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## Weinheimer Ranch, Inc. v. Pospisil, 299 P.3d 327 (Mont. 2013)

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The Court first examined whether the disputed channel fit the PCD definition of a natural stream. The PCD applies the Act to natural, perennial streams, including flood channels, high water channels, and other channels where water naturally enters during high water or normal flow. The Court noted the channel was a contiguous channel to the Yellowstone River, an undisputed natural stream under the Act, and water naturally entered the channel at times of high water flow. These facts were sufficient for the Court to uphold the PCD determination that the channel was a natural stream under the Act.

To determine if the PCD's declaratory ruling was arbitrary or capricious, the Court next reviewed the PCD's decision making process. The City argued PCD overlooked various documents in the record referring to the disputed channel as a "ditch." The Court held the City did not show that these references to a ditch arose in the context in which the decision maker was deciding whether the channel was natural or man-made. Furthermore, the reference to the channel as a ditch was only marginally relevant to the specific channel's status under the Act, especially compared to actual physical evidence to the contrary. Moreover, other similar historical references to the waterway supported its status as a natural channel of the Yellowstone. Although there was evidence in the record that could support a different decision by the PCD, the court held it was not enough to overturn the declaratory ruling under the arbitrary and capricious standard of review.

Because the PCD relied on numerous pieces of evidence to support its decision and reasonably concluded that the channel was a natural watercourse the court accordingly affirmed the declaratory ruling of the PCD.

*Sarah Cassinis*

**Weinheimer Ranch, Inc. v. Pospisil, 299 P.3d 327 (Mont. 2013)** (holding water court made no administrative or judicial error in denying, for lack of sufficient evidence, a water right holder's motion to amend his water right to an earlier priority date).

In 1991 Weinheimer Ranch, Inc. ("Ranch") acquired a sixty acre-foot per year water right from Francis Weinheimer. Francis acquired the water right from his father Franz Weinheimer, who originally filed a notice of appropriation for the water right in 1971. In 1984 the Montana Water Court ("water court") issued a Temporary Preliminary Decree ("decree") for the Judith Basin River that provided a 1900 priority date and a historical diversion point in Section Four for the Ranch's water right. The decree also provided an 1897 priority date for George Pospisil's ("Pospisil") senior water right. Pospisil owns land adjacent to the Ranch. According to the decree, Odenwald Creek was the point of diversion for both water rights.

In 2002, after Pospisil placed a call on Odenwald Coulee, the Ranch filed a motion with the water court to amend its water right's historical right, priority date, and source. The Ranch filed a supplemental motion in 2003. Pospisil thereafter filed an objection to the Ranch's proposed amendment of the historical right and priority date. However, Pospisil did not contest that, due to a past clerical error, the listed source should be amended from Odenwald Creek to Odenwald Coulee. Before the water court considered the motion,

Senior Water Master Kathryn Lambert (“water master”) held a hearing on the motion.

The Ranch relied on two documents, both discovered in 2002, to support its motion to amend the water right. The first document was a Notice of Appropriation of Water Right (“1896 notice”) filed by Adrian Odenwald (“Odenwald”), the Ranch’s predecessor in interest. Among other things, the 1896 notice listed a priority date of 1882, the diversion point as Section Nine, and an attestation by Odenwald that the information listed on the 1896 notice was true and correct. The second document was a 1969 Montana Water Resources Survey of Fergus County (“survey”). The survey stated Odenwald filed the 1896 notice for a water right with an 1882 priority date. In addition, the survey separately described the Ranch’s current water right. Weinheimer also testified, and Pospisil conceded, that no ditch existed from Section Nine to Section Four since the 1930s.

After consideration, the water master recommended the water court deny the Ranch’s motion due to insufficient evidence. The water court accepted the water master’s recommendation and denied the Ranch’s motion to amend its historical right and priority date. The water court further ruled that the Ranch abandoned the water right described in the 1896 notice and mentioned in the survey because the Ranch, or its predecessor in interest, failed to properly file a claim on the water right as state law required. Finally, the water court amended the water master’s ruling that no surface water existed in Section Nine since 1882, ruling instead that the evidence only supported a finding that no surface water existed since the 1930’s.

The Montana Supreme Court (“Court”) considered two issues on appeal. First, the Court considered whether the factual record mandated an inference that the 1896 notice mistakenly listed Section Nine instead of Section Four as the point of diversion for the Ranch’s water right. The Ranch argued that Odenwald never owned land in Section Nine and that Odenwald actually diverted the water only a quarter mile from the diversion point detailed in the 1896 notice, suggesting a mistaken point of diversion listing. But because Odenwald attested to the validity of the 1896 notice, because no party brought up the accuracy of the 1896 notice for more than a century, and because the Ranch and its predecessors already filed claims with a 1900 priority date, the Court held the water master reasonably declined to infer mistake in the listed point of diversion.

Second, the Court analyzed whether the water court made a clear error in its findings of fact. The Ranch first argued that because Section Nine did not contain a water source to appropriate and because Odenwald never owned land in Section Nine, the 1896 Notice mistakenly listed the diversion point as Section Nine and should have listed Section Four. The Court noted it was not clear that no water flowed in Section Nine, but reasoned that even if it were clear, that fact would not prove Odenwald intended to appropriate water from Section Four. Additionally, the Court noted it is common for a water right to originate outside the physical boundaries of a water right holder’s property, so not owning property at the diversion point did not prove mistake in the 1896 Notice. The Ranch then argued that the two water rights mentioned in the survey—the Ranch’s current water right and the water right described in the

1896 notice—actually represented the same water right. The Court stated that another reasonable interpretation of the survey was that the two water rights were distinct. The Court held that the Ranch failed to prove error on the part of the water court.

Accordingly, the Court affirmed the water court's denial of the Ranch's motion to amend its water right.

*Gabriel Kester*

## NEW MEXICO

**Bounds v. New Mexico ex rel. D'Antonio**, Nos. 32,713 32,717, 306 P.3d 457 (N.M. 2013) (holding (i) New Mexico Domestic Well Statute ("DWS") requiring state engineer to issue domestic well permits without regard to the availability of unappropriated water did not violate prior appropriation principles as enshrined in the New Mexico Constitution; and (ii) the plaintiffs failed to demonstrate how the DWS deprived holders of a property interest in senior appropriative rights).

Horace Bounds ("Bounds"), a farmer and rancher in the Mimbres basin in southwestern New Mexico, brought a facial constitutional challenge against New Mexico's DWS, which requires the state engineer to issue domestic well permits without also determining the availability of unappropriated water. On June 15, 2006, Bounds filed an action for declaratory judgment in New Mexico's Sixth Judicial District Court ("district court"), arguing three counts in his complaint. The first count asked the district court to rule the DWS unconstitutional as it requires the state engineer to issue domestic well permits without determining the availability of unappropriated water. Bounds argued this permitting system operated to the detriment of senior water holders and in violation of New Mexico's prior appropriation standard. The second count asked for a ruling that the issuance of domestic well permits, in accordance with the DWS, constituted a taking under the United States and New Mexico Constitutions. Lastly, Bounds asked for an injunction preventing the state engineer from issuing new domestic well permits without also determining if unappropriated water was available. The New Mexico Farm and Livestock Bureau ("NMFLB"), an independent and nongovernmental agency representing many farm and ranch families, filed a motion to intervene, which the district court granted. The state engineer then filed a motion for summary judgment arguing the language of the DWS evidenced clear legislative intent that domestic well permits were outside the scope of the general prior appropriation system.

The district court: (i) ruled the DWS unconstitutional as a matter of law as it concluded the DWS was an impermissible exception to the prior appropriation standard; and (ii) rejected Bounds's takings claim because he was unable to show any injury to his existing senior water rights as a result of the DWS. The state engineer appealed the district court's constitutional holding to the Court of Appeals, which reversed the district court's holding. The Court of Appeals reasoned that the prior appropriation doctrine contained in Article XVI of the New Mexico Constitution sets forth only general and broad principles, while the New Mexico legislature had authority to enact a specific statuto-