

**PENDING MUNICIPAL FILES 4-26-2007**

RO	NAME	NUMBER	BASIN	STATUS	OBJ	LOCATION	Basin Closure?	ACTION
Bozeman								
	Utility Solutions LLC	30012025	41H	Issued - Permit - process stayed	Y	Gallactic Park, North Star Subdivisions	Yes	No letter sent because final order issued
	Utility Solutions LLC	30013629	41H	Issued - Permit - process stayed	Y	Gallatin River Hideaway	Yes	No letter sent because final order issued
	Utility Solutions LLC	30019215	41H	Draft Final Order Issued 3/2007	Y	Black Bull Run & Middle Creek Parklands	Yes	Chuck will handle
	Utility Solutions LLC	✓ 30017376	41H	Change Application - Change Zoot 41H-115469 to Municipal	Lohmeier, West Gallatin Canal Co, Montana River Action Network, Shennum, Mcmanus, Faust	North Star Subdivision	Yes	Retroactive & Municipal letter sent
	Utility Solutions LLC	✓ 30023457	41H	Hearing Requested (1/19/2007)	Montana River Action Network, Mcmanus, Shennum, Cain, Faust, Montana, State of Dept of Fish Wildlife & Parks, Kelly, Sales, Association of Gallatin Agricultural Irrigators, Montana Trout Unlimited	3 Wells for Gallactic Park Subdivision	Yes	Retroactive & Municipal letter sent
	Utility Solutions LLC	✓ 30024735	41H	Change Application- Issued 1/19/2007, expand 41H-110168 pou and to change MD to municipal. In process of writing CA.	N	Elk Grove Subdivision	Yes	Retroactive & Municipal letter sent
	Utility Solutions LLC	✓ 30026244	41H	C/C process	NA	Gallatin Heights Subdivision	Yes	Retroactive & Municipal letter sent
	Bostwick Properties	✓ 30025398	41H	PN Objections recd. (2 obj)	State of Dept of Fish Wildlife & Parks, Montana Trout Unlimited		Yes	Retroactive & Municipal letter sent
	Treeline Springs	✓ 30013630	41F	Renoticed amending purpose to municipal and correct errors in first notice. Objection deadline was 3/28/2007. No additional objections were received.	N	Area around Big Sky, MT.	Yes	Retroactive & Municipal letter sent

RO	NAME	NUMBER	BASIN	STATUS	OBJ	LOCATION	Basin Closure?	ACTION
	Town of Manhattan	30021840	41H	Waiting on augmentation plan for Response after PN (4objjs)	ASSOCIATION OF GALLATIN AGRICULTURAL IRRIGATORS; MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS; MONTANA TROUT UNLIMITED; HEAVNER, WILLIAM; BUCKMAN, SAMUEL; F DOUBLE D LLC; DYK, JANICE;	Pioneer Crossing Subdivision	Yes	Retroactive & Municipal letter sent
<b>Lewistown</b>								
	City of Melstone	30024071	40C	PN - Objection Deadline 4-20-2007	N	Melstone	No	Retroactive & Municipal letter sent
	Central MT Regional Water (Utica)	30019140	41S	Major EA	NA	9 or 10 municipalities, Hobson, Judith Gap, Harlowton, Levina ... etc. Possible other rural users.	No	Retroactive & Municipal letter sent
<b>Billings</b>								
	City of Red Lodge	30025286	43D	Form Received 11/16/2006	NA	Red Lodge	No	Retroactive & Municipal letter sent
	Worden/Ballentine/Yellowstone County Water & District	30022352	43Q	Published 4-4-2007 - Objection Deadline 5-3-2007	UNK	Worden/Ballentine share the same municipal water system	No	Retroactive & Municipal letter sent
<b>Havre</b>								
	City of CutBank	30025802	41C	Deficiency Letter Response needed	NA	CutBank	No	Retroactive & Municipal letter sent
<b>Missoula</b>								
	Mountain Water Co.	30024604	76M	C/C process	NA	Additional water for the city of Missoula	No	Retroactive & Municipal letter sent
<b>Helena</b>								
	Fieldstone Estates	30018527	41I	Waiting to re-PN	Objections to first PN Gary & Jodee Alm, Lonnie & Phyllis Brookshire, Vivian & Ron Drake, James & Susan McCormick, Brendon & Tria McCormick	Helena	No	
	Thomas Harrison, Mountain View Estates	30015402	41I	Waiting to re-PN	objections to first PN Lawrence Sickerson	Helena- Jim Darcy School	No	

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



BRIAN SCHWEITZER  
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074  
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601  
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918  
<http://www.dnrc.mt.gov>

1324 9TH AVENUE  
PO BOX 201601  
HELENA, MONTANA 59620-1601

April 27, 2007

WORDEN/BALLENTINE/YELLOWSTONE COUNTY WATER & DISTRICT  
PO BOX 217  
WORDEN MT 59088

Re: Water Right Application Number 30022352-43Q

Dear Sir/Madam;

The Department recently sent you a letter raising questions regarding your water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), and of your application, #30022352, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from proceeding with your application for a municipal use.

As a municipality seeking a water use "in and around" the geographic limits of that municipality, you qualify to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your application under the reinstated definition does not equate to granting your application. You must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you

A handwritten signature in cursive script, appearing to read "Kim Overcast".

Kimberly A. Overcast  
New Appropriations Program Manager  
Phone No. 406-444-6614  
Fax No. 406-444-0533  
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1424 9TH AVENUE  
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HELENA, MONTANA 59620-1601

April 27, 2007

TOWN OF MANHATTAN  
JANE MERSEN  
716 S 20TH STE 101  
BOZEMAN MT 59718

Re: Water Right Application Number 30021840-41H

Dear Ms. Mersen;

The Department recently sent you a letter raising questions regarding your water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), and of your application, #30021840, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from proceeding with your application for a municipal use.

As a municipality seeking a water use "in and around" the geographic limits of that municipality, you qualify to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your application under the reinstated definition does not equate to granting your application. You must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you

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PO BOX 201601  
HELENA, MONTANA 59620-1601

April 27, 2007

CITY OF MELSTONE  
PO BOX 237  
MELSTONE MT 59054

Re: Water Right Application Number 30024071-40C

Dear Sir/Madam;

The Department recently sent you a letter raising questions regarding your water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), and of your application, #30024071, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from proceeding with your application for a municipal use.

As a municipality seeking a water use "in and around" the geographic limits of that municipality, you qualify to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your application under the reinstated definition does not equate to granting your application. You must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you

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HELENA, MONTANA 59620-1601

April 27, 2007

CITY OF CUTBANK  
ROBERT OLSON  
CUT BANK CITY ATTORNEY.  
PO BOX 547  
CUT BANK MT 59427

Re: Water Right Application Number 30025802-41C

Dear Mr. Olson;

The Department recently sent you a letter raising questions regarding your water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), and of your application, #30025802, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from continuing to process your application for a municipal use.

As a municipality seeking a water use "in and around" the geographic limits of that municipality, you qualify to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your application under the reinstated definition does not equate to granting your application. You must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you

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1424 9TH AVENUE  
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HELENA, MONTANA 59620-1601

April 25, 2007

MOORE, O'CONNELL & REFLING  
MICHAEL CUSICK  
601 HAGGERTY LANE, SUITE 10  
BOZEMAN MT 69715

Re: Water Right Application Number 30025286-43D by the City of Red Lodge

Dear Mr. Cusick

In response to your letter of April 20, 2007, application number 43D-30025286, indeed the application appears to be a duplicate of 43D-30001172. Therefore, 43D-30025286 has been terminated and the filing fee of \$400.00 will be refunded.

If you have any questions about the application, please call Chris Smith at the Billings Water Resources Regional Office, 1371 Rimtop Dr., Billings, MT 59105-1978 Phone # 406-247-4419.

Thank you,

A handwritten signature in black ink that reads "Kim Overcast".

Kimberly A. Overcast  
New Appropriations Program Manager  
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C: Billings Regional Office

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HELENA, MONTANA 59620-1601

April 25, 2007

GARLINGTON, LOHN, ROBINSON  
STEPHEN R BROWN  
PO BOX 7909  
MISSOULA MT 59807

Re: Water Right Application Number 30024604-76M by Mountain Water Company  
(Missoula)

Dear Mr. Brown;

The Department recently sent you a letter raising questions regarding your client's water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), your response to that letter and your client's application, #30024604, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from continuing to process your client's application for a municipal use.

As a party seeking a water use "in and around" the municipality of Missoula, your client qualifies to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your client's application under the reinstated definition does not equate to granting the application. Your client must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence in order to be granted a permit.

Thank you.

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April 27, 2007

TREELINE SPRINGS, LLC  
RUSS MCELYEA  
PO BOX 1369  
ENNIS, MT 59729

Re: Water Right Application Number 30013630-41F – Moonlight Basin

Dear Mr. McElyea;

The Department recently sent you a letter raising questions regarding your client's water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law identified in that letter (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), your response to that letter and your client's application, #30013630, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from continuing to process your application for a municipal use.

First, you assert and the Department agrees and the record confirms that application # 30013630-41F was filed before January 1, 2005, when the rule definition first became effective. Even if the rule applied, the community of Moonlight Basin appears to meet the qualification for an unincorporated town as set forth in the case law relied upon in the Department's initial letter on the matter. (See *Pollard v. Montana Liquor Central Board*, 114 Mont. 44, 131 P.2d 974 (1942).) As a party seeking a water use "in and around" the unincorporated town of Moonlight Basin, your client qualifies to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your client's application under the reinstated definition does not equate to granting the application. Your client must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you.

A handwritten signature in cursive script that reads "Kimberly A. Overcast".

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April 25, 2007

HUBBLE, RIDGEWAY, UNMACK & WESTVEER  
JAMES A HUBBLE  
PO BOX 556  
STANFORD MT 59479

Re: Water Right Application Number 30019140-41S (Central Montana Regional Water Authority)

Dear Mr. Hubble;

The Department recently sent you a letter raising questions regarding your client's water right application raised by the recent First Judicial District court decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454. Upon further analysis of the reinstated rule, relevant case law (*Pollard v. Montana Liquor Control Board*, 114 Mont. 44, 131 P.2d 974 (1942)), identified in that letter, your response to that letter and your client's application, #30019140, the Department concludes that the definition of "municipal use" reinstated by Judge McCarter's decision does not prevent the Department from continuing to process your client's application for a municipal use.

As a party seeking a water use "in and around" municipalities and unincorporated towns including Hobson, Judith Gap, Harlowton, Shawmut, Ryegate, Lavina, Broadview, Roundup, Musselshell and Melstone, as set forth in your letter of April 20, 2007, your client qualifies to apply for a municipal use under the reinstated definition. As you are no doubt aware, the continued processing of your client's application under the reinstated definition does not equate to granting the application. Your client must also meet the relevant statutory criteria by the statutorily-mandated standard, preponderance of the evidence, in order to be granted a permit.

Thank you.

Handwritten signature of Kimberly A. Overcast in cursive.

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1424 9TH AVENUE  
PO BOX 201601  
HELENA, MONTANA 59620-1601

June 15, 2007

BOSTWICK PROPERTIES  
JAMES TAYLOR  
1045 REEVES RD E, SUITE C  
BOZEMAN MT 59718

Re: Water Right Application No. 30025398-41H

Dear Mr. Taylor;

Recently, the Department sent you a letter regarding the impact of the First Judicial District Court's recent decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454 on your water right application. The Department has concluded that the reinstatement of the definition of "municipal use" by Judge McCarter's decision does not prevent the Department from proceeding with your application for a municipal use (see the attached memoranda to file).

The Department's decision to allow your application to proceed under the reinstated municipal use definition does not mean that the Department will grant your application. In order for your application to be granted, you must still prove, by a preponderance of the evidence, that the criteria for issuance of a permit set forth in 85-2-311, MCA, have been met. Finally, any party disagreeing with the Department's decision to process your application under the municipal use exception has the ability to raise that issue in the contested case hearing for objectors and in any appeal to district court.

Thank you.

Handwritten signature of Kimberly A. Overcast in cursive script.

Kimberly A. Overcast  
New Appropriations Program Manager  
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Email - [kovercast@mt.gov](mailto:kovercast@mt.gov)

C: MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS, PO BOX 200701, HELENA MT 59620 0701  
MONTANA TROUT UNLIMITED, LAURA ZIEMER, 321 E MAIN ST, SUITE 411, BOZEMAN MT 59715

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# Memorandum

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WATER RIGHTS BUREAU

TO: File No. 30025398 by Bostwick Properties  
FROM: Terri McLaughlin, Water Rights Bureau Chief  
SUBJECT: File Action Pertaining to Municipal Use Court Decision & Order  
DATE: June 15, 2007

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## Background

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 an unincorporated town.” In November 2005, having become aware of the fact that the definition was not consistent with 30 years of Departmental and Water Court practice, DNRC repealed this definition of municipal use.

The repeal of this definition was challenged before First Judicial District Court Judge Dorothy McCarter in Lohmeier, et al. v. DNRC, Cause No. ADV-2006-454. Judge McCarter determined in her Decision and Order dated March 26, 2007, that the repeal was invalid and that the repealed definition of ARM 36.12.101(39) should be reinstated (see attached Order.) For reasons described below, Judge McCarter’s Order applies retroactively and therefore requires DNRC to process all pending water rights applications in light of the reinstated definition of municipal use set forth in ARM 36.12.101(39).

The DNRC sent a letter on April 10, 2007, to the applicant, Bostwick Properties, on application no. 41H- 30025398, allowing the Applicant the opportunity to address two questions: 1) Whether Judge McCarter’s Lohmeier decision retroactively applies to its pending application; and 2) Whether Bostwick Properties application qualifies for “municipal use” under the reinstated definition (see letter in files.)

The Department included with the letter two Montana Supreme Court cases that the Department believed to be controlling on the issue of retroactivity, the applicability of Judge McCarter’s decision to pending applications. Those cases are 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). In addition, the Department included a Montana Supreme Court case that addressed the elements of “unincorporated town,” a term central to the reinstated definition of municipal use. That case is Pollard v. Montana Liquor Control Board, 114 Mont. 44, 131 P.2d 974 (1942).

The Department received a response from the Applicant, Bostwick Properties. Bostwick Properties’ application received two objections during the public notice process, so on April 26, 2007, the Department sent letters to the objectors allowing the same opportunity for comment provided the applicant. The Department included a copy of the Applicant’s comments, the Montana Supreme Court’s opinions on retroactivity and on the elements of an unincorporated town.

After receipt of responses from the applicant and objectors, Department staff met to determine what action should be taken on the applications.

## **Application Information (30025398)**

This permit application is for a 1278' foot deep well and was filed by Bostwick Properties on 12/01/2006, for municipal use on LAZY J SOUTH, TRACTS 1 & 2 in Gallatin County Montana. The application was public noticed, received objections and a hearing was requested. **The two objections were settled on 5/18/2007.** The Department is reviewing the application to determine if the water right criteria under Mont. Code Ann. § 85-2-311 have been met.

Bostwick Properties proposes to supply water to multiple homes, lawns, gardens, and businesses within Lazy J South Tracts 1 and 2 Subdivision. Lazy J South is a platted subdivision consisting of 99 lots comprising 158 developed acres within the 550 acre area (.86 sq. miles). The plat designates 60 lots for residential use and the remaining lots for 9 light industrial, 14 office, 20 retail, 1 restaurant, 16 apartment and 1 hotel/ car wash uses. The northern edge of the development is .5 miles from the first commercial businesses of the Big Sky area including a gas station, a convenience store, and a few tourist shops. It is 2.8 miles from the center of Big Sky at Big Sky Meadow Village. Big Sky has two concentrated population centers, Big Sky Mountain Village and Big Sky Meadow Village approximately 5 miles apart from each other. Mountain Village is made up of 3 platted subdivisions within a 1.5 sq. mile area. Meadow Village contains 5 platted subdivisions within a 1.5 sq. mile area. The United States Census Bureau classifies Big Sky as a Census Designated Place (CDP). CDPs are defined in each decennial census according to Census Bureau guidelines, and are densely settled concentrations of population not within an incorporated town, but locally identified by a name. CDPs are identified cooperatively by state and local officials and the Census Bureau, following Census Bureau guidelines. See "U.S. Census Bureau, Definition: Census Designated Place". The U.S. Census Bureau, Census 2000 reports Big Sky having a population of 1221. Big Sky has 1788 housing units of which 573 are permanent residences. Big Sky has 2 gas stations, 2 churches, 189 businesses including restaurants/saloons, construction companies, retail trade, real estate companies, professional and technical services, a U.S. Post Office, and a golf course. Big Sky students attend the Ophir School District # 72 located on Gallatin Road, 2.6 miles south from Big Sky Spur Rd. intersection into Big Sky, Mt. Big Sky, MT. is identified on the MT Department of Transportation Highway Map and the USGS Quadrangle "Lone Mountain".

In keeping with the reasoning set forth in the attached legal memorandum on the issues of retroactivity and whether or not this application may go forward under the reinstated definition of the municipal use exception to the Upper Missouri Basin closure, the Department finds that in order to go forward, this application must qualify under the reinstated definition of municipal use. The Department also finds that this application does qualify under the reinstated definition and may proceed because the appropriation sought is "by and for those in and around a municipality or an unincorporated town" as required by the definition.

The presumption in Montana is that rules of law apply retroactively. Exceptions may be made where all three of the factors set forth in the United States' Supreme Court's *Chevron* decision, cited in the attached legal memorandum, are met. The Department finds that the *Chevron* factors are not present in this instance and that, therefore, the reinstated rule definition does apply to this application. Further, the Department does find that Bostwick Properties application may go forward under the reinstated municipal use definition because Bostwick's proposed project, Lazy J South Tracts 1 & 2, proposes to supply "water appropriated by and provided for those in and around a municipality or an unincorporated town." Bostwick Properties proposed project is itself an unincorporated town so the proposed development itself meets the reinstated definition of municipal use.

In *Pollard*, the Montana Supreme Court analyzed the meaning of “unincorporated town,” finding that term to include population centers ranging from a gathering of eight houses, one store, 3 gas stations and 2 saloons on an unplatted site supporting a population of thirty people (Nissler) to an urban center of “several hundred” houses, three stores and a gas station on a platted site supporting a population of “approximately” 1500 people. (West Butte). The *Pollard* guidelines for the limits of an unincorporated town are, therefore, very broad. The *Davis* decision, *Davis v. Stewart* 171 P. 281, 282 (Mont. 1918), also offers a guideline in terms of the reasonable inference that where the aggregation in question could incorporate as a town, it logically qualifies as one. (“Of course, the statutes of this state leave no uncertainty as to what a town is, viewed in the light of the statutes covering municipal incorporations, and for all purposes of statutory construction in that connection the matter is settled and requires no comment.” *Id.* 283). For the purposes of the applications currently before the Department, it need only be noted that all that is required to qualify for municipal incorporation is a population of 300. (Mont. Code Ann. § 7-2-4103).

The Lazy J South Tracts 1 & 2 when fully developed, will have 60 residences, 9 light industrial sites, 14 offices, 20 retail stores, 1 restaurant, 16 apartments and 1 hotel/ car wash. All of these structures are situated within a platted area covering .86 square miles. The Lazy J South is an unincorporated town in its own right under the *Pollard* standard, taking into consideration *McCracken*'s examination of that standard. In addition, the northern boundary of the Lazy J South is .5 miles from the edge of Big Sky and 2.8 miles from the center of Big Sky Meadow Village. Big Sky has two major population centers, Big Sky Mountain Village and Big Sky Meadow Village. These population concentrations are approximately 5 miles apart. Mountain Village is made up of 3 platted subdivisions within a 1.5 sq. mile area. Meadow Village contains 5 platted subdivisions within a 1.5 sq. mile area. The U.S. Census Bureau, Census: 2000 reports Big Sky has a population of 1,221. It has 1788 housing units of which 573 are permanent residences. Big Sky has 2 gas stations, 2 churches, 189 businesses including restaurants/saloons, construction companies, retail trade, real estate companies, professional and technical services, a U.S. Post Office, and a golf course.

The Lazy J South clearly fits within the parameters of “unincorporated town” established in *Pollard*. It will have considerably more than 8 houses, be platted, and have 45 places of business within its .89 sq. mile area of development. Even if the Lazy J South itself could not be considered an unincorporated town in its own right, at .5 miles from the first commercial area of the unincorporated town of Big Sky, the Lazy J South is “around” that unincorporated town.

For those reasons, the Department finds that Bostwick Properties application for a municipal use appropriation to supply water to Lazy J South may go forward under the definition of municipal use reinstated by Judge McCarter's March 26, 2007 decision.

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



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June 15, 2007

MATT WILLIAMS  
WILLIAMS & JENT LLP  
506 E BABCOCK ST  
BOZEMAN MT 59715

Re: Water Right Application Numbers 30017376-41H, 30023457-41H, 30024735-41H, 30026244-41H by  
Utility Solutions, LLC

Dear Mr. Williams,

Recently, the Department sent you a letter regarding the impact of the First Judicial District Court's recent decision in *Lohmeier, et al. v. DNRC*, Cause No. ADV-2006-454 on the above water right applications. The Department has concluded that the reinstatement of the definition of "municipal use" by Judge McCarter's decision does not prevent the Department from proceeding with these applications for a municipal use (see the attached memoranda to file).

The Department's decision to allow these applications to proceed under the reinstated municipal use definition does not mean that the Department will grant the applications. In order for the applications to be granted, the applicant must still prove, by a preponderance of the evidence, that the criteria for issuance of a permit or change authorization set forth in 85-2-311 and 85-2-402, MCA have been met. Finally, any party disagreeing with the Department's decision to process these applications under the municipal use exception has the ability to raise that issue in the contested case hearing for objectors and in any appeal to district court.

Thank you.

A handwritten signature in black ink, appearing to read "Kimberly A. Overcast".

Kimberly A. Overcast  
New Appropriations Program Manager  
Phone No. 406-444-6614  
Fax No. 406-444-0533  
Email - [kovercast@mt.gov](mailto:kovercast@mt.gov)

C: BARBARA CAMPBELL, UTILITY SOLUTIONS, PO BOX 10098, BOZEMAN MT 59719  
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MONTANA, STATE OF DEPT OF FISH WILDLIFE & PARKS, BILL SCHENK, PO BOX 200701, HELENA MT 59620 0701  
MONTANA TROUT UNLIMITED, LAURA ZIEMER, 321 E MAIN ST, SUITE 411, BOZEMAN MT 59715  
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# Memorandum

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WATER RIGHTS BUREAU

TO: File No. 30017376, 30023457, 30024735, and 30026244 by Utility Solutions, LLC  
FROM: Terri McLaughlin, Water Rights Bureau Chief  
SUBJECT: File Action Pertaining to Municipal Use Court Decision & Order  
DATE: June 15, 2007

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## Background

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 challenged before First Judicial District Court Judge Dorothy McCarter in Lohmeier, et al. v. DNRC, Cause No. ADV-2006-454. Judge McCarter determined in her Decision and Order dated March 26, 2007, that the repeal was invalid and that the repealed definition of ARM 36.12.101(39) should be reinstated (see attached Order.) Judge McCarter's Order requires DNRC to process all pending water rights applications in light of the definition of municipal use set forth in ARM 36.12.101(39).

The DNRC sent letters (one letter per application) on April 10, 2007, to the applicant, Utility Solutions, LLC on applications no. 41H- 30017376, 30023457, 30024735, and 30026244, allowing the Applicant the opportunity to address two questions: 1) Whether Judge McCarter's Lohmeier decision retroactively applies to its pending application; and 2) Whether its application qualified for "municipal use" under the reinstated definition (see letter in files.)

The Department included with those letters copies of two Montana Supreme Court cases that the Department believed to be controlling on the issue of retroactivity, or the applicability of Judge McCarter's decision to pending applications. Those cases are 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). In addition, the Department included a Montana Supreme Court case that addressed the elements of "unincorporated town," a term central to the reinstated definition of municipal use. That case is Pollard v. Montana Liquor Control Board, 114 Mont. 44, 131 P.2d 974 (1942).

The Department received a response from the Applicant, Utility Solutions. Utility Solutions' applications received objections during the public notice process, so on April 26, 2007, the Department sent letters to the objectors allowing the same opportunity for comment provided the applicant. The Department included a copy of the Applicant's comments, the Montana Supreme Court's opinions on retroactivity and on the elements of an unincorporated town.

After receipt of responses from the applicant and objectors, Department staff met to determine what action should be taken on the applications.

**Application Details (30017376)**

This is a change application which was filed by Utility Solutions on 11/17/2005. The application is to change the use of provisional permit # 115469-41H to municipal use and to expand the place of use to US LLC Service Area # 2, which includes North Star subdivision. The application was public noticed, received objections, and a hearing was requested. The hearing process was stayed pending a District Court decision.

**Application Details (30023457)**

This is a permit application is for 3 wells and was filed by Utility Solutions on 8/2/2006 for municipal use within Galactic Park. The application was public noticed, received objections, and a hearing was requested. A hearing date has not been set.

**Application Details (30024735)**

This is a change application which was filed by Utility Solutions on 10/12/2006. The application is to change a permit that was granted on October 11, 2000. The applicant seeks to change the place of use to include Elk Grove subdivision; change the purpose from commercial, irrigation, and multiple domestic to municipal use; expand the place of use for irrigation; and to change the number of homes supplied from 300 to 337. The application was public noticed on 12/11/2006, and the objection deadline was 1/9/2007. No objections were received.

**Application Details (30026244)**

This is a permit application is for 9 wells and was filed by Utility Solutions on 1/26/2007 for municipal use. The application seeks to increase the volume of water needed for the Gallatin Heights subdivision. Additionally, the application includes use of the water at Galactic Park, North Star, Gallatin River Hideaway, Black Bull Run, and Middle Creek Parklands subdivisions located within the Utility Solutions service area and Four Corner area. The application was public noticed on 5/17/2007 and objections are due on 6/15/2007

All of the above applications, are seeking a water right for use within 1.25 - 4.5 miles of the eastern boundary of the Bozeman City limits and wholly or partially within, or adjacent to the unincorporated town of Four Corners encompassing 14.98 sq. miles (*See Gallatin County Planning Department Four Corners Plan Area, 1/31/06 map*). These uses specifically by application are as follows:

1) 30017376 for Utility Solutions LLC Service Area #2 on 1.1 sq. miles including Galactic Park, North Star, and Gallatin River Hideaway, for 565 homes, 120 condo units, 80 apartments, 20 cabins, 5 shops, 76 offices, a daycare center, lodge, 5 retail shops, Zoot Business center and 76 acres of commercial park.

2) 30023457 Galactic Park for 42 homes, 120 condo units, 5 cabins, a daycare center, a lodge and Zoot business center on .25 sq. miles,

3) 30024735 Elk Grove subdivision for an additional 37 homes (making a total of 337 homes) and commercial use on .75 sq. miles,

4) 30026244 for Gallatin Heights with 342 homes and 10 acres of commercial area on .5 sq. miles, Gallatin River Hideaway for 80 apartments, 15 cabins, 11 houses, 76 offices on .5 sq. miles, Black Bull Run with 378 homes and 10 acres of commercial area on .5 sq. miles, Middle Creek Parklands for 250 homes and 1 club house on .375 sq. miles, North Star for 512 houses, and 76 acres of commercial business on .25 sq. miles and Galactic Park identified above.

All are platted subdivisions except Gallatin River Hideaway. These subdivisions are .5 to 3.0 miles from the center of the unincorporated town of Four Corners.

The United States Census Bureau classifies Four Corners as a Census Designated Place (CDP). CDPs are defined in each decennial census according to Census Bureau guidelines, and are densely settled concentrations of population not within an incorporated town, but locally identified by a name. CDPs are identified cooperatively by state and local officials and the Census Bureau, following Census Bureau guidelines. See "U.S. Census Bureau, Definition: Census Designated Place". The U.S. Census Bureau, Census 2000 reports Four Corners having a population of 1,828 and 795 housing units.

The Four Corners area within the Gallatin County Four Corners Plan Area (1/31/06) includes 2 gas stations, 3 churches, 2 schools, and approximately 30 businesses. Businesses include a hotel, restaurants/saloon, fitness center/day spa and retail stores. It's eastern boundary is approximately 1.5 miles from the western boundary of the City of Bozeman.

In keeping with the reasoning set forth in the attached legal memorandum on the issues of retroactivity and whether or not these applications qualify for the reinstated definition of the municipal use exception to the Upper Missouri Basin closure, the Department finds that the reinstated definition of municipal use does apply to these municipal use applications pending before the Department. The Department also finds that these applications do qualify under the reinstated definition and may proceed. The appropriations sought are "by and for those in and around a municipality or an unincorporated town" as required by the definition.

The presumption in Montana is that rules of law apply retroactively. Exceptions may be made where all three of the factors set forth in the United States' Supreme Court's *Chevron decision*, cited in the attached legal memorandum, are met. The Department finds that the *Chevron* factors are not present in these applications and that, therefore, the reinstated rule definition does apply to these applications. Further, the Department does find that Utility Solutions' applications may go forward under the reinstated municipal use definition because Utility Solutions' proposed projects, propose to supply "water appropriated by and provided for those in and around a municipality or an unincorporated town."

In *Pollard*, the Montana Supreme Court analyzed the meaning of "unincorporated town," finding that term to include population centers ranging from a gathering of eight houses, one store, 3 gas stations and 2 saloons on an unplatted site supporting a populations of thirty people (Nissler) to an urban center of "several hundred" houses, three stores and a gas station on a platted site supporting a population of "approximately 1500 people. (West Butte) The *Pollard* guidelines for the limits of an unincorporated town are, therefore, very broad. The *Davis* decision, *Davis v. Stewart* 171 P. 281, 282 (Mont. 1918), also offers a guideline in terms of the reasonable inference that where the aggregation in question could incorporate as a town, it logically qualifies as one. ("Of course, the statutes of this state leave no uncertainty as to what a town is, viewed in the light of the statutes covering municipal incorporations, and for all purposes of statutory construction in that connection the matter is settled and requires no comment." *Id.* 283). For the purposes of the applications currently before the Department, it need only be noted that all that is required to qualify for municipal incorporation is a population of 300. (Mont. Code Ann. § 7-2-4103).

The Four Corners Area clearly fits within the parameters of "unincorporated town" established in *Pollard*. It has considerably more than 8 houses, parts of the area is platted, and has over 30 places of business within its 14.98 sq. mile area of development. All of Utility Solutions applications propose to provide water to subdivisions that will be completely or partially within or adjacent to the unincorporated town of Four Corners. Additionally, these applications can also be considered to be in and around a municipality (the City of Bozeman). For these reasons, the Department finds that Utility Solutions,

LLC's applications for municipal use appropriations to supply water under 30017376 for Service Area #2, 30023457 for Galactic Park, 30024735 for Elk Grove and 30026244 for Gallatin Heights, Galactic Park, North Star, Gallatin River Hideaway, Black Bull Run and Middle Creek Parklands may go forward under the definition of municipal use reinstated by Judge McCarter's March 26, 2007 decision.

## Legal Memorandum

**To: John Tubbs, Terri McLaughlin, Tim Hall**

**From: Britt Long**

**Re: Effect of Judge McCarter's Decision Reinstating ARM 36.12.101(39) on  
Pending Municipal Use Applications**

**Date: June 14, 2007**

Since Judge McCarter's March 26, 2007 reinstatement of the rule definition of the term "municipal use," the Department has been charged with the obligation of determining whether that decision requires the application of the reinstated definition to pending municipal use water right applications and, if so, whether those applications are for "appropriation[s] by and provided for those in and around a municipality or an unincorporated town," as required by the reinstated definition. ARM 36.12.101(39).

On the issue of retroactivity, the Department concludes that Judge McCarter's opinion applies retroactively to require the application of the reinstated definition to pending municipal use applications before the Department. The Supreme Court's holdings in *Dempsey v. Allstate Ins. Co.*, 2004 MT 391, 325 Mont., 207, 104 P.3d 483, and *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724, establish the "strong presumption favoring retroactivity" *Stavenjord*, ¶ 10. In order to defeat that presumption, a party must qualify for the exception to retroactive application established in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), which requires:

First, that the decision to be applied [prospectively] must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of [prospective application]."

*Id.*

Judge McCarter's order concluded that the definition of "municipal use" the Department repealed was an accurate expression of the legislative intent behind the Upper Missouri Basin Closure, which the Court interpreted as the preservation of "existing water rights [and the protection of] . . . existing irrigation and other consumptive water use." (Order, p. 5). The Court concluded that the absence of a definition of municipal use did not accomplish these purposes, that

the definition of municipal use the Department had repealed did accomplish these purposes, that the repeal was therefore invalid and that the definition must be reinstated.

The Court's order, on its face, finds the reinstated definition an accurate expression of the legislative intent behind the Upper Missouri Basin closure, hence the reinstatement. Therefore, the Court facially construes the appropriation and provision of water by and for those in and around **either a municipality or an unincorporated town**, as explicitly set forth in the reinstated rule, as consistent with the articulated purposes of the Upper Missouri Basin Closure Act.

The Court considered the plain language of the rule, **municipality or unincorporated town**, and reinstated that rule requiring the Department to allow municipal use applications from those seeking to appropriate and provide water for those in and around municipalities or unincorporated towns. The Court's order requires the Department to abide by the Court's order and administer the rule in accordance with the plain meaning of the rule, which the Court determined was in keeping with the legislative intent behind the Upper Missouri Basin Closure. The Department can only abide by the Court's order, observing the arguably very broad application of the term "unincorporated town," which term the Court found expressive of the Legislature's intent.

Therefore, on the issue of retroactivity, the Department finds that while Judge McCarter's Order may impose a new rule of law, that rule, because of the breadth of the adjudicated meaning of the term "unincorporated town," does not impose an additional burden on the Applicant. Therefore, the reinstated rule does not in that sense overrule a precedent upon which applicants have relied to their detriment. Retroactive application imposes no inequity either upon the applicant facing an arguably broader definition or upon the objector who may still offer evidence and argument on the question of whether or not the Applicant qualifies. Therefore, the Department does not find that all three of the *Chevron* criteria have been met, as is required to limit the application of a rule of law prospectively.

On the issue of the meaning of the definition itself, the Department finds that "around" lacks easy precision and "unincorporated town" has an established, arguably very broad, adjudicated and applicable meaning. Judge McCarter's opinion, narrowly holds the repeal of ARM 36.12.101 (39) invalid. It also contains dicta reflecting the Court's impression that the repeal reflected a broadening of the Department's interpretation of the term "municipal use" and that the reinstatement would have the effect narrowing the Department's interpretation of the term. To the extent that that dicta provides guidance to the Department in its practical administration of the reinstated rule, the Department takes that direction to mean that the Department must closely hew to the plain language of the reinstated rule, which the Court finds representative of the legislative intent of the Upper Missouri Basin Closure Act.

The relief sought and the order's effect is to reinstate the definition. Pending a successful appeal, the Department must obey that order. The Department must, therefore allow to go forward those municipal use applications currently before it that seek the appropriation and provision of water by and for those "in and around a municipality or unincorporated town." Whether the definition represents an broadening or narrowing of the Department's past practice in the absence of the rule has no bearing on the

Department's duty to obey the order, to closely observe and administer the plain language of a rule the Court has explicitly declared an accurate expression of the legislative intent behind the Upper Missouri Basin Closure Act. The Court has reinstated the rule. The Department must follow it. The Court has determined that allowing a municipal use water right application for water use by those "in and around a municipality or an unincorporated town" is required by the legislative intent behind the applicable statute. The Department may not decide otherwise.

There is little question as to what comprises a municipality. It's defined by statute. (Mont. Code Ann. § 7-2-4704 (2).) However, there is no statutory definition of "unincorporated town." Neither is there any statutory definition of "around." While municipalities have fixed geographic boundaries, unincorporated towns do not. Therefore, while it is possible to delineate what is in a municipality and what is around it with some precision, it is not possible to delineate what is in an unincorporated town and what is around it with the same degree of precision.

The Department, required to reinstate a rule that is imprecise at best, must arrive at a reasonable working interpretation of "unincorporated town," in keeping with what case law exists and with reason. Case law on the subject does not address or arise from any portion of the Water Use Act but from unrelated statutes addressing liquor license revenues and the Montana Constitution Art. 15, § 12 and Art. 17 § 1. The term does, however, appear and the cases provide all the guidance available.

The first case addressing the term "unincorporated town" did so in the context of answering, in the affirmative, the question of whether an unincorporated town could be a town for the purpose of housing the county seat as provided by the Leighton Act, Laws 1911, p. 205. On unincorporated towns, the Court noted that in a contemporaneous statute providing for the bonding of fire districts, the Legislature "clearly presents, under the term 'unincorporated city or town,' the idea of a community entirely beyond the stage of a mere village or camp." *State ex rel. Powers v. Dale* 47 Mont. 227, 227, 131 P. 670, 671 (1913).

The next case addressing the term concluded that unincorporated Square Butte was a town for the purposes of forestalling school land sales within three miles of the town, as prohibited by Article 17, § 1 of the Montana Constitution. The Court had this to say about the attributes of a town and the lack of statutory specificity in that regard in Montana:

In popular use and acceptance the words "city," "town," and "village" present nothing obscure. "The word 'town' is more comprehensive than either of the others; it is a generic word, applicable as well to a city as to a village. In England a city was distinguished from other towns by the fact that it had a cathedral, and was the residence of a bishop, but in this country the name 'city' is used ordinarily to designate the larger classes of towns. The name 'village' always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word 'city' or 'village' indicates the size of the town." (Citations omitted) **The principal and essential idea conveyed "is that of oneness,**

**community, locality, vicinity . . . a body of people collected or gathered together in one mass . . . and having a community of interest because residents of the same place.”** (Citations omitted). **In fact, the word “town” in its popular significance has been accepted by all the writers to mean substantially the same thing, although defined in different language, and when you have an aggregation of inhabitants and houses used for various purposes so near to one another that the inhabitants may fairly be said to dwell together, you have a town in the common acceptation of the word.**

*Davis v. Stewart* 171 P. 281, 282 (Mont. 1918) (Emphasis added).

The *Davis* Court also offers a guideline in terms of the reasonable inference that where the aggregation in question could incorporate as a town, it logically qualifies as one. (“Of course, the statutes of this state leave no uncertainty as to what a town is, viewed in the light of the statutes covering municipal incorporations, and for all purposes of statutory construction in that connection the matter is settled and requires no comment.” *Id.* 283). For the purposes of the applications currently before the Department, it need only be noted that all that is required to qualify for municipal incorporation is a population of 300. (Mont. Code Ann. § 7-2-4103).

The two remaining cases that address the definition “unincorporated town” both do so in the context of state liquor licensing fees which charged \$200 per year for a license in a town and \$600 per year for a license not within a town but within five miles of a city. The first of these cases, *Pollard*, is the first explicitly to address the attributes of an unincorporated town. It sets a very low bar for a community to be considered a town. The latter of these two cases, *McCracken*, finds that Lake Elmo/McCracken is not a town for liquor license fee purposes for reasons which are not exhaustively articulated and, to some degree, inconsistent with the reasoning in *Pollard*.

In *Pollard*, the Court began with the following: “[t]he question then arises as to what is an unincorporated town, or what is a ‘town’ within the meaning of Chapter 163. In its broad sense, a town is ‘an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together.’ (Citation omitted) [which aggregation] constitute[s] a distinct place with a name. (Citations omitted). *Pollard v. Montana Liquor Control Board* 131 P.2d 974, 975 (Mont. 1942). The *Pollard* Court found the following communities to be towns for the purposes of qualify for the lower liquor license fee:

Town	On Map	Popula tion	School	Plat?	Houses	Church	Stores	Saloons	Liquor License
Rocker	Yes	Approx . 100	Yes	Yes	about 20		General	2	3
Meader-ville	No	5-600			Approx. 160	1	mines, 3 blocks of stores, night clubs, gas		8

							stations, fire dept.		
Centerville	No	15- 1800	1		500	1	Fire dept, stores and boarding houses.	3 retail	
Nissler	Yes	About 30			8		1 store, 3 gas stations	2 retail	
W. Butte	Yes	Approx imately 1500 people.		Yes	several hundred		three stores, a gas station,	1	
E. Butte	No	about 100	Yes				one grocery store	2	

*Pollard*, therefore, supports the position that an unincorporated town need not even appear on the map and may have a footprint as small as 8 houses, be populated by 30 people and be served by a school, three gas station and two saloons, all within an undefined geographic area. The saloons, of course, are the reason for being of the entire case and do not seem specifically necessary where the liquor license statute is not what's at issue.

In *McCracken*, the final case addressing "unincorporated town" in any substantive fashion, the Court cites *Pollard* but does not clearly distinguish its decision from the reasoning in *Pollard*. The Court noted that *Pollard* "does not lay down a rule by which we may say that a group of dwellings is or is not a town." *State ex rel. McCracken v. State Liquor Control Board* 143 P.2d 891, 892 (1943). *McCracken* does not either. The Court nonetheless found that *McCracken/Lake Elmo* did not qualify as an unincorporated town for lower liquor license fee purposes the Court because:

[t]here are no other business houses anywhere near that of relator. There is another liquor establishment some two miles away and a service station out on the main highway a mile distant. The schoolhouse sought to be included in Lake Elmo or *McCracken* is some two miles distant. No attempt is made to show the boundaries of the community nor to prove that any of the inhabitants of the community consider Lake Elmo to be a town. The record and the map show Lake Elmo to be a resort in the country with dwellings scattered along the road leading to it and nothing more. By a reference to the map it is clear that the dwellings are farm houses situated in a row adjacent to a county road extending for a half mile or more. It is obvious that this row of dwellings was not intended to be, nor is, urban in character, but is purely agricultural. The dwellings were not built as they were because the inhabitants wanted to dwell together but were erected because the small agricultural tracts of land made such an

arrangement of dwellings necessary.

While the fact that McCracken appears on the Public Service Commission map of the state of Montana is entitled to consideration, it is not conclusive that McCracken is a town. There are innumerable sidings on the various railroads in the state of Montana which have no buildings at all in the near vicinity and no one would suggest that their mere designation on the map by name makes them towns.

*State ex rel. McCracken v. State Liquor Control Board* 143 P.2d 891, 892 - 893 (1943). The *McCracken* Court, however, limited its reasoning specifically to the liquor license fee statute with: "It seems obvious that the legislature, in providing for the larger license fee for premises within five miles of a larger city, had exactly the relator's type of place in mind." *Id.*

While both the *Pollard* and *McCracken* courts specifically discussed the meaning of "unincorporated town" within the context of the liquor license statute, the quality of that discussion was wider ranging and more comprehensive in the *Pollard* decision. That Court addressed the question of what constituted an unincorporated town in general and then applied the liquor license statutes to its conclusions whereas the *McCracken* Court specifically measured the candidate community against the Legislature's intent for the liquor licensing statute. The methodologies differed, however slightly. For the Department's purposes, *Pollard* provides the better guidance.

In conclusion, Judge McCarter's Order requires the Department to reinstate a definition of "municipal use" that allows those appropriating water for and providing water to those in and around a municipality or an unincorporated town to go forward with a pending application for a municipal use water right because the Court explicitly found that that plain language of the definition was consistent with the Court's construction of the legislative intent behind the upper Missouri Basin Closure. The Court held that reinstating that definition would protect existing water rights, existing irrigation and existing consumptive uses, which the Court explicitly found to be the purpose of the Upper Missouri Basin Closure, the statute the Court determine authorized the definition. The Department may not second guess the Court. Pending a successful appeal it must administer the reinstated rule by narrow adherence to the rule's plain language. The rule's plain language, to which the Department intends to adhere narrowly, includes the jurisprudentially defined, broad "unincorporated town." The Department may no more read that phrase out of the rule than it may read in "limited to a municipality." The Court's order does not allow it.