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Paulson v. Flathead Conservation Dist., 91 P.3d 569 (Mont. 2004)

John Lintzenich

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The district court's recognition of an independent source of water, determination of the flow rate, and referral to the water at issue as developed water fell under this authority. Thus, the district court did not exceed its jurisdiction.

Hidden Hollow also argued the district court erred in denying Hidden Hollow's motion to certify the issue involving the controversy as to the source of the respective parties' water rights to the chief water judge. The court rejected Hidden Hollow's argument, relying again on the determination that the district court did not exceed its jurisdiction in respect to the previous issue.

Next, the court addressed the argument that the district court erroneously shifted the burden of proof to Hidden Hollow to prove how much water Hidden Hollow contributed to the natural drainage from its independent source. The court stated the burden of proof rests on the party asserting he or she is entitled to use water released into a natural carrier from another water source. In the case at issue, the court noted the district court weighed the evidence presented at trial and concluded Field proved more water was imported from his water source than the water diverted at his lower point of diversion. On the other hand, Hidden Hollow's evidence was not as persuasive. Thus, the district court permissibly shifted the burden of proof to Hidden Hollow.

Finally, the court addressed the issue of whether the district court's order regarding Hidden Hollow's water right deprived Hidden Hollow of due process of law by ruling on issues not raised by the pleadings. On this issue, Hidden Hollow maintained the district court permanently modified the Decree by declaring Field was entitled to all but a 0.83 miner's inches of water at his lower point of diversion. Hidden Hollow argued that such a modification, in what was essentially an action for contempt and injunctive relief, deprived Hidden Hollow of due process of law. However, the court held the district court did not permanently modify the Decree, thus the district court did not deprive Hidden Hollow of procedural and substantive protections embodied by the due process clauses of the United States Constitution and the Montana Constitution.

In conclusion, the court rejected all of Hidden Hollow's arguments and affirmed the district court's holding.

Benjamin M. Petre

Paulson v. Flathead Conservation Dist., 91 P.3d 569 (Mont. 2004)
(holding the conservation district had statutory authority to determine property owners' rights to construct a waterfront improvement project where another state agency had concurrent jurisdiction over the project).

Jack and Donna Paulson (“the Paulsons”) applied for and received a permit from the Flathead Regional Development Office (“FRDO”) to construct a waterfront project (“project”) on Flathead Lake. Five months into the project’s construction, the Flathead Conservation District (“FCD”) notified the Paulsons the project was also in the Swan River and, therefore, subject to FCD’s jurisdiction. Upon receiving this notice, the Paulsons petitioned FCD for a permit, which FCD denied. The Paulsons thereafter sought to determine whether FRDO or FCD had jurisdiction over the project. An arbitration panel (“panel”) determined the project was located on a flowing stream and the FCD therefore had jurisdiction over the project. The panel’s decision also necessarily upheld FCD’s denial of the Paulsons’ permit petition. As a result, the Paulsons filed a motion in the Flathead County District Court to vacate the panel’s decision.

The Paulsons contended the dispute involved a jurisdictional issue between administrative agencies that the court needed to decide the issue. The Paulsons also questioned the legitimacy of appointing a former state agency official to the panel. Specifically, the Paulsons argued a former Montana Department of Fish, Wildlife, and Parks (“FWP”) employee could not be an impartial arbiter. The district court granted FCD’s motion for judgment on the pleadings and the Paulsons appealed to the Montana Supreme Court.

The Paulsons asserted the question of whether FCD or FRDO had proper jurisdiction was properly decided by the district court, not an arbitration panel. FCD contended it could make determinations of water status and that its internal arbitration panel had the authority to review FCD decisions in order to resolve all factual and legal issues arising from disputes. Montana generally gives arbitrators broad authority to decide both legal and factual questions, and courts uphold such decisions upon review if the decisions are rationally derived from the agreement to arbitrate. The agreement to arbitrate, in this case, called for review by an arbitration panel if a party was unsatisfied. However, state law severely limited judicial review of the arbitration decision.

In this instance, the test laid out in *Bitterroot River Prot. Ass’n v. Bitterroot Conservation Dist.* applied. The *Bitterroot* test stated for a court to interfere with an agency’s determination of its jurisdiction: (1) the agency’s jurisdiction must be plainly lacking, (2) forcing a party to exhaust its remedies must result in irreparable injury, and (3) the agency’s special expertise must be of no help on the question of jurisdiction. The court ruled FCD’s jurisdiction was not plainly lacking because it was logical for the agency involved to determine what constituted a stream. The court also concluded that requiring the Paulsons to exhaust administrative remedies would not result in irreparable injury. Finally, FCD’s expertise was not without value, as FCD and FRDO asserted concurrent jurisdiction over Flathead Lake throughout the history of the agencies. For these reasons, the court held the arbitra-

tion panel did not abuse its power and it had the proper authorization to make the decisions regarding the Paulsons' permit.

Next, the court determined a former employee of a state agency is not automatically barred from serving as an arbitrator in a case where the same agency is a party. As long as the individual was a resident of the judicial district in which the arbitration occurred and the judge chose the individual from the lists of potential arbiters submitted by FWP, FCD, and the permit applicant, then the person could be an arbitrator. The former FWP employee that served as an arbitrator in this case met both of these conditions. Additionally, the court had previously held prior employment was insufficient to establish partiality *per se*. The Paulsons' argument of partiality was therefore speculative and conclusory at best.

Thus, the arbitration panel had the statutory authority to make permit determinations, was impartial in making its decision, and provided adequate remedies for permit application review. For these reasons, the court upheld the ruling of the district court not to vacate the arbitration panel's decision.

John Lintzenich

NEBRASKA

In re Applications T-851 and T-852, 686 N.W.2d 360 (Neb. 2004) (holding the Department of Natural Resources properly reduced the allocation of incidental groundwater storage rights in proportion to a decrease in state power district's direct irrigation service).

The Nebraska Public Power District ("NPPD") filed applications with the Department of Natural Resources ("DNR") concerning two of NPPD's water appropriations. The NPPD filed the applications after one of its water users, Terry Crawford, ceased use of NPPD's surface water and began irrigating his land with well water. NPPD's applications requested a transfer of the location of diversion and use of two of NPPD's water appropriation rights. NPPD believed the transfer was necessary in order to avoid losing the water rights associated with Crawford's land. The DNR approved the transfer for one application. However, with respect to the second appropriation, the DNR cancelled 0.65 cubic feet per second ("cfs") of the NPPD's incidental groundwater storage allocation. The NPPD appealed this decision to the Supreme Court of Nebraska.

The DNR based its decision on language from a May 1988 order ("order") that originally granted water appropriation rights to the NPPD, but also stipulated that a proportionate reduction in incidental underground storage would accompany any reduction in direct irrigation service. Based on the terms of the order, the DNR concluded Crawford's decision not to use the direct irrigation service consequently reduced the NPPD's direct irrigation service. Thus, pursuant