

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF CHANGE APPLICATION)
NO. 41H-30110660 BY UTILITY SOLUTIONS)
LLC)**

**FINAL ORDER ON MOTIONS FOR
SUMMARY JUDGMENT**

Utility Solutions, LLC (“US”) filed Application to Change an Existing Non-Irrigation Water Right No. 41H-301106660 (“Application”) on May 27, 2017. The Department of Natural Resources and Conservation (“Department”) processed and analyzed the Application and issued a “Preliminary Determination to Grant Change” (PD) on January 19, 2018. The US Application included, *inter alia*, an element of changing (expanding) the place of use for their existing Beneficial Water Use Permit No. 41H-30046241 to include a strip of land generally described as the E1/2’s of Sec.’s 29 and 32, T1S, R5E, the E1/2’s of Sec.’s 5, 8, 17 and 20, T2S, R5E, and a portion of the NE1/4 Sec. 29 T2S, R5E, Gallatin County, Montana (“Disputed Area”). (PD pp. 5-6.) See Exhibit 1, attached.

On April 13, 2018 the City of Bozeman (“City”) filed an “Objection to Application” No. 41H-30110660 that was deemed a valid objection by the Department on May 1, 2018, and this matter came before the undersigned Hearing Examiner for a contested case hearing under the Montana Administrative Procedure Act, Title 2, Chapter 4, Part 6, MCA. (§ 85-2-309, MCA)

The gravamen of the City’s objection is that the Disputed Area lies within the City’s “Community and Water Facilities Planning Area” and that by granting the Application, US “will deprive the City of its ability to use water beneficially in the planned Place of Use.” (City of Bozeman’s Brief in Support of Motion for Summary Judgment 1-2) (Sept. 7, 2018) (“City’s Br. In Supp.”).) The City bases its argument on the language found in § 85-2-402(2)(a), MCA, that provides that an applicant for a change in use must prove by a preponderance of the evidence that “[t]he proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or *other perfected or planned uses or developments* for which a permit or certificate has been issued or for which a state water reservation has been issued . . .” (emphasis provided).

The City has filed a “Motion for Summary Judgment” and US has filed a “Motion for Summary Determination.” The parties agree that there are no issues of material fact in dispute

in this matter. (City's Br. in Supp. 7; Motion of Utility Solutions LLC for Summary Determination and Brief in Support 2, 7) ("US's Br. In Supp.") The parties therefore agree that summary judgment is appropriate in this matter. US requests the Hearing Examiner to strike the City's objection and grant the Application. (US's Br. In Supp. 2.) The City requests the Hearing Examiner to order denial of the Application. (City's Br. In Supp. 2.)

The Hearing Examiner is authorized to rule on motions filed in a contested case proceeding, including motions for summary judgment. ARM 36.12.203(2)(b); ARM 36.12.213(1)(a). Both parties have thoroughly briefed their respective motions and this matter is ripe for decision.

APPLICABLE LAW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Capital One v. Guthrie*, 2017 MT 75, ¶11; 387 Mont. 147; 392 P.3d 158 (citing: M. R. Civ. P. 56(c)(3); *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1; 221 P.3d 1200)

The moving party has the burden of establishing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *In re Estate of Harmon*, 2011 MT 84A, ¶ 14, 360 Mont. 150, 253 P.3d 821. Once established the non-moving party must then present substantial evidence that raises a genuine issue of material fact essential to one or more elements of the case. *Apple Park LLC v. Apple Park Condos LLC*, 2008 MT 284, ¶ 11, 345 Mont. 359, 192 P.3d 232.

In the instant matter both parties have moved for summary judgment and agree that there are no genuine issues of material fact presented. Review of the file and pleadings in this matter confirm that there are no genuine issues of material fact presented and this matter is appropriate for summary judgment (or determination) as a matter of law.

Restated, the question presented can be posed in the following manner:

Question: Does a change of use proposal pursuant to § 85-2-402, MCA, that results in the geographic overlap of the place of use with City of Bozeman's Growth Policy and Water Facility Plan adopted pursuant to § 76-1-601, MCA, constitute "adverse effect" to the City's water rights, or interests in water rights, held to satisfy future demand within the Growth Policy boundaries under § 85-2-402(2)(a), MCA?

The question is purely a matter of statutory construction. “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” § 1-2-101, MCA. A court “construes a statute by reading and interpreting the statute as a whole without isolating specific terms from the context, and ‘must account for the statute’s text, language, structure and object.’” *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P3d 819.

Section 85-2-402(2), MCA, upon which the City relies, provides, in pertinent part:

[] the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) [t]he proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or *planned uses or developments for which a permit or certificate has been issued* or for which a state water reservation has been issued under part 3.

(emphasis provided)

ARGUMENTS

The City asserts that if the Application is granted “the City’s right to use water beneficially within the Disputed Area will be adversely affected because any parcels served by Utility Solutions will reduce the Place of Use available for planned uses and development of the City’s water rights.” (City’s Br. In Supp. 2.) The City argues that “allowing [US] to expand its service area into the City’s *Planning Area* will adversely affect the City’s ability to use its water rights by reducing the *established Place of Use*.” (City’s Br. In Supp. 3.)

The City relies *Bostwick Properties, Inc. v. Montana Dep’t of Nat. Res. & Conservation*, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154 to support its position. (City’s Br. in Supp. 5.) The issue in *Bostwick* was that Bostwick proposed to pump ground water which the DNRC determined would eventually result in the physical depletion of surface waters thus adversely affecting senior surface water appropriators. DNRC denied the permit and the Supreme Court agreed. The Supreme Court held that “[a]ny additional *depletion* of water, even one as minimal as 39 acre-feet per year, potentially would adversely affect senior appropriators’ water rights” (emphasis provided). (*Id.* ¶ 39.) The City argues that by adopting its growth policy, it has established a place of use for its water rights (or interests) and that by allowing US to establish

a place of use that overlaps the City's place of use, the City's right to use water beneficially within the Disputed Area will be adversely affected because any parcels served by US will reduce the planned use and development of the City's water rights. The City asserts "[t]here is no practical difference between and action that reduces the amount of water available and one that reduces the appropriators ability to use water for the authorized beneficial use." (City's Br. in Supp. 5-6)

US argues that the objection of the City alleges matters that do not relate to any of the statutory criteria governing DNRC's authority over changes in water rights. US points out that the City will have the same amount of water under all its water rights after the perfection of US's authorization as it does now. (US's Br. in Supp. 2) Additionally, US points out that a "growth policy is not a regulatory document and does not confer any authority to regulate that is not otherwise specifically authorized by law or regulations adopted pursuant to the law" and "the City 'may not withhold, deny, or impose conditions on any land use approval or other authority to act based solely on compliance with a growth policy adopted pursuant to this chapter.'" (US's Br. in Supp. 3; *citing* § 76-1-605(2), MCA) US argues that the City cannot "withhold authority for US to act because it has adopted a monopoly on water under its growth policy." (US's Br. in Supp. 3)

US also points out that none of the City's water rights or interests in water rights have a place of use commensurate with the growth policy.

US avers that "planned uses" for which a permit has been issued or for which water has been reserved "...are those unperfected parts of the protected interests in water reflected by the permit or reservation." (US's Br. in Supp. 6)

ANALYSIS

The City's Water Rights or Interest in Water Rights

The record reveals that the City is not listed as an owner of any water rights that include a place of use within the Disputed Area. The City, however, has purchased *shares* of water from both the Farmers Canal Company under Water Right Claims 41H 120530 – 41H 120537 and Middle Creek Water Users Association under Water Right Claim 41H 119496 and Permit 41H 58294 (which are owned by the State of Montana). (Affidavit of Brian Heaston, PE, Exhibit 7.) Both the Farmers Canal Co water rights and the Middle Creek Water Users Association water rights do describe a place of use that includes the Disputed Area. The Farmers Canal

water rights list only “irrigation” as a purpose of use, and the Middle Creek Water Users water rights include both “sale” and “municipal” as a purpose of use.

The City also asserts that its Water Reservation 41H 70118 could be used to provide water in the Disputed Area, however, review of Water Reservation 41H 70118 shows that the authorized place of use for that reservation lies well east of the Disputed Area. (City’s Br. in Supp. 2; Affidavit of Brian Heaston, PE, Exhibit 11)

None of the water rights that the City relies upon to support its argument involve *a permit or certificate or state water reservation that was issued for its planned uses or developments.*

The Farmers Canal Co. water rights were issued for irrigation purposes only. There is no evidence that Farmers Canal Co. had any “planned uses or developments,” particularly for providing water for municipal use, at the time those water rights were granted. Additionally, there is no evidence in the record of any intent for such a use by Farmers Canal Co. Should the City desire to use the shares they own in Farmers Canal Co. for municipal use, Farmers Canal Co. would be required to file for a change in use to add a “municipal” use to its water right claims. The City’s reliance on its shares of water from Farmers Canal Co. to support its claim that the US permit will adversely affect other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued is not well taken.

The same analysis applies to the Middle Creek Water Users shares of water. Those shares, based on the water rights owned by the State for the Middle Creek Reservoir Project, were issued originally for “sale” in 1938 and describe a “general service area for irrigation, stock and municipal” consisting of eight (8) entire townships or approximately 184,000+ acres. (Affidavit of Brian Heaston, PE, Exhibit 7.) In 1984, the State applied for and was eventually granted a provisional permit for additional water for its project as a result of an expansion of the reservoir. That expansion included a place of use for “municipal” overlapping with “irrigation” consisting of two (2) entire townships and a place of use for “fish and wildlife” overlapping with one of those two townships. All the water under the expansion falls within the “general service area for irrigation, stock and municipal” found in the original 1938 water rights. (*id.*)

All of the State’s water under the Middle Creek Reservoir Project is administered by the

Middle Creek Water Users Association for sale to end users. As owner of those water rights, the State Department of Natural Resources and Conservation has developed that water for the purpose of sale, and the State has never identified any specific “planned use or development” of its water rights either when those rights were granted or since.

The City asserts that their shares from the Middle Creek Water Users Association were specifically purchased for the “Community and Water Facilities Planning Area.” (City’s Br. in Supp. 2.) However, examination of the water purchase contract reveals only that the water provided to the City will be “released for municipal consumption.” (Affidavit of Brian Heaston, PE, Exhibit 6, §5.) The water purchase contract does not specify how the City’s shares are to be used, importantly, the contract does not specify a place of use or planned uses or developments for the City’s shares.

Finally, the City relies on its Water Reservation 41H 70118 for 2857 AF/Year as a water right that may be used within the Disputed Area. While this may or may not be true¹, the City’s Water Reservation indicates a place of use that lies approximately three (3) miles east of the Disputed Area. There is nothing in the record to indicate that at the time the reservation was granted (1992), there were any “planned uses or developments” lying over three (3) miles west of the place of use that was granted. Even if the City now plans to use the Water Reservation within the Disputed Area, the City would need to proceed through the requirements of § 85-2-402 in order to change the place of use for its reservation.

The office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Adoption of the City’s position would require this Hearing Examiner to omit the final phrase of § 85-2-402(2), MCA, “...*planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued* under part 3. The City has not pointed to any permit, certificate or reservation that has been issued that contemplates municipal use within the Disputed Area.

1. The City’s Water Reservation contains a remark that states “Reservation granted until Hyalite Reservoir expansion water supply contract between City and DNRC is signed, 2,857 AF/Year of water (47.3 CFS during spring runoff). If the contract for the Hyalite Reservoir expansion water supply of 2,248 AF/Year is entered into, the City’s Reservation need will be reduced by the reliable reservoir expansion amount, to and expected need of 609 AF/Year of water at a rate of 10.1 CFS. Water Reservation granted June 29, 1992.” The City has currently contracted for 5,712 AF/Year from DNRC through the Middle Creek Water Users Association. (Affidavit of Brian Heaston, PE, Exhibit 10, 11)

Overlapping Places of Use Authorized

The City argues that it holds water rights or interests in water rights that include a place of use within the Disputed Area and asserts that, according to DNRC guidance, DNRC “will consider the Place of Use [for municipal water rights] to be the . . . maximum extent of the boundary as defined in the properly adopted growth policy.” (City’s Br. in Supp. 5; citing *Guidance for Municipal Purposes & Water Rights*, DNRC, 08-12-2014) The City avers that US is seeking to establish a new place of use that includes an area where the City already has an existing place of use and thus “any parcels served by Utility Solutions in the Disputed Area will reduce the Place of Use available for planned use and development of the City’s water rights. (City’s Br. in Supp. 6) The City relies on *Bostwick Properties, Inc. v. Montana Dep’t of Nat. Res. & Conservation*, 2013 MT 48, ¶ 39, 369 Mont. 150, 296 P.3d 1154, for the proposition that any depletion in the amount of water available for beneficial use is considered an adverse effect and invites the Hearing Examiner to extend that rule to include a change in use that creates competing places of use. (“There is no practical difference between an action that reduces the amount of water available and one that reduces the appropriators [sic] ability to use water for the authorized beneficial purpose.” City’s Br. in Supp.6).

The City’s reliance on *Bostwick* is misplaced. A careful reading of *Bostwick* reveals that the Supreme Court was concerned only with amounts of water. The Court uses terms such as “actual amount diverted” and “amounts that will likely be lost in conveyance” in determining depletions to surface water. (*Bostwick* ¶ 24) The City’s leap from “depletion” being tied to amounts or sources of water to a diminution, or “depletion” of the place of use or ability to apply the water to a beneficial use is simply not supported in law. The City points to no authority supporting such an interpretation.

Bostwick is not applicable in this matter. In *Bostwick* there was an actual diminishment of the water supply available and the Court found that to be an adverse effect. In the instant matter there is not even an alleged diminishment of the City’s water supply and the City can use up to the full amount of its water rights and interests in water rights for any authorized use in any authorized place of use under each water right.

Implicit in the City’s argument is that a place of use is exclusive to a particular water right. However, separate water rights can have overlapping places of use. Indeed, the very water rights that the City relies on identify large areas of overlapping places of use – for the same purpose of use. (General Abstract of Claim 41H 58294 (Middle Creek) and 41H 120530

(Farmers Canal).) In addition, the US existing place of use entirely overlays the existing place of use for Four Corners County Water & Sewer District place of use – both of them for municipal purposes. (General Abstract of Claim 41H 30046241 (US) and 41H 30012025).) Even the City's existing water rights and water reservation places of use currently overlap with both Farmers Canal and Middle Creek Water Users places of use. Such overlap is certainly not uncommon.

CONCLUSION

For the foregoing reasons Application to Change an Existing Non-Irrigation Water Right No. 41H 30110660 that results in the geographic overlap of the place of use with the City of Bozeman's Growth Policy and Water Facility Plan does not result in adverse effect as contemplated under § 85-2-402(2)(a).

The City of Bozeman's Motion for Summary Judgment is **DENIED**.

Utility Solutions LLC Motion for Summary Determination is **GRANTED**.

Application to Change Water Right No. 41H 30110660 by Utility Solutions, LLC is **GRANTED** as provided in the Preliminary Determination to Grant Change dated January 18, 2018.

IT IS SO ORDERED.

NOTICE

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 29th day of November 2018.

/Original signed by David A. Vogler/
David A. Vogler, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6835

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the ORDER ON MOTIONS FOR SUMMARY JUDGMENT was served upon all parties listed below on this 29th day of November 2018 by first class United States mail.

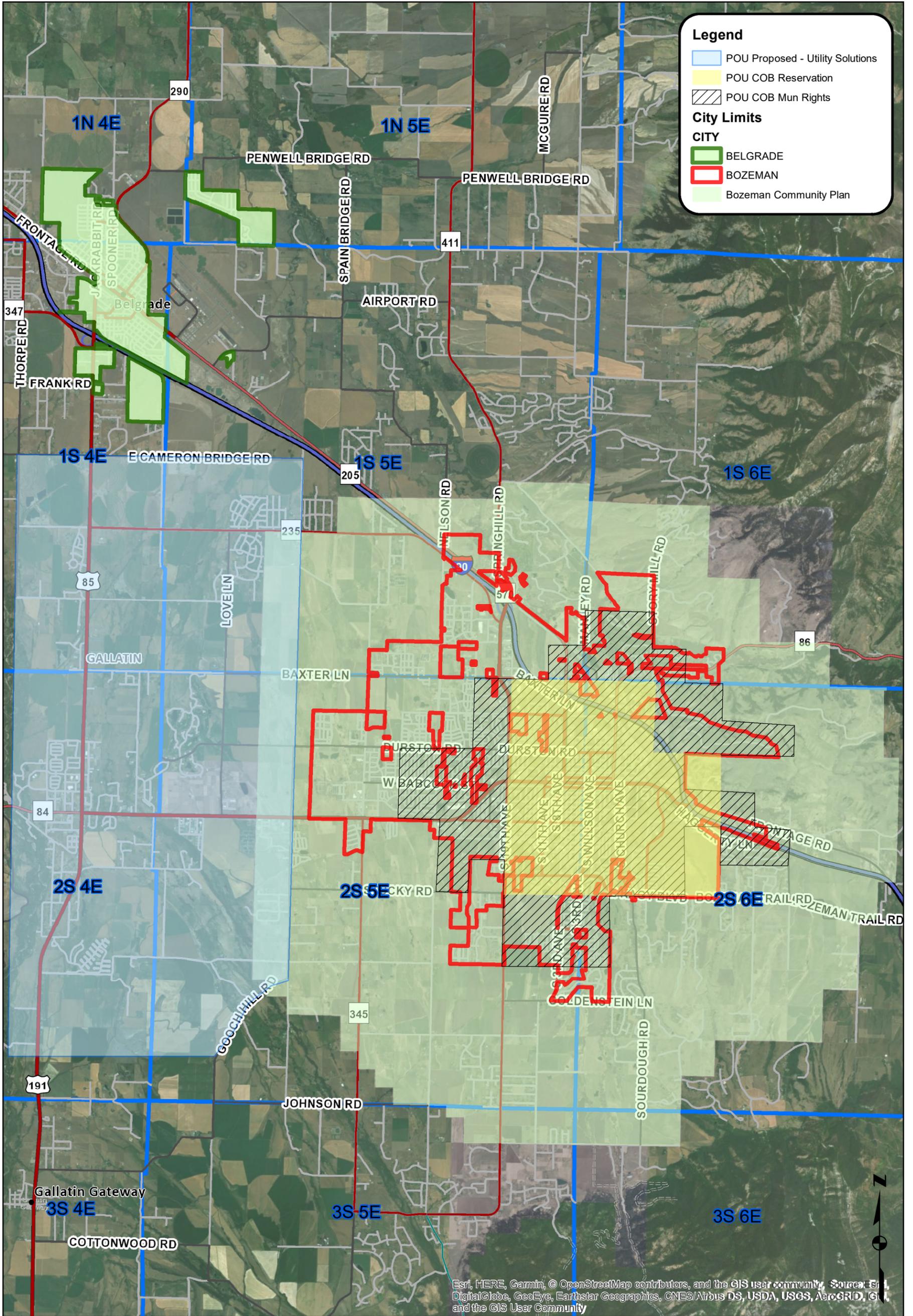
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Legend

- POU Proposed - Utility Solutions
- POU COB Reservation
- POU COB Mun Rights

City Limits

CITY

- BELGRADE
- BOZEMAN
- Bozeman Community Plan



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 engineers • surveyors • planners • scientists	2880 Technology Blvd. W. Bozeman, MT 59718 Phone: (406) 587-0721 Fax: (406) 922-6702 <small>COPYRIGHT © MORRISON-MAIERLE, INC., 2018</small>	DRAWN BY: <u>NPE</u> CHK'D BY: <u>NPE</u> APPR. BY: <u>MEG</u> DATE: <u>3/29/2018</u>	POU Planning Map UTILITY SOLUTIONS, LLC	PROJECT NO. N:13709.037 FIGURE NUMBER FIG. 2
				MT

EXHIBIT 1