



Montana Legislative Services Division

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TO: Water Policy Interim Committee
FROM: Cori Hach, Staff Attorney
RE: Summary of Water Court Petitions Pursuant to SB 28
DATE: December 16, 2019

In 2017, the Montana Legislature passed Senate Bill 28¹, which gave the Water Court the authority to review Final Orders from the Department of Natural Resources & Conservation (DNRC) upon the petition of one of the parties. To date, the Water Court has decided three cases under this new authority, two in 2018 and one in 2019.

In all three cases, the DNRC decision was appealed by an applicant whose petition had been denied or modified by the DNRC. Also in all three cases, the Water Court reversed the Final Order of the DNRC and directed the DNRC to approve the water user's application. Although each appeal was decided by a different water judge, the reasons cited for the reversal were similar in each case. Among the most common reasons for reversal were:

- Imposing demands on the applicant to demonstrate lack of adverse effect in excess of the minimum standard of proof required by statute;
- Rejecting evidence supplied by the applicant but failing to provide a meaningful explanation for the rejection; and
- Inconsistency with internal guidance or prior agency decisions.

The orders are summarized below.

Clark Fork Coalition v. DNRC (Case No. WC-MAPA-2018-01)

This case was heard by Chief Water Judge Russ McElyea in the Water Court for the Clark Fork Division, and the Order Remanding Case and Closing Proceedings was filed on April 10, 2019.

The Clark Fork Coalition (CFC) purchased a 433.3 acre-foot (AF) storage right that was originally used for irrigation with the intention of changing the use to instream flow protection and enhancement on Racetrack Creek. CFC's predecessors-in-interest had used the water by impounding it in Racetrack Lake then releasing it as needed. Once released, water from Racetrack Lake flowed down Racetrack Creek 16.5 miles to the Cement Ditch, where it was diverted to irrigate the ranch property. When CFC purchased the water right without purchasing

¹ Ch. 126, L. 2017

the appurtenant ranch, the water right was considered to be severed from its historical place of use.²

Procedural History:

CFC applied to the DNRC for a change of water right to change its irrigation storage right to the new use of instream flow protection and enhancement on Racetrack Creek. The DNRC issued an order titled Preliminary Determination to Grant Change in Modified Form, in which it ruled that CFC could not use its storage right to protect streamflows below the Cement Ditch. The distance between Cement Ditch and Racetrack Creek's confluence with the Clark Fork River is several miles. CFC requested review of this decision and was granted a hearing before a DNRC Hearing Examiner. The Hearing Examiner found that the amount of water historically consumed by irrigation was 66.53 AF, with the remaining 323.47 AF returning to Racetrack Creek downstream of the Cement Ditch and potentially available for diversion by other water users. Thus, the Hearing Examiner issued a ruling that CFC could protect 66.53 AF below the Cement Ditch. CFC filed a Petition for Review of Final Agency Action with the Water Court.³

Water Court Decision:

The Water Court reversed the DNRC's order and directed the DNRC to approve the protection of 390 AF⁴ from all the way to Racetrack Creek's confluence with the Clark Fork River.⁵ The Water Court discussed the following factors in explaining the reversal:

- The Water Court found that the DNRC abused its discretion by requiring more evidence than necessary to meet the statutory criteria for the change. In this case, the Water Court found that *Hohenlohe v. State*, 2010 MT 203, 357 Mont. 438, 240 P.3d 628, applied and that the DNRC had acted inconsistently with the requirements of *Hohenlohe* in two respects:
 - First, the DNRC required a full analysis of return flows even though CFC had already shown by a preponderance of the evidence that its application would not adversely affect other water users.⁶
 - Second, the DNRC required CFC to rule out potential injury to hypothetical water users when the CFC had had already shown by a preponderance of the evidence that its application would not adversely affect other water users.⁷
- The Water Court found that the DNRC's decision to modify CFC's application was inconsistent with its own internal policies and therefore arbitrary. The Water Court cited

² The explanation of the purchase is summarized in the Order Remanding Case and Closing Proceedings in Clark Fork Coalition v. DNRC, WC-MAPA-2018-01, dated Apr. 10, 2019 (CFC Order) at pages 1-2.

³ The procedural history is summarized in the CFC Order, 2-3.

⁴ CFC showed "that the amount of water historically diverted into the Cement Ditch was 390 AF."

⁵ CFC Order, 16.

⁶ CFC Order, 8-10. It appears that compelling evidence was presented showing that there were no return flows from the irrigation water applied on the ranch back to Racetrack Creek.

⁷ CFC Order, 10-11.

a DNRC policy memo suggesting that rather than unilaterally modifying the CFC's application, the proper procedure would have been to first issue a Preliminary Determination to Grant CFC's application and then allow other water users the opportunity to object.⁸

- The Water Court found that the DNRC's reasoning in this case departed from its prior decisions regarding return flows and was therefore arbitrary.⁹
- The Water Court found that *Hohenlohe* required the DNRC to balance the benefits to the fishery resource and aquatic habitat that were likely to result from the CFC's proposal against the realistic likelihood of adverse effects to other users, and that the DNRC's failure to undertake this balancing test constituted legal error.¹⁰

Broken O Land & Livestock, LLC v. DNRC (Case No. WC-MAPA-2018-02)

This case was heard by Judge Loren Tucker in the Water Court for the Upper Missouri Division, and the Order Reversing DNRC Administrative Decision was filed on September 9, 2019.

Broken O Land & Livestock, LLC (Broken O) owns four water rights previously adjudicated by the Water Court for irrigation purposes. All four water rights are diverted from the Sun River through a ditch known as the Company Ditch. Because Broken O demonstrated that livestock historically drank from the Company Ditch when water was diverted for irrigation, all four water rights include the following remark added by the Water Court in 2016: "The incidental use of this right for stock is limited to times when water is diverted for irrigation and does not provide an independent basis for a call on other water rights."¹¹

Procedural History:

Broken O applied to the DNRC for a change in use in order to divert water into several stock tanks dispersed on the ranch instead of allowing the livestock to drink directly from the Company Ditch. After initially advising Broken O that its application was correct and complete and that its requested change would be granted with a measurement condition added, the DNRC changed course and denied the application. Broken O thereafter submitted a Petition for Judicial Review to the Water Court.¹²

Water Court Decision:

⁸ CFC Order, 11-14.

⁹ CFC Order, 11-14.

¹⁰ CFC Order, 15-16.

¹¹ The explanation of the water rights is summarized in the Order Reversing DNRC Administrative Decision in Broken O Land & Livestock, LLC v. DNRC, WC-MAPA-2018-02, dated Sept. 9, 2019 (Broken O Order) at pages 1-2.

¹² Broken O Order, 2-4.

The Water Court reversed the DNRC's decision, finding that the DNRC acted arbitrarily and that its denial of Broken O's change permit constituted clear error in abuse of the agency's discretion.¹³ The Water Court discussed the following factors in explaining the reversal:

- The DNRC has adopted rules to implement the water rights change statute and publishes forms to implement those rules. Broken O submitted a “correct and complete” Form 606, which is the form developed by the DNRC for stock tank changes. The DNRC determined that the application was nevertheless deficient because Broken O had failed to provide information regarding the historical irrigation use. The Water Court found that it was arbitrary and capricious for the DNRC to request information that the Water Court deemed irrelevant and deny the addition of stock tanks based on the failure to provide information not required on the DNRC's own form¹⁴.
- The DNRC took the position that since the four water rights were for irrigation, Broken O should be required to follow the irrigation change procedure and provide a historical use analysis of the irrigation rights. The Water Court found that because the number of cows allowed to drink was not proposed to change, it was improper to require additional information. The Water Court took the DNRC's insistence on irrigation information as evidence that was misinterpreting and misapplying the stock water remark authorizing incidental stock watering with the four water rights¹⁵.
- The Water Court believed that the DNRC was applying its internal rules and procedures inconsistently, constituting error of law¹⁶.

The Water Court also addressed Broken O's request for attorney fees as the prevailing party. The DNRC argued that it was not a party to the case, but instead acted in a judicial capacity in ruling on the change application and should thus be afforded absolute immunity for acts performed in the judicial capacity. The Water Court also noted that Section 85-2-125, MCA, authorizes district courts to award attorney fees but does not address the Water Court. The Water Court concluded that although there was "equitable impetus" to award attorney fees since the DNRC sent agency counsel to defend its position in the Water Court proceedings as though it were a party, there was insufficient case law guidance and statutory authority to allow the award of attorney fees¹⁷. The Water Court noted that the Legislature was free to clarify whether it intended to bestow the power to award attorney fees on the Water Court.

¹³ Broken O Order, 12-13.

¹⁴ Broken O Order, 8-9.

¹⁵ Broken O Order, 9-10.

¹⁶ Broken O Order, 10-11.

¹⁷ Broken O Order, 11-12.

DeBuff v. DNRC (WC-MAPA-2019-01)

This case was heard by Associate Judge Brown in the Water Court for the Lower Missouri Division, and the Order on Petition for Judicial Review was filed on November 21, 2019.

Procedural History:

The applicants applied to the DNRC for a permit to use groundwater pumped from four wells and a pit for irrigation purposes.¹⁸ After requesting correction of deficiencies and receiving additional information from the applicants, the DNRC determined that the application was correct and complete and sent the applicants a technical report which determined that groundwater, but not necessarily surface water, was physically and legally available to support the proposed use. The DNRC expressed concern that the proposed withdrawals would decrease flows on a down-gradient creek, impacting water users on that creek. The applicants and their consultants then met with the DNRC to provide a conceptual model and propose terms to protect senior water users from adverse effect.

During protracted back-and-forth spanning over two years, the applicants and their consultant provided additional information, proposed strategies to mitigate potential impact to other water users, and eventually amended the application to reduce the amount of water permitted by an amount equivalent to what the applicants proposed to mitigate. The DNRC responded with several revised technical and depletion reports, occasionally shifting the focus of the anticipated adverse effect. Finally, the DNRC issued a Preliminary Determination to Deny Permit, and the applicants requested a show cause hearing. After a hearing, the DNRC Hearing Examiner issued a Final Order denying the application, which the applicants appealed to the Water Court.

Water Court Decision:

The Water Court reversed the DNRC's decision and remanded with instructions that the DNRC grant the application.¹⁹ The Water Court found that the DNRC had failed to perform a meaningful evaluation of the applicants' evidence and failed to investigate whether or not downstream water users could meaningfully exercise their water rights under the changed conditions. Relying heavily on *Hohenlohe*, the Water Court determined that this failure was arbitrary and constituted an abuse of discretion under these circumstances. Of note in the Water Court's decision were the following factors:

- The Water Court acknowledged that it was obligated to “pay some deference to the agency” where the agency has relied on its technical expertise and that it was not permitted to “reweigh the evidence or find new facts.”²⁰ However, the Water Court found that the agency's actions were clearly erroneous on a number of factors:

¹⁸ The lengthy procedural history is summarized in the Order on Petition for Judicial Review in *DeBuff v. DNRC*, WC-MAPA-2019-01, dated Nov. 21, 2019 (*DeBuff Order*) at pages 2-10.

¹⁹ *DeBuff Order*, 23.

²⁰ *DeBuff Order* at 14.

- The Water Court found that the DNRC incorrectly determined that the source aquifer was connected to the aquifer of concern because the agency relied on a map that was not properly submitted as part of the administrative record to support its conclusion and rejected evidence submitted by the applicants without providing an explanation.²¹
- The Water Court found that the DNRC improperly relied on facts from a prior permit decision because the agency did not follow official notice procedures to add the prior permit application to the administrative record or notify the applicants that the prior application would factor heavily in its decision²².
- At some point after initially determining that the application was correct and complete, the DNRC determined that it could no longer follow the surface-water-estimation methodology provided by the applicants. The Water Court found that this change of course was accompanied by insufficient explanation, and that “[a]bsent a rule or more clear explanation . . . DNRC’s change of position was arbitrary and capricious.”²³
- Similarly, the Water Court found that the DNRC failed to provide meaningful explanation for its rejection of an evapotranspiration model supplied by the applicants, and that this failure was likewise arbitrary and capricious.²⁴
- The applicants provided a report theorizing that the downstream surface water users only withdrew surface water when precipitation events caused the otherwise dry streambed to run full. The applicants argued that this meant that their groundwater depletions would not affect this practice even if the aquifer was connected. The Water Court found that DNRC failed to meaningfully evaluate this theory and that failure was arbitrary in abuse of discretion.²⁵

²¹ DeBuff Order, 12-13.

²² DeBuff Order, 14-15.

²³ DeBuff Order, 17.

²⁴ DeBuff Order, 19.

²⁵ DeBuff Order, 22.