

OPINION AND DECISION

**MONTANA RIVER ACTION NETWORK, PAUL SHENNUM, ROSELEE FAUST,
and WEST GALLATIN CANAL COMPANY, Petitioners, v. MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION and
UTILITY SOLUTIONS, LLC, Respondents, BLACK BULL RUN
DEVELOPMENT, LLC, and CIRCLE F, LLC, Intervenors-Respondents.**

Cause No.: CDV-2007-602

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

2008 Mont. Dist. LEXIS 676

November 7, 2008, Decided

PRIOR HISTORY: *Mont. River Action Network v. Mt. DNRC, 2008 Mont. Dist. LEXIS 103 (2008)*

JUDGES: [*1] THOMAS C. HONZEL, District Court Judge.

OPINION BY: THOMAS C. HONZEL

OPINION

MEMORANDUM AND ORDER ON PETITION FOR JUDICIAL REVIEW OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41H-30019215

P1. In this action, Petitioners' seek judicial review of the final order entered July 24, 2007, by Respondent Montana Department of Natural Resources and Conservation (DNRC), which granted Respondent Utility Solutions, LLC's (Utility Solutions), application for beneficial water use permit No. 41H-30019215. Also before the Court is DNRC's motion to dismiss Petitioners' claim under the Montana Environment Policy Act (MEPA). The matters were heard July 30, 2008. The Court concludes that the final order should be affirmed and that DNRC's motion to dismiss the MEPA claim should be granted.

BACKGROUND

P2. Petitioner Montana River Action Network is a non-profit organization established to protect Montana's rivers and other water resources from dewatering and degradation. Petitioners Paul Shennum and Roselee Faust are residents of Gallatin County, Montana, and are owners of land and water rights in the Four Corners area of Gallatin County. Petitioner West Gallatin Canal Company manages the appropriation of irrigation water [*2] for approximately 5,000 acres in Gallatin County. DNRC is the Montana state agency responsible for issuing permits to appropriate ground water. Utility Solutions is engaged in building and operating central

water and wastewater systems.

P3. In 1993, in response to over appropriation of ground water, the Montana legislature enacted the upper Missouri River basin closure law, *Sections 85-2-342 and -343, MCA (2005)*. Subject to certain exceptions, the basin closure law prohibits DNRC from granting a permit application to appropriate ground water within the Missouri River basin upstream from the Morony Dam near Great Falls, Montana. The West Gallatin River, a tributary of the upper Missouri River, is subject to the basin closure law.

P4. On January 1, 2005, DNRC adopted *Rule 36.12.101(39), ARM (2005)*, which defined municipal use as "water appropriated by and provided for those in and around a municipality or an unincorporated town." DNRC had not previously adopted a rule defining municipal use.

P5. In January 2006, Utility Solutions filed with DNRC its application for beneficial water use permit No. 41H-30019215 (permit application) for the appropriation of ground water near the West Gallatin [*3] River in the Four Corners area of Gallatin County. The permit application sought to supply potable and fire suppression water and wastewater to Intervenor-Respondent Black Bull Run Development, LLC's, Black Bull Run subdivision and Intervenor-Respondent Circle F, LLC's, Middle Creek Parklands subdivision (Intervenors).

P6. In March 2006, Utility Solutions filed its application No. 41H-30021139 to change decreed water right Nos. 41H-12231-00 and 41H-12232-00 (change application). The change application was filed to change irrigation water rights held by Utility Solutions in order to offset any depletion to the West Gallatin River that might occur if the permit application were granted.

P7. Petitioners objected to both applications. Separate contested case hearings were held, and Petitioners participated in both hearings.

P8. DNRC repealed *Rule 36.12.101(39), ARM* (2005), effective June 1, 2006. The repeal was based on DNRC's determination that the rule was not in line with the historical interpretation of municipal use by the Montana Water Court and DNRC's previous interpretations. In response, Faust, Sandy McManus, and James C. Lohmeier filed a separate action against DNRC, seeking [*4] a declaratory ruling that DNRC's repeal of *Rule 36.12.101(39) ARM* (2005), was invalid because it violated *Section 2-4-506, MCA*. That action was assigned to Judge Dorothy McCarter of the Montana First Judicial District Court, Cause No. ADV-2006454. On March 27, 2007, Judge McCarter issued her decision and order, holding: The Court concludes that the legislature intended to preserve the existing water rights by closing the Upper Missouri River Basin to new appropriations. The exceptions to the closure must be interpreted narrowly to comply with the legislative intent. The repeal of the narrowly defined term "municipal use" in order to enable DNRC to apply a more liberal definition contravened the legislative intent and placed the existing water rights of Plaintiffs in jeopardy. Therefore, Plaintiffs are entitled to summary judgment. *Lohmeier v. Mont. Dep't of Natural Res., 2007 Mont. Dist. LEXIS 74, P20 (March 27, 2007)*. DNRC appealed that decision to the Montana Supreme Court.

P9. On July 24, 2007, the hearing examiner issued his final orders on both the permit and the change applications. The first order conditionally granted Utility Solutions the right to appropriate 373 gallons per [*5] minute and up to 194.6 acre-feet of ground water per year under the permit application. The hearing examiner held that the application was granted under the municipal use exception to the basin closure law. *Section 85-2-343(2)(c), MCA* (2005). Significantly, the final order conditioned the permit on augmentation to offset the impact to the West Gallatin River. The second order granted Utility Solutions' change application, effectively changing Utility Solutions' irrigation water rights to be used for augmentation purposes in relation to the permit.

P10. In August 2007, Petitioners filed their petition for judicial review pursuant to the Montana Administrative Procedures Act (MAPA), *Section 2-4-701, et seq., MCA*. The petition was filed for both the permit and the change applications. The petition sought: 1) a stay of both DNRC's final orders until judicial review has been completed, *Section 2-4-702(3), MCA*; 2) reversal of DNRC's final orders; and 3) a writ of mandamus to stop DNRC from processing ground water permit applications.

P11. DNRC moved to dismiss Petitioners' request for a writ of mandamus and to bifurcate the petition into two separate proceedings. By order entered February [*6] 26, 2008, the Court granted the motion to dismiss Petitioners' claim for a writ of mandamus. It also granted

DNRC's motion to bifurcate the petition. By separate Memorandum and Order issued this same date, the Court has addressed the change application.

P12. On September 3, 2008, the supreme court issued its decision in *Lohmeier v. Mont. Dep't of Natural Res., 2008 MT 307, 346 Mont. 23, 192 P.3d 1137*. In it, the court reversed Judge McCarter's decision, holding that DNRC did not violate *Section 2-4-506, MCA*, in its repeal of *Rule 36.12.101(39), ARM* (2005). *Id., P32*.

STANDARD OF REVIEW

P13. A district court's review of an administrative agency's final order is governed by the Montana Administrative Procedure Act. The standard of review is set forth in *Section 2-4-704(2), MCA*, which provides: The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because: (a) the administrative findings, inferences, conclusions, or decisions are: [*7] (i) in violation of constitutional or statutory provisions; (ii) in excess of the statutory authority of the agency; (iii) made upon unlawful procedure; (iv) affected by other error of law; (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (b) findings of fact, upon issues essential to the decision, were not made although requested.

P14. A district court reviews a contested administrative decision "to determine whether findings of fact are clearly erroneous and whether the agency correctly interpreted the law." *O'Neill v. Dep't of Revenue, 2002 MT 130, P10, 310 Mont. 148, 49 P.3d 43*.

DISCUSSION

P15. Petitioners seek judicial review on four issues: 1) whether the final order violates the basin closure law; 2) whether the basin closure law prohibits augmentation; 3) whether DNRC's decision in granting the permit application under the municipal use exception was arbitrary and capricious; and 4) whether DNRC violated the Montana Environmental Policy Act (MEPA), *Section 75-1-101, et seq., MCA*. 1. Upper Missouri River [*8] Basin Closure Law

P16. *Section 85-2-343(1), MCA* (2005), states that "the department may not process or grant an application for a permit to appropriate water or for a reservation to reserve water within the upper Missouri River basin until the final decrees have been issued. . . ." However, there are several exceptions to the general ban on processing or granting an application, including "an application for a

permit to appropriate water for domestic, municipal, or stock use." *Section 85-2-343(2)(c), MCA (2005)* (emphasis supplied).

P17. Petitioners argue that the term "municipality" is defined at *Section 7-1-4121(9), MCA*, as "an entity that incorporates as a city or town." Under *Section 1-2-107, MCA*, when the meaning of a word or phrase is defined in any part of the code, the definition is applicable to the same word or phrase wherever it occurs. Petitioners contend that when the definition of municipality is applied to Utility Solutions, it does not qualify as municipality because it is neither a city nor a town; rather it is a private company. Petitioners also argue that DNRC's broad interpretation of the municipal use exception undermines the purpose of the basin closure law and [*9] the Montana Supreme Court's statements in *Mont. Trout Unlimited v. Mont. Dep't of Natural Res., 2006 MT 72, 331 Mont. 483, 133 P.3d 224*. They contend that Judge McCarter's decision and order correctly applied the basin closure law by narrowly interpreting the municipal use exception in order to preserve existing water rights. Accordingly, the hearings examiner erred in concluding that the ground water permit application fell under the municipal use exception.

P18. Respondents argue that the Court should look to the 1999 amendment to *Section 85-2-227(4), MCA*, which addresses the abandonment of a water right. The 1999 amendment added *subsection 4* which states "the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in *75-6-102*, is presumed to not be abandoned. . . ." In this case, the proposed use of the ground water is for high density domestic use, a golf course, clubhouse and restaurant, and fire suppression, all of which are municipal uses.

P19. Relying on *Pollard v. Mont. Liquor Control Bd., 114 Mont. 44, 131 P.2d 974 (1942)*, Respondents further argue that [*10] the final order is supported by evidence that the groundwater to be appropriated would be used by persons in close geographical proximity to Bozeman, Montana, a municipality, and Four Corners, an unincorporated town. Respondents also argue that in defining municipal use, the focus is on the use of the water, not the character of the water user, and that DNRC has issued other permits for municipal uses to a wide variety of entities, including private companies and individuals.

P20. The dispositive issue is whether Utility Solutions' permit application falls under the municipal use exception. Subsequent to the hearing, the Montana Supreme Court issued its decision in *Lohmeier v. Mont. Dep't of Natural Res., supra*. The supreme court reversed Judge McCarter's decision, holding that DNRC did not violate *Section 2-4-506, MCA*, in repealing *Rule*

36.12.101(39), ARM (2005). Id., P32. In coming to its conclusion, the supreme court reasoned: In 1993, the upper Missouri River basin closure law was the third basin closure law to be enacted and the second that contained an exception for municipal use. However, the Legislature again declined to define the term. "Where the Legislature acquiesces in [*11] long-standing agency interpretation of a statute and takes no action to inform that interpretation, the court will presume that the Department has properly interpreted the law." We must conclude that when the Legislature enacted the basin closure law, it was aware of and--declining to define municipal use--acquiesced in the agency's prior interpretations of the term. We also presume the Legislature to know the contents of the code. As noted above, *§ 85-2-227(4), MCA*, incorporates within the concept use by private entities that operate public water supply systems. Thus, the character of the use rather than the character of the applicant has been the defining factor in determining whether an application could be considered as one within the municipal use category; historically, therefore, private entities could qualify as municipal users as long as those entities were operating public water supplies. Only after the DNRC adopted Admin. R. M. 36.12.101(39) (2005) was the interpretation of municipal use called into question. Eighteen months after its adoption, the regulation was repealed and the meaning of municipal use reverted to an agency interpretation, as applications were reviewed [*12] on a case-by-case basis. The regulation defining municipal use was not in effect for more than a year and a half. Eighteen months is not enough time for the agency to have instilled reliance in the public, whereas the time between the enactment of the basin closure law in 1993 and the promulgation of the new definition in 2005 is sufficient time to create reliance in the public and those having an interest in the operation of public water supply systems. *Id., PP28-30* (emphasis added) (citations omitted).

P21. The supreme court recognized that between 1973, when the Montana Water Use Act (MWUA) was enacted, and 1993, when the upper Missouri River basin closure law was enacted, DNRC granted applications to private entities which sought to supply water to the public. *Id., P20*. The court also noted that after the closed basin law was enacted, municipal use remained undefined, except for *Section 85-2-227(4), MCA (2005)*, which described municipal use. However, DNRC continued to process permit applications on a case by case basis, with the determination of whether the municipal use exception applied being driven by the facts of each case. *Id.*

P22. Based on *Lohmeier*, whether a permit application [*13] is properly granted under the municipal use exception, the focus is on the use of the water, not the user. Accordingly, a private entity can

qualify as a municipal user if the entity is supplying water to the public. *Id.*, P29. Here, in the hearing examiner's proposal for decision he noted that the proposed use for the ground water was "a high density use for domestic, commercial, industrial, firefighting, parks etc. of the type normally found in a municipal use." In his final order, he rejected Petitioners' contentions that Utility Solutions' use was not a municipal use. Petitioners have not presented evidence that the ground water will be appropriated for anything other than municipal use. Therefore, the Court concludes that in his final order, the hearing examiner correctly determined that Utility Solutions' proposed use of the ground water permit is for a municipal use. 2. Augmentation Under the Basin Closure Law and the Montana Water Use Act

P23. In granting Utility Solutions' permit application, the hearing examiner required augmentation to offset any depletion to the West Gallatin River. Petitioners argue that the hearing examiner erred as a matter of law by relying on augmentation [*14] as a means to offset ground water depletion. First, they contend that the upper Missouri River basin closure statutes do not authorize augmentation. While *Section 85-2-337(3), MCA* (2005), allows for augmentation, it is only permissible in the upper Clark Fork River basin, not in the upper Missouri River basin. Second, Petitioners contend that augmentation violates the MWUA because under *Section 85-2-311, MCA* (2005), an application for the appropriation of water cannot adversely affect a senior appropriator.

P24. Respondents contend that the hearing examiner correctly determined that augmentation is a permissible means to replace ground water in the West Gallatin River so that senior water right holders are not adversely affected. They argue that the augmentation plan proffered by Utility Solutions is intended to satisfy *Section 85-2-311(1)(a)(ii) and (b), MCA* (2005), and is not being used as an exception to the closed basin statutes. While the basin closure statutes, *Sections 85-2-342 and -343, MCA* (2005), only address new appropriations, the MWUA expressly allows an existing water right to be changed under *Section 85-2-402, MCA* (2005). In this case, the change of water right is being [*15] sought by Utility Solutions for augmentation purposes. Additionally, the upper Missouri River basin closure administrative rules expressly recognize augmentation plans. Finally, DNRC's approval of augmentation plans in other permit applications, as well as Montana law supporting augmentation, provide a legal basis for the hearing examiner conditioning Utility Solutions' permit application on augmentation. As a result, Respondents maintain that the hearing examiner correctly determined that augmentation is permissible means to protect senior water right holders.

25. Under *Section 85-2-311, MCA*, the burden is

placed on the applicant to establish by a preponderance of the evidence several criteria, including that "the water rights of a prior appropriator under an existing water right . . . will not be adversely affected." *Section 85-2-311(1)(b), MCA*. Further, DNRC "may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in *85-2-311. . . .*" *Section 85-2-312(1), MCA* (2005). Here, the hearing examiner expressly conditioned the permit on augmentation in order to ensure that senior water rights are not adversely affected. [*16] Although, Utility Solutions' permit application is for the appropriation of ground water in a closed basin, DNRC by administrative rule permits augmentation in a closed basin. *Rule 36.12.120(6), ARM* (2005), states: "Augmentation plans are allowed in basin closure areas. An augmentation plan must mitigate the effects to the surface water source that would be depleted because of a proposed application." (Emphasis added.) DNRC in other cases has approved of augmentation to offset potential water depletions. Other than arguing that *Sections 85-2-342 and -343, MCA* (2005), do not expressly provide for augmentation similar to *Section 85-2-337(3), MCA* (2005), Petitioners have not presented any legal basis that DNRC cannot condition a beneficial use permit application on augmentation. Indeed, the permit application is entirely dependent on Utility Solutions obtaining the change of water right under the change permit. Therefore, the Court concludes that the hearing examiner correctly determined that augmentation is permissible. 3. Whether DNRC's Actions Were Arbitrary and Capricious

P26. Because the Court has determined that the final order does not violate the basin closure law, it is not necessary [*17] to address this issue. 4. The Montana Environmental Policy Act

P27. Petitioners assert that DNRC violated MEPA by preparing an environmental assessment instead of an environmental impact statement. Additionally, DNRC erred by not completing a cumulative impact analysis as required by *Rules 36.2.524 and 36.2.529, ARM*, and DNRC failed to analyze the correct number of wells. DNRC has moved to dismiss the claim, contending the Court lacks subject matter jurisdiction to hear it.

P28. The final order states in relevant part: The Department [DNRC] file contains an environmental assessment which addressed cumulative impacts, in the absence of the Applicant's proposed augmentation plan to mitigate impacts. The adequacy of the Department EA is an issue outside the scope of this Hearing Examiner's authority. The issues for which he was appointed are "whether the appropriation for which the Applicant has applied meets the required statutory criteria of *Mont. Code Ann. § 85-2-311*, and whether one of the exceptions in *Mont. Code Ann. § 85-2-343(2)* applies."

P29. *Section 75-1-201(6)(a)(i), MCA*, states: "A

challenge to an agency action under [MEPA] may only be brought against a final agency action [*18] and may only be brought in district court or in federal court, whichever is appropriate."

P30. The hearing examiner was correct in declining to examine the substance of DNRC's environmental assessment because he was without jurisdiction. Under *Section 75-1-201(6)(a)(i), MCA*, Petitioners were required to bring a separate action in district court or federal court to challenge the findings in DNRC's environmental assessment. See *Pompeys Pillar Historical Ass'n v. Mont. Dep't. of Env'tl. Quality, 2002 MT 352, PP20-21, 313 Mont. 401, 61 P.3d 148*. Because Petitioners have improperly included a MEPA claim in their petition for judicial review, the Court concludes that the MEPA claim should be dismissed.

P31. For these reasons,

P32. IT IS ORDERED that:

P33. 1. The final order entered July 24, 2007, by the Montana Department of Natural Resources and Conservation granting Utility Solutions' application for beneficial water use permit No. 41H-30019215 IS AFFIRMED.

P34. 2. Petitioners' claim that the Montana Department of Natural Resources and Conservation violated the Montana Environmental Policy Act IS DISMISSED.

DATED this 7th day of November 2008.

THOMAS C. HONZEL, District Court Judge