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**In re SRBA, No. 33669, 2008 WL 427550 (Idaho Feb. 19, 2008)**

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the necessary infrastructure to perfect the use and reuse of 64,000 acre-feet of stored water coupled with an additional 80 cfs direct flow right.

Accordingly, the Court set aside the conditional water right while reversing and remanding the water court's judgment. In doing so, the Court held that a governmental agency must satisfy the "can-and-will" test by showing that it can and will put the conditionally appropriated water to beneficial use within a reasonable period of time. Additionally, the Court held that the water court must make sufficient findings of fact that a governmental water supply agency has met the burden of demonstrating three elements in regard to its intent to make a non-speculative conditional appropriation: 1) what is a reasonable planning period; 2) what are the substantiated population projections based on a normal rate of growth for that period; and 3) what amount of water is reasonably necessary to serve the reasonably anticipated needs of the governmental agency for the period, above its current supply.

*Tim Fiene*

## IDAHO

***In re SRBA, No. 33669, 2008 WL 427550 (Idaho Feb. 19, 2008)*** (holding that an 1888 federal act did not grant water rights to the City of Pocatello, but rather merely granted access to surface water on an Indian reservation and the opportunity to establish water rights under state law).

In the late 1800s, the Utah Northern Railway Company ("railroad") built two intersecting railroad lines on the Fort Hall Indian Reservation ("reservation"). Within a few years, non-Indian trespassers settled on the intersection at a site called Pocatello Junction ("townsite"). In 1887, the United States and the Tribes of the reservation negotiated a Cession Agreement ("agreement"). This agreement transferred the townsite to the settlers and granted a right-of-way to the railroad for the existing rail lines but made no mention of water. An 1888 congressional bill approved the agreement but, unlike the agreement, did mention water. Section 10 of the bill ("Section 10") stated Pocatello citizens "shall have the free and undisturbed use in common with the said Indians of the waters . . . in the vicinity of [the townsite], with right and access at all times . . . and the right to construct, operate, and maintain all [water carrying structures]."

In 1990, the City of Pocatello ("Pocatello") filed a claim in the Snake River Basin Adjudication ("SRBA"), asserting that Section 10 granted Pocatello a federal water right via the Property Clause of the U.S. Constitution. The United States, Idaho, and the Shoshone-Bannock Tribes ("opposing parties") all objected and moved for summary judgment. An SRBA Special Master granted summary judgment in favor of the opposing parties and recommended that the SRBA court not confirm Pocatello's claim. The SRBA court affirmed the

Special Master's decision and determined that Section 10 granted only a right of access to appropriate water, not any water right. Pocatello appealed to the Idaho Supreme Court.

The Court first considered Section 10's plain language. Under the accepted statutory interpretation technique, clear and unambiguous statutory language requires no further interpretation. Applying this technique, the Court held that Section 10's plain language clearly and unambiguously did not convey any water rights because Section 10 failed to include historically recognized and accepted water conveyance terms such as "convey," "grant," or "water rights." Congress' intent to purposefully omit these conveyance terms was even more obvious when contrasted with Section 11 of the act, which "granted" a railroad right of way.

The Court next explained that even if Section 10's language were ambiguous, general historical context, including the federal government's deference to state water law, would contradict Pocatello's position. Because of this well-established deference to state law, courts have recognized federal water rights only when contract language explicitly granted federal control. Because no such explicit language existed in Section 10, state law would control any of Pocatello's water rights.

Specific historical context would also contradict Pocatello's position. Least favorable for Pocatello was that the issue of water rights did not come up until *after* the agreement. Two letters also discredited Pocatello's claim. In 1888, the Commissioner of Indian Affairs wrote that the agreement made no water use provisions and that Idaho laws regulated the settlers' water rights. In 1891, the Idaho Assistant Attorney General wrote that Section 10 was a mere license that granted a right-of-way upon Indian lands. Also unfavorable to Pocatello was the fact that it adjudicated its water rights under state law from 1888 through 1990. In addition, a 1990 agreement settled water right disputes among tribes, Idaho, and the United States without recognizing any of Pocatello's water rights.

The Court rejected Pocatello's claim that Section 10's "in common with" phrase granted the city a portion of the Indians' water rights. Although previous cases interpreted the same phrase as granting an actual right rather than just a right of access, those cases interpreted Indian treaties using Indian canons of construction. Unlike those cases, the phrase within Section 10 is part of a statute, not a treaty. "In common with" appeared nowhere in the agreement; instead, it showed up for the first time in a statute created by non-Indians. The Court explained that if a statute is ambiguous, a court will liberally construe the meaning in favor of Indians. Accordingly, if Section 10 were ambiguous, courts would interpret it to benefit the Indians, not Pocatello.

Even if Section 10 were part of an Indian treaty rather than a statute, Pocatello's argument would still fail. To interpret an Indian trea-

ty, courts apply Indian canons of construction, which construe language in a manner Indians would naturally understand it. However, courts only apply Indian canons of construction to the benefit of Indians. Pocatello is a city, not an Indian tribe, and cannot benefit from the same type of interpretation.

Next, the Court pointed to two reasons why, contrary to the city's claim, Section 10 did not abrogate the Indians' federally reserved water rights. First, Congress abrogated Indian treaty rights only through language clearly evidencing intent to do so. For example, Congress used such clear language to abrogate Indian rights in an earlier 1885 act. In contrast, Congress failed to include similar language in Section 10, a signal that it had no intent to abrogate any of the Indians' federally reserved water rights. Second, the reservation treaty between the United States and the Tribes required a majority of adult male Indians on the reservation to consent to any abrogation of treaty rights. However, there was no record of such a majority deciding to cede water rights, a fact that also defeated the city's claim.

Finally, the Court rejected Pocatello's claim of federal water rights based on the Property Clause. The Court explained that although Congress had the power to grant Pocatello a federal water right under the clause, Congress did not choose to exercise that power.

The Court affirmed the SRBA court's decision, holding that the 1888 act did not grant Pocatello any federal water rights. The act only granted access to surface water sources on the reservation and granted the opportunity to establish water rights under state law.

*Kurt Kropp*

## MONTANA

**Faust v. Utility Solutions, LLC, 2007 MT 326, 340 Mont. 183, 173 P.3d 113 (Mont. 2007)** (holding that the issuance of a final permit for the pumping of groundwater rendered claims for injunction and attorney fees moot, and further holding that the Water Use Act does not create a private right of action to enforce civil penalty provisions).

On September 6, 2006, Roselee Faust ("Faust") and Sandra McManus ("McManus") filed a complaint against Four Corners County Water and Sewer District ("The District") and Utility Solutions, LLC ("Utility"), a private company contracted to provide water and sewer services within The District's boundaries. Under their amended complaint, Faust and McManus claimed they suffered direct and irreparable harm because Utility began pumping groundwater upon receiving a conditional permit for pumping groundwater from the Department of Natural Resources and Conservation ("DNRC"). The conditional permit obtained by Utility required final approval by the DNRC before Utility could begin legally pumping groundwater. Faust and McManus sought to enjoin Utility from continuing to pump, stating that further