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**IN THE WATER COURT OF THE STATE OF MONTANA**

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| <p>TOWN OF KEVIN,<br/><br/>Petitioner,<br/><br/>vs.<br/><br/>MONTANA DEPARTMENT OF NATURAL<br/>RESOURCES AND CONSERVATION,<br/><br/>Respondent,<br/><br/>CITY OF SHELBY<br/><br/>Applicant.</p> | <p>Cause No.:</p> <p><b>PETITION FOR JUDICIAL REVIEW</b></p> |
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Town of Kevin submits the following Petition for Judicial Review of Montana Department of Natural Resources and Conservation’s (“DNRC”) March 30, 2022, Findings of Fact and Conclusions of Law and Final Order (“Final Order”) in which the Department granted the City of Shelby’s Application for Beneficial Water Use Permit No. 41P 30117451; Change Application No. 41P 30114262; and Change Application No. 41P 30116656 (“Applications”).

## **PARTIES**

1. Town of Kevin is a municipality located in Toole County, Montana, which depends on the bulk sale of water to fund a significant portion of its municipal budget. The City of Shelby filed the Applications seeking to expand the place of use for its water rights so it could sell water to Kevin's customers for bulk water.
2. DNRC is the administrative agency that issued the Final Order.
3. City of Shelby is a municipality located in Toole County, Montana, and the party that filed the Applications.

## **JURISDICTION AND VENUE**

4. Pursuant to Mont. Code Ann. § 2-4-702, a party aggrieved by a final decision on an application for a permit or change in appropriation right filed under Mont. Code Ann. Title 85, chapter 2, part 3, may petition the Water Court for judicial review of the decision. Mont. Code Ann. § 2-4-702(2)(e)(i).

## **MANNER AGGRIEVED**

5. Montana Code Annotated § 2-4-704(2)(a), entitles the Town of Kevin to relief from the Final Order if the Court finds the decision was:
  - (i) in violation of constitutional or statutory provisions;
  - (ii) in excess of the statutory authority of the agency;
  - (iii) made upon unlawful procedure;
  - (iv) affected by other error of law;
  - (iv) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(v) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

6. Kevin is aggrieved by the Final Order granting the Applications because the Order is erroneous and entered in violation of one or more standards in Mont. Code Ann. § 2-4-704, thus prejudicing Kevin's substantial rights. DNRC's Final Order must be set aside and vacated for the reasons raised in Kevin's Briefing before the DNRC, the issues raised at the hearings before DNRC, and for the reasons stated in Kevin's proposed Findings of Fact and Conclusions of Law, which are summarized below. This includes, but is not limited to:

- a. DNRC's failure to grant Kevin's September 7, 2021, Motion for Summary Judgment regarding Place of Use for the reasons stated in the Motion.
- b. DNRC's failure to grant Kevin's September 7, 2021, Combined Motion to Compel and to Exclude City of Shelby From Offering Certain Witnesses for the reasons stated in the supporting briefs.
- c. DNRC's failure to grant Kevin's November 5, 2021, Emergency Motion to Certify to the Director and Stay the Proceedings. This includes DNRC's decision to hold the first hearing in this matter six days after it appointed a new Hearing Examiner when DNRC's Rules clearly provide that "A hearing notice and appointment of hearing examiner shall be served not less than 30 days prior to the hearing . . ." Mont. Admin. R. 36.12.204(5).
- d. DNRC's denial of Kevin's request to issue subpoenas for Matt Miles (the DNRC Deputy Regional Director and author of the PDGs) and Atilla Fohnagy (DNRC's

ground water hydrologist who worked on the Applications) for the second hearing in this matter.

- e. DNRC's decision to overrule Kevin's objections to the Hearing Examiner relying on documents in the DNRC's files related to the Applications unless the author of the documents was present and subject to cross-examination at the hearing. *See* Admin. R. Mont. 36.12.221(2) ("The department file shall be deemed part of the record in its entirety unless objections are made to a specific portion thereof upon review by the parties.") and Admin. R. Mont. 36.12.223(4) ("Each party shall be provided the opportunity to cross-examine witnesses.").
- f. DNRC's decision to grant the Applications even though they were not correct and complete by the statutory deadline. "Section 85-2-302(7), MCA, is explicit in stating '[a]n application not corrected and completed within 90 days from the date of notification of the defects is terminated.'" *In the Matter of Change Application No. 41E-30071675*, Order Granting Motion to Dismiss (Sept. 8, 2017) (emphasis in original). Shelby's applications were not correct and complete by the statutory deadline, and thus they were terminated as a matter of law. DNRC, however, disregarded the statute and its precedent to grant the Applications.
- g. DNRC's decision to grant the Applications even though Shelby did not have a possessory interest in the intended place of use or the written consent of the landowners. One of the elements Shelby had to prove for all three Applications is that it had "a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use." Mont. Code Ann. § 85-2-311(1)(e) (new appropriation), § 85-2-402(2)(d) (change

application). As the Final Order concluded, “Applicant concedes that it does not have a possessory interest in all of the places of use identified in the Permit Application and the Change Applications or the written consent of all such owners.” Final Order at ¶ 40. The Order went on to note that “Objector is correct that there is no exception for municipalities to the possessory interest requirement set forth in §§ 85-2-311(1)(e) and 85-2-402(2)(d), MCA.” *Id.* ¶ 42. Yet, DNRC still granted the Applications.

- h. DNRC’s failure to apply Admin. R. Mont. 36.12.101(54), which defines “possessory interest” as “the right to exert some interest or form of control over specific land. It is the legal right to possess or use property by virtue of an interest created in the property, though it need not be accompanied by fee title, such as the right of a tenant, easement holder, or lessee.” DNRC, instead, relied on Admin. R. Mont. 36.12.1802(1)(b) instead, to find a municipality does not have a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. Admin. R. Mont. 36.12.1802(1)(b) does not negate the possessory interest requirement; it merely states that a municipality does not have to sign an affidavit stating it has a possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest. Shelby still has to satisfy the possessory interest requirement using some other evidence besides an affidavit, which it failed to do.
- i. DNRC’s decision that an additional 205 GPM of water was physically and legally available to be appropriated from the aquifer where Shelby’s wells are located.

According to Shelby's own expert, the aquifer can only produce water at the rate of 2,055.6 GPM. Shelby already has water rights that allow it to pump water from the aquifer at the rate of 2,895 GPM. But the new Permit issued by DNRC allows Shelby to pump an *additional* 205 GPM from the aquifer despite the fact that the aquifer is not capable of producing this additional water.

- j. DNRC's Final Order incorrectly decided that the volume of water Shelby had historically used was 1,124.9 AF. This number was based on "estimates of historic use" and is not supported by any records or measurements. Instead, evidence based on actual records shows that the maximum volume of water historically used by Shelby was 683.7 AF. The Final Order nevertheless allowed Shelby to use the higher volume number for the change applications. Shelby now has permission to sell this "excess" water to people who currently purchase bulk water from Kevin.
- k. DNRC's Final Order incorrectly granted Shelby's Application for a Beneficial Use Permit for more water than it needs to stratify its current demand for municipal water. According to DNRC's 2020 Permit Application Manual, "There is no growing cities doctrine in Montana." But DNRC's Final Order granted Shelby a Permit to appropriate more water for future uses. While the agency never stated why it did so, it appears it ignored its own Manual and granted the additional water based on the growing cities doctrine. Moreover, Shelby stated that it only needed an additional flow rate of 86.1 GPM and a volume of 138.9 AF of water to satisfy its current demands for water *and its future anticipated demands*. However, DNRC granted Shelby a Permit for 205 GPM and 331.6 AF

of water, which is 118.9 GPM and 192.7 AF *above* what Shelby said it needed to meet its current and anticipated future demands. Thus, even if the growing cities doctrine applied to new permits issued by DNRC, the decision to award Shelby more water than it needs for its current and anticipated future demands is flawed.

1. DNRC's Final Order incorrectly determined that Shelby could claim a volume based on the estimate of water usage from its peak population in 1960. And since the City's population has decreased since then, the Department found, Shelby could sell this "excess" water to people located outside the municipal boundaries. Instead, DNRC should have applied the principal of "use it or lose it" and found that Shelby had abandoned the portion of its water rights that it longer used due to its declining population. *City of Fort Peck v. Army Corps of Engineers*, 2019 MT 174, 396 Mont. 433, 445 P.3d 828.
  - m. DNRC's Final Order incorrectly determined that Kevin's interests would not be adversely affected if the Applications were granted. The Final Order disregards the uncontradicted, credible evidence regarding the impacts on Kevin's bulk water sales and how the decreased sales would impact Kevin's water rights.
7. In addition, this Court may set aside and vacate the Final Order if "findings of fact, upon issues essential to the decision, were not made although requested." Mont. Code Ann. § 2-4-704(2)(b). In its Proposed Findings of Fact and Conclusions of Law, Kevin requested that DNRC make a number of factual findings that the Final Order did not address. Kevin's substantial rights, including its right to have the Final Order be based on the complete and accurate factual record, were prejudiced as a result. This includes, but is not limited to, DNRC's failure to adopt the following facts in the Final Order:

- a. A finding that Shelby does not have a possessory interest or the written consent of the persons with the possessory interest in the various properties where the water is to be put to beneficial use under the Applications. Proposed FOF # 62.
- b. A finding that the DNRC violated Mont. Code Ann. § 85-2-402(15)(b)(i) when it asked Shelby to file replacement well forms when it knew the replacement wells had not been drilled yet. Proposed FOF # 15-18.
- c. A finding that Shelby never signed the portion of the Replacement Well Notice forms which required it to “affirm [it] had possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use.” Proposed FOF # 60.
- d. A finding that Shelby’s applications were not correct and complete by the statutory deadline. Proposed FOF # 18-21
- e. A finding that Shelby only requested a volume of 330.4 AF in its Permit Application, yet the Final Order granted it a Permit with volume of 331.6 AF. Proposed FOF # 26.
- f. A finding that Shelby’s population has been decreasing since 1960, and that in 2015 the population was 3,304, and in 2021, the population was 2,907. Proposed FOF # 82.
- g. A finding that maximum volume of water historically used by Shelby was 683.7 AF. Proposed FOF # 87, 92.
- h. A finding that there is no evidence that Shelby ever diverted 1,124.9 AF of water in any given year. Proposed FOF # 87, 92.



- i. A finding that Shelby’s historical use of water for municipal purposes was not 100% consumptive. Proposed FOF # 45, 101.
  - j. A finding that the rate Shelby uses water is not constant year-round. Proposed FOF # 98-101.
  - k. A finding that Shelby’s use of the water covered by the Applications will result in Kevin receiving less revenue from bulk sales, which will impact Kevin’s existing water rights. Proposed FOF # 105-113.
8. Kevin reserves the right to supplement or amend this Petition as necessary.

**DEMAND FOR RELIEF**

The Court should vacate or modify the Final Order based on the errors identified above. Kevin requests such other and further relief as this Court deems just and proper, including an award of attorney fees and costs as permitted by law or equity.

DATED this 28th day of April, 2022.

DONEY CROWLEY P.C.

/s/ Jack G. Connors

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Jack G. Connors  
Samuel J. King  
*Attorneys for Petitioner Town of Kevin*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Petition for Judicial Review* was served via email and U.S. mail, first-class postage prepaid, on this 28th day of April, 2022, upon the following:

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/s/ Jodi L. Bell

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