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Bostwick Props., Inc. v. Mont. Dep't of Natural Res. & Conservation, 296 P.3d 1154 (Mont. 2013)

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**Bostwick Props., Inc. v. Mont. Dep't of Natural Res. & Conservation, 296 P.3d
1154 (Mont. 2013)**

On appeal, the Court affirmed the trial court's ruling that the easement was sixteen feet in width, no larger, and the District must make every effort to preserve the maple trees and septic drain field when replacing its pipe. The Court began its analysis by defining two types of easements: an indefinite express easement and a prescriptive easement. An indefinite express easement is defined by the intent of the parties "as demonstrated by the easement's initial use." A prescriptive easement exists when there is continuous and uninterrupted use by a party of the easement during the prescriptive period.

The District first argued the "initial use" aspect of its express easement should include the initial method and dimensions of construction, which was forty feet wide. The Court disagreed and stated that previous Idaho cases defined "initial use" by the constructed size, not by the method of construction. In other words, the District's "initial use" was not the forty-foot wide construction area, but rather the existing four-inch pipe. The Court then determined that the real issue in the case did not concern the primary easement, but rather the scope of a secondary easement. The term "secondary easement" refers to the right to enter and repair and do those things necessary for the full enjoyment of the easement, provided such activities are reasonable.

The District next argued that its secondary easement rights should allow the proposed installation of the ten-inch pipe. While, historically, trees had not unreasonably interfered with the District's secondary easement, the Court noted the District's proposed method of installation required three pieces of heavy machinery and forty feet of width. Lamarca's proposed alternative method, by contrast, only required one piece of heavy machinery and sixteen feet of width. As such, the Court concluded a sixteen-foot width was reasonable for the District's purposes and that scope of the secondary easement was limited to sixteen feet in width. The Court ultimately concluded that requiring the District to make every effort to preserve the maple trees and septic drain field was reasonable and also in line with burdening the servient estate as little as possible, a hallmark of Idaho easement law.

Accordingly, the Court affirmed the trial court's conclusion that the District's easement had a sixteen-foot width and that the District had to make every effort to preserve the maple trees and septic drain field on Lamarca's property.

Skylar Marshall

MONTANA

Bostwick Props., Inc. v. Mont. Dep't of Natural Res. & Conservation, 296 P.3d 1154 (Mont. 2013) (holding (i) the Montana Department of Natural Resources and Conservation had the authority to deny developer a water permit; (ii) runoff from impermeable surfaces could not be used in calculating net depletion of surface water; (iii) uncertain hydrological connections and senior water right holders' ability to bring later administrative actions did not shift developer's burden of proof as to lack of adverse effect; (iv) *de minimus* use did not establish developer's lack of adverse effect; (v) developer proved lack of adverse effect when the mitigation plan would only potentially adversely affect one party and that party stipulated that the developer would not adverse-

ly affect that party; and (vi) developer was not prejudiced by the bias of the Montana Department of Natural Resources and Conservation).

Bostwick Properties ("Bostwick") filed an application with the Montana Department of Natural Resources and Conservation ("DNRC") for a water use permit for municipal use in a subdivision in Gallatin County, Montana. When DNRC failed to take action within the statutorily-required timeframe, Bostwick sought a writ of mandate to require DNRC to issue the permit or, alternatively, to hold a hearing on the matter. After Bostwick filed the writ, DNRC denied Bostwick's water use permit. Specifically, DNRC denied the permit on the grounds Bostwick failed (i) to demonstrate no net depletion of surface water; and (ii) to prove legal availability of water and lack of adverse impact.

The District Court for Gallatin County ("district court") then granted Bostwick's writ of mandate request, which DNRC appealed to the Supreme Court of Montana. The Court reversed the district court's decision and remanded the case to DNRC to hold a hearing on Bostwick's permit application, because Bostwick had not proved lack of adverse effect and DNRC had no legal duty to grant Bostwick's permit. On remand, Bostwick requested DNRC remove itself from the permit application due to bias. DNRC denied Bostwick's request.

After holding a hearing on Bostwick's permit application, DNRC again denied the permit, determining (i) Bostwick's water use would cause a net depletion of surface water; (ii) Bostwick failed to demonstrate lack of adverse effect; and (iii) Bostwick's mitigation proposal was inadequate because the mitigation plan was to purchase a water right that would only provide water during irrigation season. Bostwick sought review by the district court, which agreed with DNRC that Bostwick failed to show no net depletion or lack of adverse effect, but found Bostwick's proposed mitigation plan to be adequate as a matter of law. Both Bostwick and DNRC appealed the district court's decision to the Court.

The Court addressed five issues on appeal. First, it addressed whether DNRC had the authority to deny Bostwick's permit. Bostwick argued Montana law required DNRC to grant the permit because Bostwick had settled all objections to the application. The Court held that not only must Bostwick resolve all objections, but a developer must also prove legal availability of water and lack of adverse effect by a preponderance of the evidence. The Court further held, if Bostwick had failed to establish these elements, DNRC had the authority to deny Bostwick's permit.

The second issue the Court addressed was whether DNRC and the district court properly required Bostwick to mitigate its water use. Bostwick presented four theories to support the proposition that it would not cause net depletion of surface water or adversely affect senior rights and was thus not obligated to mitigate its water use.

First, Bostwick asserted, because paved roads and parking lots in its proposed development prevent water from being used by native plants or evaporating, the water can be collected and used to recharge the Gallatin River. Bostwick argued DNRC should have considered this runoff when calculating whether net depletion exists. The Court responded in three ways. Specifically,

the Court concluded: (i) Montana law did not require DNRC to consider any sources of water other than those sources listed in the proposed permit; (ii) to consider other sources would be contrary to legislative intent; and (iii) doing so would cause an absurd result if Bostwick could factor that water into its calculation, even though it did not have the right to use it.

Next, Bostwick argued that, because there was no way to determine when its proposed extraction of groundwater would cause the Gallatin River to lose water, the DNRC could show no net depletion or adverse effect. Bostwick asserted DNRC must grant the permit if it could not prove net depletion. The Court held this attempt to shift the burden of proof to DNRC was impermissible and Bostwick failed to satisfy its burden of showing lack of any adverse effect.

Bostwick then argued the amount of water it applied for was *de minimus* and would not adversely affect senior rights. The Court held it was Bostwick's burden to demonstrate a lack of adverse effect and it failed to do so. Finally, Bostwick asserted senior rights holders could force Bostwick to stop using water through the administration of priorities. The Court once again concluded that the law was clear; it was Bostwick's burden to show it would not jeopardize senior rights, and it failed to make that showing.

The third issue on appeal was whether the district court properly determined the adequacy of Bostwick's mitigation proposal. Bostwick proposed to mitigate its water usage through the purchase of a water right, but that water right only granted Bostwick water during the irrigation season. The district court noted Bostwick's non-irrigation season usage could only potentially adversely affect one party, FWP, who said Bostwick's proposal would not adversely affect them. The Court held, while generally settling with objectors was not enough, because there was only one affected party who would not suffer adverse effects, Bostwick met its burden of showing its mitigation plan was adequate.

The fourth issue the Court addressed was whether DNRC could require Bostwick to specifically identify a water right it would use for mitigation purposes. Bostwick argued providing DNRC with other details, including the amount and location of water, timing, and seniority rights, was sufficient. The Court agreed with DNRC that the identification of the specific water right was necessary to fully evaluate the mitigation plan.

The final issue the Court addressed was whether DNRC was biased and therefore prejudiced Bostwick to the point of violating its due process rights. Bostwick argued DNRC's bias during the permit application procedure violated its right to due process. The Court remanded the case to DNRC after the first denial of Bostwick's application, despite Bostwick's request a neutral party hold the hearing. The district court held there was no prejudice because it independently came to the same conclusions as DNRC. The Court found the district court's reasoning to be persuasive and ultimately held Bostwick failed to show substantial prejudice.

Accordingly, the Court affirmed the judgment of the district court on all counts.

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