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## Fellows v. Office of Water Commission for the Perry v. Beattie Decree

Jack G. Connors

University of Montana School of Law, john.connors@umontana.edu

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***Fellows v. Office of Water Commissioner for the Perry v. Beattie Decree*, 2012 MT 169, 365 Mont. 540, 285 P.3d 448.**

Jack G. Connors

**ABSTRACT**

The issue of whether two adjoining waterways are hydrologically interconnected such that a change in flow in one will affect the flow in the other is a complex question. In *Fellows v. Office of Water Commissioner*, the Montana Supreme Court held that if two waterways are hydrologically interconnect, the water rights on each river have to be considered together single system.

**I. INTRODUCTION**

In *Fellows v. Office of Water Commissioner*,<sup>1</sup> Fellows, the plaintiff, filed a complaint alleging that upstream water users were diverted the entire flow of the Teton River into a ditch, which denied him the water he needed to satisfy his senior water right on an adjacent stream.<sup>2</sup> The district court granted the defendant's motion to dismiss because it believed that it did not have the jurisdiction to adjudicate the issue.<sup>3</sup> The Montana Supreme Court reversed, finding that if Fellows could prove the facts in his complaint, the district court could grant the declaratory judgment he requested.<sup>4</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

The Teton River and Spring Creek are two adjacent waterways that run parallel to each other near Choteau, Montana.<sup>5</sup> In the relevant area, they are separated by approximately a quarter mile. The Springhill Reach is a gravelly and porous section of the Teton River. It is a losing section of the river because as the river flows through the reach, a significant amount of

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<sup>1</sup> *Fellows v. Office of Water Comimssioner for the Perry v. Beattie Decree*, 2012 MT 169, 365 Mont. 285, P.3d 448.

<sup>2</sup> *Id.* at ¶ 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶ 21.

<sup>5</sup> *Id.* at ¶ 3.

water seeps underground and the volume the river decreases.<sup>6</sup> This means there is more water at the start of the reach than at the end of the reach.<sup>7</sup> In 1908, as part of the *Perry v. Beattie* decree, the local district court issued a decree granting the Choteau Cattle Company the right to divert water at the end of the Springhill Reach.<sup>8</sup> Later, the district court appointed a water commissioner to distribute water according to the decree.<sup>9</sup> Prior to that, the district court had issued a decree granting Fellow's predecessor in interest the right to obtain water from Spring Creek.<sup>10</sup> Fellow's point of diversion is near the Springhill Reach but downstream and at a lower elevation.<sup>11</sup> This makes it possible that the water that was historically lost in the Springhill Reach became part of the water Fellows diverted form Spring Creek.

Although the Court was not certain when it started, during the 1950s or 1960s the water commissioner administering the *Perry v. Beattie* decree began diverting water out of the Teton River and into a ditch called the Bateman Ditch.<sup>12</sup> The ditch transports water around the Springhill Reach and returns it to the river's natural channel immediately upstream from the Choteau Cattle Company's point of diversion.<sup>13</sup> In some years, the Springhill Reach runs dry because the entire flow of the Teton River is diverted into the Bateman Ditch.<sup>14</sup> The water commissioner implemented this diversion as a water saving measure to provide additional water for upstream water users who have water rights junior to the Choteau Cattle Company.<sup>15</sup> Preventing the seepage enables the junior water users to use the water that otherwise would have been lost underground while still providing an adequate flow of water for the Choteau Cattle

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<sup>6</sup> *Fellows*, at ¶ 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (*Perry v. Beattie*, Mont. Eleventh Jud. Dist., Cause No. 371 (1908)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 2 (*Sands Cattle and Land Co. v. Jackson*, Mont. Eleventh Jud. Dist., Cause No. 727 (1892)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶ 4.

<sup>13</sup> *Fellows*, at ¶ 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Company.<sup>16</sup>

Fellows claimed that using the Bateman Ditch to avoid the Springhill Reach diminishes the flow in neighboring Spring Creek where he diverts his water because the two are hydrologically interconnected.<sup>17</sup> The decreased, or non-existent, flow of the Teton River decreases the flow in Spring Creek and interferes with Fellow's senior water right.<sup>18</sup> He also claimed that the *Perry v. Beattie* decree and Montana water law dictates that the flow of the Teton River must remain as it was at the time of the decree—down the river's natural channel.<sup>19</sup> In February 2011, he filed a complaint under Montana Code Annotated § 85-5-301(1) as a "dissatisfied water user."<sup>20</sup> He also filed claims based on private and public nuisance and negligence. For relief he requested a declaratory judgment, an injunction, and a writ of prohibition.<sup>21</sup>

After conducting a hearing and reviewing the parties' briefs, the district court dismissed Fellow's complaint because it found he lacked standing to bring an action as a dissatisfied water user.<sup>22</sup> The court held that its jurisdiction was limited to enforcing the *Perry v. Beattie* decree and it lacked jurisdiction to determine the Spring Creek–Teton River interconnectivity issue.<sup>23</sup> After dismissing the complaint, the district court suggested that Fellows could file a new complaint requesting the district court certify the interconnectivity issue to the Montana Water Court.<sup>24</sup> Fellows did not file an amended complaint; instead, he appealed to the Montana Supreme Court.<sup>25</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at ¶ 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Fellows*, at ¶ 6.

<sup>20</sup> *Id.* at ¶ 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at ¶ 9.

<sup>24</sup> *Fellows*, at ¶ 10.

<sup>25</sup> *Id.*

### III. ANALYSIS

The only issue on appeal was whether the dismissal of Fellow's complaint was proper.<sup>26</sup> The Montana Supreme Court will affirm the dismissal of a complaint only if it finds the plaintiff was not entitled to relief under any set of facts that he/she could have proven.<sup>27</sup> Pursuant to article IX, section 3 of the Montana Constitution, the legislature created the Montana Water Court that has exclusive jurisdiction over "all matters relating to the determination of existing water rights within the boundaries of the state of Montana."<sup>28</sup> The only exception is that a district court has the jurisdiction to hear cases involving the distribution of a decreed water right.<sup>29</sup>

A party to a decree may file a complaint about the method of water distribution under the decree as a dissatisfied water user.<sup>30</sup> The Montana Supreme Court affirmed that Fellows was not a dissatisfied water user because the water commissioner for the *Perry v. Beattie* decree only has the authority to distribute water according to the decree.<sup>31</sup> Fellows derives his water right from another decree, and the law does not provide a mechanism for him to complain about the actions of the water commissioner for another decree.<sup>32</sup>

However, the Supreme Court found that Fellows had another avenue for relief available because he had requested a declaratory judgment.<sup>33</sup> The Court reiterated that a district court should liberally grant declaratory relief when necessary to eliminate "uncertainty and insecurity with respect to rights, status, and other legal relations."<sup>34</sup> In Montana, the law recognizes that

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<sup>26</sup> *Id.* at ¶ 12.

<sup>27</sup> *Id.* at ¶ 11.

<sup>28</sup> *Id.* (citing Mont. Code Ann. § 3-7-224(2) (2011)).

<sup>29</sup> *Fellows*, at ¶ 16.

<sup>30</sup> *Id.* at ¶ 13 (citing Mont. Code Ann. § 85-5-301 ("[a] person owning or using any of the waters of the stream . . . who is dissatisfied with the method of distribution of the waters of the stream . . . may file a written complaint")).

<sup>31</sup> *Id.* at ¶ 16.

<sup>32</sup> *Id.* at ¶ 16.

<sup>33</sup> *Id.* at ¶ 17.

<sup>34</sup> *Fellows*, at ¶ 17 (quoting Mont. Code Ann. § 27-8-102).

groundwater and surface water may be interconnected. In this case, there was substantial uncertainty whether the two waterways were hydrologically interconnected.<sup>35</sup> Therefore, the district court had jurisdiction to declare whether the Teton River was hydrologically connected to Spring Creek and are and Fellows had stated a valid claim for relief.<sup>36</sup> The Supreme Court remanded the case back for the district court to resolve the interconnectivity issue. If the district court declares the waterways are hydrologically interconnected, it is to certify the case to the Montana Water Court to adjudicate the parties' respective water rights.<sup>37</sup>

#### **IV. CONCLUSION**

The Court's holding that two waterways can be hydrologically interconnected in a way that could affect the relative priority of the water rights is an important step in Montana water law. Unfortunately, the Court did not offer guidance how significant the connection between the flows has to be. If the district court finds an interconnection between the Teton River and Spring Creek, the Water Court will face a difficult task of determining how much water must flow through the Springhill Reach to provide an adequate flow in Spring Creek to satisfy Fellow's senior water right. It will have to consider the relative priority dates of water users on both waterways, and whether they are upstream or downstream from the Springhill Reach.

In this case, the location of the alleged interconnectivity and Fellow's point of diversion were close. However, this holding applies even if the point of interconnectivity is far up- or down-stream. This could come as a surprise to water users who are accustomed to only considering other users on the same river.

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<sup>35</sup> *Id.* at ¶ 20.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at ¶ 21.