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Montana v. Wyoming

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***Montana v. Wyoming*, 131 S. Ct. 1765 (2011).**

Ben Sudduth

I. INTRODUCTION

In *Montana v. Wyoming*,²³⁰ Montana alleged that Wyoming violated the Yellowstone River Compact (Compact) by allowing its pre-1950 water users to increase irrigation efficiency by switching from flood irrigation to sprinklers.²³¹ The Compact is an agreement between the states of Wyoming, Montana, and North Dakota that allocates water from the Yellowstone River System.²³² The only issue under review was whether the Compact allows Wyoming’s water users to increase consumption of water by improving irrigation systems even if it ultimately reduces the water returned to the rivers and reduces the flow of water for Montana users.²³³ The United States Supreme Court held that the appropriation doctrine in Montana and Wyoming, which was incorporated into the Compact, permitted a switch to more efficient irrigation.²³⁴

Montana also asserted that even if the doctrine of appropriation did not support its position, the Compact’s definition of “beneficial use” restricted the scope of pre-1950 rights to the volume of water Wyoming used to irrigate in 1950.²³⁵ Again, the Court struck down Montana’s argument, stating that the plain reading of the Compact’s definition of “beneficial use” did not support Montana’s position.²³⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

Ratified in the 1951, Article V(A) of the Compact states that “[a]ppropriative rights to the beneficial uses of water . . . existing in each signatory State as of January 1, 1950, shall continue

²³⁰ *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

²³¹ *Id.* at 1770.

²³² *Id.* at 1769.

²³³ *Id.* at 1771.

²³⁴ *Id.* at 1771.

²³⁵ *Id.* at 1777.

²³⁶ *Montana*, 131 S. Ct. at 1779.

to be enjoyed in accordance with the laws governing the acquisition and use of water under the *doctrine of appropriation*.”²³⁷

Montana alleged that Wyoming violated the Compact by appropriating water from the Tongue and Powder Rivers for “a number new, post-1950 uses”; the Compact, Montana argued, did not allow these new uses as long as Montana’s pre-1950 users’ rights remained unfulfilled.²³⁸ Montana believed its appropriative rights to the Tongue and Powder Rivers were not “continu[ing] to be enjoyed” because Wyoming’s pre-1950 users increased consumption when they switched from flood to sprinkler irrigation.²³⁹ Furthermore, Montana claimed the increased consumption of water, and decreased seepage returning to the Tongue and Powder Rivers, reduced the volume of water that flowed to Montana by 25% or more.²⁴⁰

After Wyoming filed a motion to dismiss Montana’s complaint, the Court appointed a Special Master to consider Wyoming’s motion.²⁴¹ The Special Master recommended that the Court deny Wyoming’s motion because some of Montana’s allegations stated a claim for relief; however, the Special Master agreed with Wyoming that Montana’s allegations regarding the “efficiency improvements” did not state a claim for relief.²⁴² Montana, upon the Special Master’s rejection of the efficiency improvement argument, filed an exception.²⁴³ The main issue before the Court was “whether Article V(A) allow[ed] Wyoming’s pre-1950 water users . . . to increase their consumption of water by improving their irrigation systems even if it reduces the flow of water to Montana’s pre-1950 users.”²⁴⁴

III. ANALYSIS

²³⁷ *Id.* at 1772 (emphasis added).

²³⁸ *Id.*

²³⁹ *Id.* at 1771 (quotations omitted).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1770.

²⁴² *Montana*, 131 S. Ct. at 1771 (quotations omitted).

²⁴³ *Id.*

²⁴⁴ *Id.* at 1771.

Montana asserted two arguments against Special Master’s ruling. First, the background principles of appropriation law, which govern the Article V(A) of the Compact, bar such an increase in consumption.²⁴⁵ Second, if appropriation law did allow such an increase in consumption, the terms of the Compact still favored Montana.²⁴⁶

A. The Appropriation Doctrine

The appropriation doctrine states that “rights to water are perfected and enforced in order of seniority, starting with the first person to divert water from a natural stream and apply it to a beneficial use.”²⁴⁷ Beneficial use restricts a user “to the amount of water that is necessary to irrigate his land by making a reasonable use of the water.”²⁴⁸ The perfection of such a right is senior to any subsequent appropriators’ rights and may be fully filled before junior appropriators get any water.²⁴⁹ Even though the Compact assigned all pre-1950 users in Montana and Wyoming the same seniority, the Court likened Montana water users to junior appropriators.²⁵⁰ Because of this equal right, Montana’s pre-1950 users could not stop Wyoming’s pre-1950 users from fully exercising their water rights.²⁵¹ Therefore, Montana could merely insist that Wyoming users confine themselves strictly according to the Compact, that is, to the extent that appropriations of water are actually applied to a beneficial use.²⁵² Regarding the doctrine of appropriation as incorporated into Article V(A) of the Compact, Montana asserted that Wyoming violated the no injury rule and the doctrine of recapture.

1. No-Injury Rule

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1772.

²⁴⁸ *Montana*, 131 S. Ct. at 1772.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

Under the no-injury rule, junior appropriators may inhibit senior appropriators from enlarging their appropriations to the junior’s detriment.²⁵³ The no-injury rule states that if a senior appropriator interferes with a junior appropriator’s water right, then the junior appropriator may complain.²⁵⁴

However, the no-injury rule was not absolute and was generally considered when there were changes in the “diversion location and the place or purpose of use.”²⁵⁵ For example, appropriators could increase their consumption by switching to more water-intensive crops, as long as the acreage irrigated and the amount of water diverted stayed the same.²⁵⁶ Ordinary operations, changes, and day-to-day repairs did not violate the no-injury rule.²⁵⁷

Here, the Court determined Wyoming’s improvements to irrigation systems fell outside of the no-injury rule because those changes did not influence the place of a diversion or the place or purpose of use.²⁵⁸ The Court used statutes from Montana and Wyoming as dispositive proof that the states did not require users to “take official action” before adjusting irrigation methods; from this, the Court concluded that Montana and Wyoming considered such changes to irrigation permissible.²⁵⁹ In both Montana and Wyoming, litigation of the no-injury rule focused on diversion changes rather than irrigation methods, strongly implying that improvements in irrigation efficiency are not violations of the no-injury rule.²⁶⁰

2. Doctrine of Recapture

²⁵³ *Id.*

²⁵⁴ *Montana*, 131 S. Ct. at 1772.

²⁵⁵ *Id.* at 1773.

²⁵⁶ *Id.* at 1774.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 1774 n. 6 (citing Mont. Code Ann § 89-803 (1947); Wyo. Stat. Ann. § 71-104 (1945)).

²⁶⁰ *Montana*, 131 S. Ct. at 1774.

Under the doctrine of recapture, an appropriator has the right to recapture water that is within his right and reuse it on his land before it flows out of his control or off of his property.²⁶¹ Appropriators have strong claims to “waste” water: an appropriator has exclusive control of his appropriated water, including incidental waste water from his irrigation, so long as he applies it to a beneficial use.²⁶²

However, Montana argued that if this waste water, when not recaptured, returned to the same stream that it was originally diverted, the doctrine of recapture did not apply.²⁶³ The Court acknowledged support for Montana’s position; case law from Colorado and Utah stated that a beneficial user may *not* reuse the water if it would otherwise return to the same stream from which it originated.²⁶⁴ However, case law from Montana and Wyoming supported the original appropriator’s recapture of water if it remained on his property and was reused for the same purpose.²⁶⁵ The Court demonstrated the application of this principle with three cases from the Supreme Court of Wyoming.²⁶⁶ The Court found similar conclusions from the same three cases: Wyoming appropriators can increase their water use efficiency by recovering incidental waste water on their property as long as the increased consumption was on the same land the appropriative right was attached.²⁶⁷ In 1933, the Montana Supreme Court outlined a similar rule where “the owner of the right to use the water—his private property while in his possession,— may collect it, recapture it, before it leaves his possession.”²⁶⁸

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 1775.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Montana*, 131 S. Ct. at 1775–1776 (citing *Binning v. Miller*, 120 P.2d 54 (Wyo. 1940), (holding that the right to use water which seeped from a creek remained was appropriated to the beneficial use to the owner of the land where the water originated); *Bower v. Big Horn Canal Assn.*, 307 P.2d 593, 601 (Wyo. 1957), (holding that if a senior appropriator can increase his efficiency so that no waste water return by seepage or percolation, no other appropriator can complain); *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980), (holding that once water escapes a appropriators land, he no longer has any superior right to it)).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1776 (quoting *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 268, 72 P.2d 1074, 1080 (1933)).

The Court concluded that Montana and Wyoming’s treatment of the doctrine of recapture supported Wyoming’s position that improvements in irrigation efficiency were within its pre-1950 appropriative rights.²⁶⁹ The Court compared the use of sprinklers to “cruder recapture systems involving ditches or pits”; sprinklers reduce runoff because they efficiently deliver the appropriated water, reduce runoff, and “recapture” the water.²⁷⁰ Thus, Montana appropriators are at the mercy of appropriators from Wyoming who choose to recapture irrigation water that would otherwise return to the Tongue and Powder Rivers.²⁷¹

B. Scope of Ordinary Appropriative Rights

Montana argued in the alternative that Article V(A) did not protect “the full scope of appropriative rights.”²⁷² Instead, Montana asserted that the definition of “beneficial use” restricted “the scope of pre-1950 appropriative rights to the net volume of water that was actually being consumed in 1950.”²⁷³ The Court believed this argument also fell short.²⁷⁴

The Court focused on plain reading of “beneficial use.” To the Court, beneficial use referred to the *type* of the irrigation use that depletes a water supply, not the *amount*.²⁷⁵ The definition of “beneficial use” clearly stated that the term depletion refers to “that *use* by which the water supply of a drainage basin is depleted.”²⁷⁶

Montana’s proposed definition of beneficial use would have changed the longstanding meaning of the Compact’s term; water put to “beneficial use” had never been defined in terms of net water consumption.²⁷⁷ The Court explained that if the Compact were meant to be read so that Montana’s definition was a set amount of water per year, then the Compact could have explicitly

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1776–1777.

²⁷² *Montana*, 131 S. Ct. at 1767.

²⁷³ *Id.* at 1777.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1778.

²⁷⁶ *Id.* at 1768, 1778.

²⁷⁷ *Id.*

stated so.²⁷⁸ To the Court, the definition of beneficial use was unequivocal, and Article V(A) did not alter the scope of the pre-1950 appropriative rights that it maintained in Montana and Wyoming.²⁷⁹

IV. CONCLUSION

The Court concluded that the doctrine of appropriation, as it was incorporated into the Yellowstone River Compact, supported the improvement of Wyoming's irrigation systems. Furthermore, the Court also concluded that the scope of ordinary appropriative rights in Article V(A) was not violated when Wyoming's appropriators increased water consumption. Therefore, Wyoming appropriators were justified in improving their irrigation efficiency.

The Court was hesitant to issue a ruling on principles of the appropriation doctrine that relied almost entirely on state law; the Court did not want to rule on issues almost entirely between states.²⁸⁰ The decision of the Court reflected the general principles of the appropriation doctrine in Montana and Wyoming holding that the appropriation doctrine of both states allows an upstream user to improve their irrigation efficiency, even if downstream user's water appropriations are impaired. The Court was unwilling to comment and further develop water regulation between Montana and Wyoming beyond what these states had intended in the Compact. The Court believes that job is for the highest courts of these states.²⁸¹

²⁷⁸ *Montana*, 131 S. Ct. at 1779.

²⁷⁹ *Id.* at 1779.

²⁸⁰ *Id.* at 1773 n. 5.

²⁸¹ *Id.*