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Curry v. Pondera Cty. Canal & Reservoir Co., 370 P.3d 440 (Mont. 2016)

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concerns by stating the insurance policy covered exactly the type of injury Rangen discussed.

Finally, the supreme court turned to Rangen's argument that IDWR's order constituted an unlawful taking of senior owner's property. Rangen argued the Director's order amounted to an unlawful taking because it forced senior owners to choose between granting IGWA an easement or risk losing water that they were entitled to because the order allowed IGWA to suspend its mitigation obligation if Rangen did not allow the pipeline's construction. The supreme court found that even if it interpreted the Director's order to require Rangen to grant IGWA an easement because Idaho's constitutional eminent domain power extends to property of public use after just compensation. Under the Idaho Constitution, right of ways for the construction of pipelines to convey water to the place of beneficial use fall under that power. This would allow the state to take the property after just compensation. Since Rangen did not allege that it was not provided just compensation, the supreme court rejected this claim.

Accordingly, the supreme court upheld the district court's partial affirmation of the Director's order conditionally approving the Plan.

Dalton Kelley

MONTANA

Curry v. Pondera Cty. Canal & Reservoir Co., 370 P.3d 440 (Mont. 2016) (holding that: (i) the Water Court did not err in concluding that the number of shares issued by water company determined the company's rights; (ii) water supply company's rights corresponded to size of service area as opposed to a historical place of use; and (iii) the Water Court erred in determining water supply company put storage rights to beneficial use prior to 1973).

The Curry Cattle Company ("Curry") is a private landowner in Montana and owns shares to irrigation rights in the Birch Creek Flats ("Flats"). Curry obtained these rights in 1988, some of which are the oldest rights in the Marias River Basin. Pondera County Canal & Reservoir Co. ("Pondera") provides land owners in Pondera County with water shares for beneficial use. Pondera possesses water rights to divert from Birch Creek, as well as a complete distribution system to serve the area.

This case originates from a dispute between the parties regarding waters in the Birch Creek. Pondera's predecessors in interest secured some of the water rights in question through the Carey Land Act ("Act"), a federal law meant to encourage relocation to the American West. In response, Montana set up the Montana Carey Land Board ("MCLB"), which sought to meet the requirements laid out in the Act. The Act functioned by setting up operating companies comprised of shareholders who had rights to water as determined by acres of land owned. Under the Act, the operating company maintains ownership of the water rights for a service area. In this case, the service area is accompanied by 72,000 water shares. Land owners in the service area may acquire these water shares. Pondera's predecessors operated under the Act and began appropriating water for irrigation and sale in the late 1800s, eventually organizing as the Pondera Canal Company. The Company officially registered as an operating company under the requirements of the Carey Act in 1927. As currently

aligned, individual stockholders own the Pondera Company, which distributes water as such on a per-share basis.

Disagreement over the priority of Curry's rights under this scheme existed for some time before this case. In 2004, Pondera communicated to Curry that its water share was less than previously believed. Curry rejected this assertion and continued to put more water to beneficial use than Pondera believed it was entitled. In 2005 Pondera locked Curry's head gate, leading Curry to file a complaint alleging Pondera interfered with their water rights.

The Water Court initially ordered a preliminary injunction against Pondera to unlock the head gate. In 2008, the Water Court held a six-day hearing to determine the correct quantity under the water right. The water master held in favor of Curry, finding the beneficial historic use of its water right established its water quantity. In 2014, the Water Court issued an order amending and partially adopting the master's report. The Water Court determined that the rights in question instead correspond to the number of shares MCLB authorized for the project. Curry appealed this order to the Montana Supreme Court.

The supreme court reviewed *de novo* five distinct issues resulting from the order of the Water Court. The supreme court also reviewed whether Water Court conducted its review of the master's findings properly under a clear error standard.

The supreme court first reviewed the Water Court's determination that a stockholder's actual historic use limits the water rights of an entity organized under the Carey Land Act. Before the supreme court, Curry argued that beneficial use is the touchstone of water law in Montana, and therefore the Water Court improperly placed Pondera's rights above all others by allowing it to retain ownership over water that was not put towards beneficial use. In opposition, Pondera argued that its beneficial use was not shown through actual irrigation, but by putting water into sale and service for shareholders. The supreme court reviewed the history of Montana water law and relied on a 1912 Montana Supreme Court case, *Bailey v. Titinger*, which held that either system capacity or company need would determine the extent of rights, to clarify the doctrine of beneficial use. The supreme court noted Montana public policy encourages public service corporations in the endeavor of irrigation. Therefore, the supreme court held that the Water Court did not err in determining that water rights paralleled the actual shares issued, and that sale of water unquestionably constituted a beneficial use.

The supreme court next confronted the issue of the Water Court's grant of a service area to Pondera rather than a place of use based on historically irrigated land. Curry contended that the Water Court misinterpreted *Bailey* in entitling Pondera to a service area larger than the historical place of use. Pondera argued that the service area was the appropriate boundary for determining place of use. The supreme court began by discussing the concept of appurtenance of water to the land as a general rule in Montana law. The supreme court then explained that due to the movement of water inherent in the scheme of the Carey Act, a strict requirement of appurtenance was not applicable in this case. The supreme court noted that under the Act, the individual stock certificate's appurtenant land did not define the overall place of use. Relying on *Bailey*, the supreme court affirmed the Water Court by holding that the idea of a

service area is the proper method of satisfying the Carey Act's place of use requirement. The supreme court declined to determine the exact size of the service area at this stage of litigation.

The supreme court also considered whether there was any evidence of water use by irrigators on the Birch Creek Flats prior to 1973. The water master found some evidence of historic use on the Flats, including some releases from storage facilities that eventually flowed into canals utilized by non-Pondera water users, but determined that these releases did not amount to Pondera use warranting inclusion of the Flats within the service area boundary. However, the Water Court found that there was evidence of Pondera water being used on the Flats prior to 1973, and concluded that the Flats should be considered as falling within the boundaries of the Pondera service area. The supreme court evaluated the use of water in the Flats based on Pondera's actions, and disagreed with the Water Court's conclusion that Pondera put the water to beneficial use on the Flats prior to 1973. The supreme court reversed this portion of the decision and remanded for further consideration.

The supreme court next examined whether the Water Court erred by substituting its judgment for that of the master regarding the "Gray Right." Curry argued that the judgment of the Water Court was erroneous regarding the flow rate of the Gray Right. Pondera in turn argued that the Master's report contained contradictory findings and therefore the Water Court's judgment was not erroneous. The supreme court held that the Water Court applied the appropriate standard of review to the Master's findings, and the Water Court's determination of the flow rate for the Gray Right was not clearly erroneous.

Finally, the supreme court considered whether the Water Court's tabulation of the parties' respective claims to water rights should have included volume measurements when it did not. Pondera contended that the tabulations should have included volume. The supreme court held that while such measurements would undoubtedly be helpful, this was a matter of discretion for the Water Court.

Accordingly, the supreme court partially affirmed the Water Court by finding Pondera's water rights corresponded to actual shares allotted under the Carey Act and extended to its entire service area, and reversed and remanded the determination with respect to the acreage determination.

Brian Hinkle

Kelly v. Teton Prairie LLC, 376 P.3d 143 (Mont. 2016) (holding: (i) the district court properly applied the prior appropriation doctrine against a junior rights holder who failed to adhere to a call for water; (ii) the junior water right holder failed to meet its burden in establishing the futile call doctrine as an affirmative defense; and (iii) the district court had proper jurisdiction and authority to grant injunctive relief to the senior water right holder).

The Teton River ("River") flows through Teton and Chouteau Counties in Montana. The River primarily relies on melting snowpack to maintain its late season flow and has a long history of water right disputes stemming from farming and ranching operations. Steven Kelly ("Kelly") was a senior appropriator who held water rights for stockwater purposes and domestic use. Teton Prairie LLC ("Teton") was a junior appropriator, located upstream from Kelly, and