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Montana Legislative Services Division

Legal Services Office

TO: Water Policy Interim Committee
FROM: Cori Hach, Staff Attorney
RE: Summary of Recent Supreme Court Water Law Cases
DATE: February 28, 2020

The Chairman requested an overview of recent water law court decisions that may be of interest to the committee. For summaries of the cases that the Water Court has heard under its new authority to review Final Orders from the Department of Natural Resources & Conservation (DNRC), please refer to the December 16, 2019, memo that accompanied your January meeting packets. This memo focuses on cases that were decided by the Montana Supreme Court or are currently pending before the Montana Supreme Court. The memo is divided between water rights and water quality.

I. WATER RIGHTS CASES

Lyman Creek, LLC v. City of Bozeman, 2019 MT 243

Lyman Creek, LLC (Lyman) and the City of Bozeman (Bozeman) both own water rights originating in Lyman Creek, which is tributary to Bridger Creek, which is tributary to the East Gallatin River. In 2018, Lyman Creek, LLC, filed a complaint with DNRC alleging that Bozeman was diverting more water than permitted under its water right, diverting from an unauthorized location, increasing the period of use of its diversions, and diverting groundwater when only permitted to divert surface water. Importantly, Lyman did not claim that its water right was being injured by the alleged unlawful diversions by Bozeman. Lyman sought enforcement of the Montana Water Use Act, Title 85, chapter 2, MCA, (MWUA) and injunctive relief, i.e. an order stating that Bozeman was violating the MWUA and enjoining it from further diversions in excess of its water rights.

Bozeman filed a Motion to Dismiss, arguing that Section 85-2-114, MCA, does not provide a private right of enforcement through injunctive relief and therefore Lyman had no standing to sue. The District Court agreed and dismissed the case, finding that under Section 85-2-114, MCA, only the DNRC, the attorney general, or the county attorney is authorized to seek injunctive relief. The District Court relied on *Faust v. Utility Solutions*, LLC, 2007 MT 326, 340 Mont. 183, 173 P.3d 1183, a prior case that found that the MWUA does not provide a private right to enforce civil penalties.

The Supreme Court affirmed the District Court. The Court completed a four-factor analysis of whether there was an implied private right of enforcement.[1] First, it found that because private disputes arising from a water right are addressed in several other provisions within the MWUA, implying a private right of action for enforcement would not be consistent with the MWUA as a whole. Second, it found that the plain language of Section 85-2-114, MCA, did not support an interpretation that would imply a private right of action for enforcement. Third, the Supreme Court found that implying a right of action for enforcement would produce an absurd result by allowing junior appropriators to collaterally attack the water rights of senior users. Fourth, it found that the DNRC had not placed a statutory construction on Section 85-2-114, MCA. The Supreme Court also reviewed the legislative history of the statute and did not find a suggestion that the Legislature intended to imply a private right of action.

The Supreme Court noted in its conclusion that Lyman could have taken a different procedural avenue to obtain relief from Bozeman's allegedly unlawful diversions: Section 85-2-406, MCA, allows water users to petition the district court for supervision of the distribution of water among users.

Interplay with 2019 Senate Bill 296:

In response to the District Court's dismissal of the case, Senate Bill 296 was introduced during the 2019 Legislative Session to clarify a private right of action to enforce the MWUA. The bill passed and became effective on May 2, 2019.[2]

Senate Bill 296 underwent significant amendments during the legislative process. The introduced version of the bill would have created a new section of law stating that "[a] water right owner may file suit to enjoin waste, unlawful use, interference, or a violation of [the MWUA]".[3] The House Natural Resource Committee amended the bill so that instead of creating a new section, the bill added a new subsection to Section 85-2-114, MCA, stating "[t]he provisions of this section do not limit a water right owner from seeking relief, including injunctive relief, in district court under Title 27, chapter 19, or [the MWUA]".

Although it is clear from the legislative history that the bill was intended to create or clarify a private right of enforcement through injunction, due to the amendments the enacted language is slightly less straightforward. Senate Bill 296 was in effect by the time *Lyman Creek, LLC v. City of Bozeman* reached the Supreme Court, but because the legislation did not apply retroactively the Supreme Court did not consider the effect of the amendment to Section 85-2-114, MCA, during its analysis of the statute. For this reason, it remains to be seen what impact Senate Bill 296 will have on the private right of enforcement through injunction.

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[1] "This Court considers four factors when analyzing a statute to determine whether a private cause of action is implied: "(1) consistency within the statute as a whole; (2) the intent of the legislature considering the statute's plain language; (3) the avoidance of absurd results; and (4) any construction of the statute by the agency charged with its administration." Lyman Creek, 2019 at ¶ 17, 397 Mont. at 373, 450 P.3d at 876 (citing Faust, ¶ 24).

[2] https://leg.mt.gov/bills/2019/billpdf/SB0296.pdf

[3] https://leg.mt.gov/bills/2019/SB0299//SB0296_1.pdf

Klamert v. Iverson, 2019 MT 110

Gene Klamert holds five irrigation rights decreed for diversion in the Flatwillow Creek basin, all decreed in *Fraser v. Shields et al.*, No. 764 (10th Jud. Dist. Petroleum Cty. Sept. 26, 1953).

The water users with rights decreed by the *Fraser* decree formed the Flatwillow Improvement Association (FIA) to bill users and document water use. In addition, from 1980 to 2012, a water commissioner was appointed to distribute water in accordance with the *Fraser* decree.

In 2012, Klamert filed motions in Water Court to correct his water right claims. Daniel Iverson and the BLM filed objections. The Water Court later granted a motion to intervene by Wilks Ranch. Klamert reached a stipulation with the BLM and the remaining parties proceeded to a five-day evidentiary hearing before a Water Master. Iverson and Wilks Ranch's primary contention was that Klamert's water rights had been abandoned.

Pursuant to Section 85-2-404(2), MCA, if an objector can establish that a period of ten successive years of nonuse of water has occurred, a statutory presumption of intent to abandon arises and the burden shifts to the claimant to rebut the presumption. Iverson and Wilks Ranch claimed that neither Klamert nor his predecessors in interest had used the water rights between 1988 and 2004. They based this assertion on the fact that neither the water commissioner records nor the FIA records for that period showed that Klamert or his predecessors used water or were billed for water use.

At the evidentiary hearing, Klamert introduced evidence that water had been used despite the lack of records. This included testimony from witnesses claiming to have observed irrigation, as well as evidence regarding the incompleteness and lack of credibility of the water commissioner and FIA records. At the conclusion of the testimony, the Water Master found that Iverson and Wilks Ranch had failed to establish a continuous period of nonuse. The Water Court adopted the Water Master's Findings.

On Appeal, the Supreme Court upheld the Water Master and Water Court. It stated that "[w]hile relevant, the commissioner and FIA records are not dispositive" given the concerns with completeness and credibility of those records and the fact that there was substantial other evidence presented suggesting that water use occurred during the relevant time period. ¶ 21.

The Objectors also argued that even if water use had occurred, if the water rights were not asserted through the water commissioner it was "illegal use" outside the terms of the Fraser decree, and therefore could not be used to defeat a claim of abandonment. The Supreme Court disagreed with this argument, stating that equating failure to follow commissioner protocol with nonuse would be inconsistent with precedent.

Nondispositive Sidenote -- Supreme Court's Discussion of Standing:

Although irrelevant to the Supreme Court's conclusion on abandonment, the opinion contained a discussion of standing under Section 85-5-301, MCA. The Water Court had

mentioned that if the Objectors wanted to resolve Klamert's failure to report diversions to the water commissioner, they could have filed a complaint pursuant to Section 85-5-301, MCA, which provides:

> A person owning or using any of the waters of the stream or ditch or extension of the ditch who is dissatisfied with the method of distribution of the waters of the stream or ditch by the water commissioner or water commissioners and who claims to be entitled to more water than the person is receiving or to a right prior to that allowed the person by the water commissioner or water commissioners may file a written complaint, duly verified, setting forth the facts of the claim.[4]

However, the Supreme Court noted that this provision was probably too narrow to include the claims of Iverson and Wilks Ranch, citing to a discussion of this provision from *Luppold v. Lewis*, 172 Mont. 280, 285, 563 P.2d 538, 541 (1977):

> A careful reading indicates there are two means to achieve standing: First the user is dissatisfied with the method of distribution by the water commissioner and claims to be entitled to more water than he is receiving, or second, the user is dissatisfied with the method of distribution by the water commissioner and is entitled to a right prior to that allowed him by such water commissioner.

Because neither Iverson nor Wilks Ranch claimed to be entitled to more rights or water than they were receiving, the Supreme Court stated that their "circumstances place them outside the scope of either approach." However, because the Water Master and Water Court were not under any obligation to discuss alternative remedies, the Supreme Court declined to further address this issue.

United States (Department of Army Corps of Engineers) v. United States (Department of Army Corps of Engineers), 2019 MT 174.[5]

The City of Fort Peck (Fort Peck) claimed a volume of 1,500 acre-feet per year (AFY) for a municipal water right, which would amount to continuous, year-round diversions of 930 gallons per minute. During the claims examination process for the Missouri River Basin (Basin 40E), the DNRC added an issue remark to the claim questioning the claimed volume. The Water Court ordered Fort Peck to meet with the DNRC to attempt to resolve the issue remark. The parties failed to reach an agreement and the matter was set for trial.

In the pretrial order, the parties agreed that Fort Peck had satisfied two of the criteria in Section 85-2-227(4), MCA, and therefore qualified for the municipal presumption of nonabandonment, shifting the burden to the State of Montana to show that Fort Peck was entitled

[4] Klamert, 2019 MT 110 at ¶ 29, 395 Mont. at 431, 443 P.at 387.

[5] A note on why the case name does not include the City of Fort Peck: This case also included claim 40E 165372-00 by the United States of America (Army Corps of Engineers), filed for a municipal right for the same 1500 AFY volume and the same November 23, 1934, priority date. On January 7, 2016, the Water Court consolidated claims 40E 182897-00 and 40E 165372-00. During case proceedings, the United States withdrew claim 40E 165372-00 as a duplicate of claim 40E 182897-00.

to a volume other than the 1,500 AFY claimed. The parties also stipulated that Fort Peck's actual historical beneficial use was 223 AFY, and that the volume to which Fort Peck was entitled was its actual historical beneficial use plus a volume for future use commensurate with its reasonably anticipated future needs.

After trial, the Water Court found that the State of Montana had presented sufficient evidence to overcome Fort Peck's presumption of nonabandonment, and it decreed the volume of the water right as 171 AFY for current use and reasonably foreseeable future use.

Fort Peck appealed the order, arguing that based on the pretrial order it could not have anticipated that its water right would be reduced below the stipulated historical beneficial use of 223 AFY. In other words, it argued that by considering the town's current use, rather than its historical use, the Water Court deprived Fort Peck of its due process right to defend its current use or present evidence regarding abandonment of the historical volume.

The Supreme Court upheld the Water Court's ruling. It found that Section 85-2-227, MCA, provides courts with broad power to determine whether all or part of an existing water right has been abandoned. Historical use, without more, does not insulate a claim from a finding of partial or total abandonment. The Supreme Court noted that while many municipalities benefit from the Growing Cities Doctrine in the sense that a claim may exceed demonstrable historical use because future increase in population is expected, "[t]he difficulty presented for Fort Peck is that its population has been declining and its water use has been declining from historical levels." Fort Peck's population dropped from about 10,000 people during the 1930's to its present population of 251 people. This holding may have implications for other municipalities relying on the Growing Cities Doctrine to secure water rights while experiencing decreasing population or water use.

Pending before Supreme Court -- Clark Fork Coalition v. DNRC, DA 19-0484

On January 29, 2018, the DNRC issued a final order granting a beneficial water use permit to RC Resources, Inc., to appropriate groundwater for mining operations in northwest Montana. A coalition of nonprofit organizations that had objected to the permit application during the administrative proceeding subsequently petitioned the District Court for Lewis and Clark County to review the DNRC's Final Order under the Montana Administrative Procedure Act (MAPA). On April 9, 2019, the District Court issued its Order on Petition for Judicial Review reversing the DNRC's Final Order and remanding the petition for further consideration consistent with the decision.

The District Court's reversal turned on its analysis of what "existing legal demands on the source of supply" means in the context of Section 85-2-311(1)(a)(ii), MCA. RC Resources argued that "existing legal demands" meant only existing appropriations that would be senior to the new water permit if granted. The objectors argued that "existing legal demands" included not only existing water rights, but also impacted streams that would be depleted by the proposed diversions. Specifically, the objectors argued that certain streams in the Cabinet Mountain Wilderness would be dewatered or depleted.

The DNRC hearing examiner agreed with RC Resources that only existing water rights need be included in the legal availability analysis. The District Court disagreed. It found that the term "legal demands" as used in Section 85-2-311(1)(a), MCA, is different from the phrase "water rights of a prior appropriator" as used in Section 85-2-311(1)(b), MCA, and therefore it was necessary to presume that a different meaning was intended by the Legislature. The District Court further found that the Cabinet Mountain Wilderness streams were "outstanding resource waters" (ORWs) meriting protection pursuant to Section 75-5-315(1), MCA.

The District Court found that protection of the public interest was a significant purpose of the Montana Water Use Act and that protecting ORWs from dewatering was a matter of public interest. Therefore, it concluded that "dewatering Outstanding Resource Waters is a known legal demand on the water to be appropriated in this case and must be included in the analysis of legal availability of water prior to issuing a permit granting an appropriation to RC Resources." Order of Petition for Judicial Review, Cause No. CVD-2018-150, p. 12. The District Court reversed the DNRC order and remanded with instructions to include an analysis of the impact of the proposed diversion on the Cabinet Mountain Wilderness ORWs.

Appeal to Montana Supreme Court

RC Resources, Inc., and the DNRC appealed the District Court's ruling to the Montana Supreme Court. The DNRC and RC Resources filed opening briefs in December of 2019, and the coalition of objectors filed a response brief on February 14, 2020. Reply briefs from the DNRC and RC Resources are due on March 30, 2020.[6] In addition, a number of amicus briefs have been filed.

II. WATER QUALITY CASES

Montana Environmental Information Center, et al. v. Department of Environmental Quality, 2019 MT 213

In 2012, the Montana Department of Environmental Quality (DEQ) issued Western Energy Company (Western) a Montana Pollutant Discharge Elimination System Permit (MPDES Permit) to discharge pollutants from the Rosebud Mine near Colstrip, Montana, into waters tributary to the Yellowstone River. The Montana Environmental Information Center (MEIC) and Sierra Club sued in District Court for a declaratory judgment invalidating the MPDES Permit for violations of the Montana Water Quality Act (WQA) and federal Clean Water Act (CWA). In 2014, DEQ modified the MPDES Permit upon appeal by Western. The District Court agreed to consider the 2014 modifications in the declaratory judgment action, and the case proceeded to oral argument on April 22, 2015.

The District Court found that DEQ had unlawfully reclassified certain waters from "C-3" classification to "ephemeral" classification without following proper procedure, that its approval of Western's monitoring protocol was arbitrary and capricious, unsupported, and unlawful, and

[6] To access filings in this case, enter DA 19-0484 in the "Case Number" field under the Active Dockets search at https://appecm.mt.gov/PerceptiveJUDDocket/

that certain unacceptable procedural irregularities existed. For these reasons, the District Court invalidated Western's modified MDPES Permit and remanded it to DEQ for reconsideration.

DEQ and Western appealed to the Supreme Court, which reversed in part and remanded to the District Court for additional fact finding. The Supreme Court began its analysis by describing the appropriate standard of review. Because the proceeding did not involve a contested case, the Montana Administrative Procedure Act (MAPA) was inapplicable. Noting that the scientific and technical expertise of the DEQ was "beyond the grasp of the Court," the Supreme Court stated that it was required to afford great deference to agency decisions where "substantial agency expertise" was implicated. Therefore, it stated the scope of its review as follows:

> Our de novo review of a non-MAPA administrative decision is therefore narrow and limited to: (1) whether the agency erred in law; or (2) whether the agency's decision is wholly unsupported by the evidence or clearly arbitrary or capricious.[7]

Specifically discussing judicial review of the DEQ's interpretation of its regulations, the Supreme Court stated that its role is to consider the range of reasonable interpretation permitted by the regulation's wording, and to defer to the agency's interpretation unless it is plainly inconsistent with the spirit of the rule. Specifically discussing judicial review of agency action, the Supreme Court stated that a court should defer to agency decisionmaking unless the action is "so at odds with the information gathered" as to be arbitrary and capricious.

Applying this standard of review to the DEQ's issuance of the modified MPDES Permit, the Supreme Court found that the District Court had not shown the proper level of deference to the DEQ's interpretation of its administrative rules. Whereas the District Court had held that it was improper for the DEQ to exempt ephemeral streams from certain water quality standards without going through the reclassification procedures, the Supreme Court held that DEQ's interpretation of the relevant administrative provision was consistent with the spirit of the WQA and accompanying regulations. Therefore, it was improper for the District Court to hold that the DEQ had erred as a matter of law.

The remaining two issues were: (1) whether the DEQ acted arbitrarily and capriciously in establishing water quality standards for a certain creek when there was evidence that the creek flowed intermittently, and (2) whether the DEQ allowing a representative monitoring protocol was unlawful or arbitrary and capricious.

On the first issue, the Supreme Court found that there were issues of material fact that prevented it from determining whether agency deference was appropriate in this circumstance. It remanded to the District Court for further factfinding.

On the second issue, the Supreme Court found that the DEQ had not acted unlawfully in generally determining that a representative monitoring protocol was appropriate to the situation. However, the Supreme Court found that the information contained in the record was insufficient to support a conclusion that the specific protocol permitted was representative of the specific

[7] MEIC, 2019 MT 213, ¶ 21, 397 Mont. at, 175, 451 P.3d at 500.

monitored activity. The Supreme Court reversed the District Court on the issue of representative monitoring generally, but remanded for further factfinding on the issue of whether the specific protocol permitted was representative of the monitored activity.

Pending Before Supreme Court -- MEIC v. DEQ, DA 19-0553

Another DEQ MPDES Permit renewal case is currently being briefed before the Supreme Court. The procedural history is very similar to the *Western* case described above. The DEQ issued a renewal of a MPDES Permit to Montanore Minerals Corporation (Montanore) in 2017. MEIC, Save Our Cabinets, and Earthworks challenged the renewal with a declaratory judgment action in District Court. The District Court granted summary judgment to MEIC and the other challengers, invalidating the entire MPDES Permit renewal and finding that DEQ had acted unlawfully, arbitrarily, and capriciously in issuing it.

Montanore and the DEQ appealed the District Court's ruling to the Montana Supreme Court. The Supreme Court will undoubtedly apply the same standard of review that it used in the *Western* case. DEQ and Montanore filed their opening briefs in January of 2020, and it is expected that MEIC and the other challengers will file response briefs by April 10, 2020.