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Montana's Constitutional Right to a Clean and Healthful Environment: Can a Value Ever Be Assigned to This Right? Shammel v. Canyon Resources Corp.

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Montana’s Constitutional Right to a Clean and Healthful Environment: Can a Value Ever be Assigned to This Right?

***Shammel v. Canyon Resources Corp.*,
2007 MT 206, 338 Mont. 541, 167 P.3d 886**

Kyle Nelson

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I. INTRODUCTION

*Shammel v. Canyon Resources Corp.*¹ determines whether Montana’s constitutional right² to a clean and healthful environment provides for the recovery of money damages in a constitutional tort action between private parties.³ In answering in the negative, the Montana Supreme Court held that where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties.⁴

II. FACTUAL BACKGROUND

Between the late 1980’s and mid-1990’s, Canyon Resources Corporation (“Canyon”) operated a cyanide heap-leach mine in the North Moccasin Mountain Range.⁵ The Shammels own various properties downstream from the mine site. Piles of tailings produced by Canyon’s mining operations have, the Shammels allege, infused the drainage’s water with toxic leachate. The Shammels further allege that storm water and spring run-off that had seeped through the tailing piles would flow onto their property, contaminating it with arsenic, cyanide, thallium, selenium, nitrate, sulfate and lead. The contamination was severe enough that the Montana Department of Environmental Quality (“DEQ”) ordered Canyon to install a back-pump system to redirect contaminated water back onto Canyon’s property. The back-pump system prevented the contaminated water from entering the

1. *Shammel v. Canyon Resources Corp.*, 2007 MT 206, 338 Mont. 541, 167 P.3d 886.
2. Mont. Const. art. II, sec. 3; *id.* at art. IX, sec. 1.
3. *Shammel*, ¶ 2.
4. *Id.* at ¶ 10.
5. *Id.* at ¶ 3.

aquifer and surface streams, effectively preventing the water from reaching the Shammels' property.⁶

In 1998, two years after the "pump-back" system had been installed, the Shammels apparently noticed a reduction in stream flows and the level of the water table in the aquifer, which the Shammels attribute to Canyon's physical altering of the topography and the implementation of the "pump-back" system.⁷ Pursuant to a second order from the DEQ, Canyon began augmenting stream flows below the mine site with diverted water taken from above the mine and from deep wells on the mine itself. Despite Canyon's efforts, the Shammels continued to assert that surface flows on their properties have not returned to "historic" levels and as a result suffered property damage.⁸ Because of Canyon's activities, the Shammels allege that elevated levels of toxic contaminants persist in the surface streams, and that a plume of toxic pollution is presently migrating through the aquifer. In addition, the Shammels also asserted some aesthetic injury to their property as a result of Canyon's mining activities.⁹

III. PROCEDURAL BACKGROUND

The Shammels filed suit alleging various tort claims, including trespass, negligence, and nuisance.¹⁰ During the final pretrial conference, more than three years after the original complaint was filed, the Shammels indicated their desire to also recover for a constitutional tort based on Art. II, Section 3 of the Montana Constitution, which grants every Montanan the right to a "clean and healthful environment." The district court agreed to postpone trial in order for the parties to brief the court on whether Montana law authorizes such a constitutional tort.¹¹ The district court concluded that a proven violation of the constitutional right to a clean and healthful environment does not authorize a distinct, constitutionally based cause of action in tort between two private parties for money damages.¹²

IV. MONTANA SUPREME COURT'S DECISION

On appeal, the Montana Supreme Court affirmed the district court concluding that the Shammels have provided no indication that traditional tort remedies, amplified by restoration damages, will not afford them complete redress for the environmental damage allegedly caused by Canyon.¹³ In reaching this conclusion, the Court applied *Sunburst School Dist. No. 2 v.*

6. *Id.* at ¶ 3.

7. *Id.* at ¶ 4.

8. *Id.*

9. *Id.*

10. *Id.* at ¶ 5.

11. *Id.* at ¶ 6.

12. *Id.*

13. *Id.* at ¶ 9.

Texaco, Inc.,¹⁴ where the Court earlier held that when adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not support a cause of action for money damages between two private parties.¹⁵ The Court further concluded that because Montana now affords restoration damages for environmental pollution to land, the Shammels would be entitled to an order from the district court ordering Canyon to remediate the former mine site to restore the Shammels' property to its pre-tort condition.¹⁶ Accordingly, the Court held that where adequate alternative remedies exist under the common law or statute, the constitutional right to a clean and healthful environment does not authorize a distinct cause of action in tort for money damages between two private parties.¹⁷

V. ANALYSIS

The *Shammel* Court correctly precludes private parties from seeking money damages for an alleged violation of the constitutional right to a clean and healthful environment where adequate alternative remedies exist under common law or statute.¹⁸ As set forth in *Sunburst*, "an 'injured party is to be made as nearly whole as possible-but not to realize a profit.'"¹⁹ The Shammels do not contend that remediation damages will be insufficient or inadequate. Rather, the Shammels attempt to create a constitutional tort between private parties for money damages, where common law principles have historically controlled the claims and remedies available.

Indeed, all Montanans enjoy the fundamental right to a clean and healthful environment.²⁰ Moreover, private property owners enjoy the right to possess, occupy, use, convey, and exclude others from their property.²¹ Damage from water pollution allegedly caused by Canyon is certainly an actionable claim with adequate remedies available under common law trespass and nuisance theories and environmental restoration statutes, should a court ultimately find Canyon liable. As the Court correctly explains, the Shammels are not without proper redress for the property damage suffered.²² Providing money damages based on a constitution tort between private parties in addition to damages awarded to make the injured party nearly whole as possible does not further the legitimate interests of justice.

14. 2007 MT 183, 338 Mont. 259, 165 P.3d 1079.

15. *Sunburst*, ¶ 64.

16. *Id.* at ¶ 9.

17. *Id.* at ¶ 10.

18. *Id.*

19. *Sunburst*, ¶ 40.

20. Mont. Const. Art. II, sec. 3; art. IX, sec. 1.

21. Also known as the "bundle of sticks" – a common metaphor attributed by some to Supreme Court Justice Benjamin N. Cardozo. See Paul Goldstein & Barton H. Thompson, *Property Law: Ownership, Use, and Conservation*, 52 (Foundation Press 2006).

22. *Shammel*, ¶ 9.

Rather, it provides a windfall for an injured party who already has an adequate remedy at law.

Enforcing Montana's fundamental right to a clean and healthful environment²³ may prove to be an impossible task. There is no commonly held or single individual perception of what exactly constitutes a clean and healthful environment. Toxic waste that has caused significant damage to another's property certainly qualifies. The problem arises when a court is asked to place a monetary value on that injury beyond the actual damages suffered.²⁴ In other words, there is simply no way to guarantee that two courts will reach the same result or even find a similar right.²⁵ Montana, however, has placed the burden on the DEQ to establish predictability of the enforcement of environmental protection.²⁶ Creating a constitutional tort as a remedy for a violation of the right to a clean and healthful environment will likely result in the removal of predictability in the fields of environmental, economic, and industrial policy and regulation, which will inevitably invite chaos.²⁷ Constitutional rights and environmental protection should not be subject to constant change or unpredictability. Rather, Montanan's fundamental right to a clean and healthful environment should be as dependable and reliable as every right protected by the Constitution of the United States and Montana's Constitution.

VI. CONCLUSION

Each Montanan is fortunate to share the constitutional right to a clean and healthful environment. It is, however, not yet a basis upon which private parties may seek money damages from one another. The right to a clean and healthful environment is an ambiguous term, and likely carries a separate meaning for each individual Montanan. While individual rights are and remain enforceable against a government actor for violation thereof, such enforcement may prove impossible, and at the very least, inconsistent between private parties. The individual right to a clean and healthful environment was not meant to elevate one person's right over another's. Given the potential for extreme subjectivity in defining the individual scope of the constitutional right to a clean and healthful environment, the Court wisely concluded that money damages for violation of the constitutional tort are inappropriate where adequate alternative remedies exist. Individuality is and remains a defining characteristic of Montanans and the courts are not the forum to decide whose individuality matters and whose does not.

23. *Montana Envtl. Info. Center v. Dept. Envtl. Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, ¶ 63, 988 P.2d 1236, ¶ 63.

24. Br. of Def.s./Respt.s' at 28-29, *Shammel v. Canyon Resources Corp.*, 2007 MT 206, 338 Mont. 541, 167 P.3d 886.

25. *Id.*

26. *Id.*

27. *Id.*