

6-14-2020

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Brent Mead
Alexander Blewett III School of Law

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Recommended Citation

Brent Mead, PREVIEW; City of Bozeman v. Montana Department of Natural Resources and Conservation, and Utility Solutions, LLC.: *Water and Where You can Use It*, 80 Mont. L. Rev. Online 133 (2020), https://scholarship.law.umt.edu/mlr_online/vol80/iss1/17.

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PREVIEW; *City of Bozeman v. Montana Department of Natural Resources and Conservation, and Utility Solutions, LLC: Water and Where You can Use It*

Brent Mead*

The Montana Supreme Court is scheduled to hear oral argument on this matter June 17, 2020 at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Peter Scott is likely to appear for the Appellant City of Bozeman (“City”), Matthew Williams is likely to appear for the Appellee Utility Solutions, LLC (“US”), and either Barbara Chillcott or Cameron S. Boster are likely to appear for Appellee Montana Department of Natural Resources and Conservation (“DNRC”).

I. INTRODUCTION

This case involves the intersection of Montana’s planning statutes and water law. The central issue is whether a change of use proposal under Montana’s Water Use Act (“MWUA”)¹ that results in the geographic overlap of the place of use with a city’s duly adopted growth policy² constitute an “adverse effect” to the city’s water rights held for that planned use according to the growth policy.³ Additionally, the City alleges DNRC’s final order erroneously relied upon inaccurate geographic information in US’s change application that results in overlapping service areas.⁴ This case will provide clarity regarding the scope of municipal authority under valid growth policies.

II. FACTUAL AND PROCEDURAL BACKGROUND

This dispute arises from US and the City’s competing plans to provide municipal water systems to an area outside the current Bozeman city limits (“Disputed Area”).⁵ The Disputed Area lies in a water basin closed to new water rights appropriations.⁶ US owns Beneficial Water Use Permit No. 41H 30046241 (the “Provisional Permit”), an unperfected permit, to appropriate and provide 1,140.68 acre–feet of water per year for municipal purposes in the Four Corners area of Gallatin County.⁷ On March 27, 2017, US submitted a Change Application with DNRC to change the Provisional Permit’s place of use to fill in purported service

* J.D. Candidate, University of Montana School of Law Class of 2021.

¹ MONT. CODE ANN. §§ 85–1–101 through 8–811. (2019).

² MONT. CODE ANN. §§ 76–1–601 through 607. (2019).

³ Appellant’s Opening Br. at 1, *City of Bozeman v. DNRC* (Jan. 13, 2020) (No. DA 19-0680).

⁴ *Id.* at 1.

⁵ *Id.*

⁶ *Id.* at 32–33.

⁷ Order on Petition for Judicial Review, *City of Bozeman v. DNRC* (Nov. 5, 2019) (No. DV-18-1323B).

gaps between US's current service area and the service areas of the cities of Belgrade and Bozeman including the Disputed Area pursuant to the MWUA.⁸ Pursuant to Montana Code Annotated § 76–1–101, the City adopted the Bozeman Community Plan as its growth policy in 2009.⁹ In July 2017, the City expanded its growth policy to include an area covering the Disputed Area under its 2017 Water Facility Plan.¹⁰ The Disputed Area constitutes approximately 2,600 acres of overlap between the City's growth policy and US's authorized place of use for its Provision Permit after its change application.¹¹

The application was deemed correct and complete on September 22, 2017, and on January 19, 2018, DNRC issued a Preliminary Determination ("PD") to grant the change.¹² The City timely filed an objection to the PD based upon "adverse effects" to the City's planned water use under its growth policy. DNRC appointed a hearing examiner and held a contested case hearing under the Montana Administrative Procedure Act ("MAPA")¹³. After both the City and US fully briefed the matter, DNRC issued its Final Order on November 29, 2018, granting the change application provided in the PD.¹⁴

The City filed a petition for judicial review of the final order on December 21, 2018.¹⁵ The Eighteenth Judicial District Court in Gallatin County held oral arguments on August 8, 2019.¹⁶ The City again argued that US's change application "adversely affects" the City's plan to provide municipal water to the Disputed Area.¹⁷ On August 29, 2019, the district court ruled that the MWUA did not protect the City's interest and affirmed the Final Order from the DNRC.¹⁸ The City now appeals from that order.¹⁹

III. SUMMARY OF ARGUMENTS

A. Appellant City of Bozeman's Argument

The City argues DNRC erred in granting the PD, and the district court erred in affirming the PD, because the City had a recognized planned use

⁸ *Id.* at 2.

⁹ Appellant's Opening Br. *supra* note 3, at 2–3.

¹⁰ Order on Petition for Judicial Review, *supra* note 7, at 3.

¹¹ *Id.*

¹² Appellant's Opening Br. *supra* note 3, at 3.

¹³ MONT. CODE ANN. §§ 2–4–601 through 631 (2019).

¹⁴ Appellee's (DNRC) Response Br. at 2–3, *City of Bozeman v. DNRC* (Feb 11, 2020) (No. DA 19-0680).

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 3–4.

¹⁹ *Id.* at 4.

of water in the Disputed Area that would be adversely affected by the US change application.²⁰

First, the City raises a preliminary issue that the PD was based on false information and should be denied on those grounds.²¹ The stated purpose of US's change application was to close a gap in municipal service areas between Belgrade, Bozeman, and the Rae County Water and Sewer District²². US provided DNRC a map that used Bozeman's 2001 Growth Policy planning boundary, instead of the 2009 Growth Policy.²³ If DNRC used the 2017 Water Facility Plan update to the 2009 Growth Policy maps instead, then there would be no gap in service in the Disputed Area, as that area is subject to a planned use by the City.²⁴ The City argues that because DNRC relied on these maps, the agency's decision is unsupported by substantial evidence and is a clearly erroneous in violation of MAPA.²⁵ Contrary to the hearing officer's findings, the Disputed Area's resulting service overlap violates established precedent that prohibits such service area overlaps and harms the City's ability to build out its public infrastructure network in an efficient manner.²⁶ The City asks the Court to either reverse the district court and deny the application or modify DNRC's final order to exclude the City's 2017 planning boundary.²⁷

Next, the City argues that MWUA's "adverse effect" language protects both water rights and other interests.²⁸ § 85-2-402(2)(a) requires applicants to show their change in use "will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued."²⁹ This language prohibits interference with both the water source and the planned place of use for that water.³⁰ The 2009 growth policy, with its 2017 amendments, constitutes a planned use of water that is protected from diminishment of the source and diminishment of the City's interest in the planned place of use.³¹ Further, the City argues that its agreements with DNRC for water from the Hyalite Reservoir constitute a legal right to use water for the planned use in the Disputed Area.³² Thus, the City planned use in the

²⁰ Appellant's Opening Br. *supra* note 3, at 9.

²¹ *Id.* at 11.

²² *Id.*

²³ *Id.* at 12-13.

²⁴ *Id.* at 12.

²⁵ *Id.* at 14-15.

²⁶ *Id.*, at 15 (citing *Billings v. Pub. Serv. Comm'n of Montana*, 631 P.2d 1295, 1302 (1981)).

²⁷ *Id.* at 16.

²⁸ *Id.* at 17-18.

²⁹ MONT. CODE ANN. § 85-2-402(2)(a) (2019).

³⁰ Appellant's Opening Br. *supra* note 3, at 19.

³¹ *Id.* at 8-9.

³² *Id.* at 28-30.

Disputed Area should be protected from adverse effects under the change application statute.

The City argues MWUA protects existing water rights both in protection from diminishment of the source and in diminishing the interest in the planned place of use for the water.³³ Here, the City acknowledges that they will not suffer any diminishment from any water source.³⁴ However, the City argues that the change application statute clearly protects the place of use for a water right, and the way municipalities acquire an interest in the place of use is through the adoption of growth policies.³⁵ DNRC guidance for municipalities states that cities may satisfy MWUA's possessory interest requirement for a water right by adopting a growth policy.³⁶ Therefore, because the City adopted such a policy, it has a recognized possessory interest in the Disputed Area that should have been protected from adverse effects.³⁷ The growth policy statutes and MWUA should be read together to protect municipal interests in sound planning decisions. The City contends that this is what DNRC guidance does and that this interaction is within the legislative intent and meaning of the change application statute.³⁸

Finally, the City cites to MWUA expression of legislative intent that its provisions be given a liberal interpretation³⁹ to urge the Court to recognize and reward beneficial municipal planning under the plain language of the statute.⁴⁰ The City argues because it has invested substantial sums in the growth policy planning and eventual execution, that expenditure of public funds should be protected from a change application that would result in a less efficient deployment of public infrastructure.⁴¹ Further, because of the length of time between the adoption of a growth policy and the perfection of the planned use, that planned use must be afforded some protection as not to undermine the public investment.⁴²

B. Appellee US's Argument

US argues because its change application does not diminish water available to the City, nor impair the City's ability to deliver that water to the Disputed Area, DNRC's PD was correct.⁴³ US characterizes the City's

³³ *Id.* at 22–23.

³⁴ *Id.*, at 19.

³⁵ *Id.* at 8–9.

³⁶ *Id.* at 4.

³⁷ *Id.* at 28.

³⁸ *Id.* at 28, 34.

³⁹ *Id.* at 18 (quoting MONT. CODE ANN. § 85–1–103).

⁴⁰ *Id.* at 33.

⁴¹ *Id.* at 33–34.

⁴² *Id.* at 33.

⁴³ Appellee's (US) Response Br. at 12, *City of Bozeman v. DNRC* (Feb 10, 2020) (No. DA 19-0680).

argument as improperly asking the Court to judicially grant the City a monopoly to provide municipal water within its growth policy boundaries.⁴⁴ This request exceeds the limited scope of § 85–2–402(2).⁴⁵ Therefore, DNRC’s PD was correct, and the district court was correct as a matter of law to affirm.⁴⁶

US dismisses any alleged defects in its application by stating that the hearing examiner properly acknowledge the issue and then dismissed the matter as being non-essential to the decision.⁴⁷ The examiner noted that when taking the City’s allegations as true, nothing in the law prevents a service area overlap.⁴⁸ Any conflict between US’s goal of closing service gaps and the City’s claim no such gap exists is irrelevant to the finding that the City does not have an interest protected from adverse effects of US’s change application.⁴⁹

US contends that the City lacks a “permit or certificate” for its planned use of water.⁵⁰ MWUA ties a permit or certificate to a planned use of water to a period of time the where the permit holder must put the water to beneficial use in the specified place of use.⁵¹ In this case, the City may be able to transfer its Hyalite shares for use in the Disputed Area in the future. However, those shares were not issued for the planned use of water in the Disputed Area.⁵² Since the City has not sought to change the place of use either, the City cannot show it has been granted a permit or certificate to provide water to the Disputed Area.⁵³ Thus, the City does not have a recognized water right under § 85–2–402(2).⁵⁴

Further, US argues that even if the City has a water right in the Disputed Area, that right is not adversely affected because the source is not diminished, nor is the City’s authority to provide water in the Disputed Area diminished.⁵⁵ The City seeks to be protected from competition in the Disputed Area.⁵⁶ If US’s application is approved, US still cannot supply water to non-consenting landowners.⁵⁷ Therefore, the City’s issue is that if both the City and US provide water in the Disputed Area, some landowners will choose US instead of the City.⁵⁸ However, according to

⁴⁴ *Id.* at 9–10.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 39.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.* at 38.

⁴⁹ *Id.* at 28–29.

⁵⁰ *Id.* at 18–19.

⁵¹ *Id.* at 16–17.

⁵² *Id.* at 21.

⁵³ *Id.* at 19–20.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 22–23.

⁵⁶ *Id.* at 32–33.

⁵⁷ *Id.* at 23, 26–27.

⁵⁸ *Id.* at 23–24.

US, lack of monopolistic authority does not diminish the City's right to use water from the Hyalite, nor does it diminish their authority to use that water in the Disputed Area.⁵⁹ US concludes that to adopt the City's argument would prohibit landowners within the boundaries of an adopted growth policy from procuring their own water supplies while waiting for the City to build out to the growth policy boundary.⁶⁰

Finally, US argues that the City misunderstands the link—or lack thereof—between growth policy and the requirements of § 85–2–402(2).⁶¹ While a growth policy may be sufficient to meet the other interest test necessary for standing under the MWUA, it does not follow that interest is protected under § 85–2–402(2).⁶² Further, the language of the growth policy act states that a growth policy does not confer any additional legal authority.⁶³ The language also precludes the City from conditioning land use solely based on its growth policy.⁶⁴ US argues that this is precisely what the City seeks to do on residents outside current city limits, but within the planning boundaries. The City insists, based on its growth policy, the authority to prohibit a landowner from purchasing water from US.⁶⁵

C. Appellee DNRC's Argument

First, DNRC argues the agency should be afforded discretion in its interpretation of MWUA. So long as DNRC does not interpret the MWUA in a way clearly contrary to legislative intent, then DNRC's interpretation should be allowed to stand.⁶⁶

DNRC argues the district court correctly determined the City's argument that the intent of US's change application was not a finding of essential to the decision according to MAPA.⁶⁷ The hearing examiner acknowledged and considered the City's argument and correctly found that nothing in the law prevents overlapping places of use.⁶⁸

Next, DNRC states the City misconstrues DNRC guidance regarding municipal growth policies.⁶⁹ According to DNRC, the adoption of a growth policy does not grant a municipality a possessory interest until that municipality applies for a new or changed water permit.⁷⁰ Furthermore,

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 27.

⁶¹ *Id.* at 35.

⁶² *Id.* at 29–30.

⁶³ *Id.* at 35 (quoting MONT. CODE ANN. § 76–1–605(2)(a))

⁶⁴ *Id.* (quoting MONT. CODE ANN. § 76–1–605(2)(b)).

⁶⁵ *Id.* at 35–36.

⁶⁶ Appellee's (DNRC) Response Brief, *supra* note at 13, at 18 (quoting *Swan Corp v. Montana Dep't of Revenue, Liquor Div.*, 755 P.2d 1388, 1390 (1980)).

⁶⁷ *Id.* at 21–22.

⁶⁸ *Id.*

⁶⁹ *Id.* at 23.

⁷⁰ *Id.* at 25.

even the City obtained a possessory interest in the Disputed Area, that interest is not among the four discrete types of interests protected from adverse effects and is therefore not protected by the MWUA.⁷¹

Further, DNRC is constrained by the discreet interests listed in § 85–2–402(2) in considering the US application.⁷² Contrary to the City’s position, § 85–2–402(2) only protects four listed interests, not a broad “other interests.”⁷³ So long as none of those four interests are adversely affected, then DNRC “shall” issue the change permit.⁷⁴ DNRC does not have the discretion to prioritize public entities over private companies.⁷⁵ DNRC argues that the City is asking the Court to grant DNRC more authority than the Legislature has delegated to the agency.⁷⁶

IV. ANALYSIS

The Court will likely uphold the district court and affirm the DNRC PD. The narrowest path would be to find that the City lacks a permit or certificate for a planned use of water in the Dispute Area and thus lacks an interest in water rights affected by US’s change application.

The City’s argument suffers from an insistence this is a case of first impression. First, unless the Court finds DNRC’s legal conclusions to be incorrect, the agency is owed deference in administering the statute so long as DNRC does not run afoul of legislative intent. DNRC’s interpretation, while narrow, appropriately relies upon the premise that the Legislature intended that DNRC has limited discretion by using “shall” and a discrete list of criteria within § 85–2–402(2). Second, the context, structure, and plain language of the relevant statutes does not necessarily lead to the policy goals of the City regarding its desire to efficiently plan for growth. As the district court found, service areas often have overlapping places of use for the same service—including water. If a municipality desires monopoly control, then they may exercise condemnation proceedings.⁷⁷

If the City’s argument persuades the Court, then the prudent path would be to rule only on the narrow issue of the change application’s factual basis. Accordingly, the Court could sidestep the more significant legal issue by finding DNRC’s final order was based on an unsupported evidentiary record. However, it only delays the underlying dispute to

⁷¹ *Id.* at 26.

⁷² *Id.* at 33.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 34.

⁷⁶ *Id.*

⁷⁷ Appellant’s Reply Br. at 9, *City of Bozeman v. DNRC* (Feb 24, 2020) (No. DA 19-0680).

another day as nothing prohibits US from refiling its change application with a corrected record. Regardless, another day, or another legislative session, does allow for the policy-making branches of government to consider the issues raised and if an amendment to or clarification of the MWUA is warranted.

Ultimately, the City's arguments probably belong in the Legislature. The Legislature is no stranger to amending § 85–2–402.⁷⁸ Additionally, § 85–2–402(4)(b), which applies to changes involving 4,000 or more acre-feet per year, contemplates the changes the City argues are part of § 85–2–402(2).⁷⁹ Specifically, DNRC must make a reasonable use determination relying in part on “projected demands for water for future beneficial purposes, including municipal water supplies,” and “the benefits to the applicant and the state.”⁸⁰ These considerations are not directly on point to the dispute at hand, but they indicate the Legislature's willingness to expand the change application review process beyond the narrow criteria of § 85–2–402(2) for larger appropriations. Accordingly, that the Legislature did not apply these criteria to *all* appropriations perhaps indicates they intended a more constrained process for smaller appropriations.

V. CONCLUSION

The Court will likely affirm the district court decision upholding the PD. The Court will likely do so on a finding that the City lacks a recognized protected interest in a water right under the MWUA. Given the legislative history of the MWUA and the policy implications of continued growth in closed basins, the decision will likely be on narrow grounds leaving the bigger issues for the political branches to consider.

⁷⁸ MONT. CODE ANN. § 85–12–402 has been amended in 1974, 1975, 1977, 1983, 1985, 1987, 1989, 1991, 1993, 1995, 1997, 1999, 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, 2017, and 2019.

⁷⁹ MONT. CODE ANN. § 85–2–402 (2019).

⁸⁰ MONT. CODE ANN. § 85–2–402(4)(b) (2019).