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Eldorado Co-op Canal Co. v. Lower Teton Joint Objectors, 337 P.3d 74 (Mont. 2014)

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Accordingly, the court affirmed the district court's findings in all respects, and held that the Browns were entitled to reformation of the original deed to specifically reserve all water rights to the Browns.

Blaine Bengston

MONTANA

Eldorado Co-op Canal Co. v. Lower Teton Joint Objectors, 337 P.3d 74 (Mont. 2014) (holding that (i) water commissioners' use of a ditch to divert water to a property was a management tool, not a right personal to the user; and (ii) the Water Court acted properly in listing the water rights that could be diverted through the ditch).

The Ninth Judicial District Court of Montana ("district court") appointed Water Commissioners to administer certain water rights diverted from the Teton River pursuant to a 1908 water rights decree in *Perry v. Beattie*. That case determined the priority date and flow rate of dozens of Upper Teton water right claims, all located upstream of the Plaintiffs' property. The Plaintiffs held priority dates senior to or contemporary with the upstream users.

Around 1950, the Water Commissioner appointed to administer the *Perry* decrees began diverting most of the Teton's flow into the Bateman Ditch. The ditch runs parallel to the Teton River's natural channel, bypassing a several-mile-long section of gravel riverbed. The gravel riverbed soaks up a significant amount of water. The Water Commissioner did not establish this practice in accordance with an express order or written agreement among appropriators. Choteau Cattle had the most senior right in the *Perry* decree, with a priority date of 1876. In exercising its water right, Choteau Cattle diverted water through the Bateman Ditch, returning it to the natural channel during times of low flow. If the Bateman Ditch were not utilized in this manner, upstream junior right holders (including Saylor and Eldorado) would have had to substantially restrict their water use. The Lower Teton Joint Objectors ("Lower Users") challenged this practice.

In 2011 the Lower Users commenced an action claiming that the Water Commissioners' diversion of water out of the Teton River and into the Bateman Ditch harmed their appropriation rights by depriving the Teton River aquifer of recharge water. The Water Court found that Saylor had a protectable right to divert Teton River water through the Bateman Ditch downstream. The Lower Users and Saylor appealed.

The Supreme Court of Montana (Court) addressed two predominant issues on appeal. It first considered whether the Water Court erred in establishing the Bateman Ditch diversion as a right belonging to Saylor. Subsequently, the Court considered whether the Water Court erred by including Choteau Cattle on the tabulation of water rights holders authorized to divert water from the Teton River into the Bateman Ditch.

In addressing the first issue, the Court reiterated portions of the Water Court's opinion, emphasizing two main points. First, water law recognizes

“historic patterns of water use.” Therefore, the fact that this particular use of the Bateman Ditch was no longer part of any claim in the water adjudication process did not preclude recognition of the practice. Additionally, the Court noted that while the Bateman Ditch diversion was not an exchange plan, it was “typical of historic arrangements” made throughout the area in order to obtain maximum benefit from a limited resource. The Bateman Ditch was a typical tool used by administrators as a conservation measure. The Court disagreed, however, with the Water Court’s conclusion that the Bateman Ditch diversion was a private right held by Saylor. In so concluding, the Court explained that Saylor did not possess a right or duty to administer the water rights of others. Rather, the administration of these rights was a management tool available only to the District Court and its Water Commissioner.

Subsequently, the Court concluded that the Water Court acted properly in listing the water rights that could be diverted through the Bateman Ditch. The Lower Users objected, arguing that Choteau Cattle’s right was improperly listed because Choteau Cattle had specifically removed the Bateman Ditch as a point of diversion for its right. Additionally, the Lower Users argued that during the water adjudication process Saylor failed to claim the right to use Bateman Ditch to supply Choteau Cattle’s right. The Court explained that because the use of Bateman Ditch to deliver water to Choteau Cattle was a management tool and not a right personal to Saylor, it was unnecessary for Saylor to have claimed the right in the adjudication process. It therefore concluded that the Water Court properly listed Choteau Cattle’s right as one diverted from the Bateman Ditch.

Accordingly, the Court affirmed the Water Court’s decision in part, reversed in part, and remanded to the Water Court for further proceedings.

Neillie Fields

Marks v. 71 Ranch, LP, 334 P.3d 373 (Mont. 2014) (holding that (i) water commissioner records of low water supply levels had little probative value regarding whether claimant applied water right to beneficial use; (ii) testimony that different portions of a creek constituted separate water sources was insufficient to overcome a prior court decree describing the creek as a single, unified system; and (iii) standing alone, water commissioner records of insufficient delivery did not prove abandonment).

In 1940, Wellington Rankin acquired a decree (“*Rankin Decree*”) to four water rights (the “creek rights”) located on Confederate Creek. Rankin’s rights had a priority date of 1866 and a combined flow rate of 385 miner’s inches. The *Rankin Decree* described Confederate Creek as a single, unified water system. It also identified a point of diversion and place of use located on the lower part of the creek (“downstream location”). In 1950, Rankin sold the property surrounding the downstream location. However, Rankin properly severed and maintained ownership of the creek rights. In 1982, Louise R. Galt, Rankin’s successor in interest and 71 Ranch’s predecessor in interest, filed Statements of Claim for the creek rights. The Statements of Claim described a new point of diversion and place of use roughly three miles upstream from the original diversion point (“upstream location”). Objector and