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Gene R. Curry, Cheryl S. Curry, And Curry Cattle Co. v. Pondera County Canal & Reservoir Company. Give Me Back My Water

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**PRECAP; Gene R. Curry, Cheryl S. Curry, And Curry Cattle Co., v.
Pondera County Canal & Reservoir Company: Give Me Back My
Water**

Megan Timm

No. DA 14-0529 Montana Supreme Court

Oral Argument: Wednesday, September 30, 2015, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, located in the Joseph P. Mazurek Justice Building, Helena, Montana.

Holly Jo Franz, Ada C. Montague; Franz & Driscoll, PLLP, Attorneys for Appellants and Cross-Appellees: Gene R. Curry, Cheryl S. Curry, and Curry Cattle Co.

John E. Bloomquist; Bloomquist Law Firm, P.C., Attorneys for Appellee and Cross-Appellant: Pondera County Canal & Reservoir Company

I. QUESTIONS PRESENTED

Did the Water Court err when it ruled water rights for the purpose of sale or rental are not limited by historic beneficial use?

Did the Water Court err by granting PCCRC a 377,555.5 acre service area rather than a place of use based upon historic beneficial use?

Did the Water Court err by ruling PCCRC's storage rights were used on the Birch Creek Flats prior to 1973?

Did the Water Court err by substituting its judgment for the trier of fact's?

II. FACTUAL AND PROCEDURAL BACKGROUND

Pondera County Canal and Reservoir Company ("PCCRC") is a water supply entity that owns infrastructure along Birch Creek in Pondera County, Montana.¹ PCCRC's earliest predecessors secured the disputed water right in the late 1890s² and "began developing a large-scale irrigation project" ("Project") shortly thereafter.³ In 1909, the Project became a part of the Carey Land Act.⁴ The Act and PCCRC's by-laws required settlers to notate the area they intended to irrigate on each share certificate purchased from the Project.⁵ The Project was deemed

¹ Appellee's Resp. Br. 4, May 4, 2015, No. DA 14-0529.

² Br. Appellant 5, Mar. 4, 2015, No. DA 14-0529.

³ Appellee's Resp. Br. 7, May 4, 2015, No. DA 14-0529.

⁴ *Id.* at 8.

⁵ *Id.* at 32, Br. Appellant 26, Mar. 4, 2015, No. DA 14-0529.

completed by the Carey Land Act Board of Montana (“Board”) in 1953.⁶ Approximately 72,000 shares had been issued to settlers, with each share representing one irrigable acre.⁷ The Board turned operations over to PCCRC and used the 72,000 shares to define PCCRC’s appropriation.⁸ Today, over 400 shareholders receive water from PCCRC’s distribution system.⁹

The plaintiff, Curry, owns land downstream from PCCRC in an area known as the Birch Creek Flats.¹⁰ He irrigates his ranch from a ditch (Ryan/Lauffer Ditch) that runs out of Birch Creek.¹¹ PCCRC has the capacity to drain Birch Creek before it reaches the Ryan/Lauffer Ditch.¹² Curry’s and PCCRC’s competing rights have never been adjudicated.

In years past, PCCRC’s former manager Faye Stokes was conscientious of downstream users. When Curry or other users ran short of water, she allowed more to flow down to them.¹³ Since Stokes’ retirement, PCCRC has been less attentive to such requests.¹⁴ Over time, the relationship between PCCRC and Curry deteriorated and they sought adjudication of their rights.

The adjudication initially went before a Water Master. The Master’s Report determined that PCCRC has the right to irrigate a “place of use” defined by the lands listed on each shareholder’s certificate.¹⁵ PCCRC may irrigate 57,073 within the place of use.¹⁶ Both parties filed objections.¹⁷ The Water Court heard the objections and subsequently filed an order granting PCCRC a “service area” of 377,555.5 acres within which it may irrigate 72,000 acres.¹⁸

III. SUMMARY OF ARGUMENTS

The Water Court relied on *Bailey v. Tintinger*¹⁹ as relevant authority.²⁰ *Bailey* defines the extent of a water appropriation by analyzing two factors: (1) the original appropriator’s intent to put the claimed water to a beneficial use, and (2) that the water was actually put

⁶ Appellee’s Resp. Br. 9, May 4, 2015, No. DA 14-0529.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² Br. Appellant 3, Mar. 4, 2015, No. DA 14-0529.

¹³ *Id.* at 4, Appellee’s Resp. Br. 12-13, May 4, 2015, No. DA 14-0529.

¹⁴ Br. Appellant 4, Mar. 4, 2015, No. DA 14-0529.

¹⁵ Appellee’s Resp. Br. 31, May 4, 2015, No. DA 14-0529.

¹⁶ *Id.* at 30.

¹⁷ Br. Appellant 3, Mar. 4, 2015, No. DA 14-0529.

¹⁸ *Id.* at 13.

¹⁹ *Bailey v. Tintinger*, 122 P. 575 (Mont. 1912).

²⁰ Br. Appellant 13-14, Mar. 4, 2015, No. DA 14-0529.

to beneficial use since that time.²¹ Both factors must be present for an appropriation to be perfected.

The parties here dispute both factors. First, the parties cannot agree whether the intent of the defendant's predecessor is sufficient to grant PCCRC the rights of a water supply entity. Second, the parties disagree on the meaning of beneficial use. PCCRC argues that making water available for customers to purchase constitutes beneficial use,²² while Curry claims that the water has to be physically applied to the land to be claimed under the second prong of the Bailey test.²³

The remaining issues rest upon the resolution of the aforementioned two. The parties dispute whether the defendant should be granted a service area, as a water supply entity, or a place of use based on historic use, as a private user. Finally, Curry argues that the lands surrounding his ranch should not be a part of the defendant's service area or place of use.

A. Did the water court err when it ruled water rights for the purpose of sale or rental are not limited by historic beneficial use?

The Water Master determined that PCCRC had perfected its right to irrigate 57,073 acres based upon its water usage records.²⁴ The Water Court reversed the Master's decision and granted PCCRC 72,000 acres based upon the number of shares the company was authorized to issue upon completion of its distribution system.²⁵ *Bailey* states that a water supply entity's appropriation is perfected when it completes its infrastructure.²⁶ However, if that appropriated water is not put to a beneficial use in a reasonable time, the unused portion is considered abandoned.²⁷ The parties question what constitutes beneficial use as required by *Bailey*.

Curry argues that the Water Court misinterpreted *Bailey*.²⁸ Curry acknowledges that a water supply entity's initial appropriation is rightfully established by its capacity.²⁹ However, he opposes the Water Court's determination that the historically unused acreage has not since been abandoned.³⁰ PCCRC's records confirmed that no more than 56,556 acres were ever irrigated in a single year prior to 1973³¹ —the year the Water Use Act was adopted and the DNRC began handling water

²¹ *Bailey*, 122 P. at 583.

²² Appellee's Resp. Br. 28, May 4, 2015, No. DA 14-0529.

²³ Br. Appellant 15, Mar. 4, 2015, No. DA 14-0529.

²⁴ *Id.* at 7, 15.

²⁵ Appellee's Resp. Br. 16, May 4, 2015, No. DA 14-0529.

²⁶ *Bailey*, 122 P. at 583.

²⁷ *Bailey*, 122 P. at 583.

²⁸ Br. Appellant 15, Mar. 4, 2015, No. DA 14-0529.

²⁹ *Id.* at 18.

³⁰ *Id.* at 22.

³¹ *Id.* at 7.

appropriations.³² Curry argues that this number represents the water put to a beneficial use.³³ Under the second prong of the *Bailey* test, Curry contends, PCCRC's appropriation should be adjusted back to the 57,073 acres established by the Water Master.³⁴ Curry further argues that the 72,000-share limit imposed by the Board in 1953 is irrelevant to PCCRC's right under Montana water law, which requires appropriations be made based upon historic use.³⁵

PCCRC supports the Water Court's determination of a 72,000-acre appropriation. PCCRC contends that physically irrigating lands is not the only way to satisfy *Bailey*'s beneficial use requirement.³⁶ Rather, because the Montana Constitution recognizes water distribution as a beneficial use, PCCRC argues that the second prong of *Bailey* has been satisfied by PCCRC's diligence in selling and distributing its original appropriation.³⁷ The 72,000 acre appropriation reinstated by the Water Court was originally established by the Carey Land Act Board of Montana ("Board") in 1953, when PCCRC's predecessor completed construction of the distribution system.³⁸ At that point, 72,000 shares had been sold to settlers.³⁹ The Board thus capped PCCRC to issue 72,000 shares; each share represented one irrigable acre.⁴⁰

PCCRC asserts that the Water Master's reduction of its appropriation "diluted the rights of PCCRC's shareholders to irrigate up to 72,000 acres."⁴¹

1. Analysis

The Court will probably focus its attention on this issue at oral argument. *Bailey* states that "it is clearly the public policy of this state to encourage these public service corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy."⁴² The Montana Constitution subsequently declared the sale and distribution of water a beneficial use.⁴³ Curry's argument that historic use should define the extent of PCCRC's water right is supported by *Bailey*'s express holding but conflicts with its stated policy objective.⁴⁴ Reducing PCCRC's appropriation would result in

³² Mont. Code Ann. § 85-2-301(1) (2013).

³³ Br. Appellant 22, Mar. 4, 2015, No. DA 14-0529.

³⁴ *Id.* at 21-22.

³⁵ Appellant's Resp. Br. 7, Jul. 6, 2015, No. DA 14-0529.

³⁶ Appellee's Resp. Br. 28-29, May 4, 2015, No. DA 14-0529.

³⁷ *Id.*

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 30.

⁴² *Bailey*, 122 P. at 583.

⁴³ MONT. CONST. art. IX, § 3.

⁴⁴ *Bailey*, 122 P. at 583.

each share representing the right to irrigate less than one acre, directly impacting the value of its distributed shares.⁴⁵ Since such a holding would undermine PCCRC's objectives as a water supply entity, the Supreme Court may ask the parties to address their conflicting interpretations of *Bailey* and comment on the Montana Constitution's role in the Court's analysis at oral argument. Both parties' arguments have support under Montana law, so the Court will have to rule on the definition of beneficial use based largely on policy considerations.

The Court may also request clarification on the role of the Montana Board's decision in 1953 to reduce PCCRC's shares from 160,000 to 72,000.⁴⁶ The reduction was based upon the number of shares sold to settlers to date,⁴⁷ which could be seen as a reduction of PCCRC's initial water right to reflect its historic use as Curry argues *Bailey* requires. Curry's contention that the Board's decision was unrelated to PCCRC's appropriation will probably be addressed by the Court at argument.

B. Did the water court err by granting PCCRC a 377,555.5 acre service area rather than a place of use based upon historic beneficial use?

The Water Master established PCCRC's irrigable area by aggregating the lands listed on share certificates in circulation as of July 1, 1973.⁴⁸ The Water Court reversed the Water Master's decision and granted PCCRC a 377,555.5 acre service area.⁴⁹

Curry opposes the Water Court's determination of a service area for PCCRC and argues that the Water Master's calculation was correct.⁵⁰ Curry cites to *Bailey* for the proposition that a party's original intent defines the scope of his ultimate appropriation.⁵¹ *Bailey* holds that "at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose."⁵² Curry argues that, while PCCRC's predecessors acquired their right and started constructing an irrigation system in the late 1890s, "the idea of a Carey Land Act irrigation project in the Valier area was first conceived in about 1907."⁵³ Curry claims that the Carey Land Act was "a mere afterthought"⁵⁴ and, under *Bailey*, does not give PCCRC the right to have

⁴⁵ Appellee's Resp. Br. 30, May 4, 2015, No. DA 14-0529.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.*

⁴⁸ Appellee's Resp. Br. 31, May 4, 2015, No. DA 14-0529.

⁴⁹ Br. Appellant 15, Mar. 4, 2015, No. DA 14-0529.

⁵⁰ *Id.* at 22.

⁵¹ *Id.* at 23.

⁵² *Bailey*, 122 P. at 583.

⁵³ Br. Appellant 23, Mar. 4, 2015, No. DA 14-0529.

its appropriation defined by the Carey Land Act.⁵⁵ The Water Master's analysis of historically irrigated lands, Curry argues, was appropriate under Montana law.⁵⁶

PCCRC argues that the Water Master misinterpreted the Act's requirement that settlers list appurtenant land on share certificates.⁵⁷ The requirement placed a construction lien on the property until the Project was completed.⁵⁸ Completion of the Project released the liens and gave PCCRC control over the shares' movement, subject to the 72,000 total acre limit imposed by the Board.⁵⁹ PCCRC argues that the Project's contracts with the State of Montana pursuant to the Carey Land Act should define the service area within which the irrigation represented by the shares can be used.⁶⁰ The Water Court analyzed "the law applicable to development of the Project, the history of the Project, the intent of the water appropriations for the Project, and the rights and relations of PCCRC and its shareholders"⁶¹ to define the service area. PCCRC contends that the Water Court's conclusion should be affirmed.⁶²

1. Analysis

Bailey states that the appropriation must not be a "mere afterthought" to the appropriator's intent.⁶³ Curry's argument that PCCRC's predecessor began constructing an irrigation system years before contracting under the Carey Land Act weighs in favor of the argument that the Act represents a "mere afterthought." However, the history of the Act in Montana may play a role in the Supreme Court's analysis. Between 1894 and 1905, the Act was unsettled and unsuccessful in the state. Administration of the Act was overhauled in 1905.⁶⁴ By Curry's analysis, PCCRC's predecessor began contemplating a relationship with the Act only two years after it began to gain momentum in the state. The relatively small time lapse weakens Curry's argument. At argument, the Court may seek to determine why the parties reached such drastically different conclusions about PCCRC's original predecessor's intent, what additional facts weigh in favor of either argument and how the parties interpret the original appropriation given the concurrent history of the Carey Land Act.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 27.

⁵⁷ Appellee's Resp. Br. 31-35, May 4, 2015, No. DA 14-0529.

⁵⁸ *Id.* at 32.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 16.

⁶² *Id.* at 35.

⁶³ *Bailey*, 122 P. at 583.

⁶⁴ The Board of Railroad Commissioners, *Irrigation in Montana* 33 (1920).

The Court may also address Curry's proposition that "water is appurtenant to land on which it is beneficially used."⁶⁵ If the sale of water is declared a beneficial use for the purposes of determine an appropriation, the service area irrigable by PCCRC's distribution system may well be deemed appurtenant land by Curry's own argument. Finally, Curry cites to the record to argue that PCCRC admitted the 377,555.5 acre service area was incorrectly determined.⁶⁶ The Court will probably question PCCRC about this statement, and may seek information regarding a more appropriate figure that would guide the Court's revision of the service area if necessary.

C. Did the water court err by ruling PCCRC's storage rights were used on the Birch Creek Flats prior to 1973?

Curry's ranch is located on the Birch Creek Flats ("Flats").⁶⁷ Historically, PCCRC did not provide water to users on the Flats.⁶⁸ In 1993, a ranch owner on the Flats traded his water rights for shares so he could use PCCRC's infrastructure to irrigate his land.⁶⁹ A second, similar trade followed in 2004.⁷⁰ The Water Court's certification included all of these lands within PCCRC's service area.⁷¹

Curry argues the Flats were incorrectly included in PCCRC's service area.⁷² The transfer that took place in 1993 marked PCCRC's first official interaction with the Flats.⁷³ Transfers of water rights after the enactment of the Water Use Act in 1973 require a DNRC change permit and an analysis of any impacts on senior right holders.⁷⁴ Curry contends that PCCRC's trading water rights for shares in an area not irrigated by PCCRC before the Act should have been subject to examination by the DNRC.⁷⁵

PCCRC counters that the Flats have been historically irrigated by PCCRC.⁷⁶ For years, landowners on the Flats called Faye Stokes when PCCRC dried up Birch Creek.⁷⁷ She would respond by allowing more water to pass PCCRC's diversion points.⁷⁸ The landowners would then draw water from Birch Creek by way of their own water rights.⁷⁹

⁶⁵ Br. Appellant 26, Mar. 4, 2015, No. DA 14-0529 (citing *Smith v. Denniff*, 24 Mont. 20 (1900)).

⁶⁶ Br. Appellant 2, Mar. 4, 2015, No. DA 14-0529.

⁶⁷ Appellee's Resp. Br. 5, May 4, 2015, No. DA 14-0529.

⁶⁸ Br. Appellant 10, Mar. 4, 2015, No. DA 14-0529.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 28.

⁷² *Id.* at 27-28.

⁷³ *Id.* at 10.

⁷⁴ Br. Appellant 28-30, Mar. 4, 2015, No. DA 14-0529.

⁷⁵ *Id.* at 28-29.

⁷⁶ Appellee's Resp. Br. 35-36, May 4, 2015, No. DA 14-0529.

⁷⁷ *Id.* at 12-13.

⁷⁸ *Id.*

⁷⁹ *Id.*

Since PCCRC had at times stored the water upstream before releasing it to the users, PCCRC argues that the Flats were serviced by PCCRC's infrastructure.⁸⁰ By this logic, the Flats were within PCCRC's pre-1973 service area and no DNRC change permit was required for the water right transfers in 1993 and 2004.⁸¹

1. Analysis

This issue rests on the Court's holding as to whether PCCRC is entitled to a service area. If PCCRC's place of use is not defined by its contracts under the Carey Land Act, its historic use will define its appropriation. PCCRC's contention that the Flats were historically serviced by its infrastructure under this test is illogical. If releasing water from a dam constitutes servicing downstream users, PCCRC's service area is effectively without limit. The Court will probably ask PCCRC to elaborate on the practical implications of sustaining such an argument, such as where this indirectly-supplied service area would end if adopted.

D. Did the water court err by substituting its judgment for the trier of fact's?

Curry appeals the Water Court's amendment of the Water Master's order regarding two questions of fact.⁸² The Water Master oversaw a trial before making determinations on two specific water rights.⁸³ The Water Court then increased the flow rate of one right and reversed the Water Master's decision regarding the other.⁸⁴ PCCRC argues that the Water Master's order was properly reversed by the Water Court, as the Master's analysis was flawed.⁸⁵

1. Analysis

This issue won't likely come up during the oral argument. Whether the standard of review was correctly applied by the Water Court is a question of law for the Supreme Court and requires no input from the parties.

E. Cross Appeal

⁸⁰ *Id.*

⁸¹ *Id.* at 17.

⁸² Br. Appellant 32-33, Mar. 4, 2015, No. DA 14-0529.

⁸³ Appellee's Resp. Br. 2, May 4, 2015, No. DA 14-0529.

⁸⁴ Br. Appellant 32-33, Mar. 4, 2015, No. DA 14-0529.

⁸⁵ Appellee's Resp. Br. 38-39, May 4, 2015, No. DA 14-0529.

PCCRC requests that particularly contentious claims of both parties be quantified by volume so as to prevent future disputes.⁸⁶ Although Curry argues that “direct flow water rights are decreed by flow rate and only receive a volume if needed to adequately administer the right,”⁸⁷ PCCRC insists that such a tabulation is necessary.⁸⁸

1. Analysis

The briefs make it apparent that the parties have developed an adversarial relationship. Despite Curry’s argument that an additional measure to adjudicate the dispute between the parties is unnecessary, PCCRC’s position that it will reduce future disputes is persuasive. The Court is unlikely to use limited oral argument time to analyze the validity of PCCRC’s request further.

⁸⁶ *Id.* at 40-43.

⁸⁷ Appellant’s Resp. Br. 19, Jul. 6, 2015, No. DA 14-0529.

⁸⁸ Cross Appellant’s Resp. Br. 9, Jul. 17, 2015, No. DA 14-0529.