

May 20, 2008

TO: Water Policy Committee

FROM: Greg Petesch

RE: Bostwick Properties, Inc. v. Montana Department of Natural Resources and Conservation

On May 12, 2008, the District Court for the 18th Judicial District in Gallatin County decided the case of Bostwick Properties, Inc. v. Montana Department of Natural Resources and Conservation, Cause No. DV-07-917AX, 18th Judicial District (2008). Bostwick is developing a subdivision located near Big Sky, Montana. In the case, Bostwick was seeking a writ of mandamus directing the Department of Natural Resources and Conservation (DNRC) to issue a water use permit for a well from a deep aquifer consisting of water in fractures in bedrock for a municipal water system. Gallatin County gave preliminary plat approval for the subdivision in February 2005.

After conducting testing, Bostwick submitted an initial application for a water permit to the DNRC on December 22, 2005. After discussion and submission of additional information, the DNRC terminated the application as untimely on July 7, 2006. On November 30, 2006, Bostwick filed another application for a water use permit for water from the same aquifer for the same use as the prior application. After the DNRC informed Bostwick of technical deficiencies in the application, Bostwick provided additional information addressing the deficiencies, and on February 13, 2007, the DNRC determined that the application was "correct and complete" pursuant to section 85-2-302, MCA, and directed that public notice be given of the application pursuant to section 85-2-307, MCA. Notice of the application was published on February 20, 2007, providing for an objection period ending March 22, 2007. Objections were received from the Department of Fish, Wildlife, and Parks and Trout Unlimited. Those objections were settled and withdrawn on May 17, 2007. By mid-August, 2007, more than 180 days had elapsed following the publication of the application for a water use permit without action by the DNRC.

Section 85-2-310(1), MCA, provides that the DNRC shall grant, deny, or condition an application for a permit in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the DNRC. If the DNRC orders the time extended, it is required to serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by section 85-2-308, MCA. DNRC did not extend the time limit.

The DNRC issued a water permit for a well for a different subdivision, the Yellowstone Mountain Club, from the same water basin in November 2007. That permit was issued within the deadlines for action on permits following publication of notice that are contained in section 85-2-310(1), MCA. On December 7, 2007, more than 280 days after the publication of notice of

its application, Bostwick filed an application for a writ of mandamus in the District Court. On December 11, 2007, the District Court issued an Alternative Writ of Mandate and directed the DNRC to show cause why the permit should not be issued and set a hearing on the matter for January 14, 2008. On December 17, 2007, the DNRC issued a statement of opinion, pursuant to section 85-2-310(3), MCA, denying the application for a permit. The basis for the opinion was that Bostwick had failed to prove by a preponderance of the evidence that there is no connection between the proposed appropriation of water and the West Fork of the West Gallatin River and that depletions to the West Gallatin River would not occur.

The District Court held the show cause hearing on January 14, 2008. The hydrogeologist for Bostwick testified that as a hydrogeologic matter, there was no basis for distinguishing the proposed use for the Yellowstone Club and Bostwick. This testimony was accepted in full by the District Court, and the District Court found that the basis for the DNRC's statement of opinion was contrary to its determination concerning the Yellowstone Club permit. The District Court granted Bostwick's motion for issuance of a Writ of Mandate and ordered the DNRC to issue a water use permit to Bostwick.

In reaching its conclusion, the District Court analyzed and interpreted the statutes governing the issuance of water use permits. The District Court noted that pursuant to section 85-2-102(8), MCA, "correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information. Section 85-2-102(22), MCA, defines "substantial credible information" as probable, believable facts sufficient to support a reasonable legal theory upon which the DNRC should proceed with the action requested by the person providing the information. The District Court noted that pursuant to section 85-2-302, MCA, the DNRC is required to adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under Title 85, chapter 2, part 3, MCA. Those provisions are contained in section 85-2-311(1), MCA, which require the applicant to prove by a preponderance of the evidence, that:

- (a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and
- (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
 - (A) identification of physical water availability;
 - (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
 - (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.
- (b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration

of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

Section 85-2-311(2), MCA, provides that the applicant is required to prove that the criteria in section 85-2-311(1)(f) through (1)(h), MCA, have been met only if a valid objection is filed. A valid objection is required to contain substantial credible information establishing to the satisfaction of the DNRC that the criteria in section 85-2-311(1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in section 85-2-311(1)(g), MCA, only the Department of Environmental Quality or a local water quality district established under Title 7, chapter 13, part 45, MCA, may file a valid objection. Section 85-2-311(5), MCA, provides that subject to section 85-2-360, MCA, to meet the preponderance of evidence standard, the applicant, in addition to other evidence demonstrating that the criteria in section 85-2-311(1), MCA, have been met, is required to submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the DNRC, the U.S. Geological Survey, or the U.S. Natural Resources Conservation Service and other specific field studies. Section 85-2-311(8), MCA, provides that for an application for ground water in a closed basin, the applicant is required to comply with the provisions of section 85-2-360, MCA, in addition to the requirements of section 85-2-311, MCA. Section 85-2-311, MCA, requires an application filed on or after May 3, 2007, to meet the requirements of section 85-2-360, MCA, which include a hydrogeologic assessment conducted pursuant to section 85-2-361, MCA, to predict whether the proposed appropriation right will result in a net depletion of surface water. Because the Bostwick application was filed on November 30, 2006, it was not subject to this statutory requirement.

The District Court concluded that the DNRC's correct and complete determination is based on probable, believable facts sufficient to support a reasonable legal theory upon which the DNRC should proceed with the issuance of a permit under Title 85, chapter 2, part 3, MCA. The District Court also determined that pursuant to section 85-2-310(3), MCA, the DNRC is authorized to issue a statement of opinion only if no objections are received to the application for

a permit. Because objections were received, the DNRC was not authorized to issue the statement of opinion. Because the objections were settled, the DNRC did not conduct a contested case hearing pursuant to section 85-2-309, MCA. The District Court stated that whatever route the application takes through the statutory process, the DNRC is required to decide whether the permit should be issued within the time allowed by law. Because the DNRC determined that the application was based on probable, believable facts sufficient to support a reasonable legal theory upon which the DNRC should proceed with the issuance of a permit under Title 85, chapter 2, part 3, MCA, and because the objections were settled, the DNRC had the clear legal duty to act on the permit application within the applicable statutory timeframe.

The District Court determined that when applying and enforcing the state water laws, the DNRC, like all other state agencies, can act only as authorized by the statutes enacted by the Legislature. The District Court concluded that the statutory time periods were enacted to safeguard the applicant's rights. The time periods are mandatory, and the DNRC cannot perform its official duty after the statutory time period has passed. Because the statutes require the DNRC to grant, deny, or condition an application within 180 days, the failure to act was a violation of a clear legal duty. Because objections were filed to Bostwick's application, the DNRC had no authority to issue a statement of opinion. Based upon its correct and complete determination with regard to Bostwick's application, the DNRC had to act on the application within 180 days. The District Court concluded that the correct and complete determination is a substantive decision and that based upon the DNRC's treatment of the Yellowstone Club application, the DNRC's treatment of Bostwick's application was arbitrary and capricious on both substantive and procedural grounds. The District Court issued a writ of mandamus directing the DNRC to perform the ministerial act of issuing the water use permit to Bostwick. The District Court noted the provisional nature of water use permits and the protections afforded by law to senior water rights under the prior appropriation doctrine. However, as discussed by the Committee, a call upon a junior water right for a community water system would likely precipitate a public health crisis making the call ineffective with regard to the community water use.