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# Bostwick Properties Inc. v. Montana Department Natural Resources and Conservation

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***Bostwick Properties Inc. v. Montana Department of Natural Resources and Conservation,***  
**2013 MT 48, 369 Mont. 150, 296 P.3d 1154.**

**Carolyn A. Sime**

**ABSTRACT**

The Montana Supreme Court upheld the law requiring that applicants for new ground water permits in closed basins show no net surface depletion and that the new appropriation will not adversely affect senior water appropriators. Where the relationship between surface and ground water is uncertain or attenuated, applicants still bear the burden of proof, even if the proposed use constitutes only a *de minimis* quantity. Once again, the Court acknowledged the hydrologic connection between surface and ground water and the underlying legal framework which seeks to make water available for new appropriation and simultaneously protect the water rights of senior appropriators through the prior appropriation doctrine.

**I INTRODUCTION**

In *Bostwick Properties Inc. v. Montana Department of Natural Resources and Conservation*,<sup>1</sup> the Montana Supreme Court upheld the Montana Department of Natural Resources and Conservation's ("DNRC") denial of Bostwick's ground water use permit application in a closed basin because Bostwick failed to show no net surface water depletion and lack of adverse effect.<sup>2</sup> Bostwick appealed the district court's affirmation of DNRC's determinations.<sup>3</sup> Bostwick argued: 1. surface runoff from the new development would offset proposed consumption; 2. potential adverse effects were unknown because the hydrological connection between surface and ground water was too attenuated and uncertain to show no net depletion; 3. the proposed water quantity was too small to have an adverse effect; and 4. DNRC

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<sup>1</sup> 2013 MT 48, 369 Mont. 150, 296 P.3d 1154 (hereinafter *Bostwick II*).

<sup>2</sup> *Bostwick II*, ¶ 1.

<sup>3</sup> *Id.* at ¶ 14.

could terminate the proposed water right if its *de minimis* use actually harmed senior appropriators.<sup>4</sup> The Montana Supreme Court rejected all of Bostwick's arguments as contrary to the clear language of various statutes and legislative intent.<sup>5</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In 2006, Bostwick sought a ground water use permit to supply municipal water for a subdivision in Gallatin County where the basin is closed to new surface water appropriations.<sup>6</sup> New ground water appropriations are only available if any adverse effects to senior water appropriators due to net surface water depletion are mitigated.<sup>7</sup> DNRC determined Bostwick's application was correct and complete, but did not act on it within the required statutory time frame.<sup>8</sup> Upon request, Bostwick received a writ of mandate from the district court. DNRC appealed to the Montana Supreme Court.<sup>9</sup> The Court reversed and remanded to DNRC.<sup>10</sup> DNRC held a hearing, after having denied Bostwick's request that DNRC disqualify itself for bias.<sup>11</sup> DNRC then denied Bostwick's permit application.<sup>12</sup> DNRC concluded that Bostwick's proposed ground water use would cause net surface water depletion, Bostwick had not demonstrated lack of adverse effect, and that Bostwick's proposed mitigation plan was not adequate because it only provided mitigation water during the irrigation season and not also during the non-irrigation period.<sup>13</sup>

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<sup>4</sup> *Id.* at 12.

<sup>5</sup> *Id.* at ¶¶ 24, 25, 26, 29, 30-31, 36, 41, 47, 50.

<sup>6</sup> *Id.* at ¶¶ 8, 11.

<sup>7</sup> *Bostwick II*, ¶ 11.

<sup>8</sup> *Id.* at ¶¶ 8-9.

<sup>9</sup> *Id.* at ¶ 11.

<sup>10</sup> *Bostwick II*, ¶ 10; *See also Bostwick Props. v. Mont. Dept. Nat. Resources & Conserv.*, 2009 MT 181, 351 Mont. 26, 208 P.3d 868 (*Bostwick I*).

<sup>11</sup> *Bostwick II*, ¶ 10.

<sup>12</sup> *Id.* at ¶ 13.

<sup>13</sup> *Id.*

Bostwick petitioned the district court to review DNRC's decision. The lower court agreed with DNRC's determination that Bostwick failed to demonstrate no net surface water depletion and lack of adverse effect.<sup>14</sup> However, the court found Bostwick's proposal to mitigate water use only during the irrigation season was adequate as a matter of law and thus DNRC improperly denied Bostwick's permit subject to the mitigation plan.<sup>15</sup> Bostwick appealed the former. DNRC cross-appealed the latter, arguing that the mitigation proposal did not also mitigate water used during the non-irrigation season.<sup>16</sup>

### **III. ANALYSIS**

The Montana Supreme Court addressed five issues on appeal and reviewed for correctness both the district court's conclusions of law and its review of DNRC's administrative decisions.<sup>17</sup> First, the Court affirmed its earlier holding in *Bostwick I* that DNRC is not required to issue a water use permit even if it determined a submitted application was correct and complete or upon settlement of all objections to a permit application.<sup>18</sup> DNRC is only required to grant a permit if the applicant resolved all objections *and* proved legal water availability and the lack of adverse effect on senior appropriators by a preponderance of evidence.<sup>19</sup> DNRC retained authority to deny the application even after determining Bostwick's initial application was correct and complete because Bostwick did not meet his burden.<sup>20</sup>

Second, the Court affirmed that DNRC and the district court properly required Bostwick to mitigate the subdivision's water usage by rejecting each of Bostwick's four theories that its proposed use would result in no net surface water depletion or adversely affect senior

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Bostwick II*, ¶ 14.

<sup>17</sup> *Id.* at ¶¶ 3-7, 15.

<sup>18</sup> *Id.* at ¶ 18. *See also Bostwick I* ¶¶ 20-21.

<sup>19</sup> *Bostwick II*, ¶ 13 (emphasis in the original).

<sup>20</sup> *Id.* at ¶¶ 17-18.

appropriators. It reasoned sequentially, as follows.<sup>21</sup> Surface water runoff from pavements in new developments may not be credited to new applicants when DNRC calculates net depletion because applicants have no legal right to appropriate or use the water and such an interpretation would run counter to the plain meaning of Mont. Code Ann. § 85-2-361.<sup>22</sup> As the applicant, Bostwick retains the burden to show ground water pumping would cause no adverse effect on prior Gallatin River surface water appropriators, regardless of how uncertain or attenuated the hydrological connection might be.<sup>23</sup> DNRC was not obligated to issue Bostwick's permit even though DNRC had wrongfully granted a permit to a different applicant seeking a ground water use permit near Bostwick's who did not show where or how its depletion would affect the river.<sup>24</sup> DNRC was not bound by its earlier decision when considering Bostwick's application, and DNRC may deny permits where "uncertainty exists regarding any hydrological connection."<sup>25</sup> Even where the surface water depletion is small, the applicant still has the burden to prove lack of any adverse impacts on senior appropriators. Because there is no statutory *de minimis* exception, any additional depletion of water could potentially adversely affect senior appropriators of the Gallatin River, where in some years even priority dates later than 1883 are cut off.<sup>26</sup> Even where an attenuated hydrologic connection exists, applicants may not shift the burden to more senior appropriators to enforce their priority dates through call to protect their rights because the statute clearly places the burden to demonstrate lack of adverse effect that could jeopardize prior appropriators' rights on applicants seeking new appropriations.<sup>27</sup>

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<sup>21</sup> *Id.* at ¶¶ 19-20, 31, 34-36, 39, 41.

<sup>22</sup> *Id.* at ¶ 31 (noting that Bostwick's interpretation would cause an absurd result whereby Bostwick could claim a "credit" for runoff water in the net depletion calculation even though Bostwick does not have a water right to beneficially use the runoff water as required by).

<sup>23</sup> *Id.* at ¶¶ 34, 36.

<sup>24</sup> *Id.* at ¶¶ 33-35.

<sup>25</sup> *Bostwick II*, ¶¶ 34-35.

<sup>26</sup> *Id.* at ¶¶ 38-39.

<sup>27</sup> *Id.* at ¶ 40-41.

The third and fourth issues concerned Bostwick’s proposed mitigation plan relying on a particular, but unnamed water right to provide mitigation water only during the irrigation season.<sup>28</sup> The only objecting, adversely affected party during the non-irrigation season withdrew its objection and stated the mitigation plan would not cause an adverse effect.<sup>29</sup> While the Court previously noted that withdrawal of all objections still does not require DNRC to grant a new permit, it upheld the district court’s ruling that, under these particular facts, Bostwick’s mitigation plan was adequate as a matter of law.<sup>30</sup> Furthermore, DNRC appropriately required Bostwick to identify a specific water right by name in its mitigation plan so that DNRC can determine a mitigation plan’s efficacy in offsetting surface water depletion.<sup>31</sup>

Lastly, the Court upheld the district court’s determination that Bostwick was not prejudiced by DNRC’s bias during Bostwick’s application review and court-ordered administrative hearing process because the district court independently reached the same substantive conclusions as the agency.<sup>32</sup> Although DNRC did commit “unlawful procedure,” Bostwick failed to show the “substantial prejudice” mandated for reversal. Although one justice would have granted it, Bostwick had not requested a new hearing.<sup>33</sup> Justice Rice disagreed that a district court independently reaching the same substantive conclusion as an agency rendered the bias issue irrelevant.<sup>34</sup>

#### **IV. CONCLUSION**

In affirming DNRC’s interpretation and implementation of the “no net depletion” and “lack of adverse effect” permitting requirements for new ground water appropriations in closed

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<sup>28</sup> *Id.* at ¶¶ 42, 47.

<sup>29</sup> *Id.* at ¶ 44.

<sup>30</sup> *Id.* at ¶¶ 44, 46, 47.

<sup>31</sup> *Bostwick II*, ¶ 50.

<sup>32</sup> *Id.* at ¶¶ 52-53; *See also Bostwick I*.

<sup>33</sup> *Bostwick II*, ¶¶ 53, 57 (Rice, J., concurring with the resolution of the remaining issues).

<sup>34</sup> *Id.* at ¶ 56 (Rice, J., concurring) (bias claim should be addressed as a threshold issue as a matter of due process; it is difficult to measure the full reach of a biased decision maker’s impact as it could pervade the entire proceeding).

basins, the Court squarely reinforced the fact that applicants bear the burden of proving these factors by a preponderance of evidence at the time of application. Additionally, attenuated or uncertain hydrological connection does not shift the burden to existing water users to protect their more senior water rights. Neither DNRC nor the applicant can “credit” surface runoff when calculating net depletion because the applicant does not have a legal right to appropriate the runoff in the first place. Even where a new proposed ground water use is *de minimis*, lack of adverse effect must still be shown. The fact that senior surface appropriators could potentially “call” the applicant’s ground water use through the prior appropriation doctrine does not relieve the burden to show lack of adverse effect at the application phase. The Court said that when mitigation plans are used to offset net depletion, applicants must identify specific water rights by name and not simply provide generalities. This case deepens the legal recognition that surface and ground waters are hydrologically connected and that the statutory requirements placed on would-be appropriators sustain the prior appropriation doctrine and protect senior water right holders.