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## Kelly v. Teton Prairie LLC, 376 P.3d 143 (Mont 2016)

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service area is the proper method of satisfying the Carey Act's place of use requirement. The supreme court declined to determine the exact size of the service area at this stage of litigation.

The supreme court also considered whether there was any evidence of water use by irrigators on the Birch Creek Flats prior to 1973. The water master found some evidence of historic use on the Flats, including some releases from storage facilities that eventually flowed into canals utilized by non-Pondera water users, but determined that these releases did not amount to Pondera use warranting inclusion of the Flats within the service area boundary. However, the Water Court found that there was evidence of Pondera water being used on the Flats prior to 1973, and concluded that the Flats should be considered as falling within the boundaries of the Pondera service area. The supreme court evaluated the use of water in the Flats based on Pondera's actions, and disagreed with the Water Court's conclusion that Pondera put the water to beneficial use on the Flats prior to 1973. The supreme court reversed this portion of the decision and remanded for further consideration.

The supreme court next examined whether the Water Court erred by substituting its judgment for that of the master regarding the "Gray Right." Curry argued that the judgment of the Water Court was erroneous regarding the flow rate of the Gray Right. Pondera in turn argued that the Master's report contained contradictory findings and therefore the Water Court's judgment was not erroneous. The supreme court held that the Water Court applied the appropriate standard of review to the Master's findings, and the Water Court's determination of the flow rate for the Gray Right was not clearly erroneous.

Finally, the supreme court considered whether the Water Court's tabulation of the parties' respective claims to water rights should have included volume measurements when it did not. Pondera contended that the tabulations should have included volume. The supreme court held that while such measurements would undoubtedly be helpful, this was a matter of discretion for the Water Court.

Accordingly, the supreme court partially affirmed the Water Court by finding Pondera's water rights corresponded to actual shares allotted under the Carey Act and extended to its entire service area, and reversed and remanded the determination with respect to the acreage determination.

*Brian Hinkle*

**Kelly v. Teton Prairie LLC, 376 P.3d 143 (Mont. 2016)** (holding: (i) the district court properly applied the prior appropriation doctrine against a junior rights holder who failed to adhere to a call for water; (ii) the junior water right holder failed to meet its burden in establishing the futile call doctrine as an affirmative defense; and (iii) the district court had proper jurisdiction and authority to grant injunctive relief to the senior water right holder).

The Teton River ("River") flows through Teton and Chouteau Counties in Montana. The River primarily relies on melting snowpack to maintain its late season flow and has a long history of water right disputes stemming from farming and ranching operations. Steven Kelly ("Kelly") was a senior appropriator who held water rights for stockwater purposes and domestic use. Teton Prairie LLC ("Teton") was a junior appropriator, located upstream from Kelly, and

held water rights for irrigation. In August 2013, Kelly observed that he was not receiving the full extent of his water rights. Kelly's attorney sent a round of call letters to junior appropriators, including Teton, instructing them to cease diversion of water from the river. Despite the call, Teton continued to divert water. Kelly filed suit, seeking injunctive relief in its claims of wrongful interference with a water right and wrongful diversion of water by a junior water right holder. A Montana district court granted Kelly's motion for summary judgment and enjoined Teton from making out-of-order diversions after the receipt of call letters from senior appropriators, such as Kelly. Teton appealed to the Supreme Court of Montana.

The supreme court first considered whether Teton violated the prior appropriation doctrine. The supreme court explained that the Montana Water Use Act explicitly recognized the prior appropriation doctrine. Under the Prior Appropriation Doctrine, the first to take possession of water on the public domain and put it to beneficial use becomes the "first in right." The supreme court noted that the senior appropriator is entitled to receive his full appropriation and junior appropriators must take notice of the senior's call and stop diversions until the senior's appropriation right was fully maximized. The supreme court rejected Teton's argument that Kelly's call was invalid because Kelly had made calls to "selective" junior appropriators, instead of making the call based on the strict order of reverse priority. The supreme court noted that when a senior water right holder's interest is injured, any and all junior water right holders are equally answerable for the injury. The supreme court concluded that senior appropriators need not follow a strict order of calls, as such a requirement would conflict with the purpose of the doctrine. The supreme court upheld the district court's finding that Teton had violated the prior appropriation doctrine by improperly ignoring a call for water by Kelly.

The supreme court next addressed the futile call doctrine, which is an affirmative defense for a junior right holder who elects not to honor a senior appropriator's call. Montana has never explicitly adopted the doctrine. The futile call doctrine excuses a junior right holder from a call when the outcome would result in no beneficial use by the senior right holder. The burden is on the junior right holder to show that no usable water would reach the senior appropriator's point of diversion because of carriage loss. The supreme court rejected Teton's application of the doctrine, noting expert testimony, which revealed that usable water could have traveled to Kelly's point of diversion had Teton ceased its diversion.

Finally, the supreme court addressed whether the district court's grant of injunction was proper. The supreme court noted that the district court had the jurisdiction, authority, and sound discretion to grant an injunction in water right disputes. The supreme court rejected Teton's argument that the injunction's scope was too broad, reasoning that the district court order only required Teton to refrain from activity that would violate the prior appropriation doctrine and Montana law. Finding no instance of manifest abuse by the district court, the court affirmed the grant of injunctive relief to Kelly.

Accordingly, the supreme court affirmed the judgment of the district court.

*Reggie Norris*