Public Land and Resources Law Review

Volume 30

Serena Vista, LLC v. State Department of Natural Resources and Conservation

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Serena Vista, LLC v. State Department of Natural Resources and Conservation
2008 MT 65, 342 Mont. 73, 179 P.3d 510

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INTRODUCTION

In *Serena Vista, LLC v. State Department of Natural Resources and Conservation*[1] (*Serena Vista*) the Montana Supreme Court held that the Department of Natural Resources and Conservation's (DNRC) promulgation of a rule defining "place of storage" rendered the case moot, even though the rule was ad hoc and created because of the judicial challenge.[2] The Court acknowledged that a change in use from a diversion to a "place of storage" requires approval from DNRC.[3]

FACTUAL BACKGROUND

Serena Vista, L.L.C. (Serena Vista) owns five water rights which support its ranching operation in Ravalli County, Montana.[4] During February of 2006, DNRC received a complaint that Serena Vista was adversely affecting the water rights of other riparian owners in the Bitterroot Valley.[5] The complaint alleged that Serena Vista had created a storage pit.[6] The storage pit at issue was 2,444 times the pump's capacity and held more water than "an Olympic-size swimming pool."[7]

In March, DNRC notified Serena Vista in writing that the activities "must cease immediately."[8] Later that month, DNRC conducted an on-site investigation finding that Serena Vista had "changed a point of diversion" and created a "place of storage" without notifying DNRC.[9] Both acts violated DNRC's regulations.[10] With the passage of the Montana Water Use Act in 1973, DNRC was given the authority to make determinations regarding changes in appropriation.[11] Pursuant to Mont. Code Ann. § 85-2-401 (2007), a change in appropriation must be approved by DNRC.

Serena Vista challenged DNRC's authority in a Petition for Declaratory Judgment alleging that DNRC's findings were based on "unlawful proce-

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1. *Serena Vista, LLC v. State Dept. of Nat. Resources and Conservation*, 2008 MT 65, 342 Mont. 73, 179 P.3d 510.
2. *Id.* at ¶ 16.
3. *Id.* at ¶ 18.
4. *Id.* at ¶ 4.
5. *Id.*
6. *Id.*
7. Petr.'s Br. 5 (May 2007).
8. *Serena Vista, LLC*, ¶ 4.
9. *Id.* at ¶ 5.
10. *Id.*
11. Mont. Code Ann. § 85-2-402 (2007).

dure."[12] Additionally, Serena Vista argued that DNRC's findings were "arbitrary and capricious" and "an unwarranted exercise of DNRC's discretion."[13]

DNRC argued that its letter to Serena Vista was not "a proper subject for declaratory judgment" and that Serena Vista had not exhausted its administrative remedies.[14] DNRC also argued that Serena Vista "failed to state a claim upon which relief could be granted."[15] The district court found that Serena Vista should have exhausted its administrative remedies before seeking judicial relief.[16] The district court concluded that it did not have jurisdiction and as a result, it dismissed Serena Vista's petition with prejudice.[17]

THE MONTANA SUPREME COURT'S DECISION

On appeal, Serena Vista alleged that because the rule defining "place of storage" had not yet been promulgated DNRC's finding that Serena Vista had violated a rule was erroneous.[18] Serena Vista disputed the fact that its case was moot on the same grounds.[19] Alternatively, Serena Vista also argued that even if the rule had been properly promulgated, Serena Vista's case was never evaluated in reference to the new rule.[20]

DNRC acknowledged that "place of storage" had not yet been defined. So, rather than refer to a definition, DNRC cited Administrative Rule 36.12.1901(1) that states a change in a "point of diversion, place of use, or place of storage" requires approval from DNRC.[21] Interpreting Administrative Rule 36.12.1901(1), DNRC asserted that a new burden on a stream such as "a new storage of water... requires a new or changed water right."[22] DNRC viewed this position so fundamental that the promulgation of a rule should not even be required.[23] DNRC also pointed out that when Serena Vista was confronted by DNRC for its "pumping pit," Serena Vista responded by asking for the legal authority rather than arguing that its storage pit was not a "place of storage."[24] In its response to Serena Vista's request for a legal authority, DNRC explained that quantities larger than what is "necessary to supply the immediate need of the pump capacity" are deemed

12. *Serena Vista, LLC*, ¶ 5.
13. *Id.*
14. *Id.* at ¶ 6.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at ¶ 9.
19. Resp.'s Br. 16 (June 8, 2007).
20. *Id.*
21. Admin. R. Mont. 36.12.1901(1) (2007).
22. Petr.'s Br. 27 (May 2007).
23. *Id.*
24. *Serena Vista, LLC*, ¶ 10.

storage.[25] Despite DNRC's acknowledgement that a definition for "place of storage" had not been properly promulgated, DNRC argued that the issue was moot because "place of storage" would be properly promulgated before the Court reached a decision in the case.[26] In fact, on February 1, 2008, DNRC promulgated a rule defining "place of storage" as a "reservoir, pit, pit-dam, or pond."[27]

Serena Vista also argued that DNRC was evading the Montana Administrative Procedure Act (MAPA) by promulgating rules after the "agency's actions are judicially challenged."[28] Serena Vista asserted that this ad hoc rule-making process was capable of repetition, and therefore, the Court should address the issue on appeal.[29]

Citing *Billings High Sch. Dis. v. Billings Gazette*,[30] the Court articulated two factors that must be satisfied in order for a party to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine: 1) "the challenged action is too short in duration to be litigated before its cessation," and 2) "there is a reasonable expectation that the same complaining party would be subject to the same action again."[31]

The Court concluded that Serena Vista had "failed to establish or even argue that there was a reasonable expectation that it [would] again be the victim of DNRC's failure to properly implement new water regulations."[32] Accordingly, the Court affirmed the district court's dismissal with prejudice and held that the issue was moot.[33] The Court also noted that Serena Vista never contested whether its "pumping pit" was a "place of storage."[34]

CONCLUSION

Although the Court reached the correct decision in *Serena Vista, LLC*, the opinion avoided making a determination on an important question. Should a state agency be allowed to define terms and make rules in order to aid its cause in litigation that has already been initiated? Even though DNRC probably would have succeeded on the merits of its case, it decided to promulgate a rule that would ensure that the Court would conclude the case was moot. "Place of storage" is now defined as "reservoir, pit, pit-dam, or pond."[35] Despite the new definition questions remain. What will happen if DNRC again finds itself in court over a place of storage that does

25. *Id.* at ¶ 10.
26. *Id.* at ¶ 12.
27. Admin. R. Mont. 36.12.101(48).
28. *Serena Vista, LLC*, ¶ 13.
29. *Id.*
30. *Billings High Sch. Dis. v. Billings Gazette*, 2006 MT 329, 335 Mont. 94, 149 P.3d 565.
31. *Id.* at ¶ 14.
32. *Serena Vista, LLC*, ¶ 15.
33. *Id.* at ¶ 16.
34. *Id.* at ¶ 9.
35. Admin. R. Mont. 36.12.101(48).

not fit within this definition? What will happen if litigation is initiated over another term that has not been defined? Based on the decision in this case, the Court seems to be encouraging DNRC to amend definitions, even if amending has a direct impact on litigation already in progress.