

1-1-2017

## Clark Fork Coal. v. Tubbs, 380 P.3d 771 (Mont. 2016)

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N. Rioux Jordan, Court Report, Clark Fork Coal. v. Tubbs, 380 P.3d 771 (Mont. 2016), 20 U. Denv. Water L. Rev. 458 (2017).

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Accordingly, the court affirmed the water court holding that the BLM maintained valid appropriations in its reservoirs under Montana law and the BLM owned reserved water rights for stockwatering in Pothole Lake pursuant to PWR 107.

Justice Laurie McKinnon, dissenting.

Justice McKinnon disagreed with the majority's application of *Bailey* to conclude that the BLM put water to beneficial use and completed an appropriation. Instead, the dissent argued that the majority expanded *Bailey's* narrow exception that applied to public service corporations. The *Bailey* court determined that to require a corporation to perfect a water right upon showing of an actual beneficial use would be impractical because corporations could not perfect a water right until a third party put water to a beneficial use. Here, the dissent argued the majority misinterpreted that exception to include "anyone" who "distributes" water could perfect a water right. In so doing, the dissent raised foundational legal principles to conclude that beneficial use "is one that inures to the benefit of the appropriator." Along that vein, the dissent contended that the ancestral free grazers inured to their benefit when their cattle grazed and drank water, and thus completed a valid appropriation. Conversely, the dissent further argued the BLM did not perfect a water right because it "never owned the livestock that appropriated the water or grazed federal lands" and thus, irrespective of reservoir construction, the BLM did not appropriate water under Montana law.

*Gia Austin*

**Clark Fork Coal. v. Tubbs, 380 P.3d 771 (Mont. 2016)** (holding that the Montana Department of Natural Resources and Conservation's ("DNRC") rule that required groundwater developments to be physically connected was inconsistent with the plain language of the statutory "combined appropriation" exception to the exemption of certain groundwater developments from the permit requirement).

Montana uses a comprehensive permit system for water appropriation. Groundwater appropriations of less than thirty-five gallons per minute and ten acre-feet per year can be exempt from the permit requirement. The law also contains an exception to this exemption. Under the Act, groundwater appropriators must acquire a permit if the "combined appropriation" from two or more wells or developed springs that draw from the same source exceeds thirty-five gallons per minute and ten acre-feet per year. Over time, the DNRC promulgated rules to further define "combined appropriation." The first of these rules ("the 1987 rule") explained that groundwater developments need neither to "be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" The DNRC replaced this rule in 1993 with a rule ("the 1993 rule") that instead requires a physical connection to exist between appropriations to count as combined. Using the Act and the 1993 rule, exempt appropriations of groundwater rose by about 3,000 each year, totaling about 113,000. These appropriations consume large quantities of water.

In response, the Clark Fork Coalition (the "Coalition"), senior water users affected by this consumption, petitioned the DNRC to declare the 1993 rule inconsistent with the statute. After the DNRC refused, the Coalition petitioned

the First Judicial District Court, Lewis and Clark County to invalidate the 1993 rule as inconsistent with the Act and to reinstate the 1987 rule. The lower court agreed with the Coalition, reinstated the 1987 rule, and further directed the DNRC to initiate rulemaking to develop a new rule consistent with this ruling. While the DNRC did not appeal the decision, the Montana Well Drillers Association, the Montana Association of Realtors, and the Montana Building Industry Association (the "Well Drillers") did. On appeal, the Montana Supreme Court considered whether the lower court erred when it invalidated the 1993 rule, reinstated the 1987 rule, and directed the DNRC to initiate a new rulemaking.

The Court broke the first question into two parts: whether the rule was inconsistent with the plain language of the statute and whether the legislature's subsequent amendments adopted the interpretation of the 1993 rule. The Court explained that, when deciding if a rule is inconsistent with statutory language, it must first ascertain the plain language meaning of the statute. If a statute does not have a plain language meaning, then it is ambiguous. Once the Court determines whether there is a plain language meaning, it will determine whether a rule is inconsistent or in conflict with the statute. If it determines there is an inconsistency or conflict, then the rule is invalid. The Court explained that an agency's "subsequent inconsistent rules" do not create ambiguity in a statutory terms. Then the Court explained that statutory amendments do not change the intent of unchanged language.

Applying these rules, the Court examined the plain language meaning of "combined appropriation" using dictionary definitions and grammar rules. First, it explained that "appropriation" refers to a quantity of water removed. Second, the Court explained that because "combined" precedes "appropriation," "combined appropriation" means a combined quantity of water, not a physically combined groundwater development. This placement does not allow "combined" to modify anything but "appropriation." Because the term refers to quantity, and not method of removal, the Court determined that the 1993 rule "effectively swallow[s] up the underlying exception" because it limits the exception to structurally combined appropriations by enabling groundwater appropriators to pump beyond the statutory limit as long as they did not physically combine their pumping systems. This contradicts the intent of the legislature because it allows combined appropriations of a greater quantity than authorized by statute. The Court went on to explain that the legislature's amendments, which continually lowered the quantity allowed for exempt ground developments but left the combined appropriation language untouched, did not adopt the 1993 rule interpretation of the term because it did not modify the combined appropriation language. Therefore, the intent of the combined appropriation language remained the same, consistent with the plain meaning of the original words and unchanged by the 1993 rule's interpretation. The Court rejected DNRC's 1993 rule.

The second question, whether the lower court erred by reinstating the 1987 rule, appeared to the Court as a question of first impression. The Court first looked to federal Administrative Procedure Act ("APA") case law that replaced an invalidated rule with the previous valid rule. Then it compared this approach to the similar approach for invalidated statutes and looked through the Montana APA for potential inconsistencies. Finding no inconsistencies, the Court

adopted the federal approach to invalidated rules and held that lower court did not err by reinstating the 1987 rule.

Finally, the Court considered the Well Driller's argument that the lower court could not require the DNRC to initiate rulemaking consistent with the order. The Court reasoned that, because courts have the authority to "pronounce a judgment and carry it into effect," the lower court could require rulemaking to be consistent with its order. However, the Court agreed that the District Court could not compel DNRC to initiate a new rulemaking. Because it is the DNRC's responsibility to adopt necessary rules, it is the DNRC's decision whether or not to keep the reinstated 1987 rule.

Accordingly, the Court partially affirmed the lower court's decision invalidating the 1993 rule.

Justice Jim Rice, dissenting.

Justice Rice dissented. He did not find the plain language of the statute "clear on its face." He found it strange that the Court's ruling implied that the "DNRC inexplicably misinterpreted and misapplied a clear statute for the past 23 years." Rather, he thought the Court found the significant increase in exempt appropriations startling and acted as a legislative body to correct a perceived policy failing.

*N. Rioux Jordan*

**Granite Cty. Bd. Of Comm'rs v. McDonald, 383 P.3d 740 (Mont. 2016)** (holding the Water Court did not err in its interpretation of a 1906 decree stating a reservoir owner must release not less than 1200 miner's inches of water for senior downstream appropriators during irrigation season, while also enjoining downstream users from demanding more than the natural flow of the creek above the dam in times of shortage).

This case came before the Supreme Court of Montana as an appeal from a decision of the Water Court regarding the decree from a 1906 case, the interpretation of which clarified disputed water rights between Granite County ("the County") and McDonald, a private party.

The rights under dispute in this case arose from the terms of the 1906 Decree in *Montana Water, Electric and Mining Co. v. Schuh*, decided by the United States District Court for the District of Montana. That court granted Montana Water, Electric and Mining Company ("the Company"), the predecessor to Granite County, water rights associated with storage of Flint Creek water in the Georgetown Lake reservoir for the purposes of generating hydro-electric power. McDonald, who is a successor to one of the defendants in that case, objected to the County's water right claims, two of which arise out of the *Schuh* Decree.

The root of the controversy in *Schuh* is the Decree's seemingly conflicting language. The Decree states that during irrigation season, the Company must cause to flow into the channel of Flint Creek "not less than 1200 miner's inches" of water below its electric plant, enjoining the Company from diverting water from the creek decreed to downstream users. At the same time, the Decree recognized downstream user's rights were limited to the natural inflow of the creek. As a result, the Company was prohibited from releasing any amount