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## Marks v. 71 Ranch, LP, 334 P.3d 373 (Mont. 2014)

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“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

appellant Donald C. Marks owned property and water rights between the claimed upstream and old downstream locations. Marks's rights were junior to the creek rights.

Marks filed an objection to the creek rights' new place of use and point of diversion. The Water Master dismissed Marks's objection in 2002 and the Water Court affirmed the dismissal. Both determined that Marks had failed to rebut the prima facie evidence that Galt's claims properly defined the point of diversion and place of use for the creek rights at the upstream location. Marks's appeal thus came to the Supreme Court of Montana ("Court") to consider whether the Water Court erred in its determination. In Montana, prior to July 1, 1973, an appropriator could change the point of diversion and place of use of its water right as long as the appropriator beneficially used the right at the new place of use and did not injure any other appropriators. Under Montana law, a claim of right is prima facie proof of its content and places the burden of proof on the claim's objector to prove, by a preponderance of the evidence, that the original claim misrepresented the actual beneficial use of the water right prior to July 1, 1973.

Thus, Marks had to prove that the information in Galt's Statement of Claim was inaccurate. Marks offered three theories: (i) the creek rights were not beneficially used at the upstream location prior to July 1, 1973; (ii) the upper and lower portion of Confederate Creek were separate water sources; and (iii) Rankin and Galt had abandoned the water rights.

To support his first argument, Marks provided records indicating that on certain days water flow was less than the *Rankin* Decree dictated. Marks used this information to argue that, if Rankin and Galt had beneficially used their creek rights, more water would have flowed to the upstream location of the creek rights. The Water Master observed that the records did not indicate the total water flow, made no mention of diversions during high flows, did not describe stream flow conditions, and did not disclose whether anyone ever requested more water. The Water Master also noted that water commissioners were generally only appointed in times of water shortage. The Court concluded that, given these facts, it was reasonable to assume that Marks's records only reflected measurements of low flow years. Given the lack of any data for several multi-year periods, the Court found that the Water Master did not err in determining these records provided minimal probative value regarding the question of beneficial use during the disputed decades.

The Court then addressed Marks's second argument. Marks argued there were separate water sources for the upper and lower portions of the creek. In support of his claim, Marks testified as to the division of the two portions, and introduced the testimony of the 2002 water commissioner. However, the commissioner's testimony conflicted somewhat with Marks' own testimony. Specifically, Marks claimed one particular area would dry up in the summer months, while the water commissioner conceded that water did flow past the area during the spring flood season. The Court considered the conflicting testimonies and noted that Marks failed to present any evidence from anyone familiar with the conditions of the Creek prior to 1973. The Court further noted that the *Rankin* Decree described the creek as a single, unified water system. Emphasizing that a "decree of a court stands as an absolute finality" and that Marks had failed to provide reliable evidence to rebut the decree, the

Court affirmed the Water Master's findings that the two portions of the creek did not constitute separate sources.

Finally, the Court addressed Marks's abandonment argument. To support this contention, Marks relied on the same evidence he had provided for his first assertion. Specifically, he used the water commissioner's reports of insufficient water flow to claim that Rankin and Galt failed to beneficially use their rights. From this argument, Marks drew the conclusion that Rankin and Galt had effectively abandoned their rights by allowing them to lie dormant for over twenty years. Relying on the previous decision that, standing alone, the water commissioner records failed to prove non-use, the Court determined that Marks's argument for abandonment failed.

Accordingly, the Court affirmed the Water Court's dismissal of Marks's objection.

*Katy Rankin*

## NEBRASKA

**Weber v. N. Loup River Pub. Power & Irrigation Dist., 854 N.W.2d 263 (Neb. 2014)** (holding that the district court properly granted the defendant's motion for summary judgment because (i) the plaintiffs' failure to pay irrigation charges was a condition precedent to the defendant's contractual duty to deliver water to the plaintiffs' land; (ii) the defendant did not waive the condition precedent when it waived the irrigation fees for one newly-contracted tract of land; (iii) the defendant did not anticipatorily breach the contracts because the plaintiffs had already materially breached the contract through nonpayment; and (iv) the defendant was not negligent in its delivery of the water to the plaintiffs because the plaintiffs' prior breach of the contracts relieved the defendant of any preexisting duty).

North Loup River Public Power and Irrigation District ("North Loup") manages an irrigation system with many diversion dams and canals, including the Taylor-Ord Canal ("Canal"), which originates at the Taylor Diversion Dam ("Dam"). William and Dixie Weber ("the Webers") held eight contracts with North Loup to irrigate their farmland from the Canal. The contracts stated that North Loup would provide water during the irrigation season to the Webers' land for \$2.50 per acre. The Webers were to pay for their water by the first of December the year preceding the irrigation season. The contracts also stated that North Loup would withhold delivery of the water if the Webers failed to pay within four months of that date.

In June 2010 the North Loup River experienced an uncommon amount of rainfall and flooding. On June 11, 2010, the flood completely destroyed the Dam and severely damaged the Canal. North Loup determined that the Dam was "beyond repair" and decided to rebuild a permanent dam. The landowners with contracts for irrigation water received no water that year due to the damage.

The Webers' bill for the 2010 irrigation season was due December 1, 2009. At the time of the flood in June 2010, the Webers still had not paid their bill. The Webers finally paid their bill on April 13, 2011, but they did so "under protest." In December 2011 the Webers filed a complaint against