

SUPREME COURT OF MONTANA

In the Matter of the Adjudication of the Existing Rights to the Use of
All the Water, Both Surface and Underground, Within the Missouri
River Drainage Area, Including All Tributaries of the Missouri River
in Broadwater, Cascade, Jefferson and Lewis and Clark Counties,
Montana (Basin 41I)

55 P.3d 396 (Mont. 2002) · No. No. 00-100 · Decided September 24, 2002

SUMMARY

The Supreme Court of Montana reviewed the validity of pre-1973 water-right claims for fish, wildlife, and recreation uses in the Missouri River basin. The court overruled the contrary language in Bean Lake, holding that such uses were recognized as beneficial uses before 1973 and that a physical diversion is not required when diversion is unnecessary to apply water to the beneficial use. The court exercised supervisory control over the Montana Water Court to resolve the legal issues and clarify the treatment of the claims.

CASE DETAILS

COURT	Supreme Court of Montana
WRITING FOR THE COURT	W. William Leaphart; James C. Nelson; Jim Regnier; Terry N. Trieweiler; Patricia Cotter; Jim Rice; Karla M. Gray
JURISDICTION	Montana
DECIDED	September 24, 2002
DOCKET	No. 00-100
DISPOSITION	other
PROCEDURAL POSTURE	The Montana Department of Fish, Wildlife and Parks sought review of the Montana Water Court's refusal to remove a Bean Lake issue remark from five pre-1973 water-right abstracts. Although the ordinary appellate procedure was not followed, the Supreme Court treated the matter as a continuation of the earlier Bean Lake supervisory-control proceeding and exercised general supervisory control.
STANDARD OF REVIEW	The Court exercised de novo supervisory review of purely legal questions concerning the Water Court's authority, the interpretation of Montana water-appropriation law, and the effect of precedent.

PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Montana Department of Fish, Wildlife and Parks v. Montana Water Court

TOPICS

appellate jurisdiction appellate procedure environmental law constitutional law

PRACTICE AREAS

water law environmental law administrative law appellate procedure

QUESTIONS PRESENTED

1. Whether the Supreme Court should accept jurisdiction and exercise supervisory control despite DFWP's failure to object to the Water Master's report within the applicable objection period.
2. Whether Bean Lake correctly held that Montana law before 1973 did not recognize appropriation rights for fish, wildlife, and recreation uses except through a Murphy right statute.
3. Whether a physical diversion is required for a valid pre-1973 appropriation when diversion is not physically necessary to apply the water to a beneficial use.
4. Whether the Water Court's use of the Bean Lake remark violated the Supreme Court's Water Right Claim Examination Rules.

HOLDINGS

1. The Supreme Court could treat the matter as a continuation of the Bean Lake controversy and exercise general supervisory control over the Water Court because the case presented purely legal issues of statewide importance and resolving them would promote judicial economy and clarify Montana law.
2. Before 1973, Montana recognized fish, wildlife, and recreation uses as beneficial uses capable of supporting water appropriations. Bean Lake was overruled to the extent it held otherwise.
3. Montana's prior-appropriation doctrine did not absolutely require a physical diversion before 1973. An instream or inlake appropriation may be valid when diversion is not physically necessary to achieve the intended beneficial use, provided the facts and circumstances establish the appropriator's intent and notice.
4. The Water Court had authority to include the Bean Lake remark because it merely identified a potential legal issue and did not decide the validity of the claims or adopt an impermissible substantive policy.

KEY QUOTATIONS

"we find that a diversion is not a requisite element of an appropriation when it is not a physical necessity for application to a beneficial use." (55 P.3d at 404)

"the doctrine of prior appropriation does not require a physical diversion of water where no diversion is necessary to put the water to a beneficial use." (55 P.3d at 405)

“Montana law prior to 1973 did not absolutely require a diversion for a valid appropriation of water.” (55 P.3d at 406)

“For the foregoing reasons, we overrule the Bean Lake conclusion that Montana, prior to 1973, did not recognize fish, wildlife and recreation appropriations of water, whether diversionary or non-diversionary.” (55 P.3d at 407)

FACTUAL BACKGROUND

DFWP asserted five pre-1973 water appropriations in the Missouri River basin involving diversions for fish, wildlife, and recreation. The Montana Water Court placed a Bean Lake remark on the claim abstracts stating that the validity of the claimed rights was questionable because Bean Lake had said that pre-1973 Montana law did not recognize appropriation rights for recreation, fish, and wildlife except through a Murphy right statute. DFWP challenged the remarks, seeking clarification that such uses were recognized and that diversion was not always required.

PROCEDURAL HISTORY

DFWP filed five pre-July 1, 1973, water-right claims based on diversions for fish, wildlife, and recreation. The Water Court inserted a remark questioning the validity of the claims under Bean Lake, denied DFWP's objections, and adopted the Water Master's report after DFWP did not object within the specified period. The Supreme Court accepted supervisory jurisdiction, resolved the legal questions, overruled the relevant Bean Lake conclusion, upheld the Water Court's authority to use the remark, and instructed the Water Court to review the affected claims.

DISPOSITION

other

REMAND INSTRUCTIONS

The Water Court was instructed to identify, review, and hold hearings, in a manner similar to Adjudication of Water Rights of Yellowstone River, on all pre-1973 recreation, fish, and wildlife claims, both diversionary and nondiversionary, and determine their validity under the holdings of this opinion.

CASES CITED

- In the Matter of the Dearborn Drainage Area, 234 Mont. 331, 766 P.2d 228 (1988)
- Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936)
- Paradise Rainbows v. Fish & Game Commission, 148 Mont. 412, 421 P.2d 717 (1966)
- McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986)
- Thomas v. Guiraud, 6 Colo. 530 (1883)
- Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933)
- State ex rel. State Game Commission v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945)
- Wheat v. Cameron, 64 Mont. 494, 210 P. 761 (1922)

- Donich v. Johnson, 77 Mont. 229, 250 P. 963 (1926)
- Axtell v. M.S. Consulting, 1998 MT 64, 288 Mont. 150, 955 P.2d 1362
- Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984)
- State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985)
- State v. Morros, 104 Nev. 709, 766 P.2d 263 (1988)
- Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992)
- Meine v. Ferris, 126 Mont. 210, 247 P.2d 195 (1952)

Retrieved from lawtools.ai · <https://lawtools.ai/cases/state/montana-supreme-court-of-montana/2002/in-the-matter-of-the-adjudication-of-the-existing-rights-to-bw34y4ic>