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United States v. Barthelmess Ranch Corporation: You Can Lead Livestock to Water, but Does That Give You the Right to a Claim?

Molenda L. McCarty

Alexander Blewett III School of Law

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**PRECAP; *United States v. Barthelmess Ranch Corporation*:
You Can Lead Livestock to Water, but Does That Give You the
Right to a Claim?**

Molenda L. McCarty

I. QUESTION PRESENTED

Did the Water Court err in granting partial summary judgment to the United States as claimant of state-law water rights on federal grazing lands managed by the Bureau of Land Management for purposes of stock watering?

II. INTRODUCTION

According to the Bureau of Land Management (“BLM”), “[g]razing, which was one of the earliest uses of public lands when the West was settled, continues to be an important use to those same lands today.”¹ Impliedly, the contentious issue of appropriation of stock water rights on federal grazing lands will have an important impact on the future of federal grazing lands in Montana. If the Court reaches this issue, it will likely have a notable impression on stockmen’s future water interests regarding grazing leases with BLM and resolve hundreds of open water rights claims in Montana.²

Although the common law elements of a valid water right appropriation are intent, notice, diversion, and application to beneficial use, Montana, along with many western states, allows procurement of the right merely through the “application of the water to a beneficial use.”³ The key issue of controversy in the present case is whether the stockmen put the application of the water to beneficial use at the turn of the twentieth century by grazing livestock or whether the BLM satisfied the beneficial use element by building reservoirs.

¹ *Fact Sheet on BLM’s Mgmt. of Livestock Grazing*, U.S. DEP’T OF INTERIOR BUREAU OF LAND MGMT., <http://www.blm.gov/wo/st/en/prog/grazing.html> (last visited Sep. 7, 2016).

² See Opening Brief at 2, *United States v. Barthelmess Ranch Corp.* (Mont. Water Ct. Dec. 7, 2015) (No. 40M-300) [hereinafter Appellant’s Brief] (“In total, 25 cases are before the Water Court, which have consolidated the objections of SPWG to over 280 claims made by BLM.”).

³ *In Re Adjudication of Existing Rights Within the Missouri River Drainage Area*, 55 P.3d 396, 399 (Mont. 2002) [hereinafter *Bean Lake III*]; see also *Thomas v. Guraud*, 6 Colo. 530, 533 (Colo. 1883) (“[T]he true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial”).

III. Factual and Procedural Background

In 2014, the Water Court consolidated ten cases encompassing 167 claims⁴ filed by the United States for stock or wildlife uses of reservoirs, pothole lakes, or springs located on federal lands managed by the BLM.⁵ A collective group of private party federal grazing permittees, South Phillips Water Users Group (SPWG), objected to a number of the water right claims on grounds that the United States' stock claims should be terminated because they are invalid, and ownership of the stock claims should be transferred from the United States to a private party.⁶ The United States and SPWG identified twelve test claims (including five reservoir claims) to address the similar legal issues in the numerous claims.⁷

SPWG is comprised of multi-generational families who own ranches situated throughout South Phillips County.⁸ Tax records, Montana brand registrations, and local historical documents indicate SPWG families owned livestock that grazed freely on property surrounding the reservoirs at issue prior to the construction of the reservoirs.⁹ With the exception of the Funnells Reservoir, the BLM constructed all of the reservoirs at issue between 1955 and 1961.¹⁰ The BLM acquired the land on which the Funnells Reservoir sits in 1951;¹¹ and, when it acquired the land, the deed was silent on water rights.¹²

After the twelve test claims were identified, the United States filed its summary judgment motion, arguing the claims should be upheld and that all objections should be dismissed.¹³ SPWG filed its response and argued that the claims should be transferred to private ownership.¹⁴ The Water Court heard oral argument on the motion, and on November 6, 2014, Water Master Gorder found the claims were valid and properly owned by the United States, granting the United States' summary judgment motion.¹⁵

⁴ See Appellant's Brief, *supra* note 2, at 2 (This number rose to 25 cases and over 280 claims by the time Appellant's Brief was filed.).

⁵ Order on Summary Judgment, *United States v. Barthelmess Ranch Corp.*, 2014 Mont. Water LEXIS 5 at *1 (Mont. Water Ct. Nov. 6, 2014) (No. 40M-300) [hereinafter Water Master's Order].

⁶ *Id.* at *1.

⁷ *Id.* at *1.

⁸ Appellant's Brief, *supra* note 2, at 5.

⁹ *Id.* at 7–10 (Tax records, Montana brand registration, and historical documents indicate stockman were grazing livestock on the land surrounding Windy Day Reservoir, PR-141, and Funnells Reservoir as early as 1911, the land surrounding PR-19 as early as 1915, and the land surrounding Sharon Reservoir as early as 1917.).

¹⁰ *Id.* at 7–10.

¹¹ *Id.* at 10.

¹² Order Granting Partial Summary Judgment and Order Remanding to Master, *United States v. Barthelmess Ranch Corp.*, 2014 Mont. Water LEXIS 5 at *54 (Mont. Water Ct. Aug. 11, 2015) (No. 40M-300) [hereinafter Water Judge's Order].

¹³ Water Master's Order, *supra* note 5, *1–2.

¹⁴ *Id.* at *2.

¹⁵ *Id.* at *43.

SPWG objected to the Master's order, challenging the beneficial use element. The United States filed an answer supporting it.¹⁶ According to the Water Court, under common law, valid appropriation of water rights exists when the following elements are satisfied: 1) intent to appropriate; 2) notice of the appropriation; 3) diversion (if necessary); and 4) beneficial use.¹⁷ After the February 25, 2015 oral argument on SPWG's objection, Judge Ritter granted partial summary judgment for the United States with regard to the five reservoir stock water claims, finding the United States appropriated rights when it constructed reservoirs on federal land.¹⁸ In *Bailey v. Tintinger*,¹⁹ the Court held a public service corporation could satisfy the beneficial use requirement and perfect water right ownership by completing a diversion system, making water available to the benefit of end users while not reaping an *actual* benefit from doing so.²⁰ Relying on *Bailey*, the Water Court held the United States completed a diversion system in the creation of reservoirs and created an end user in the grazing allotment permittees, thus perfecting its water rights.²¹ Regarding the Funnells Reservoir, the Water Court further held that since the deed conveying the land was silent on water rights, the rights passed with the conveyance of the property.²²

SWPG raised a number of issues on appeal, including actual beneficial use of the water claims; the BLM's qualification as a "public service corporation"; the creation of separate stock water rights upon reservoir construction; the BLM's claim to the pothole stock water right; and state-based water law being assessed under a federal right reservation.²³ Due to time constraints, it is likely a number of these issues will not be addressed at oral argument. As a result, only the Water Court's decision as to the United States' stock water claims to the reservoirs will be discussed below.

IV. SUMMARY OF ARGUMENTS

A. Objectors Barthelmess Ranch Corporation; Double O Ranch, Inc.; Lela M. French; William R. French; Conni D. French; Craig R. French; M Cross Cattle Company (collectively "SPWG")

The crux of SWPG's argument lies in its contention that the "Water Court erred as a matter of fact and law in holding that BLM, and

¹⁶ Water Judge's Order, *supra* note 12, at *45.

¹⁷ *Id.* at *50 (citing *Bean Lake III*, 55 P.3d 396, 399 (Mont. 2002)).

¹⁸ *Id.* at *80-82 (The pothole lake appropriation issue is not addressed in this Pre-Cap due to the likelihood it will not be addressed because of time constraints placed on the oral arguments.)

¹⁹ 122 P. 575 (Mont. 1912).

²⁰ Water Judge's Order, *supra* note 12, at * 51 (citing *Bailey*, 122 P. at 579).

²¹ *Id.* at *52-53.

²² *Id.* at *55.

²³ Appellant's Brief, *supra* note 2, at 1.

not SPWG's members, owns the stock water claims."²⁴ SWPG argues, as a matter of fact, the BLM was not the party who placed the water to actual beneficial use.²⁵ Further, as a matter of law, SPWG asserts the Water Court "erroneously interpreted and applied the principles of *Bailey*," and common-law law prior to the Water Use Act²⁶ should control the claims.²⁷

1. SPWG's Predecessors-in-Interest Were the Actual Beneficial Users, Which Resulted in Valid Appropriation and Ownership of the Reservoir Claims.

SPWG claims when its individual predecessors-in-interest grazed their stock on public domain they placed the water at issue to beneficial use.²⁸ As previously noted, Montana accepts the application of water to beneficial use alone as a valid appropriation.²⁹ SPWG argues that merely owning land or constructing a reservoir does not create water rights.³⁰ SPWG claims, "[a] beneficial use contemplated in an appropriation is **one that inures to the benefit of the appropriator**."³¹ And, because SPWG alleges that the benefit of the reservoir inures solely to SPWG members, the BLM has not satisfied the beneficial use requirement.

SPWG further contends the Water Court previously concluded that stockmen whose stock grazed federal open or leased range had vested water rights in the sources that watered their stock.³² SPWG concedes the previous cases involved the private parties as claimants but asserts this distinction should make no difference to the application of the principles.³³ Since SPWG has specifically "(1) demonstrated who the original appropriators of the claims were; (2) demonstrated the identity of all successors-in-interest; (3) established that each successor-in-interest continued stock use; and (4) established that SPWG members continue to utilize their predecessors' appropriations," it is SPWG's stance that it has demonstrated the members' predecessors were the actual appropriators of

²⁴ *Id.* at 13.

²⁵ *Id.* at 13.

²⁶ MONT. CODE ANN. § 85-2-101 (2015).

²⁷ *Id.* at 13.

²⁸ *Id.* at 15.

²⁹ *Id.* at 15 (citing *Bean Lake III*, 55 P.3d 396, 399 (Mont. 2002)).

³⁰ Appellant's Brief, *supra* note 2, at 16 (citing *Smith v. Denniff*, 60 P. 398, 401 (Mont. 1900) (legal title to the land upon which water is appropriated or used does not affect an appropriator's title to the right); *Hays v. Buzard*, 77 P. 423, 425 (Mont. 1904); Decree Water Right Declaration, *In re Adjudication of Existing Rights to the Use of All Water Within Powder River Prelim.* (Mont. Water Ct. Mar. 4, 1983) (No. 5117-01) (Objector: Burlington N.).

³¹ *Id.* at 17 (citing MONT. CODE ANN. § 85-2-102(4)) (emphasis in original).

³² *Id.* at 18–19 (citing *In re All the Adjudication of the Existing Rights Between the Musselshell River and Fort Peck Dam*, No. 40E-A, at 39 (Mont. Water Ct. June 29, 2005), available at <http://courts.mt.gov/water/fed-rule> [hereinafter *Edwards*]; *In re All the Adjudication of the Existing Rights Within the Jefferson River Drainage Area*, No. 41G-190, at 19 (Mont. Water Ct. July 19, 2005) available at <http://courts.mt.gov/water/fed-rule> [hereinafter *Hamilton*]).

³³ *Id.* at 20–21.

the water at issue.³⁴ Thus, SPWG argues it satisfied the beneficial use element prior to the United States' creation of reservoirs, and SPWG's members are entitled to ownership of the claims.

2. *The Water Court Erred in Applying the Principles of Bailey to Support the BLM's Ownership of the Reservoir Stock Water Claims.*

According to SPWG, the Court in *Bailey* held that the application of water to beneficial use was not required when a public service corporation, formed for the purpose of renting, selling, or distributing water to another party, perfected water rights by completing a distribution system and offering the water for sale, lease, and distribution.³⁵ Since, by SPWG's assertion, the BLM is not "organized as a public service corporation under Montana law" and the "BLM has never actually rented, sold, or distributed the reservoir stock water rights to permittees or their predecessors-in-interest," it is SPWG's contention that the *Bailey* requirements are not satisfied.³⁶ As a result, SPWG argues that *Bailey* is not applicable to the case at issue, and SPWG members are the proper owners under the BENEFICIAL use standard.³⁷

B. *Response of the United States*

1. *The United States Perfected Water Rights by Impoundment of Water for Use, and This Use Did Not Expand Any Possible Direct-From-Source Rights.*

According to the United States, summary judgment should be upheld since the United States has perfected its water rights under Montana law.³⁸ Montana's Water Use Act defines "appropriate" as "divert, impound, or withdraw . . . a quantity of water for beneficial use"³⁹ and sets forth that "beneficial use" includes "stock water" use "for the benefit of the appropriator, other persons, or the public."⁴⁰ The United States contends that by constructing reservoirs on federal grazing lands for the benefit of livestock and wildlife, it appropriated water for beneficial use "within the plain terms of the Water Use Act."⁴¹ The United States further claims it acts in a proprietary capacity by developing water

³⁴ *Id.* at 20.

³⁵ *Id.* at 24 (citing *Bailey*, 122 P. 575, 583 (Mont. 1912)).

³⁶ Appellant's Brief, *supra* note 2, at 26.

³⁷ *Id.* at 27.

³⁸ See MONT. CODE ANN. § 85-2-101.

³⁹ Answering Brief for Claimant/Appellee the United States of America at 17, *United States v. Barthelmess Ranch Corp.* (Mont. Water Ct. Mar. 3, 2016) (No. 40M-300) [hereinafter Appellee's Response] (quoting MONT. CODE ANN. § 85-2-102(1)(a)).

⁴⁰ Appellee's Response, *supra* note 38, at 17 (quoting MONT. CODE ANN. § 85-2-102(4)(a)).

⁴¹ *Id.* at 17.

resources to improve the conditions of federal grazing land and is thus entitled to the claim to the water rights in the improvements.⁴²

The United States concedes that SPWG's claims to water rights could possibly be direct-from-source stock water rights through grazing operations; however, direct-from-source rights are different from the reservoir rights acquired by the United States upon impoundment of water for stock water use.⁴³ The United States asserts the Water Court observed that the impoundment of streams by the United States was "plainly an expansion of water use and not merely the exercise of preexisting direct-from-source rights."⁴⁴

2. *SPWG Misconstrues the Import of Bailey.*

The Court noted in *Bailey* that water rights could be acquired within Montana by two methods: (1) by putting water to beneficial use or (2) by complying with specified statutory procedures.⁴⁵ According to the United States, SPWG's argument against the application of *Bailey* "suffers from at least three critical flaws."⁴⁶ First, the Court concluded the United States must make appropriations of water in the same manner as corporations or individuals.⁴⁷ The United States argues that the Court thus indicated that the United States should be treated the same as public service corporations for purposes of water appropriation.⁴⁸ Second, the United States asserts that *Bailey* does not preclude the appropriation of water for the benefit of others, which includes its grazing permittees.⁴⁹ The United States finally notes that there is simply no Montana authority that denies landowners rights for waters appropriated for their permittees.⁵⁰ Therefore, the United States agrees with the Water Court's conclusion as to the reservoir water claims.

IV. ANALYSIS

The Court is reviewing this issue de novo; therefore, it will likely inquire further as to Montana's meaning of beneficial use of water and whether or not grazing livestock on the land prior to the construction of reservoirs satisfies this element. Secondly, if the Court finds that grazing livestock does not satisfy the element, it will look to whether or not the

⁴² *Id.* at 18 (citing *Nevada v. Morros*, 766 P.2d 263, 267–69 (Nev. 1988)).

⁴³ *Id.* at 23–24.

⁴⁴ *Id.* at 26.

⁴⁵ *Id.* at 32.

⁴⁶ Appellee's Response, *supra* note 38, at 33.

⁴⁷ *Id.* at 34 (citing *Bailey*, 122 P. 575, 583 (Mont. 1912)).

⁴⁸ *Id.* at 34.

⁴⁹ *Id.* at 34–35.

⁵⁰ *Id.* at 36 (citing MONT. CODE ANN. § 85-2-102(1)(a) (2015) ("beneficial use" includes beneficial use by other persons)).

BLM did by the construction of reservoirs as improvements on federal grazing lands. Clarification whether the Water Use Act is the controlling authority for the water appropriation on federal grazing lands would have a large impact in its application to hundreds of claims currently open in the Water Court.

To aid in its decision, the Court will likely set forth policy questions at oral argument regarding appropriation of water claims in conjunction with grazing permits on federal lands. There are some arguments presented in the briefs that could possibly give implications to public policy; however, neither party offers a straightforward public policy argument. Due to the historical nature of grazing permittees and the impact this case will have on Montana's water law precedent, the Court will likely want to consider policy arguments from both parties.

As a threshold issue, the Court will likely need to decide whether the Water Use Act controls the claims. Section 85-2-102(1)(a) instructs that to "appropriate" means "to divert [or] impound . . . a quantity of water for a beneficial use."⁵¹ Section 85-2-102(4)(a) further states that "beneficial use" is "a use of water for the benefit of . . . other persons . . . including . . . stock . . . uses."⁵² If the Court holds the Water Use Act controls, like the United States argues, the SPWG will have a difficult time overcoming the plain language of the statute. Conversely, although SPWG argues the Water Use Act does not apply,⁵³ it appears the Court could also rely on the Water Use Act's language to find that SPWG was the valid appropriator. Under Section 85-2-102(1)(a), appropriation includes the withdrawal of water "by stock for stock water" for a beneficial use.⁵⁴ The Court's decision on whether the Water Use Act applies will likely be the ultimate determination of which argument holds more water.

Under a determination that pre-Act law applies, the Court will likely look to case law like that is presented by SPWG. As SPWG argues, pre-Act law holds that the beneficial use requirement is not satisfied when the benefit inures to third parties.⁵⁵ Therefore, the Court could reverse under SPWG's argument that the United States may not appropriate water rights by putting it to beneficial use by means of the third party grazing permittees.

Yet, if the Court finds the Water Use Act controls, it will likely need to address the import of *Bailey*. SPWG bases its argument on the

⁵¹ MONT. CODE ANN. § 85-2-102(1)(a).

⁵² MONT. CODE ANN. § 85-2-102(4)(a).

⁵³ See Reply Brief at 11, *United States v. Barthelmess Ranch Corp.* (Mont. Water Ct. Apr. 18, 2016) (No. 40M-300) (citing *Axtell v. M.S. Consulting*, 955 P.2d 1362, 1368 (Mont. 1998); *Marks v. 71 Ranch LP*, 334 P.3d 373, 376 (Mont. 2014) ("[T]his Court also recognized that the [Water Use Act] is not a complete reflection of pre-1973 law, and that pre-1973 statutes and case law govern the validity of a pre-1973 water right").

⁵⁴ MONT. CODE ANN. § 85-2-102(1)(a).

⁵⁵ *Edwards*, No. 40E-A, at 39 (Mont. Water Ct. June 29, 2005), available at <http://courts.mt.gov/water/fed-rule>; *Hamilton*, No. 41G-190, at 19 (Mont. Water Ct. July 19, 2005) available at <http://courts.mt.gov/water/fed-rule>.

contention that *Bailey* is only applicable to public service corporations and does not include the BLM.⁵⁶ However, the United States claims SPWG errs in arguing that *Bailey* only controls public service corporations.⁵⁷ If the Court determines that the rule in *Bailey* is fundamentally dependent upon the party at issue being a public service corporation, it will need to determine whether the BLM is as such. Since *Bailey* did not set forth elements for a public service corporation, the Court will need to rely on additional case law. Yet, the *Bailey* Court's explicit statement that the United States "must proceed in making appropriation of water" in the same manner "as a corporation or individual"⁵⁸ may carry more weight in the Court's decision. Finally, there is also a possibility that in the Court's de novo review it will not put heavy reliance upon *Bailey* due to the issues it raised twice in the Water Court.

Ultimately, the Court will need to decide whether the Water Use Act applies to the claims. If the Water Use Act and *Bailey* apply, as the United States contends, the Court will likely affirm. Contrarily, if water law prior to the Act applies, SPWG's argument will have a greater foundation, and the Court may reverse. This case provides an opportunity to aid stockmen in understanding their interest in water rights on federal grazing land; the United States in its current and future claims; and offer persuasive authority for the twelve states that the majority of the BLM's leases grazing land are located in.⁵⁹

⁵⁶ See Appellant's Brief, *supra* note 2, at 26.

⁵⁷ Appellee's Response, *supra* note 38, at 34.

⁵⁸ *Bailey*, 122 P. 575, 583 (Mont. 1912).

⁵⁹ See generally *Rangeland Admin. Reports*, U.S. DEP'T OF INTERIOR BUREAU OF LAND MGMT. <https://reports.blm.gov/reports.cfm?application=RAS> (last visited Sep. 7, 2016) (The BLM "administers more public land—over 245 million surface acres—than any other Federal agency in the United States. Most of this land is located in the 12 Western states, including Alaska").