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## Mustang Holdings v. Zaveta, 143 P.3d 456 (Mont. 2006)

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Krolczyk had not appealed this decision, the court found that Neifert & Krolczyk were unable to demonstrate that the denial of their permits under the 1992 Policy was the proximate cause of their lots being undevelopable.

Second, although the denial of the septic permits rendered Neifert & Krolczyk's lots undevelopable, the denials did not constitute a taking as there was a "nuisance exception," recognized by the Supreme Court in *Lucas*, to taking when the government restricted development of a property to prevent public harm. The court found that the operation of an on-site septic system on Neifert & Krolczyk's lots most likely would have contributed to the contamination problem and constituted a nuisance; thus, there was no taking when the State denied Neifert & Krolczyk's permits for on-site septic systems in 1979.

Finally, the court found that Neifert & Krolczyk's takings claim also failed because Neifert & Krolczyk did not sufficiently allege that access to sewer service was an interest that qualified as a constitutionally protected property interest. Instead, the court found that there was no right to sewer service under either constitution, and that Neifert did not demonstrate a property interest established by other existing rules or state law.

The Maryland Court of Appeals affirmed the judgment of the Circuit Court for Worcester County.

*Patrick Greenleaf*

## MONTANA

**Mustang Holdings v. Zaveta, 143 P.3d 456 (Mont. 2006)** (holding that the district court erred in granting a preliminary injunction to prevent an injury where the injury in question was already complete).

Mustang Holdings ("Mustang") and Marge Zaveta ("Zaveta") owned neighboring land in Montana. For more than a century, a creek on Mustang's property provided water via an irrigation ditch to Zaveta's property. Although Zaveta had valid claims for water rights associated with the ditch, the Water Court terminated those claims in 1999 for nonpayment of the claim processing fee. After Zaveta continued to divert water through the ditch, Mustang filed a complaint in the Fourth Judicial District Court, Missoula County, in July 2003 seeking a declaratory judgment that Zaveta had no right to use the ditch because the Water Court's 1999 decision had permanently terminated Zaveta's water rights. Zaveta offered an affirmative defense and claimed an easement for the ditch. She subsequently paid her claim fees and the Water Court reinstated her claims in November 2003. However, before the district court could rule on the declaratory judgment, Mustang bulldozed the ditch. Mustang's actions prompted Zaveta to move for a preliminary injunction in 2005, alleging that Mustang violated a statute prohibiting interference with a party's ditch easements. The district

court ruled in Zaveta's favor and required Mustang to restore the ditch.

On appeal, Mustang argued that the district court abused its discretion because none of the five statutory situations in which a court may grant a preliminary injunction applied here. Specifically, none of the situations addressed granting an injunction to remedy past injuries. Because Mustang completely destroyed the ditch before Zaveta requested a preliminary injunction there was no action to enjoin. In reversing the trial court, the Montana Supreme Court also relied on *Bouma v. Bynum Irrigation District*. In *Bouma*, the court upheld the trial court's denial of a preliminary injunction under similar circumstances and states that "an injunction . . . is to afford preventive relief only."

The court noted that the trial court had not yet made findings regarding whether Zaveta held a valid easement over Mustang's property or if the easement was extinguished when the water rights were terminated for nonpayment of claim fees. Should Zaveta prevail in those proceedings, she would then have a possible remedy in the form of damages or enjoining Mustang. However, because Mustang had completed the destruction of the ditch, the preliminary injunction issued by the district court was erroneous and constituted an abuse of its discretion. The court therefore reversed the district court's order granting Zaveta a preliminary injunction and held in favor of Mustang.

In a lengthy opinion, the dissent raised multiple arguments, including the validity of the underlying water rights, the existence of a prescriptive easement, and legislative intent on the importance of irrigation ditches. Moreover, the court distinguished the facts of this case from those of *Bouma*. In *Bouma*, the plaintiff constructed dams in a canal to prevent the contaminated water at issue from entering his property prior to the court ruling on the plaintiff's motion for a preliminary injunction. The dissent distinguished *Bouma* because the contested action stopped the harm. Mustang's action of destroying the ditch, on the other hand, caused Zaveta's harm by ceasing her access to water. Therefore, the dissent argued, the majority erred by holding that the remedy by injunction was not an option as enjoining Mustang to restore the ditch would resolve the problem.

*Emily Bright*

## NEVADA

**Bacher v. Office of State Eng'r of the State of Nevada, 146 P.3d 793 (Nev. 2006)** (holding that applicants can demonstrate a need to import water through third parties, that the anti-speculation doctrine applies in Nevada, and that the State Engineer's decisions regarding water applications must be supported by substantial evidence).

In 1999, Primm South Real Estate Company sought, through its agent, Vidler Water Company, an interbasin groundwater transfer