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Faust v. Utility Solutions, LLC, 2007 MT 326, 340 Mont. 183, 173 P.3d 113 (Mont. 2007)

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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

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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

groundwater appropriations would adversely affect Faust's and McManus's water rights. Additionally, Faust and McManus sought the imposition of civil penalties against Utility under the Montana Water Use Act. Further, Faust and McManus sought attorney fees under both the Water Use Act and the private attorney general doctrine. In response to Faust's and McManus's claims, The District and Utility filed separate motions to dismiss, which the court granted. The court found Faust and McManus lacked standing to enforce the Water Use Act.

Faust and McManus appealed the district court's ruling to the Montana Supreme Court. Two weeks prior to the appeal, the DNRC issued final approval of Utility's groundwater pumping permit. In light of the final issuance of the permit, Utility filed a motion to dismiss the appeals as moot. Faust and McManus argued that their claims were not moot due to Utility's earlier unauthorized pumping. Faust and McManus maintained their appeal against The District only with regards to their request for injunctive relief. The Court held that the issuance of final permits ended any on-going violations of the Water Use Act and all claims for injunctive relief were therefore moot. The Court further held that Faust and McManus were not entitled attorney fees under the Water Use Act because the act directs the award of attorney fees only to those parties who obtain injunctive relief when enforcing a water right.

The Court then addressed Faust's and McManus's private right of action to enforce the civil penalty provision of the Water Use Act. The Court noted that whether or not a statute creates a private right of action is a matter of statutory construction. Faust and McManus argued that the attorney fee provision in the Water Use Act implies that the act allows for private rights of action. However, the Court noted that the attorney fee provision is only associated with injunctive relief and is not implicated under the act's civil penalty provisions. The Court further noted that the statutory language stated that only actions initiated by government entities could collect fines under the civil penalty provision. Upon observing the legislative history of the Water Use Act, the Court clarified that the "independent action" clause in the civil penalty provision referred only to actions brought by the county attorney. Finally, the Court held that Faust and McManus were not entitled to attorney fees under the private attorney general doctrine because the doctrine requires that a claimant succeed in some measure in the underlying controversy.

Accordingly, the Court affirmed the lower court's dismissal and did not grant attorney fees.

Tim Fiene