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

<p>JAMES C. LOHMEIER, SANDY McMANUS and ROSELEE FAUST, Plaintiffs, v. STATE OF MONTANA, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, Defendant.</p>	<p>Cause No. ADV-2006-454 DECISION AND ORDER</p>
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This matter is before the Court on a request for declaratory relief under Section 2-4-506, MCA. Specifically, Plaintiffs seek to have this Court declare invalid a decision of Defendant (DNRC) to repeal ARM 36.12.101(39) defining “municipal use.”

The parties filed cross-motions for summary judgment, as did Defendant-Intervenor Utility Solutions, LLC. A hearing was held November 16, 2006. Plaintiffs were represented by Frederick P. Landers, Jr.; DNRC was represented by Britt T. Long

1 and Tim D. Hall; and Utility Solutions was represented by Matthew W. Williams.
2 During the hearing the Court requested that the parties brief the legislative history of
3 the basin closure laws as it relates to this matter. Those briefs have been received, and
4 the motions are ready for decision.

5 **BACKGROUND**

6 Plaintiffs in this case are three individuals who reside in Gallatin County
7 and hold water rights in the Upper Missouri River Basin. With limited exceptions, the
8 Upper Missouri River Basin is closed to new appropriations of water pursuant to
9 Sections 85-2-342 and 343, MCA. One of the exceptions, under Section 85-2-
10 343(2)(c), MCA, is a new appropriation for “municipal use.” After following the
11 proper rulemaking procedure, on January 1, 2005, DNRC adopted a number of new
12 rules relating to the Montana Water Use Act, including ARM 36.12.101(39), which
13 defined municipal use as “water appropriated by and provided for those in and around
14 a municipality or an unincorporated town.” In November 2005, DNRC issued a public
15 notice of its proposal to repeal this definition of municipal use, and, after public
16 comment and hearing, the definition was repealed. No new definition of municipal use
17 has been promulgated; however, DNRC has indicated that it now applies a more liberal
18 definition of the term to include non-municipal entities that propose to use water in a
19 manner similar to that used by municipalities.

20 **DISCUSSION**

21 Summary judgment will only be granted when the record discloses no
22 genuine issue of material fact and the moving party is entitled to judgment as a matter
23 of law. See Rule 56(c), M.R.Civ.P.; Dillard v. Doe, 251 Mont. 379, 382, 824 P.2d

1 1016, 1018 (1992). The moving party must establish both the absence of genuine
2 issues of material fact and entitlement to judgment as a matter of law. Hadford v.
3 Credit Bureau of Havre, Inc., 1998 MT 179, ¶ 14, 289 Mont. 529, ¶ 14 962 P.2d 1198,
4 ¶ 14. Once the moving party has met its burden, the opposing party must present
5 material and substantive evidence, rather than mere conclusory or speculative
6 statements, to raise a genuine issue of material fact. Id.

7 All reasonable inferences must be drawn in favor of the party opposing
8 the motion. In making its determination, the court must consider the entire record.
9 Smith v. Barrett, 242 Mont. 37, 40, 788 P.2d 324, 326 (1990).

10 This issues before the Court are legal and do not involve disputed
11 material facts. The motions raise the following issue: Whether DNRC's repeal of its
12 rule defining municipal use is a violation of Section 2-4-506, MCA. That statute
13 provides that a rule can be held invalid if it or its threatened application interferes with
14 or injures the legal rights or privileges of the plaintiff.

15 Section 85-2-343, MCA, closed the Upper Missouri River Basin.
16 Subsection (2) of that statute enumerates exceptions to the closure: applications to
17 appropriate ground water, water for nonconsumptive use, water for "domestic,
18 municipal, or stock use," to store water during high spring flows, and for water from
19 Muddy Creek drainage to prevent erosion.

20 DNRC adopted regulations to implement the Water Use Act, which
21 includes the basin closure laws. ARM 36.12.101(39) defined "municipal use" as
22 meaning "water appropriated by and provided for those in and around a municipality or
23 an unincorporated town." A year later, DNRC repealed this definition, believing it to

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1 be too narrow and restrictive.

2 Section 2-4-506, MCA, states that a rule may be declared invalid if: 1)
3 “it is found that the rule or its threatened application interferes with or impairs or
4 threatens to interfere with or impair the legal rights or privileges of the plaintiff” or
5 2) “the rule was adopted with an arbitrary or capricious disregard for the purpose of the
6 authorizing statute as evidenced by documented legislative intent.” The Court notes
7 that the law pertaining to promulgation of rules also applies to repeal of rules. Section
8 2-4-102(11)(a), MCA.

9 Plaintiffs assert that DNRC violated both of the subsections of Section 2-
10 4-506, MCA, when it repealed the definition. Plaintiffs assert that DNRC’s repeal of
11 its definition will impair their legal rights and also contravenes the legislative intent of
12 the basin closure laws.

13 The basin closure laws do not define “municipal use.” The issues raised
14 in the complaint revolve around the proper definition of that term for the purposes of
15 the basin closure laws.

16 It is a fundamental rule of statutory construction that the intention of the
17 legislature controls. United States v. Brooks, 270 Mont. 136, 890 P.2d 759 (1995).
18 Such intent must be determined first from the plain meaning of the words used, and if
19 interpretation can be so arrived at, the court may go no further and apply other means
20 of interpretation. State ex. rel Huffman v. Dist. Ct., 154 Mont. 201, 461 P.2d 847
21 (1969). However, where ambiguity does exist, the Court is permitted to look
22 elsewhere to determine legislative intent. For example, the sense in which a word in
23 the statute is used must be determined from the context of the entire act. State ex rel.

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1 Board of Comm'rs v. Bruce, 104 Mont. 500, 69 P.2d 97 (1937).

2 As counsels' briefs indicate, the term "municipal use" is not limited to
3 one definition. The Court agrees. For example, BLACK'S LAW DICTIONARY, 5th
4 edition, defines "municipal" as: "In a narrower, more common, sense, it means
5 pertaining to a local governmental unit, commonly a city or town or other
6 governmental unit. In its broader sense, it means pertaining to the public or
7 governmental affairs of a state or nation or of a people." (Citations omitted.)

8 Defendants cite Section 85-2-227(4), MCA, which governs abandonment
9 of water rights, for the proposition that the legislature intended municipal uses to
10 include private entities. That subsection states, in part:

11 In a determination of abandonment made under subsection (3), the
12 legislature finds that a water right that is claimed for municipal use by a
13 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
if the city, town, or other private or public entity has used any part of the
water right or municipal water supply

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15 Thus, for the purpose of that section, a private entity's use of a public water supply
16 system can be a municipal use.

17 Defendants also cite an Arizona statute defining municipal use as all
18 nonagricultural uses of water supplied by a city, town, private water company, or
19 irrigation district. Ariz. Rev. Stat. § 45-2201(10). This statute does not pertain to the
20 state's attempt to protect limited sources of water for holders of water rights.

21 Defendants also cite to DNRC's and the Montana Water Court's past practices of
22 granting municipal use rights to non-municipal and private entities. Those grants were
23 not made, however, under the basin closure laws.

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1 As previously noted, Plaintiffs hold water rights in the upper Missouri
2 Basin. Contrary to Defendants' contentions that Plaintiffs have asserted no legal
3 rights at risk, their water rights are potentially affected if the outcome of the lawsuit
4 results in increased competition for the water.

5 The legislative history clearly indicates the purpose of the basin closure
6 laws – to preserve existing water rights. As several witnesses testified before the
7 legislative natural resources committees in 1993, the Upper Missouri River Basin was
8 already over appropriated, and the purpose of the legislation was to protect existing
9 irrigation and other consumptive water use. There was no discussion regarding the
10 legislature's decision to exempt municipal uses from the basin closure.

11 Application of liberal definitions to any of the enumerated exceptions to
12 the basin closure laws would clearly undermine the purpose of the laws – to protect the
13 existing water rights. Expanding the definition to permit private developers in any part
14 of the Upper Missouri River Basin to appropriate water for new subdivisions would
15 most likely take a significant amount of water away from the already over appropriated
16 water source, resulting in not enough water for the owners of the existing water rights.

17 The Court concludes that the legislature intended to preserve the existing
18 water rights by closing the Upper Missouri River Basin to new appropriations. The
19 exceptions to the closure must be interpreted narrowly to comply with the legislative
20 intent. The repeal of the narrowly defined term "municipal use" in order to enable
21 DNRC to apply a more liberal definition contravened the legislative intent and placed
22 the existing water rights of Plaintiffs in jeopardy. Therefore, Plaintiffs are entitled to
23 summary judgment.

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
summary judgment is GRANTED to Plaintiffs.

IT IS SO ORDERED.

DATED this ___ day of _____, 20__.

DOROTHY McCARTER
District Court Judge

pcs: Arthur W. Wittich/Frederick P. Landers, Jr.
Britt T. Long/Tim D. Hall
Matthew W. Williams

T/DMc/lohmeier v dnrc d&o.wpd