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Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999)

**Scott v. McTiernan, 974 P.2d 966 (Wyo. 1999)** (holding no abandonment exists where an appropriator's nonuse was involuntary when circumstances beyond his control prevented his water use).

The Scotts owned property adjacent to the McTiernan property in Sheridan County. The two properties were previously owned in common. The prior owner developed an intricate ditch irrigation network to utilize his water rights on the entirety of his property. As a result of partitioning the property, Scott's irrigation water was conveyed through ditches across McTiernan's land.

The Scotts irrigated two parcels of property with water from the John Ross Appropriation with a priority date of May 1883, number three priority on Smith Creek. The adjudicated point of diversion for the John Ross Appropriation from Smith Creek was Ross No. 1 Ditch. The Scotts did not divert irrigation water for these two parcels through Ross No. 1 Ditch, but through the prior owner's network of multiple points of diversion, crossing McTiernan's land. The Scotts also asserted a right to irrigate their Shallcross property with water from the John Ross Appropriation.

McTiernan deliberately shut down the ditches running to the Scott property in 1991. McTiernan's ranch manager and another employee assured the Scotts that the ditches would be replaced. On August 29, 1996, McTiernan petitioned the Board of Control of the State of Wyoming ("Board") for a declaration of abandonment by the Scotts of their water right, claiming that the Scotts failed to beneficially use their John Ross Appropriation right in the preceding five years. The Scotts filed a petition for the declaration of abandonment of several McTiernan rights. The Board consolidated the petitions in a single abandonment hearing.

On January 5, 1998, the Board ruled that part of the John Ross Appropriation was abandoned and reduced the Scotts' appropriation from 1.78 c.f.s. for the irrigation of 125 acres to .46 c.f.s. for the irrigation of thirty-two acres. This measurement reflected the Scotts' irrigation practices during the previous five years. The Scotts appealed this decision, and the district court certified the case to the Wyoming Supreme Court. McTiernan did not appeal the Board's abandonment determination regarding his property.

The Wyoming Supreme Court reviewed the Board's decision with deference. Wyoming statute obligated the Board to make its factual findings on all of the material issues upon which its conclusions were based. The court reversed the Board's determination that the Scotts had abandoned their John Ross Appropriation water right. It decided the Board's finding of fact regarding the Scotts' Shallcross property irrigation water was inadequate and remanded this issue for further determination and additional fact finding. The court affirmed that the John Ross Appropriation did not apply to 10.1 acres south of Smith Creek. The Board's determination was supported by substantial evidence that the lay of the land prevented irrigating this acreage from

the Ross No. 1 ditch because the ditch was located on the opposite bank. The 10.1 acres was irrigated instead with water from the Morrill Ditch.

Abandonment under Wyoming statute exists where the holder of an appropriation fails either intentionally or unintentionally to use the water for a beneficial purpose during any successive five year period. The Board, following the legislature's language determined that even if unintentional, the Scotts' failure to use their Smith Creek right during the preceding five years triggered an abandonment of that right. The court distinguished this language and determined that a right could not be abandoned involuntarily, when caused by circumstances not under the appropriator's control. The court found intent to abandon is not required. Thus, because the Scotts' failure to use their water right was the direct result of McTiernan's flow prevention practices, the Scotts did not abandon their water right.

The Board's record of decision was inadequate to determine the Scotts' irrigation practices on their Shallcross property. The Board decided that the Scotts' had irrigated only 14.1 acres of this property during the preceding five years. The court found the Board's argument for its decision was a justification made in hindsight, and the Board's calculations flawed regarding the Shallcross property. Thus, the court remanded this portion of the Board's decision for reconsideration and additional fact finding.

Finally, the court upheld the Board's determination that 15.5 acres of the Scott property were historically and were irrigated currently through the Morrill Ditch. The court determined that 10.1 acres irrigated under this permit were not included in the John Ross Appropriation blanket land description, covering 160 acres.

The original description of the John Ross Appropriation included the Scotts' 10.1 acres and provided water sufficient to irrigate 125 acres. In 1929, a previous common owner of the Scott and McTiernan properties received a permit to irrigate 98.1 acres from the Morrill Ditch that included the 10.1 acres at issue. Thus, both the blanket John Ross Appropriation land description and the Morrill Appropriation permit included the 10.1 acres. The court deferred to the Board's authority to define and quantify water rights, as the scope of the original adjudication documents was unclear. The Board's decision reflected its finding that the 10.1 acres at issue were located on the opposite bank of Smith Creek from the Ross No. 1 ditch, the supply of the Scotts' asserted irrigation rights. The court affirmed the Board's determination that the 10.1 acres were not a part of the John Ross Appropriation.

*Chip Cutler*