



# Water Policy Interim Committee

## 60th Montana Legislature

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### Memorandum

To: Water Policy Interim Committee Members

From: Krista Lee Evans, Research Analyst

RE: Municipal use exemption in closed basins

Date: June 12, 2007

Attached is information pertinent to discussion related to new ground water appropriations in closed basins. On March 27, 2007 the First Judicial Court issued a decision and order related to the use of the "municipal" exemption in closed basins -- Lohmeier v. DNRC, Cause No. ADV - 2006-454.

### Background

Closed basins (prior to the 2007 session) limited new appropriations except for certain exemptions which varied from closed basin to closed basin but generally included stock water, domestic wells, and municipal use. This was a very important issue because there were multiple applicants that were applying for a new appropriation for subdivisions under the municipal use definition. DNRC had repealed their definition of "municipal use" that was in rule and the issue was taken to court. The actual case was regarding whether or not DNRC could repeal the rule. However, the underlying issue is the use of the municipal definition for subdivision purposes.

This issue only applies to the applications that were pending before the department when HB 831 was passed. HB 831 made it clear that the exemption in a closed basin was for a municipality and was only for surface water. The argument could be made that the pre-HB831 municipal use exemption applied only to surface water as well since ground water was specifically exempted in a different subsection but that was not specifically stated in the statute. If the municipal use exemption did not apply to subdivisions then those applications would have to be returned to the applicant and the applicant would be required to reapply for the water right under the more stringent requirements of HB 831.

### Decision

In her decision, Judge McCarter stated:

"Application of liberal definitions to any of the enumerated exceptions to the

basin closure laws would clearly undermine the purpose of the laws -- to protect the existing water rights. Expanding the definition to permit private developers in any part of the Upper Missouri River Basin to appropriate water for new subdivisions would most likely take a significant amount of water away from the already over appropriated water source, resulting in not enough water for the owners of the existing water rights.

The Court concludes that the legislature intended to preserve the existing water rights by closing the Upper Missouri River Basin to new appropriations. The exceptions to the closure must be interpreted narrowly to comply with the legislative intent. The repeal of the narrowly defined term "municipal use" in order to enable DNRC to apply a more liberal definition contravened the legislative intent and placed the existing water rights of Plaintiffs in jeopardy. Therefore, Plaintiffs are entitled to summary judgement."

The effect of the summary judgement was to require DNRC to reinstate the municipal use definition in rule.

Attached are copies of the decision along with a copy of an example of the memo that DNRC sent to applicants notifying the applicant that the reason decision may impact their application and requesting the applicants to essentially submit a legal brief to the department outlining whether or not the ruling affected their application. An example of an applicants response is also attached. If the committee is interested in more detail on this issue I can provide copies of all of the response letters from the applicants.

DNRC has not yet publicly outlined how it will interpret the rule related to municipal use which as reinstated will read:

"water appropriated by and provided for those in and around a municipality or an unincorporated town."

I have requested a copy of this decision once it is made public and hope to have it for you by the July meeting date in Dillon. A copy of the decision is also attached for your review. If you have questions or comments don't hesitate to contact me at 444-1640 or kevans@mt.gov. If I am unavailable I will check my messages and respond as quickly as possible.

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**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

<p>JAMES C. LOHMEIER, SANDY McMANUS and ROSELEE FAUST,  Plaintiffs,  v.  STATE OF MONTANA, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,  Defendant.</p>	<p>Cause No. ADV-2006-454  <b>DECISION AND ORDER</b></p>
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This matter is before the Court on a request for declaratory relief under Section 2-4-506, MCA. Specifically, Plaintiffs seek to have this Court declare invalid a decision of Defendant (DNRC) to repeal ARM 36.12.101(39) defining "municipal use."

The parties filed cross-motions for summary judgment, as did Defendant-Intervenor Utility Solutions, LLC. A hearing was held November 16, 2006. Plaintiffs were represented by Frederick P. Landers, Jr.; DNRC was represented by Britt T. Long

1 and Tim D. Hall; and Utility Solutions was represented by Matthew W. Williams.  
2 During the hearing the Court requested that the parties brief the legislative history of  
3 the basin closure laws as it relates to this matter. Those briefs have been received, and  
4 the motions are ready for decision.

### 5 **BACKGROUND**

6 Plaintiffs in this case are three individuals who reside in Gallatin County  
7 and hold water rights in the Upper Missouri River Basin. With limited exceptions, the  
8 Upper Missouri River Basin is closed to new appropriations of water pursuant to  
9 Sections 85-2-342 and 343, MCA. One of the exceptions, under Section 85-2-  
10 343(2)(c), MCA, is a new appropriation for "municipal use." After following the  
11 proper rulemaking procedure, on January 1, 2005, DNRC adopted a number of new  
12 rules relating to the Montana Water Use Act, including ARM 36.12.101(39), which  
13 defined municipal use as "water appropriated by and provided for those in and around  
14 a municipality or an unincorporated town." In November 2005, DNRC issued a public  
15 notice of its proposal to repeal this definition of municipal use, and, after public  
16 comment and hearing, the definition was repealed. No new definition of municipal use  
17 has been promulgated; however, DNRC has indicated that it now applies a more liberal  
18 definition of the term to include non-municipal entities that propose to use water in a  
19 manner similar to that used by municipalities.

### 20 **DISCUSSION**

21 Summary judgment will only be granted when the record discloses no  
22 genuine issue of material fact and the moving party is entitled to judgment as a matter  
23 of law. See Rule 56(c), M.R.Civ.P.; Dillard v. Doe, 251 Mont. 379, 382, 824 P.2d

1 1016, 1018 (1992). The moving party must establish both the absence of genuine  
2 issues of material fact and entitlement to judgment as a matter of law. Hadford v.  
3 Credit Bureau of Havre, Inc., 1998 MT 179, ¶ 14, 289 Mont. 529, ¶ 14 962 P.2d  
4 1198, ¶ 14. Once the moving party has met its burden, the opposing party must  
5 present material and substantive evidence, rather than mere conclusory or speculative  
6 statements, to raise a genuine issue of material fact. Id.

7 All reasonable inferences must be drawn in favor of the party opposing  
8 the motion. In making its determination, the court must consider the entire record.  
9 Smith v. Barrett, 242 Mont. 37, 40, 788 P.2d 324, 326 (1990).

10 This issues before the Court are legal and do not involve disputed  
11 material facts. The motions raise the following issue: Whether DNRC's repeal of its  
12 rule defining municipal use is a violation of Section 2-4-506, MCA. That statute  
13 provides that a rule can be held invalid if it or its threatened application interferes with  
14 or injures the legal rights or privileges of the plaintiff.

15 Section 85-2-343, MCA, closed the Upper Missouri River Basin.  
16 Subsection (2) of that statute enumerates exceptions to the closure: applications to  
17 appropriate ground water, water for nonconsumptive use, water for "domestic,  
18 municipal, or stock use," to store water during high spring flows, and for water from  
19 Muddy Creek drainage to prevent erosion.

20 DNRC adopted regulations to implement the Water Use Act, which  
21 includes the basin closure laws. ARM 36.12.101(39) defined "municipal use" as  
22 meaning "water appropriated by and provided for those in and around a municipality or  
23 an unincorporated town." A year later, DNRC repealed this definition, believing it to

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1 be too narrow and restrictive.

2           Section 2-4-506, MCA, states that a rule may be declared invalid if: 1)  
3 "it is found that the rule or its threatened application interferes with or impairs or  
4 threatens to interfere with or impair the legal rights or privileges of the plaintiff" or  
5 2) "the rule was adopted with an arbitrary or capricious disregard for the purpose of the  
6 authorizing statute as evidenced by documented legislative intent." The Court notes  
7 that the law pertaining to promulgation of rules also applies to repeal of rules. Section  
8 2-4-102(11)(a), MCA.

9           Plaintiffs assert that DNRC violated both of the subsections of Section 2-  
10 4-506, MCA, when it repealed the definition. Plaintiffs assert that DNRC's repeal of  
11 its definition will impair their legal rights and also contravenes the legislative intent of  
12 the basin closure laws.

13           The basin closure laws do not define "municipal use." The issues raised  
14 in the complaint revolve around the proper definition of that term for the purposes of  
15 the basin closure laws.

16           It is a fundamental rule of statutory construction that the intention of the  
17 legislature controls. United States v. Brooks, 270 Mont. 136, 890 P.2d 759 (1995).  
18 Such intent must be determined first from the plain meaning of the words used, and if  
19 interpretation can be so arrived at, the court may go no further and apply other means  
20 of interpretation. State ex. rel Huffman v. Dist. Ct., 154 Mont. 201, 461 P.2d 847  
21 (1969). However, where ambiguity does exist, the Court is permitted to look  
22 elsewhere to determine legislative intent. For example, the sense in which a word in  
23 the statute is used must be determined from the context of the entire act. State ex rel.

1 Board of Comm'rs v. Bruce, 104 Mont. 500, 69 P.2d 97 (1937).

2           As counsels' briefs indicate, the term "municipal use" is not limited to  
3 one definition. The Court agrees. For example, BLACK'S LAW DICTIONARY, 5th  
4 edition, defines "municipal" as: "In a narrower, more common, sense, it means  
5 pertaining to a local governmental unit, commonly a city or town or other  
6 governmental unit. In its broader sense, it means pertaining to the public or  
7 governmental affairs of a state or nation or of a people." (Citations omitted.)

8           Defendants cite Section 85-2-227(4), MCA, which governs abandonment  
9 of water rights, for the proposition that the legislature intended municipal uses to  
10 include private entities. That subsection states, in part:

11           In a determination of abandonment made under subsection (3), the  
12 legislature finds that a water right that is claimed for municipal use by a  
13 city, town, or other public or private entity that operates a public water  
supply system, as defined in 75-6-102, is presumed to not be abandoned  
if the city, town, or other private or public entity has used any part of the  
water right or municipal water supply . . . .

14  
15 Thus, for the purpose of that section, a private entity's use of a public water supply  
16 system can be a municipal use.

17           Defendants also cite an Arizona statute defining municipal use as all  
18 nonagricultural uses of water supplied by a city, town, private water company, or  
19 irrigation district. Ariz. Rev. Stat. § 45-2201(10). This statute does not pertain to the  
20 state's attempt to protect limited sources of water for holders of water rights.

21 Defendants also cite to DNRC's and the Montana Water Court's past practices of  
22 granting municipal use rights to non-municipal and private entities. Those grants were  
23 not made, however, under the basin closure laws.

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1                   As previously noted, Plaintiffs hold water rights in the upper Missouri  
2 Basin. Contrary to Defendants' contentions that Plaintiffs have asserted no legal  
3 rights at risk, their water rights are potentially affected if the outcome of the lawsuit  
4 results in increased competition for the water.

5                   The legislative history clearly indicates the purpose of the basin closure  
6 laws – to preserve existing water rights. As several witnesses testified before the  
7 legislative natural resources committees in 1993, the Upper Missouri River Basin was  
8 already over appropriated, and the purpose of the legislation was to protect existing  
9 irrigation and other consumptive water use. There was no discussion regarding the  
10 legislature's decision to exempt municipal uses from the basin closure.

11                   Application of liberal definitions to any of the enumerated exceptions to  
12 the basin closure laws would clearly undermine the purpose of the laws – to protect the  
13 existing water rights. Expanding the definition to permit private developers in any part  
14 of the Upper Missouri River Basin to appropriate water for new subdivisions would  
15 most likely take a significant amount of water away from the already over appropriated  
16 water source, resulting in not enough water for the owners of the existing water rights.

17                   The Court concludes that the legislature intended to preserve the existing  
18 water rights by closing the Upper Missouri River Basin to new appropriations. The  
19 exceptions to the closure must be interpreted narrowly to comply with the legislative  
20 intent. The repeal of the narrowly defined term “municipal use” in order to enable  
21 DNRC to apply a more liberal definition contravened the legislative intent and placed  
22 the existing water rights of Plaintiffs in jeopardy. Therefore, Plaintiffs are entitled to  
23 summary judgment.

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1 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that  
2 summary judgment is GRANTED to Plaintiffs.

3 IT IS SO ORDERED.

4 DATED this \_\_\_ day of \_\_\_\_\_, 20\_\_.

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DOROTHY McCARTER  
District Court Judge

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8

9 pcs: Arthur W. Wittich/Frederick P. Landers, Jr.  
Britt T. Long/Tim D. Hall  
Matthew W. Williams

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T/DMc/lohmeier v dnrc d&o.wpd

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**EXAMPLE OF LETTER**  
**SENT TO APPLICANTS**  
**USING "MUNICIPAL" EXEMPTION**

April 10, 2007

CENTRAL MT REGIONAL WATER AUTHORITY  
PO BOX 251  
HOBSON MT 59452

**Re: A New Court Decision May Affect Your Application**

Dear Central Mt Regional Water Authority:

This letter is in regards to your Application for Beneficial Water Use Permit No. **30019140-41S**, currently pending before the Department of Natural Resources and Conservation (DNRC). A recent court decision may affect your Application and DNRC would like to hear from you on its potential applicability.

On January 1, 2005, DNRC adopted several administrative rules under the Montana Water Use Act, including a definition for the term "municipal use." ARM 36.12.101(39). Specifically, DNRC defined the term municipal use under this rule as "water appropriated by and provided for those in and around a municipality or unincorporated town." In November 2005, DNRC repealed this definition of municipal use.

The repeal of this rule was recently challenged before First Judicial District Court Judge Dorothy McCarter in the matter of Lohmeier, et al. v. DNRC, Cause No. ADV-2006-454. Judge McCarter determined in her Decision and Order dated March 26, 2007, that DNRC incorrectly repealed ARM 36.12.101(39). A copy of the Order is enclosed for your reference. Judge McCarter's decision to nullify the repeal now requires that DNRC process all water rights applications using the definition of municipal use set forth in ARM 36.12.101(39).

The purpose of this letter is to inform you that based upon Montana case law, Judge McCarter's decision may apply retroactively to your pending Application resulting in your Application being processed under the reinstated municipal use definition adopted in ARM 36.12.101(39). Please find attached copies of two Montana Supreme Court cases that the DNRC believes to be controlling on the question of retroactive application of Judge McCarter's decision to pending applications. Dempsey v. Allstate Insurance Co., 325 Mont. 207, 104 P.3d 483, 2004 MT 391 (2004); Stavenjord v. Montana State Fund, 334 Mont. 117, 146 P.3d 724, 2006 MT 257 (2006).

CENTRAL MT REGIONAL WATER AUTHORITY (UTICA)

April 10, 2007

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In addition and for your general information, please find a copy of another Montana Supreme Court case that provides a definition of an "unincorporated town," a key term in the reinstated definition of municipal use. *Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942).

The DNRC would like to hear from you on two issues: 1) do you believe that Judge McCarter's recent *Lohmeier* decision retroactively applies to your pending Application, why or why not; and 2) if you believe the decision applies to your Application, does your Application qualify for "municipal use" under the reinstated definition, why or why not? Please fully explain your position on these two issues and include any information that you believe relevant. This is your only opportunity to provide input to the DNRC before it determines whether your Application can proceed to be processed under "municipal use." The DNRC will make a final determination on these issues soon; therefore, **if you choose to submit comments on these issues, you must do so in writing and the letter must be postmarked no later than April 20, 2007 to the DNRC at the address shown above.** Please reference your Application number at the beginning of your comments so that that DNRC can make sure that your comments are received on your Application.

The DNRC appreciates your cooperation in this matter. If you have any comments please give me a call at the number below. Thank you.

Sincerely,

/Original Signed by Kim Overcast/

Kimberly A. Overcast  
New Appropriations Program Manager  
Phone No. 406-444-6614  
Fax No. 406-444-0533  
Email - kovercast@mt.gov

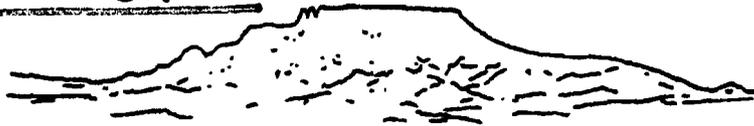
c: Regional Manager  
Terri McLaughlin

EXAMPLE OF RESPONSE FROM  
APPLICANT

RECEIVED

APR 23 2007

D.N.R.C.



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*Charles Frederick Unmack (1955-2004)*

April 20, 2007

Kimberly A. Overcast  
New Appropriations Program Manager  
Montana DNRC  
PO Box 201601  
Helena, MT 59620-1601

RE: Central Montana Regional Water Authority Application for Permit No.  
30019140-41S

Dear Ms. Overcast:

This firm represents Central Montana Regional Water Authority in matters related to its Application for Beneficial Water Use Permit 30019140-41S. This is in response to your letter of April 10, 2007. Thank you for the opportunity to respond.

Our answers to your questions are as follows:

1. We do not believe Judge McCarter's *Lohmeier, et al. v. DNRC* decision applies retroactively or otherwise to our Application. The *Lohmeier* case involved a "closed basin." Therefore, the definition of "municipal use" contained in ARM 36. 2. 01(39) was at issue because an application to appropriate water for "municipal use" in a closed basin is exempt from the basin closure statute at MCA §85-2-343. Judge McCarter ruled "the legislature intended to preserve the existing water rights by closing the Upper Missouri River Basin to new appropriations. The exceptions to the closure must be interpreted narrowly to comply with the legislative intent." Judge McCarter therefore reasoned that DNRC's repeal of the narrow definition at ARM 36. 2. 01 (39) "contravened (that) legislative intent." Judge McCarter's decision does not discuss whether the definition in the administrative rule applies in basins that are

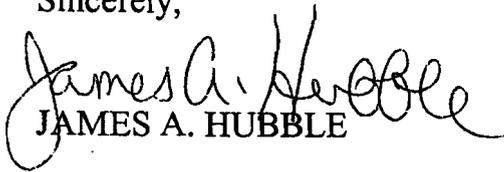
Kimberly A. Overcast  
New Appropriations Program Manager  
Montana Department of Natural Resources  
April 20, 2007  
Page 2 of 2

not closed. For those reasons, Central Montana Regional Water Authority believes the decision does not apply to its Application. Further, whether the decision applies retroactively is moot, because it does not apply at all.

2. Nonetheless, Central Montana Regional Water Authority's Application is for "municipal use." The Application further defines the place of use to include "a one mile radius of each of the following communities: Hobson, Judith Gap, Harlowton, Shawmut, Ryegate, Lavina, Broadview, Roundup, Musselshell, and Melstone." The notice for the Application states "this area would cover the potential event of growth over a 50-year planning period, typically used for regional water projects." All of the listed communities are either a municipality in the form of a incorporated town or city, or are unincorporated towns under the definition contained in the Supreme Court case *Pollard v. Montana Liquor Control Board*, case 8384 (1942) 131 P.2d 974, 114 Mont. 44. We believe the Application may be approved under either the narrow or broad definitions of "municipal use."

Thank you. Please contact me if you have any questions.

Sincerely,

  
JAMES A. HUBBLE

JAH: bks

C: Dale Longfellow

Bob Church

Monte Sealey

Enclosure