Water Law Review

Volume 20 | Issue 2 Article 37

1-1-2017

Granite Cty. Bd. Of Com'rs v. McDonald, 383 P.3d 740 (Mont 2016)

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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 is 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

exceeding that of the "average natural flow" which, during the irrigation season, does not "exceed 1200 miner's inches" of water.

For purposes of this case the Water Court defined "natural inflow" as that amount of water that would pass through the creek without interference from the dam and defined "storage water" as water from the natural flow of the creek that was impounded for use during times of low natural flow.

Applying the analysis in *Schuh*, the court had to determine whether the Decree intended that the reservoir release 1200 miner's inches of storage water throughout the irrigation season, or whether Granite County was only required to release to downstream users that amount equivalent to the natural inflow of the creek above the dam. McDonald argued that the wording in *Schuh* required the County to maintain a constant flow of not less than 1200 miner's inches of water for senior downstream appropriators to use at all times during irrigation season regardless of the natural flow of the creek into the reservoir. The County contended it was only required to release the natural inflow of Flint Creek, and not to release storage water from the reservoir when the natural inflow from the creek fell below 1200 miner's inches.

The Water Court looked to other decisions of the Montana Supreme Court, explaining that limiting downstream users to the natural conditions of a stream at the time of appropriation and not considering storage water as part of the natural flow of a creek was consistent with established Montana Law. The Water Court further explained that Montana case law has recognized that downstream appropriators may not demand release of storage water exceeding the natural inflow of the creek. Though the *Schuh* Decree did not state this explicitly, the language of the Decree implicitly recognizes this principle. The *Schuh* court's decision was consistent with the law as it applies to storage rights, which recognizes natural flow may only be impounded for storage purposes when there is enough water to satisfy rights of senior downstream appropriators. However, a reservoir is not required to release lawfully impounded storage water to downstream appropriators in times of low natural flow.

In interpreting seemingly conflicting statements in the *Schuh* Decree, the Water Court determined the *Schuh* court did not intend for downstream users to receive a benefit that the law did not provide; in this case, the mandatory release of storage water is the unintended benefit. Instead, the *Schuh* court's instruction that the Company release 1200 miner's inches "at all times" was designed to ensure that the water that was used in the hydroelectric plant was returned to the creek and not diverted elsewhere. It was not meant to be interpreted that the Company release 1200 miner's inches at all times during irrigation season regardless of natural flow levels of Flint Creek. The Water Court held this was consistent with the County's contention that it was not required to release storage water for downstream appropriators to use during times of shortage.

The Supreme Court affirmed the Water Court's decision, concluding that the *Schuh* Court did not intend for downstream appropriators to have a right to water stored behind an upstream dam as long as the dam operator released that amount of water which would naturally flow through the stream without the interference of the dam.

The final issue the Water Court contemplated was McDonald's assertion

that principles of claim preclusion estopped the County from contending that it was not required to release 1200 miner's inches of water at all times during irrigation season. The Water Court dismissed a res judicata argument on grounds that both parties agreed the point under dispute was the interpretation of rights the *Schuh* Decree already recognized, and interpreting a decree is not the same as re-litigating issues of fact already decided in it. The Water Court next considered McDonald's claim of judicial estoppel. The court dismissed the claim, finding her argument failed because she showed no evidence the County intended to commit fraud or abuse the judicial process, thus failing to demonstrate all the elements of judicial estoppel.

The Supreme Court affirmed the Water Court's dismissal of McDonald's estoppel argument, holding the Water Court properly applied the principles of claim preclusion upon which McDonald relied.

In a specially concurring opinion, Justice McKinnon agreed with the opinion of the court that downstream appropriators have no right to water stored behind an upstream dam as long as the dam operator releases that amount of water which would naturally flow through the stream without the interference of the dam. She concurred specially to opine that the *Schuh* Decree established a quantity of natural flow above the dam only, and this did not enjoin senior downstream appropriators from using in excess of 1200 miner's inches when the natural inflow of the Flint Creek exceeded 1200 miner's inches. Similarly, the Decree did not require the Company to draw from its reservoir to supplement inflow rates when they dropped below 1200 miner's inches.

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NEBRASKA

Lingenfelter v. Lower Elkhorn Nat. Res. Dist., 881 N.W.2d 892 (Neb. 2016) (holding that (i) a farmer's uncontroverted claim that he had received approval to irrigate his land did not constitute approval by a Natural Resource District to irrigate those lands; (ii) a Natural Resources District's cease-and-desist order against the farmer was proper because the district created a rule that prohibited farmers from irrigating undesignated land without obtaining approval; and (iii) the district's rules of land designation were not arbitrary and capricious and did not violate the farmer's due process or equal protection rights).

The Nebraska Ground Water Management and Protection Act ("Act") created twelve Natural Resources Districts ("NRDs") within the state. NRDs have authority to regulate ground water. The NRDs' legislative purpose is to develop, manage, utilize, and conserve groundwater and surface-water. NRDs set limits on total ground water usage, require practices that promote the efficiency of ground water usage, and "limit or prevent the expansion of irrigated acres." This authority allows NRDs to protect groundwater quantity and quality. State legislators deemed this protection as "essential to the general welfare." Since the Act's adoption in 1975, NRDs have gained increasingly more authority to regulate Nebraska's groundwater. By 1996, the NRDs' authority was extended to regulate surface water that was hydrologically connected to groundwater.

The Lower Elkhorn Natural Resources District ("District") is the NRD that