

1-1-2017

## United States v. Barthelmess Ranch Corp., 386 P.3d 952 (Mont. 2016)

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Gia Austin, Court Report, United States v. Barthelmess Ranch Corp., 386 P.3d 952 (Mont. 2016), 20 U. Denv. Water L. Rev. 455 (2017).

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the inaccurate estimate cast serious doubt on the validity of the remaining figures and, thus, the entire report. The County failed to provide a convincing explanation for their inaccurate HCU. Thus, the Court affirmed the water court's decision that the County failed to carry its burden of accurately quantifying the amount of Bailey Farm Inches actually used on the Bailey Farm.

The Court also held that County did not show the Bailey Farm Inches historically irrigated the entire Bailey Farm. Covering a total of 101 acres, the Bailey Farm existed as two main parcels: a thirty-one-acre parcel and a seventy-acre parcel. To carry its burden, the County had to prove that the 101 acres of the Bailey Farm claimed was within the lawful place of use and historically irrigated with Bailey Farm Inches. The County failed to offer definitive proof that the larger portion of the Bailey Farm in fact received Bailey Farm Inches for irrigation. Specifically, the Court pointed to the lack of evidence on the record demonstrating the seventy-acre parcel received any of the Bailey Farm Inches. Without actual evidence showing past users irrigated the seventy-acre parcel with Bailey Farm Inches, the Court could not accept the analysis. Moreover, the Court also explained that even if the seventy-acre parcel fell within the lawful place of use, the County would still have to prove that the MM water right was actually used on that land over time. At first, different entities appropriated the Bailey Farm Inches to use in different properties. Over time, the owners consolidated the properties. Because of the convoluted past, the water court required an accurate accounting of actual past use. Absent actual proof of historical use, the water court declined to rely on the County's HCU. In committing these two errors, the County failed to prove the HCU and, thus, failed to prove a lack of injury to other water users.

The Court also rejected the County's request for an appropriative right of substitution and exchange. The Court found the County could not supplement its augmentation plan through a water lease with the City of Lafayette because the lease alone could not satisfy the County's replacement obligations.

Accordingly, the Court affirmed the ruling of the water court and denied the County's change of use application.

*Connor Pace*

## MONTANA

**United States v. Barthelme Ranch Corp., 386 P.3d 952 (Mont. 2016)** (holding: (i) the U.S. Bureau of Land Management could perfect stockwatering appropriation claims in its reservoirs irrespective of contentions rooted in historic water use from the same source and (ii) the United States owned reserved water rights for stockwatering in a pothole lake on federal grazing land pursuant to an Executive Order).

The United States Bureau of Land Management ("BLM") filed six water right claims in Montana. These included five reservoir claims rooted in Montana law, and a reserved water right in Pothole Lake, a natural feature located on a federal land reservation. The BLM claimed to use each water source, all located wholly or partially on federal land, for wildlife and stockgrazing for grazing permittees, the latter being the primary focus in the following discussion.

The BLM's five reservoir claims relate to the agency's acquisition of Funnells Reservoir in 1951, and its construction of the Windy Day Reservoir in

1955, Tallow Creek Reservoir in 1936, North Flat Creek Reservoir in 1937, and the Sharon Reservoir in 1961. The sources of contention regarding the BLM's water right claims, including Pothole Lake, stemmed from the respective holders of property interest in surrounding land ("Objectors"). The Objectors claimed proper ownership of BLM's water rights, claiming instead their own right that derived from ancestral free grazers who, prior to the reservoir construction, owned and grazed livestock on the appurtenant land.

BLM claimed a reserved water right in Pothole Lake pursuant to two legal frameworks: (1) the Stock Raising Homestead Act enacted in 1916, which permitted the Secretary of the Interior to reserve lands containing "waterholes or other bodies of water needed or used by the public for watering purposes"; and (2) the Public Water Reserve No. 107 ("PWR 107") enacted pursuant to a 1926 Executive Order, which "reserved all springs and water holes on vacant, unappropriated, and unreserved public land throughout the country." The Objectors claimed, however, that ancestral free grazers owned and watered stock in the same area.

The BLM moved for summary judgment for all objections and the Montana Water Court consolidated them into this single case. The water court first addressed the validity of the Objectors' claims to BLM reservoirs. The water court recognized as undisputed that the BLM developed the Windy Day, North Flat Creek, Tallow Creek, and Sharon Reservoirs with a stockwater right priority date coinciding with their respective completion and since consistently used the reservoirs for stockwatering. Then, after addressing the common law elements for valid water appropriation, the water court determined that impounding water into a reservoir is a sufficient diversion and the sole contention rested on whether the BLM applied the water to beneficial use. The Objectors claimed that the BLM *itself* did not own livestock or use reservoir water and thus under Montana law, BLM could not perfect its stockwatering claims.

However, the water court examined principles from a governing precedent, *Bailey v. Tintinger*, that "an appropriation of water for the use of *others* was complete upon the completion of the diversion system [in this case the reservoirs] and making the water available for use by others." When extending this principle to the present case, the water court determined that Montana law did not require that BLM own and graze livestock to perfect water rights and complete appropriation.

Similarly, the water court found it undisputed that BLM consistently used Funnels Reservoir since acquiring its property interest. Thus under Montana law, BLM also acquired any appurtenant water rights.

Although the Objectors claimed prior use by their ancestral free grazers precluded BLM's six water right claims, this contention ran counter to the core principle of water rights governed by Montana law that "multiple appropriators can enjoy rights from the same source." The water court also clarified that the Objectors' claimed stockwatering by direct uses from water sources, not by reservoir impoundments, and it followed that the Objectors' claims differed from the subsequent BLM reservoir claims.

The water court next addressed the Objectors' claim to Pothole Lake and determined that PWR 107 reserved Pothole Lake's respective land and water.

The Objectors appealed. The Montana Supreme Court ("Court"), under

the “clearly erroneous” standard, reviewed two issues on appeal: (1) whether the BLM held stockwatering rights in constructed reservoirs under Montana law and (2) whether the BLM owned reserved water rights for stockwatering in Pothole Lake. The Objectors made multiple contentions and the Court rejected each as invalid when evaluating them pursuant to relevant federal and Montana law.

The first issue raised three primary contentions. First, the Court confirmed that BLM appropriated water. However, Objectors argued that irrespective of a capability to appropriate water, the BLM failed to meet the requirements for perfecting water rights because it did not charge grazers for reservoir use. The Court quickly dismissed this contention when reiterating that *Bailey* expressly recognized that, “as long as the water is made available for sale, rental, or *distribution* or *disposal* to others, it is a valid appropriation.” Additionally, the Court acknowledged that Montana public policy encourages capable individuals and entities to appropriate water and make it available for use by others. Further, the Court recognized that Montana law commits to “recognizing the ability to appropriate water for its ultimate use by a third party.”

Second, the Objectors argued that even if BLM could appropriate water, it did not do so by impounding water in reservoirs because “simply facilitat[ing] use of water already appropriated” by ancestral free grazers did not constitute a valid appropriation. Again, the Court dismissed this contention as unsupported by Montana water law and public policy when noting, “multiple appropriators can claim water rights from the same source, and that the first in time has the best right.” Along that vein, the first user on a water source does not obtain the right to exclude all others from claiming water from the same source. The Court noted, for example, if Objectors held viable stockwatering claims based on ancestral free grazers, then those rights would be senior to those claimed by BLM because each right has its own priority in time.

Third, the Objectors contended that by developing new reservoirs, the BLM “simply modified” prior stockwatering practices by ancestral free grazers rather than creating a new appropriation. The Court acknowledged, however, that although a direct-flow water user can construct reservoirs to stabilize available water without creating new appropriations, the BLM claimed no such direct-flow water rights. BLM only claimed new rights to stored water with mid-twentieth century appropriation dates, which created separate rights with their respective priority dates.

Once resolving the contentions, the court then emphasized its unwillingness to depart from the “bedrock principles” of Montana water law that multiple appropriators can perfect claims from the same water source and thus the water use by ancestral free grazers did not preclude the BLM from claiming water rights to the same source. Further, Montana public policy encourages the benefits arising from allowing appropriations that make water available to third party users.

The second issue led the Court to determine the broad language of PWR 107 reserving “every spring or waterhole, located on unsurveyed public land” encompassed Pothole Lake. Therefore, the BLM maintained a reserved stockwatering right on federal land and the Objectors raised no valid contentions to undermine this established right.

Accordingly, the court affirmed the water court holding that the BLM maintained valid appropriations in its reservoirs under Montana law and the BLM owned reserved water rights for stockwatering in Pothole Lake pursuant to PWR 107.

Justice Laurie McKinnon, dissenting.

Justice McKinnon disagreed with the majority's application of *Bailey* to conclude that the BLM put water to beneficial use and completed an appropriation. Instead, the dissent argued that the majority expanded *Bailey's* narrow exception that applied to public service corporations. The *Bailey* court determined that to require a corporation to perfect a water right upon showing of an actual beneficial use would be impractical because corporations could not perfect a water right until a third party put water to a beneficial use. Here, the dissent argued the majority misinterpreted that exception to include "anyone" who "distributes" water could perfect a water right. In so doing, the dissent raised foundational legal principles to conclude that beneficial use "is one that inures to the benefit of the appropriator." Along that vein, the dissent contended that the ancestral free grazers inured to their benefit when their cattle grazed and drank water, and thus completed a valid appropriation. Conversely, the dissent further argued the BLM did not perfect a water right because it "never owned the livestock that appropriated the water or grazed federal lands" and thus, irrespective of reservoir construction, the BLM did not appropriate water under Montana law.

*Gia Austin*

**Clark Fork Coal. v. Tubbs, 380 P.3d 771 (Mont. 2016)** (holding that the Montana Department of Natural Resources and Conservation's ("DNRC") rule that required groundwater developments to be physically connected was inconsistent with the plain language of the statutory "combined appropriation" exception to the exemption of certain groundwater developments from the permit requirement).

Montana uses a comprehensive permit system for water appropriation. Groundwater appropriations of less than thirty-five gallons per minute and ten acre-feet per year can be exempt from the permit requirement. The law also contains an exception to this exemption. Under the Act, groundwater appropriators must acquire a permit if the "combined appropriation" from two or more wells or developed springs that draw from the same source exceeds thirty-five gallons per minute and ten acre-feet per year. Over time, the DNRC promulgated rules to further define "combined appropriation." The first of these rules ("the 1987 rule") explained that groundwater developments need neither to "be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" The DNRC replaced this rule in 1993 with a rule ("the 1993 rule") that instead requires a physical connection to exist between appropriations to count as combined. Using the Act and the 1993 rule, exempt appropriations of groundwater rose by about 3,000 each year, totaling about 113,000. These appropriations consume large quantities of water.

In response, the Clark Fork Coalition (the "Coalition"), senior water users affected by this consumption, petitioned the DNRC to declare the 1993 rule inconsistent with the statute. After the DNRC refused, the Coalition petitioned