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Gene R. Curry, Cheryl S. Curry, And Curry Cattle Co. v. Pondera County Canal & Reservoir Company: Bailey Said What?

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RECAP*; Gene R. Curry, Cheryl S. Curry, And Curry Cattle Co., v. Pondera County Canal & Reservoir Company*: *Bailey* said what?

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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.

I. HOLLY JO FRANZ FOR APPELLANT

Ms. Franz answered questions spotlighting two issues: 1) The dispute over the meaning of "beneficial use" as used in *Bailey*[1] and the Montana Constitution, and 2) the practical effect of the size of PCCRC's place of use.

Before reaching these issues, Justice Baker drew attention to the fact that the Water Court's order represents a certification—not a final adjudication of the parties' water rights. She asked Ms. Franz whether Curry would have an opportunity during adjudication to object to the 72,000-acre appropriation and 377,555.5-acre place of use listed in the Water Court's order. Ms. Franz was unsure.

The Court asked Ms. Franz to speak to the assertion by amicus and PCCRC that the 1889 Montana Constitution declares the sale and distribution of water to be a beneficial use, and to address whether storage of water is considered a beneficial use. Ms. Franz explained her client's stance that all uses are considered beneficial uses by the Constitution, but all must still be limited by historic use. There is no place in Montana law, she argued, for preferential treatment of corporations over individuals. She continued that while water may be stored to be made available for a beneficial use, storage is not itself a beneficial use of water. The actual beneficial use, such as irrigation, is what should define the extent of the right—not the amount stored to meet that need.

Ms. Franz supported the Appellant's stance on historic beneficial use by relying on *Bailey*. She explained *Bailey* as holding that a water supply entity's water right must be limited by beneficial use after its distribution system is completed. The Court requested clarification on the latter portion of *Bailey* that explicitly rejects another jurisdiction's law requiring water to be put to a beneficial use in order to perfect a water right.[2] Ms. Franz explained *Bailey*'s ultimate holding as granting an

[1] Bailey v. Tintinger, 122 P. 575 (Mont. 1912).
[2] *Id*. at 583.

inchoate right to water service entities, with respect to establishing seniority, when the distribution system is completed. However, the water must then be put to beneficial use within a reasonable time in order to establish the extent of the final appropriation.

The Court next sought to clarify the practical effect the size of PCCRC's place of use has on users like Curry. Ms. Franz explained that an oversized place of use serves as a regulatory "loophole" for the company. She stated that PCCRC added approximately 8,000 acres to its historic place of use in recent years on the Birch Creek Flats. Because the area was considered a part of the company's service area, the DNRC was not required to evaluate the change's impact on Curry and similarly situated private right holders. Even though rights acquired by PCCRC after 1973 can only be used within the area of their historic use, Ms. Franz told the Court that nothing prevents PCCRC from irrigating those lands with water from its distribution system. PCCRC can draw water from the Birch Creek Flats to apply to the newly acquired lands, resulting in an effective expansion of the company's service area and a reduction in the water available for private right holders like Curry.

The Court asked Ms. Franz to explain how private users that had sold their water rights to PCCRC after 1973 in exchange for shares would be impacted if the Supreme Court overturned the Water Court's determination of a service area. She stated that the private rights would remain appurtenant to the land historically irrigated, though private users that had sold their shares may have to offer PCCRC some consideration in order to use them. The Court questioned how a water right for sale could be appurtenant to land owned by the end user—not the distributer. Water rights remain appurtenant to the land it irrigates, even when the land changes ownership, she explained. PCCRC's by-laws and shares state that the water represented by shares is appurtenant to the land it is used on. The company's place of use, she continued, should be defined by these appurtenant lands. PCCRC would still have the right to move water freely within this area. When directly asked whether water should be movable within appurtenant lands listed on share certificates without authorization, Ms. Franz answered affirmatively.

The appellant's argument concluded with Ms. Franz's statement that PCCRC's right to store water does not equate to ownership of the water. Because PCCRC does not own the water it stores, releasing it for private users to access downstream does not amount to servicing the land those users apply it to; The Birch Creek Flats were not historically irrigated by PCCRC.

II. JOHN BLOOMQUIST FOR THE APPELLEE

Mr. Bloomquist led his argument by addressing the District Court's failure to provide a tabulation for the Ryan-Lauffner creek that

PCCRC shares with Curry. The Court again inquired into the adjudication process to determine whether the objections raised by both parties would be addressed during the proceedings. Mr. Bloomquist believed so but was not definitive.

The Court's next line of questioning for Mr. Bloomquist sought to clarify the relationship between the 72,000-acre appropriation and the physical volume of water diverted and stored by PCCRC at any given time. In response, Mr. Bloomquist stated that PCCRC's volume of diverted water has not increased with time.

Questions then turned to Mr. Bloomquist's interpretation of beneficial use, with the Justices asking far more questions of him than they had of Ms. Franz. Mr. Bloomquist explained his client's position that the water rights owned by the company were perfected under *Bailey* around 1914 when PCCRC completed its distribution system and offered water for sale.[3] He rejected the Currys' position that PCCRC's appropriation is not limited by historic use, citing several forms of limitations imposed by the Water Court to demonstrate that the company's usage is subject to limits. However, he conceded that of the 377,555.5-acre place of use granted by the Water Court, only an approximate 85,000 acres had been historically irrigated. The larger area, he explained, represents DNRC's analysis of the entire area serviceable by PCCRC's distribution system. He confirmed the Court's understanding that PCCRC could, at its discretion, begin at any point to irrigate portions of the remaining 290,000 acres never historically irrigated without a DNRC change authorization. However, he did not agree that the law offers preferential treatment to Water Supply Entities. Rather, it recognizes a necessary distinction between individual appropriators and Water Supply Entities because Montana law obligates the latter to sell available shares to customers. The law should not require a DNRC change authorization to do so when shares are sold to customers seeking irrigation within the distribution area recognized by the DNRC.

Mr. Bloomquist continued his argument that the law recognizes a distinction between individuals and Water Supply Entities by presenting his client's interpretation of *Bailey*. Because such entities can neither force third parties to purchase their shares nor to put the water available to them to use, the company's appropriation could not reasonably be based upon the actions of those parties. Therefore, under *Bailey*, PCCRC's due diligence in putting the water to a beneficial use was completed when the shares were made available for sale to customers. Bloomquist agreed that part of the resulting appropriation could be subject to abandonment, but reiterated that because PCCRC made the shares available for sale, none had been abandoned. The Court asked

[3] *Id.*

whether abandonment could be addressed at adjudication, and he stated that he believed it could.

The Court questioned Mr. Bloomquist about what role the Montana Board of the Carey Land Act's determination of a 72,000-acre limit in 1953 had on PCCRC's water rights. Mr. Bloomquist stated that the State made determinations regarding the project, such as where water would be used. He continued that the construction companies that PCCRC's predecessor contracted with were obligated by contracts with the State of Montana to sell shares of the developing irrigation system to settlers as they arrived. No priority was given to shares sold early in the project; All were sold on "equal footing."

Mr. Bloomquist was then asked what happens to senior water right holders that fall within PCCRC's place of use. He explained that the rights in dispute were originally noticed by PCCRC's earliest predecessor. Rights owned by private users on Birch Creek are direct flow rights, which are administered by priority. PCCRC also owns direct flow rights, he continued, on Birch Creek Flats that were purchased during the Carey Land Act.

Before concluding his argument, Mr. Bloomquist addressed the Birch Creek Flats' inclusion in PCCRC's place of use, disagreeing with the Currys' assertion that PCCRC lost control of water flowing to users on the Flats after releasing it from Swift Dam. He explained that stored water is not equivalent to a natural flow, so the water released by PCCRC to downstream users was, in effect, serving them by way of PCCRC's distribution system.

III. HOLLY JO FRANZ FOR THE APPELLANT – REBUTTAL

The Court immediately addressed Ms. Franz at rebuttal, stating that she and Mr. Bloomquist disagree on the issue of whether the water stored by PCCRC and then released to Birch Creek Flats users was used to serve those users and asking her input on deciding the issue. She responded that there was no historic exchange agreement between the parties. The users along Birch Creek Flats calling on the company's manager were doing so regarding their private rights – they were not calling to use PCCRC's water.

Next, the Court asked for Ms. Franz to address PCCRC's volume appropriation. She pointed to *Bailey*'s standard of a reasonable time to put water to use after completion of a distribution system,[4] referencing the State of Montana's 1953 conclusion that the project was completed. When asked to rectify the 72,000-share cap determined at that time with her client's assertion that 72,000 acres had never been irrigated, she explained that the Carey Land Act and Montana water law are not

[4] *Id.*

synonymous; The Carey Land Act merely transferred federal land to private owners. The actual extent of a water right requires separate consideration.

Ms. Franz's interaction with the Court became rather contentious for the remainder of her argument, beginning with her assertion that Mr. Bloomquist's analysis of *Bailey* would have allowed PCCRC a perfected water right upon completion of its irrigation system even if no shares were ever sold. The Court responded with disapproval of her argument, explaining to Ms. Franz that Mr. Bloomquist had only argued that because Water Supply Entities are not the end users of water, they need time to put their appropriation to use. She next relied upon *Mont. Dept. of Nat. Resources and Conservation v. Intake Water Co.*[5] as support for her argument that abandonment of a right and initial failure to perfect a right are separate considerations. The Court felt that *Intake* supported Mr. Bloomquist's position - not hers. However, she continued to relate her client's position to the case, explaining that making water available for sale was merely a condition precedent to putting it to beneficial use. Placing water for sale, then, does not satisfy *Bailey*'s measure of beneficial use.

As her last argument, Ms. Franz explained that Curry is being harmed presently and pleaded with the judges not to make him wait for the adjudication proceedings to settle his issue.

IV. PREDICTIONS

The Court on numerous occasions referenced the potential for resolution of issues during adjudication in the future. Although neither party could answer concretely whether individual issues—tabulations, abandonment, volume appropriation, and a place of use determination—would be decided during adjudication, it seems likely that the Court will abstain from ruling on any issues that can be addressed during that process. Based upon the depth of the questions asked by the Court regarding PCCRC's place of use and volume appropriation according to beneficial use, a ruling will probably be made on both issues.

The Court appeared unimpressed with Mr. Bloomquist's explanation of PCCRC's continuing need for a place of use that includes approximately 290,000 acres that have not historically been irrigated. Mr. Bloomquist was also asked—almost rhetorically —whether the law gives preferential treatment to corporations. Ms. Franz answered two questions that further lend to the likelihood the Court is leaning toward overturning the Water Court: (1) Whether PCCRC would be able to move irrigable acres around within the lands listed on share certificates,

[5] Mont. Dept. of Nat. Resources & Conservation v. Intake Water Co., 558 P.2d 1110 (Mont. 1976).

and (2) how overturning the Water Court would affect water users on the Flats whose water rights have been sold to PCCRC. Little time was spent on the issue of the Birch Creek Flats' inclusion in PCCRC's service area. If the Court is planning to limit PCCRC's place of use to the historically irrigated lands, the Birch Creek Flats issue will solve itself. Taken as a whole, it appears the Court may be siding with Curry on the issue. If it does, the Court will probably define the timeframe that accurately reflects PCCRC's historic use so the company's place of use can be determined correctly during adjudication.

The questions about volume appropriation were less pointed, despite Ms. Franz's exchange with the Court. However, *Bailey*'s holding that water appropriated to a water supply entity not put to use in a reasonable time would be abandoned[6] was mentioned repeatedly. With adjudication still pending—and the outcome of this particular issue having a less substantial impact on users like Curry in the meantime—it appears likely that the Court will order evidence of abandonment to be considered during adjudication so that PCCRC's final appropriation can be adjusted appropriately.

[6] *Bailey*, 122 P. at 573.