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City of Helena v. Community of Rimini

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City of Helena v. Community of Rimini, 388 Mont. 1, 397 P.3d 1,
(Mont. 2017)

Molly M. Kelly

After twenty years of adjudication, the Montana Supreme Court affirmed the City of Helena’s right to 13.75 cfs from Ten Mile Creek, the city’s primary water source. The Court found a statute allowing cities and municipalities to exercise water rights that have gone through extended periods of nonuse did not need a retroactive clause.

I. INTRODUCTION

In 1982, the City of Helena claimed water rights dating from the 1860s, despite prolonged periods of non-use.¹ Andy Skinner and the Community of Rimini, both junior water rights holders to Ten Mile Creek, objected.² In 2005, the Montana Legislature amended the water rights claims statutes and formally recognized municipality nonabandonment despite periods of nonuse, if certain criteria were met. The objectors argued the 2005 amendment to the municipality non-use exception was impermissibly retroactive and needed a retroactivity clause as required by the Montana Code.³ The Montana Supreme Court disagreed and found the amendments permissible because they were procedural, rather than substantive.⁴ The Court recognized the Montana Legislature’s codification of the “growing cities doctrine.”⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

In the 1800s, miners used water from Tenmile Creek near Helena, Montana for silver mining.⁶ When they no longer had use for the appropriated water, some miners sold their water rights to the Helena Water Works Company.⁷ A 1903 decree declared the Helena Water Works Company (“Company”) the owner of the first two rights on Tenmile Creek.⁸ Taken together, the two water rights total 550 miner’s inches (“MI”), and have a flow rate of 13.75 cubic feet per second (“cfs”).⁹

1. City of Helena v. Community of Rimini, ¶ 8, 388 Mont. 1, P.3d 1 (Mont. 2017).
2. *Id.*
3. *Id.* ¶ 15.
4. *Id.* ¶ 17.
5. *Id.* ¶ 36.
6. *Id.* ¶ 4.
7. *Id.*
8. *Id.*
9. *Id.*

At the time of the decree to the Company, it was using two points of diversion from the stream.¹⁰ The first point diverted through an open ditch, into a water treatment facility, and then went through two sixteen-inch pipelines to the City of Helena (“City” or “Helena”).¹¹ The City replaced the open ditch in 1922 with an eighteen-inch concrete diversion pipeline called the “Rimini Pipeline.”¹² The Rimini Pipeline’s capacity is 13.15 cfs.¹³ After construction, and after the City stopped utilizing the Yaw Yaw ditch (described below) for municipal purposes, all of Helena’s Tenmile Creek diversions flowed through the Rimini Pipeline.¹⁴ Helena’s total claim is 13.75 cfs, so Rimini Pipeline’s 13.15 cfs capacity is 0.60 cfs less than Helena’s entire Tenmile Creek water rights.¹⁵

The second original point of diversion was downstream of the treatment facility, diverting through an open channel called the Yaw Yaw ditch.¹⁶ In 1919, after Helena acquired the Company’s facility and water rights, it ceased using the Yaw Yaw ditch for municipal purposes.¹⁷ The City continued to lease the ditch for agricultural purposes and maintain the facilities for emergencies.¹⁸

In 1929, the City commissioned an engineering report that identified restricted capacity for the two sixteen-inch pipelines, which limited their capacity to 5.50 cfs.¹⁹ In 1948, the City built a new twenty-four-inch pipeline with a capacity of 13.75 cfs.²⁰ This enabled the City to divert 13.15 cfs through the Rimini Pipeline, through the treatment facility, and then through the new twenty-four-inch pipeline to Helena.²¹

The City filed water rights claims for the two rights in 1982.²² Andy Skinner, a junior water rights holder, and the Community of Rimini, objected to the City’s claims.²³ Twenty years of adjudication culminated in this decision.

In 2011, Water Master Hugh B. McFadden, Jr. (“Master”) found against the City’s claims to the entire water rights from the two original rights. He found that the City abandoned 7.35 cfs of its rights to Tenmile Creek.²⁴ In 2013, the Water Court held that the Master erred because he did not consider Montana’s presumption of municipal nonabandonment statute.²⁵ On appeal to the Montana Supreme Court, the case was

10. *Id.* ¶ 5.

11. *Id.*

12. *Id.* ¶ 6.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* ¶ 5.

17. *Id.*

18. *Id.*

19. *Id.* ¶ 7.

20. *Id.*

21. *Id.*

22. *Id.* ¶ 3.

23. *Id.* ¶ 8.

24. *Id.*

25. *Id.* (citing Mont. Code Ann. § 85-2-227(4)).

remanded to address “procedural errors and ambiguities in the Water Court’s order.”²⁶ On remand, the Water Court reversed and found the City abandoned their water rights under the common law, but ordered briefs on abandonment under Mont. Code Ann. § 85-2-227(4).²⁷ After the parties composed briefs on the issue, the Water Court held that under the nonabandonment statute, “evidence established a presumption that the City did not intend to abandon 7.35 cfs.”²⁸ The Water Court also found that the City abandoned 0.60 cfs in the Rimini Pipeline, the difference between the 13.15 cfs capacity of the pipeline and 13.75 cfs, the capacity decreed.²⁹ Skinner appealed and the City cross-appealed.³⁰

III. ANALYSIS

A. *The nonabandonment statute is not impermissibly retroactive.*

In 2005, the Montana Legislature amended the nonabandonment statute to “create a presumption of nonabandonment for all water rights claimed for municipal use.”³¹ Skinner argued that because the amendment did not contain a retroactivity clause, as required by Montana law, it could not be retroactively applied to this particular water rights claim dating from the 1860s.³²

The Court held that there was no retroactive application of the law because the 2005 amendments were procedural, not substantive.³³ Because of this distinction, the Court held that the amendments fell outside of Montana law, which states that unless expressly declared, none of the law contained in any Montana statute is retroactive.³⁴ The Court called attention to the fact that it has continually held that “[a]lthough the general rule of law [was] that a statute is not to be applied retroactively, an exception to that rule [was] a change in a law that is merely procedural rather than substantive.”³⁵

The 2005 amendments changed the municipal abandonment inquiry’s burden of proof, which is a procedural change, not substantive.³⁶ The Court cited *Royston*, where the Court had affirmed that an amendment to Montana law dealing with changing appropriation rights modified the

26. *Id.*

27. *Id.* ¶ 9 (citing Mont. Code Ann. § 85-2-227(4)(2015)).

28. *Id.*

29. *Id.* (citing Mont. Code Ann. § 85-2-227(4)(2015)).

30. *Id.* ¶ 10.

31. *Id.* ¶ 16.

32. *Id.* ¶ 15.

33. *Id.* ¶ 17.

34. Mont. Code Ann. § 1-2-109 (2015).

35. *City of Helena*, ¶ 17 (citing Saint Vincent Hosp. & Health Ctr. v. Blue Cross & Blue Shield, 261 Mont. 56, 61, 862 P.2d 6, 9 (1993)).

36. *Id.* ¶ 20.

procedural aspect, not the substantive law.³⁷ Based on *Royston*, the Court found the 2005 amendment only changed the assignment of the burden of proof, not actual, vested water rights.³⁸ This modification was procedural, and not a substantive retroactive application of the law in violation of Montana Code Annotated § 1-2-109.³⁹

B. The Water Court did not err by reinstating 7.35 cfs of Helena's Tenmile Creek water rights.

The Water Court, using the nonabandonment statutory analysis, determined that the City did not intend to abandon their 7.35 cfs water right.⁴⁰ To determine whether the Water Court's findings were correct, the Court made two determinations: (1) the Water Court's findings as to the nonabandonment statute's application were not clearly erroneous,⁴¹ and (2) Skinner had not successfully established an intent to abandon by the City.⁴²

The Court reiterated the general presumption behind abandonment in water rights, stating that "abandonment of a water right requires both non-use *and intent to abandon*."⁴³ The amended statute allows that if a water right is claimed for municipal use by a city, it can be presumed to not be abandoned, if a city has regularly maintained the systems for the "future municipal use of the water right," conducted a formal survey regarding using the water right for municipal supply, or maintain the facilities for the water system.⁴⁴

Here, the Water Court found, and the parties did not dispute, the City had "continuously and partially used each water right since the date of the Decree."⁴⁵ The Court agreed with the Water Court's findings and upheld that "construction of the Rimini Pipeline established a presumption of municipal nonabandonment."⁴⁶ The construction of the 1921 pipeline established that the City intended to use the municipal water right in the future, thus creating a presumption of nonabandonment required by the nonabandonment statute.⁴⁷ Furthermore, the Court found evidence to

37. *Id.* ¶ 18 (citing Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston, 249 Mont. 425, 816 P.2d 1054 (1991)).

38. *Id.*

39. *Id.* ¶ 22.

40. *Id.* ¶ 32; see Mont. Code Ann. § 85-2-227(4) (2015).

41. *City of Helena*, 388 Mont. at ¶ 26.

42. *Id.* ¶ 26, 32.

43. *Id.* at 7-8 (emphasis added) (citing 79 Ranch v. Pitsch, 204 Mont. 426, 432, 666 P.2d 215, 218 (1983)).

44. Mont. Code Ann. § 85-2-227(4) (2005).

45. *City of Helena*, 388 Mont. at ¶ 24 (citing *City of Helena v. Cmty. of Rimini*, Case No. 411-67, Mont. Water Court (2015) (hereinafter "*Water Court Decision*")).

46. *Id.* ¶ 26.

47. *Id.*

satisfy the other statutory requirements of the nonabandonment statute.⁴⁸ Specifically, the Court found that the City commissioned an engineering report in 1929 that discussed a new transmission line to make full use of the City's water rights from Tenmile Creek to meet current needs and future growth.⁴⁹ The Court finally found that the City maintained the Yaw Yaw ditch for other purposes, such as irrigation and emergency use, which presumed nonabandonment even though it was not using the water rights for the municipal water supply.⁵⁰

The Court upheld the Water Court's rejection of the Master's finding that Skinner had rebutted the presumption of nonabandonment.⁵¹ The Master had also determined that because the sixteen-inch transmission lines could not carry the full capacity, due to leakages and other "losses that the City could not have predicted when it constructed the pipelines in 1903,"⁵² this was non-use and the City had abandoned their rights to the lost water.⁵³ The Court found the Master's determination on this point erroneous and upheld the Water Court's rejection.⁵⁴ There is a presumption of nonabandonment because the unplanned undersized delivery system was not enough to demonstrate an intent to abandon.⁵⁵

C. The City did not abandon 0.60 cfs of its Tenmile Creek water rights.

The Master determined that because the actual capacity of the Rimini Pipeline was less than the amount decreed, 13.15 cfs and 13.75 cfs respectively, the City abandoned the difference of 0.60 cfs due to non-use.⁵⁶ The Water Court agreed.⁵⁷ However, on appeal, the Court recognized the Legislature's purpose in enacting the nonabandonment statute for municipalities: to recognize the "great and growing cities doctrine."⁵⁸ Originating in Colorado, the doctrine supports cities' planning efforts for future water needs and "requires flexibility in such planning efforts."⁵⁹ This doctrine allows a city to retain their water rights through periods of non-use if the city "takes the affirmative steps prescribed by the statute."⁶⁰ These affirmative steps include building a larger-capacity pipeline or retaining the ditch for emergency purposes,⁶¹ as Helena did with the Yaw Yaw ditch. Recognizing the Legislature's intent to establish

48. *Id.* ¶ 27.

49. *Id.*

50. *Id.* ¶ 28.

51. *Id.* ¶ 29.

52. *Id.* ¶ 31.

53. *Id.*

54. *Id.* ¶ 32.

55. *Id.*

56. *Water Court Decision*, 13.

57. *Id.*

58. *City of Helena*, 388 Mont. at ¶ 36.

59. *Id.* ¶¶ 36, 38; see Mont. Code Ann. § 85-2-227(4) (2015).

60. *City of Helena*, 388 Mont. at ¶ 38.

61. Mont. Code Ann. § 85-2-227(4)(a)-(g) (2015).

the growing communities doctrine when enacting the nonabandonment statute, the Court found that though the City built a smaller pipeline originally, it intended to build a larger one in the future, and thus is presumed to not abandon its water rights.⁶²

D. Dissent

Justice Rice, joined by Justice McKinnon and Justice Baker, dissented from the majority's holding. Justice Rice's dissent disagreed with the finding that the 2005 nonabandonment statute was not retroactive.⁶³ The dissent analyzed the history of water rights in Montana and the historical significance of the beneficial use doctrine.⁶⁴ Specifically, it cited many Montana Supreme Court cases supporting the conclusion that "non-use, in and of itself, [was] sufficient evidence to prove an intent to abandon."⁶⁵ It cited many water rights adjudication decisions that established that "because a water right is founded on application for a *beneficial use*, a water right holder may lose the water right through abandonment."⁶⁶

The dissent argued that the majority's reliance on *Royston*, finding merely a procedural change, was misguided. *Royston* involved "purely a shift of the burden of proof in a water case,"⁶⁷ holding that the 1972 Constitution "[did] not include the right to not have to carry a burden of proof."⁶⁸ Since *Royston* was not a substantive change in the law, the retroactive requirement did not apply. However, the dissent argued that the nonabandonment statute definitively changed the substantive law.⁶⁹ The dissent contended that changing the favorable presumption for a city when it only uses *part* of a water right changes the levels of proof from city to challenger, "*regardless of period of non-use*."⁷⁰ According to the dissent, this change is not a procedural change, but a substantive one that is impermissibly retroactive and demands a different analysis for the retroactive constitutionality of the statute.⁷¹

IV. CONCLUSION

The *Rimini* holding recognizes the "growing cities doctrine" of western water law, maintaining cities' water rights through extended periods of nonuse if they meet certain statutory requirements. The City

62. *City of Helena*, 388 Mont. at ¶ 39.

63. *Id.* ¶ 47 (Rice, J., dissenting).

64. *Id.* ¶¶ 49-53 (Rice, J., dissenting).

65. *Id.* ¶ 53 (Rice, J., dissenting).

66. *Id.* ¶ 52 (Rice, J., dissenting) (citing *In re Adjudication of Water Rights of Clark Fork River*, 254 Mont. 11, 15-17, 833 P.2d 1120, 1123-24 (1992)).

67. *Id.* ¶ 56 (Rice, J., dissenting).

68. *Id.* ¶ 55 (Rice, J., dissenting).

69. *Id.* ¶ 57 (Rice, J., dissenting).

70. *Id.* ¶ 59 (Rice, J., dissenting).

71. *Id.* ¶ 62 (Rice, J., dissenting).

maintained a presumption of nonabandonment because it maintained water supply systems, conducted formal studies regarding the water rights and the municipal use, and maintained the facilities for emergency use. Furthermore, the nonabandonment amendment was a procedural change and not impermissible retroactive.