

Public Land and Resources Law Review

Volume 0 Case Summaries 2016-2017

United States v. Barthelmess Ranch Corp.

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Recommended Citation

Brown, Jonah P. (2013) "United States v. Barthelmess Ranch Corp.," *Public Land and Resources Law Review*: Vol. 0 , Article 25.
Available at: <http://scholarship.law.umt.edu/plrlr/vol0/iss7/25>

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***United States v. Barthelmess Ranch Corp.*, 2016 MT 348, 386 Mont. 121, 386 P.3d 952**

Jonah P. Brown

Application of water to a beneficial use is the decisive element of a perfected water right in Montana. The BLM claimed rights to five reservoirs and one natural pothole under Montana law. The agency did not own livestock, but instead made the water available to grazing permittees. In *United States v. Barthelmess Ranch Corp.*, the Montana Supreme Court affirmed the Montana Water Court’s holding that the BLM’s practice of making water available to others constituted a beneficial use and a perfected water right.

I. INTRODUCTION

In order to perfect a water right in Montana prior to 1973, the appropriator needed to meet certain criteria including the intent to appropriate, notice of the appropriation, diversion, and beneficial use.¹ *United States v. Barthelmess Ranch Corp.*, involved six water right claims filed by the Bureau of Land Management (“BLM”) to water sources located wholly or partially on federal land.² The claims included five reservoirs based in Montana law, and one natural pothole pursuant to federal reservation of lands.³ Barthelmess Ranch, Double O Ranch, William French, Conni French, Craig French, and M Cross Cattle (collectively “Objectors”) argued that the BLM failed to perfect any of the asserted water rights and requested the Montana Water Court (“Water Court”) transfer the rights to the current grazing permittees on the federal lands.⁴ Their objection was based solely upon the beneficial use issue.⁵ The Objectors alleged the BLM could not have perfected its claims because the agency did not own any livestock, thus it did not actually use the water.⁶ In November 2014, the Water Master, recommended summary judgment in favor of the BLM, holding the BLM had properly perfected the rights.⁷ The Water Court upheld the Water Master’s recommendation.⁸ The Objectors appealed the order, and the Montana Supreme Court affirmed the Water Court’s holding.⁹

¹ *United States v. Barthelmess Ranch Corp.*, 2016 MT 348, ¶ 11, 386 Mont. 121, 386 P.3d 952.

² *Id.* at ¶ 3.

³ *Id.*

⁴ *Id.* at ¶ 4.

⁵ *Id.* at ¶ 11.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at ¶ 40.

II. FACTUAL AND PROCEDURAL BACKGROUND

In conjunction with the Water Court's claims adjudication process, the BLM filed six water right claims.¹⁰ The claims, each located partially on federal land, involved five reservoirs: Windy Day Reservoir, North Flat Creek Reservoir, Tallow Creek Reservoir, and Sharon Reservoir, and one natural pothole, Pothole Lake.¹¹

The Objectors argued that the BLM could not have perfected a water right because it did not own any livestock or use reservoir water, thus, the BLM failed to put the water to a beneficial use.¹² The Objectors asserted that "they thereby obtained the sole and paramount right to all of the waters at issue . . . any BLM claims to water should therefore be transferred to them."¹³ In June 2014, the BLM moved for summary judgment on the objections.¹⁴ In November 2014, the Water Master recommended summary judgment in favor of the BLM, asserting that its

¹⁰ *Id.* at ¶ 3.

¹¹ *Id.* The following is a summary of the BLM claims:

Windy Day Reservoir – built by the BLM in 1955 with participation by the BLM grazing permittee at the time. *Id.* at ¶ 5. The French objectors own property surrounding the reservoir and claim that their ancestors owned livestock on the land now containing the reservoir. *Id.*

North Flat Creek Reservoir – built by the BLM in 1937. *Id.* at ¶ 6. The reservoir is partially located on lands conveyed to the French objectors in 1995. *Id.* The French objectors claim that their ancestors placed livestock on land now containing the reservoir as early as 1911. *Id.*

Tallow Creek Reservoir – built by the BLM in 1936. *Id.* at ¶ 7. The Objectors contend that their ancestors' livestock grazed in the area and drank the water as early as 1915. *Id.*

Sharon Reservoir – built by the BLM in 1961. *Id.* at ¶ 8. The M Cross objectors claim that its property surrounds the reservoir and was used to graze and water livestock. *Id.*

Funnells Reservoir – acquired by the BLM in 1951 when surrounding property was secured. *Id.* at ¶ 13. A portion of the reservoir is on the Barthelmess objector's land. *Id.* The Barthelmess objectors claim that a portion of the reservoir is on its land and the area was used for stock as early as 1915. *Id.*

Pothole Lake – a natural feature located on BLM land. *Id.* at ¶ 15. The Objectors claim that their ancestors used the pothole for stockwater as early as 1917. *Id.* The BLM contends that the Pothole Lake was reserved by the Secretary of the Interior pursuant to the Stock Raising Homestead Act and the Public Water Reserve No. 107. *Id.*

¹² *Id.* at ¶ 11.

¹³ *Id.* at ¶ 16.

¹⁴ *Id.* at ¶ 3.

claims were valid.¹⁵ The Water Court upheld the Water Master’s recommendation.¹⁶

As to the Windy Day Reservoir, North Flat Creek Reservoir, Tallow Creek Reservoir, and Sharon Reservoir, the Water Court concluded that the

“impoundment of water in a reservoir is a sufficient diversion of water to support a claim to a use right of water . . . and noted that the Objectors contested only whether the BLM had applied the water to a beneficial use.”¹⁷

The Water Court held that “an appropriation of water for the use of others was [perfected] upon completion of the diversion system (in this case the reservoirs) and making the water available for use by others.”¹⁸ Thus, the Water Court held that stock ownership was not required to perfect the appropriation.¹⁹ As to the Funnells Reservoir, the Water Court held that the BLM acquired all appurtenant water rights when it secured the surrounding property.²⁰ Regarding the Pothole Lake; the Water Court held that the lake was a reserved right based upon Public Water Reserve No. 107 (“PWR 107”), which “reserved all springs and water holes on vacant, unappropriated, and unreserved public land throughout the country.”²¹ Finally, after determining that each reservoir was “a sufficient appropriation to consummate a right for wildlife uses,” the Water Court held that the wildlife use was supported by sufficient proof of a water right.²²

The Objectors appealed and the Montana Supreme Court affirmed the Water Court’s decisions.²³

III. ANALYSIS

A. Reservoirs

The appeal raised three issues regarding reservoirs.²⁴ First, whether the BLM was qualified to appropriate water for sale or

¹⁵ *Id.* at ¶ 4.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 11 (citing *In the Matter of the Adjudication of Existing Rights (Bean Lake III)*, 2002 MT 2016, 311 Mont. 327, 55 P.3d 369).

¹⁸ *Id.* at ¶ 12 (citing *Bailey v. Tintinger*, 45 Mont. 154, 166-67, 122 P. 575, 579 (1912)).

¹⁹ *Id.* at ¶ 12.

²⁰ *Id.* at ¶ 14 (citing Mont. Code Ann. § 85-2-401(1) (2015)); *Maclay v. Missoula Irrig. Dist.*, 90 Mont. 344, 353, 3 P.2d 286, 290 (1931).

²¹ *Id.* at ¶ 15.

²² *Id.* at ¶ 20.

²³ *Id.* at ¶ 46.

²⁴ *Id.* at ¶ 2.

distribution.²⁵ Both parties relied upon *Bailey v. Tintinger*, which held, “Montana law recognized that an appropriation of water to be used by others was complete upon construction of the diversion system (such as a reservoir) and making the water available to others.”²⁶ The Objectors argued *Bailey* mandated a rule that only a “public service corporation” can appropriate water to be used by others.²⁷ Accordingly, the Objectors argued that the BLM cannot perfect its claims as it is not a “public service corporation.”²⁸ However, the Montana Supreme Court held that Montana law recognizes “the right of an *individual* to appropriate water to rent or sell to another.”²⁹ The Court reasoned that Montana law does not limit sale or use by others to “public service corporations,” rather, Montana allows individuals and entities to appropriate and make water available to others.³⁰

The second issue was whether the BLM appropriated water or “simply facilitated use of water already appropriated” by ancestral grazers.³¹ The Court noted that Montana law allows multiple appropriations from the same source.³² Thus, the Court reasoned, the BLM did not claim water rights of the ancestral grazers, but rather, its claims were based upon its own appropriations via the reservoir construction.³³ The Court asserted that if the Objectors own valid stockwater claims, each right will have its own separate priority date.³⁴

Finally, the Court addressed whether the BLM’s construction of the reservoirs was a modification of prior stockwatering practices, rather than a new appropriation.³⁵ The Court determined the BLM’s reservoir construction was simply a claim to new rights, each separate with their own priority dates.³⁶ The Court held that water use by the Objectors’ ancestral grazers did not preclude the BLM from claiming a right to the same source, consistent with Montana’s prior appropriation doctrine.³⁷ A contrary holding would “throw Montana water rights into chaos.”³⁸ Thus,

²⁵ *Id.* at ¶ 27.

²⁶ *Id.* at ¶ 28 (citing *Bailey*, 45 Mont. at 166-67, 122 P. at 579).

²⁷ *Id.* at ¶ 29 (emphasis in original).

²⁸ *Id.* (emphasis in original).

²⁹ *Id.* (quoting *Bailey*, 45 Mont. at 174, 122 P. at 582 (emphasis in original)).

³⁰ *Id.* at ¶ 35 (citing *Curry v. Pondera Cnty Canal & Reservoir Co.*, 2016 MT 77, ¶ 25, 383 Mont. 93, 370 P.3d 440).

³¹ *Id.* at ¶ 36.

³² *Id.*

³³ *Id.*

³⁴ *Id.* The court noted that if the Objectors hold valid claims based upon ancestral grazing in the early twentieth century, those rights are separate from, and would be senior to, any BLM reservoir rights claimed.

³⁵ *Id.* at ¶ 38.

³⁶ *Id.*

³⁷ *Id.* at ¶ 39.

³⁸ *Id.*

the Court held that there was no basis to assign ownership of the BLM claims to the Objectors.³⁹

B. Pothole Lake

An additional issue raised on appeal was whether the Water Court had a valid basis to recognize the reservation of the Pothole Lake.⁴⁰ The Objectors argued that the Pothole Lake was too small to qualify for reservation under PWR 107.⁴¹ However, PWR 107 reserved “every spring or waterhole, located on unsurveyed public land.”⁴² The Court found this broad language clearly included the Pothole Lake.⁴³ Thus, the Supreme Court agreed with the Water Court’s conclusion that the Pothole Lake was properly reserved.⁴⁴

C. Justice McKinnon’s Dissenting Opinion

Justice Laurie McKinnon dissented, arguing the majority’s conclusion was erroneous because “[the] BLM’s claims are premised upon the actual beneficial use of water consumed by Stockowner’s cattle.”⁴⁵ According to Justice McKinnon, the requirement of beneficial use for a completed appropriation is “the touchstone of the appropriation doctrine.”⁴⁶ Thus, applying water to the intended beneficial use is essential to acquiring the right.⁴⁷ Justice McKinnon argued that the true beneficial use was accomplished by the Stockowner Objectors who actually used the water for their stock. Therefore the BLM cannot claim the beneficial use of the underlying stockowners as its own.⁴⁸ Further, Justice McKinnon argued that impounding water has never been held to be a beneficial use.⁴⁹ Accordingly, a water right cannot be perfected upon mere reservoir construction.⁵⁰ Finally, Justice McKinnon argued that the Court misconstrued *Bailey* by shifting its focus away from the beneficial use requirement.⁵¹ The BLM’s attempt to perfect a water right was based solely upon construction of reservoirs, ownership of land beneath the

³⁹ *Id.* at ¶ 40.

⁴⁰ *Id.* at ¶ 41.

⁴¹ *Id.* at ¶ 43.

⁴² *Id.* at ¶ 44 (emphasis in original).

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 45.

⁴⁵ *Id.* at ¶ 47.

⁴⁶ *Id.* at ¶ 54 (quoting *In the Matter of the Adjudication of Existing Rights*, ¶ 10).

⁴⁷ *Id.* (citing 1 Wells A Hutchins, *Water Rights Laws in the Nineteen Western States*, 442 (1971)).

⁴⁸ *Id.* at ¶ 60.

⁴⁹ *Id.* at ¶ 61 (citing *Teton Co-op Canal Co. v. Teton Coop Reservoir Co.*, 2015 MT 344, ¶ 12, 382 Mont. 1, 365 P.3d 442).

⁵⁰ *Id.* at ¶ 62.

⁵¹ *Id.* at ¶ 68.

reservoirs, and the duty to manage grazing districts.⁵² Justice McKinnon contended that *Bailey* did not hold “that *offering* or making *available for future consumption* is an application of water to an actual beneficial use.”⁵³ A contrary holding, Justice McKinnon asserted, would “[permit] water rights to be created without an actual use and then indefinitely held without any actual use until the appropriator sees fit.”⁵⁴ Thus, according to Justice McKinnon, the Stockowner Objectors’ livestock put the water to beneficial use and the Stockowners own the rights, not the BLM.⁵⁵

IV. CONCLUSION

Montana has fully embraced the western water law concept providing citizens the right to use Montana’s waters.⁵⁶ In Montana, a valid appropriation is not perfected until the water is successfully applied to the beneficial use designed.⁵⁷ The Montana Supreme Court in *United States v. Barthelmess Ranch Corp.* provided that the essential elements of perfecting a pre-1973 water right are met when water is impounded and made available for use by others.⁵⁸ This decision has important implications for Montana. The Court held that an appropriation for the purpose of making water available to others is consistent with Montana water law.⁵⁹ In her dissenting opinion, Justice McKinnon warned that this decision “erodes, further, the long established principle in western water law that the application of water to beneficial use is essential to a completed appropriation.”⁶⁰ It is unclear whether this case will serve as a basis for a broader interpretation of what constitutes a beneficial use. Directly, however, the decision allows appropriators to make valid claims by providing use of their water to others.

⁵² *Id.* at ¶ 69.

⁵³ *Id.* (emphasis in original).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at ¶ 52.

⁵⁷ *Id.* at ¶ 55.

⁵⁸ *Id.* at ¶ 40.

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 47.