FILED
11/19/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0314

No. DA 21-0314

IN THE

Supreme Court of the State of Montana

ADVOCATES FOR SCHOOL TRUST LANDS,
Plaintiff and Appellant,

AND

K.B. AND K.B., BY AND THROUGH THEIR PARENT AND GENERAL GUARDIAN,
Plaintiffs,

VS.

THE STATE OF MONTANA,
Defendant and Appellee,

AND

MONTANA FARM BUREAU FEDERATION, MONTANA STOCKGROWERS ASSOCIATION, MONTANA WATER RESOURCES ASSOCIATION, AND ASSOCIATION OF GALLATIN AGRICULTURAL IRRIGATORS,
Intervenors and Appellees.

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, HON. MICHAEL MCMAHON, PRESIDING
CASE NO. BDV-2019-1272

RURAL MONTANA FOUNDATION'S *AMICUS CURIAE* BRIEF

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INTERESTS OF AMICUS

The Rural Montana Foundation ("RMF") is a nonprofit organization dedicated to supporting rural communities across Montana. Given the significance of water rights to local agriculture, this case is profoundly important to RMF. RMF's reasons for filing this amicus brief are primarily twofold.

First, RMF seeks to ensure due process for Montana ranchers and farmers. As noted in earlier briefing, the Trust Lands Management Division ("TLMD") divested hundreds of local ranchers and farmers of water rights without any process of law. This startling lack of due process was best summed up by one legislator, during legislative debate on HB 286, calling it as "ugly as anything I've seen." Mont. Sen. Nat. Resour. Comm., Hr'g on H.B. 286, 66th Legis., 16:46:25 (March 18, 2019). HB 286 restores due process and offers a fair way to resolve ownership disputes.

Second, RMF seeks to persuade this Court against holding that water rights sourced from private property are automatically vested in the State merely by using the water on state lands. HB 286 is a procedural law and this appeal does not require the Court to address the issue. Should this Court do so, however, RMF counsels against a ruling in favor of ASTL. Such a holding would effectively preclude agricultural producers from using water from their private property on state lands in the future. The net result of which will be lost economic opportunities for Montana's agricultural producers, its rural economies, and its school trust.

ARGUMENT

I. The District Court Properly Rejected ASTL's Constitutional Challenge to House Bill 286 As Unripe.

Under Montana law, "[t]here is both a constitutional and a prudential component to the ripeness inquiry." *Reichert v. State*, 2012 MT 111, ¶ 56. Constitutional ripeness is a limitation derived from the Montana Constitution, whereas prudential ripeness is a limitation imposed by courts themselves as matter of judicial restraint. *Reichert*, ¶ 53. Prudential ripeness involves weighing two concerns: "[**A**] fitness of the issue for judicial decision and [**B**] the hardship to the parties of withholding court consideration." *Reichert*, ¶ 56 (emphasis added).

On appeal, ASTL appears to ask this Court to decide whether post-1973 water rights sourced from water on private property and diverted onto state trust lands are vested into state ownership as a matter of law. *See* Appellant Brief ("Br."), p. 1.[1] Because this issue is not prudentially ripe for judicial decision, this Court should decline to decide the issue and affirm the district court.

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[1] RMF assumes this is, in fact, the issue ASTL is raising on appeal, though ASTL's briefing is in many respects unclear and, as noted by the State, ASTL back tracks from this categorical approach, just like it did in district court, in several places in its briefing. *See* State of Montana's Answer Brief, p. 17 n. 8. *See also* Doc. 64, pp. 3-4 (RMF's amicus brief in district court noting instances where ASTL concedes water rights sourced from water on private property and diverted onto state trust lands are not vested into state ownership as matter of law).

A. ASTL's Challenge to House Bill 286 Does Not Require This Court to Decide the Issue.

For several reasons, the issue ASTL asks this Court to decide is not ripe for judicial resolution. Chiefly, this Court does not need to address it to reject ASTL's challenge to HB 286.

ASTL devotes seemingly most of its briefing to asserting this Court's decision in *Department of State Lands v. Pettibone*, 216 Mont. 361 (1985), directs that water rights diverted from private property onto trust lands are automatically vested into state ownership. Br., pp. 1-18. But, as in district court, ASTL does not explain why its challenge to HB 286 requires a judicial decision on that issue. *See* Br., pp. 19-28. In other words, ASTL fails to connect the issue it is asking this Court to decide with its challenge to HB 286—it rather is merely requesting an advisory opinion on *Pettibone* under the guise of a constitutional challenge.

Although this Court is under no obligation to try to make the connection for ASTL, *see Cutler v. Jim Gilman Excavating, Inc.*, 2003 MT 314, ¶ 22 ("It is not this Court's obligation to . . . formulate arguments for a party"), even if it did, there is not one. HB 286 is indifferent to ASTL's assertion concerning *Pettibone*. HB 286 is a procedural statute unconcerned with substantive law. It simply creates a process by which TLMD may assert an interest in post-1973 water rights, namely through court adjudication. § 85-2-441(2), MCA.

As the district court rightfully recognized, HB 286's judicial process is functionally no different than the adjudication process for pre-1973 water rights. *See* Order, p. 25. For pre-1973 water rights, once a water right holder files a statement of claim, that claim is prima facie proof of its contents. §§ 85-2-221, - 227(1), MCA. If a water user identifies itself as the listed owner on a water right and TLMD wishes to challenge that assertion and assert an interest in the claim, TLMD must file an objection and a water court decree is required before the abstract's listed owner may change to include TLMD. § 85-2-227(1), MCA. By requiring a court decree before modifying a water user's abstract, the adjudication process ensures a fair process of law for water users claiming pre-1973 water rights.

HB 286 now does the same for water users claiming post-1973 water rights. Under HB 286, if a water user identifies itself as the listed owner on a water right and TLMD wishes to challenge that assertion and assert an "interest in a [post-1973] water right," it generally must a file a claim in a "court of competent jurisdiction" to "determine[] that the state is an owner of that particular water right[.]" § 85-2-441(2)(a), MCA.

Under both the adjudication process and HB 286, TLMD remains free to argue that all water rights diverted from private property onto trust lands are vested into state ownership. And, as to the adjudication process, TLMD has done so in the water court—though unsuccessfully. *See*, e.g., *Kunnemann v. Mont. Dep't of Nat.*

Resources, Case No. 43A-A, 2000 Mont. Water LEXIS 1, *46 (Mont. Water Ct. 2000) ("TLMD's motion for declaratory relief determining the State of Montana to be the owner of [the water right] used on school trust land in Section 16 . . . is DENIED.").

In short, the upshot of all this is that even if ASTL is right on its issue 1 – which it is not – that does not impact the constitutionality of HB 286. HB 286 is agnostic. It provides a process to decide, not a result to reach. ASTL is improperly requesting an "academic conclusion" from this Court. *See* Order, p. 9.

B. The Parties Will Not Suffer Hardship Without Judicial Resolution.

To receive a judicial resolution on the issue, TLMD needs only to follow the process in HB 286. No hardship is visited on any party by allowing the process to play out under HB 286. Indeed, as to pre-1973 rights, TLMD has been litigating *Pettibone's* application without incident in the water court. *See*, e.g., *Kunnemann*, 2000 Mont. Water LEXIS 1; *In re Adjudication of the Existing Rights to the Use of All the Water*, 2005 Mont. Water LEXIS 9 (Mont. Water Ct. 2005); *In re Anthony L. Marletto Family Revocable Trust*, 2020 Mont. Water LEXIS 257 (Mont. Water Ct. 2020).

The reason this Court has heard no complaints of injustice concerning this litigation is because the adjudication process works. It offers a fair mechanism for TLMD to assert ownership through the court system, while providing water users

their day in court as well. *See* § 85-2-227(1), MCA. All for the better that HB 286 now provides the same for post-1973 rights. *See* Order, p. 26 ("HB 286 will effectively and fairly resolve any dispute whether Montana or the lessee own the water interest used on trust land but developed on private land.").

II. ASTL's Interpretation Will Result in Demonstrable Injury to Montana's Agricultural Producers, Its Rural Economies, and Its School Trust.

As noted above, this Court should decline to wade into ASTL's argument that water rights diverted from private property onto trust lands are automatically vested into state ownership. However, should this Court do so, RMF strongly counsels this Court against deciding in favor of ASTL on that issue, as such a holding would have negative ramifications for Montana.

A. ASTL's Interpretation Will Result in Agricultural Producers Refusing to Use Their Water Rights on State Land.

The most obvious impact of a decision favorable to ASTL is agricultural producers will cease applying water from their private property to state lands in the future. As detailed in the legislative debate on HB 286 and in the legislation itself, ASTL's position "disincentives" future use of water from private property onto state lands. *See* 2019 Mont. Laws 1790, Ch. 432, Whereas Clauses, Exhibit D to Doc. 33 ("HB 286 Declarations"); Mont. Sen. Nat. Resour., Hearing on H.B. 286, 66th Legis., Reg. Sess., 15:34:25 (March 18, 2019) ("Senate Hearing").

The development of water rights frequently requires significant capital outlay (e.g., drilling the well, putting in pipeline, power generation) as well as time and work from the rancher or farmer to develop the infrastructure. *See generally* Senate Hearing, 15:42:02. When the landowners here originally diverted their water onto state school section, they did so under the "assumption that their water right was protected." *Id*. at 15:42:02. But if the rule is now, as proposed by the ASTL, that landowners lose their water rights simply by using them on state lands, they will refuse to do so in the future. *E.g. id* at 15:55:45 (Manhattan farmer) ("By doing this, I don't think you will find another person in this State that will develop state land and give up their water right for it. It will not happen.").

Several negative economic impacts arise from this disincentive. First, agricultural producers themselves are financially injured. Instead of farmers and ranchers increasing yields of their crops or cow herds by applying water to their state leases, producers are forced to forgo economic opportunities for fear of losing their water right. Second, rural economies, who depend upon sustained agriculture, necessarily also suffer from these lost opportunities, because the agricultural producers they depend upon suffer.

Lastly, the school trust suffers. Where water is applied to state lands, the value of the lease increases significantly. As detailed by ranchers and farmers from across Montana during the debate on HB 286, agricultural producers pay "much higher

rates" by placing water on the state leases through crop sharing and competitive bidding. *Id*. at 15:36:59, 15:43:13,15:55:22. This directly correlates, as the Legislature found, into increased value to the school trust. *See*, e.g., HB 286 Declarations ("the ability to manage livestock grazing and improve grazing management through the use of [water on state property] generates revenue to the state through increased revenue from grazing leases").

If local agricultural producers can no longer apply water to state property from their private lands without losing their water right, state leases will have less value. Ranchers and farmers will produce less from the lands and have less incentive to increase bidding pressure where the land is unavailable for irrigation or other water uses to develop crops and cattle. The beneficiaries instead from the system ASTL seeks to create will likely be those of financial means that do not need the property to produce revenue to lease it and those thus less interested in ensuring Montana's properties achieve their highest and best agricultural production. All of this translates into less revenue to Montana's state school trust.

In short, Montana's agricultural producers, rural economies, and school trust all benefit by allowing Montana ranchers and farmers to use water sources from their private properties on state lands without divesture of their water rights.

B. ASTL's Interpretation Will Result in the State Receiving a Paper Right That in Most Cases is of Limited Value to the State.

The question then is, by divesting landowners of their water rights, what great benefit will ASTL bestow upon the school trust? In most cases, the short answer is nothing. In ASTL's view, upon a landowner developing water from his property to state lands, the State receives the water right, but the State does not receive a possessory right in the private land or the means of diversion on the private property. Thus, following ASTL's interpretation, the State receives a piece of paper (an abstract with its name on it) that entitles it to an amount of water (e.g., 2.5 cfs).

But that paper – now separated from the landowner holding the possessory interest in the private land where the water right was developed and, in whose hands, possessed great value – significantly depreciates once given to the State. For the water right to have value independent of the former lessee landowner, the State must convince a new lessee to develop water at a new place of diversion on state property.

That is a hard sell. The new lessee faces significant obstacles to develop water on the state property. First, the new lessee must locate developable water on the state property, which might not exist. For instance, the stream on the former lessee's private property that he had used to develop the water right might not run onto the state property. Similarly, if the former lessee developed a spring on his property, that same readily available water source may not be available on the state property.

Thus, divested from the former lessee landowner, the water right may have no independent value at all.

Second, even if the state property has readily available water, the new lessee must outlay potentially significant capital to develop it (e.g., drill a well or construct a diversion) and build infrastructure to utilize it (e.g., a pipeline, energy generation) on the state property, while knowing all along that he does so for a water right that he does not own and, should he lose the lease, he has no right to the water.

Third, the new lessee faces the reality that developing on state property is almost always more difficult than developing on private property. As a couple of examples, before placing improvements (e.g., pipeline, power generation) necessary to develop the water at its new location on the state property, the lessee must obtain authorization from the State. § 77-6-301, MCA. Similarly, if there is sage-grouse habit on the state property, the new lessee will likely need to undertake review under the Montana Sage Grouse Habitat Conservation Program and receive an approval letter from the Montana Sage Grouse Oversight Team. *See generally* Mont. Exec. Order No. 12-2015 (September 8, 2015); § 76-22-115, MCA.

Fourth, and lastly, the new lessee must navigate the DNRC administrative process to change the place of diversion listed on the water right from the former lessee's property to the state's property. § 85-2-402, MCA; ARM 36.12.1901(1) ("An applicant who desires to change the point of diversion . . . of a water right must

file an application to change a water right"). *See also* DNRC's Change Application Manual (2020) ("Change Manual"), p. 35.

The change process is no easy chore. Among other requirements, the change process generally demands the applicant prove certain criteria by a preponderance of evidence, including no adverse effect on other users. ARM 36.12.1903; § 85-2-402, MCA. During the process, the change is typically subject to public notice, an objection period, and potentially litigation on objections. *See* Change Manual, p. 11 (showing 17-step chart of process). Accompanying this process, there is potentially an attorney to navigate it and a consultant (e.g., hydrologist) to show no adverse effect. *See* Change Manual, pp. 14-15 (noting "DNRC encourages attendance by the Applicant's attorney [and] consultant" at pre-application meeting).

In sum, ASTL seeks to bestow a largely empty benefit upon the State. New lessees are frequently to find it more trouble than it is worth and value it accordingly in forming a bid. In most cases, the net effect of ASTL's rule will be simply to take water rights from ranchers and farmers – who spent thousands of dollars to develop them and who are positioned to use them productively for themselves and the State – and give the rights to the State – who has spent nothing and to whom, separated from the landowners, have little value. At the same time, ASTL will confidently ensure agricultural producers in the future do not increase revenue to the State by using water sources from their private lands for the benefit of state lands.

Put simply, it is difficult to identify any clear benefits in the system ASTL asks this Court to design, least of all to Montana's children, who, by any reasonable, common-sense analysis, are assured to receive less money in their school trust.

CONCLUSION

For the forgoing reasons, the Rural Montana Foundation requests that this Court affirm the district court.

Respectfully submitted this 19th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned, Matthew Dolphay, certifies that this Brief complies with Mont. R. App. P. 11. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5,000 words or fewer, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and this certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

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