, 337 P.2d 359 (1959). A local government's concern with preventing health problems is a legitimate reason for controlling the water supply and a proper exercise of governmental power. Therefore, a city ordinance requiring all city residents to hook up to the city water system was valid. Ennis v. Stewart, 247 Mont. 355, 807 P.2d 179 (1991). Although section 7-13-4403, MCA, provides for the acquisition of a private water supply system by a city or town, if a private water supply system exits, the city is not required to acquire that system before procuring its own supply. Carlson v. Helena, 39 Mont. 82, 102 P. 39 (1909). Section 7-13-4405, MCA, provides that for the purpose of providing the city or town with an adequate water supply for municipal and domestic

purposes, the city or town council shall procure appropriate water rights and the necessary real and personal property to make an adequate water supply available.

Section 7-13-4404, MCA, authorizes a city or town to use the power of eminent domain to acquire a system of water supply and the necessary water rights to fulfill the system of supply. In exercising the power of eminent domain, a city is required to meet the standard of proof outlined in section 70-30-111, MCA, before private property may be taken for a public use. That section requires that before property can be taken, the condemnor is required to show by a preponderance of the evidence that the *public interest* requires the taking based on the following findings:

(1) that the use is authorized by law;

(2) that the taking is *necessary* for the use;

(3) if already appropriated to a public use, that the proposed public use is a *more necessary* public use; and

(4) that an effort was made to obtain the property sought to be taken by a written offer that was refused by the property owner.

In City of Missoula v. Mountain Water Company, 228 Mont. 404, 743 P.2d 590 (1987), the City attempted to take a water supply and a privately owned water system by eminent domain. The City passed an ordinance and a resolution authorizing the taking of the water supply and water system. The City contended that the *necessity* for the taking was conclusively presumed based upon the ordinance and resolution. The District Court disagreed, and the Supreme Court upheld the District Court. The Supreme Court reaffirmed that *necessary* as used in section 70-30-111, MCA, means a reasonable, requisite, and proper means to accomplish the improvement. The Supreme Court relied on State ex rel. Smart v. City of Big Timber, 165 Mont. 328, 528 P.2d 688 (1974), to illustrate the wide range of considerations that are used in determining whether a proposed public use is more necessary than the present use. The District Court made detailed findings listing the reasons for concluding that the City did not prove that it was *necessary* to acquire the water system. The findings included the effect on Mountain Water employees, the effect on public savings on rates and charges, the effect on cooperation between the City and the company, and the effect of having the company's home office in Missoula. The Supreme Court found that the District Court had erred in excluding evidence concerning profit, the out-of-state ownership of Mountain Water, and the votes of the people and the City Council. The Supreme Court determined that the evidence concerning private versus public ownership was pertinent to determining whether the *public interest* required the taking under section 70-30-111, MCA, as broadly drafted and defined. The Supreme Court held that because section 70-30-111, MCA, gives the District Court the power to determine whether a taking is *necessary*, the votes by the people and the City Council could not be finally dispositive of the issue of *necessity*. The Supreme Court determined that the votes had to be considered and weighed with other factors in determining the *necessity* of the taking. The Supreme Court expressed regret that section 70-30-111, MCA, does not set forth all of the issues that are appropriate for consideration on the *necessity* for a taking or the weight to be given to the various factors. The Supreme Court did point out that the City has the burden of proving that the taking was *necessary* by a preponderance of the evidence. On remand, the District Court again concluded that the City had

failed to prove the *necessity* for the taking. In a second appeal, in City of Missoula v. Mountain Water Company, 236 Mont. 442, 771 P.2d 103 (1989), the Supreme Court upheld the District Court determination. In that case, many additional offers of evidence by the City were precluded by the law of the case.

Although Montana statutes give some special consideration to municipal water supplies, they do not appear to explicitly encompass the entire Growing Communities Doctrine or to provide details on potential applications of the Doctrine. By way of contrast, Idaho codified the Growing Communities Doctrine in 1996. Section 42-219(2) of the Idaho Code provides that if the use is for municipal purposes, the license for the use of water must describe the service area and must state the planning horizon for that portion of the water right, if any, to be used for reasonably anticipated future needs. Section 42-202B of the Idaho Code defines "planning horizon" as referring to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider. That same section defines "reasonably anticipated future needs" as referring to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs may not include uses of water within areas overlapped by conflicting comprehensive land use plans. A "service area" is defined as the area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area must correspond to its corporate limits, or other recognized boundaries, including changes after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area is required to correspond to the area that it is authorized or obligated to serve, including changes in that area after the permit or license is issued.

Idaho's codification of the Growing Communities Doctrine may be based upon early Idaho case law and is enhanced by the Idaho Constitution. Article XV, section 3, of the Idaho Constitution, gives priority to domestic water rights but requires that junior water right holders must compensate senior water right holders for any taking of their water.

In City of Pocatello v. Murray, 206 F. 72 (D.C. Id. 1913), the City sought to cancel a franchise that it had granted to Murray to supply the City with water for failure to provide an adequate supply of water as required by the terms of the franchise agreement. The agreement required Murray to bring the water of Mink Creek into the supply system. Murray had only brought a minimal amount of water from that source into the supply system and the City had experienced chronic shortages of water during the summer months. The federal District Court noted that under the Idaho system of water appropriation, private individuals could be initiated and become

vested in the water from Mink Creek at any time. The City's present and future interests demanded that the defendant perfect the City's interest by construction of the means for diversion and application of the water to beneficial use. Murray contended that it would have been against public policy to appropriate more water than was necessary to supply the immediate needs of the City. The Court rejected this argument by noting that under Idaho law an appropriator has a reasonable time to apply the appropriated water to a beneficial use and if that rule applied to appropriations for agricultural purposes, the rule should be applied with even greater liberality to the superior and more elastic needs of a growing municipality. The Court also noted that even if not required for the immediate needs of the City, the appropriation could have been consummated and the water right held intact by temporary application of any surplus water to other beneficial uses. The City was allowed to cancel the franchise. The decision was affirmed in Murray v. City of Pocatello, 214 F. 214 (9th Cir. 1914).

In Beus v. City of Soda Springs, 107 P.2d 151 (1940), the Supreme Court of Idaho was asked to address the question of whether a municipality could acquire water for future use. Section 49-1132 of the Idaho Code provided that a municipal corporation had the power to acquire water works and to supply its inhabitants with water. A municipal corporation was also authorized to supply any excess water to persons outside of the municipality and to charge them for that water. The Court said that the statute did not limit the power of a municipality to supply water to present inhabitants. Therefore, if at the time of acquiring water for the purpose of supplying existing needs it was necessary to also acquire and hold an additional supply of water for future needs, a municipality had the power to do so. The Idaho Court also cited Holt v. City of Cheyenne, 137 P. 876 (Wyo. 1914), as having reached the same conclusion.

As stated previously, Montana has not explicitly adopted the Growing Communities Doctrine either statutorily or through case law. Montana case law has long recognized that it is not necessary that immediate use of appropriated water be made to the full extent of the needs of the appropriator. The needs may be prospective and contemplated. However, there is a stated requirement for a present ownership of the land or a possessory right to the land upon which the water is to be applied, a genuine intention to use the water, and due diligence on the part of the appropriator to apply the water to the appropriator's needs. See St. Onge v. Blakely, 76 Mont. 1, 23, 245 P. 532 (1926), citing Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922), and O'Shea v. Doty, 68 Mont. 316, 218 P. 658 (1923). The determinations in these case were made with regard to agricultural and irrigation purposes. I am unaware of any extension of the "intention" and "due diligence" requirements to municipal water rights. However, the ability to reserve water in section 85-2-316, MCA, and the presumption against abandonment contained in section 85-2-227, MCA, could lead to an extension of the principles discussed in the cited cases to municipal water rights.

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