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Bentley v. Dir. of State Lands & Invs., 2007 WY 94, 160 P.3d 1109 (Wyo. 2007)

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tial illegal watering, and the State mailed warning letters to landowners engaged in this practice. After some neighbors received these letters, the Tuttle became concerned and visited the Utah Division of Water Rights. An employee referred the Tuttle to a map delineating areas of illegal watering in red; the Tuttle's farm was not included in the red area. In 1996, the State mailed letters to all valley landowners that explained that all irrigated lands had valid water rights and that the State had notified all illegal water users.

In 1998, the Tuttle decided to sell the farm to the Ellsworths. During the negotiations, the State notified the Tuttle that the survey overlooked a diesel-powered well on their property, and no valid water rights existed for the well. Nonetheless, the Tuttle provided the Ellsworths with a copy of the 1996 letter confirming sufficient and valid water rights for the farm and completed the sale in 1999. After learning that the farm did not have valid water rights for the well, the Ellsworths brought a successful \$1.4 million suit against the Tuttle. The Tuttle subsequently filed negligence and takings claims against the State; however, the trial court dismissed the claims.

On appeal, the Tuttle argued that the trial court improperly considered matters outside of the pleadings in dismissing the claims. The Court of Appeals of Utah agreed, and held that the trial court erred by considering the Ellsworths' judgment against the Tuttle.

Examining the pleadings under the correct standard, the court held that the Tuttle satisfactorily stated a claim for negligence by alleging that the State was not required to perform the water usage survey, the State did not conduct the survey with reasonable care, and the negligent survey resulted in a \$1.4 million verdict against the Tuttle. Accordingly, the court held that negligent surveying could result in a successful suit by the Tuttle.

However, the takings claim did not survive the motion to dismiss. While water rights are a protectable property interest in Utah, the court held that the Tuttle did not allege facts showing that the State deprived the Tuttle of any legal water rights. The State did not decrease or change the Tuttle's water rights; rather, the 1998 letter only deprived them of the illegal use of water for the diesel-powered well. Accordingly, the court held that the trial court properly dismissed the takings claim.

Matt Larson

WYOMING

Bentley v. Dir. of State Lands & Invs., 2007 WY 94, 160 P.3d 1109 (Wyo. 2007) (holding that water rights were validly severed from real property and conveyed by the owners of the lands to the Wyoming Game and Fish Commission with an easement).

In 1992, the State Board of Land Commissioners (“Board”) considered a sale of lands in Carbon County that contained the Dome Rock Reservoir (“reservoir”), also known as Indian Creek Reservoir. The reservoir, a trophy fishery, is located entirely within the boundaries of Section 16. In response to concern that public use of the reservoir would cease with the sale of the land, the Board approved an easement in favor of the Wyoming Game and Fish Commission (“Game & Fish”). The easement allowed public use of the access road, parking area, area around the reservoir, and fishing in the reservoir. The easement did not convey any water rights to Game & Fish on its face, but it incorporated by reference Board Matter E1-A, which grants “any water rights that the Board may own in the reservoir.” John Anselmi purchased the property subject to any easements at a public auction and later assigned the Sales Contract to James and Pamela Bentley.

The reservoir is an on-channel facility along Indian Creek, completely located within Section 16. The section’s primary permit allowed for the creation of the reservoir and provided for the storage of 65.15 acre-feet of water within the reservoir. Three secondary permits granted the authority to appropriate the stored waters of the reservoir to beneficial use. These three secondary permits allocated the entire capacity of the reservoir to lands within Sections 16 and 21. The Bentleys owned all lands in Sections 16 and 21 that benefit from the water rights preserved in the permits.

In 2004, the Bentleys sued, seeking a declaration that the easement was void, injunctive relief, and damages. With respect to the water rights, the Bentleys argued that, as owners of the lands benefiting from the use permits, they were the owners of the water in the reservoir. The district court of Carbon County upheld the validity of the easement and determined that the transfer of the water rights of Section 16 to Game & Fish was valid. On appeal to the Supreme Court of Wyoming, the Bentleys contended that the district court erred, asserted that the easement was invalid, and claimed ownership of the water rights associated with the property.

The Bentleys contended the easement could not have severed the water rights because the legal owner of the lands also owns the water rights. Generally, a water right beneficially used upon land becomes appurtenant to the land and passes with the land upon conveyance. However, owners can identify and separately convey water rights. After conveyance of the easement, the Board still held legal title to Section 16 and owned the water rights attached to it. In Matter E-1A, the Board declared its intent to sever its ownership and transfer “any water rights that the Board may own in the reservoir” to Game & Fish. The Board clearly indicated its “intention to convey specific property” when it excluded the reservoir water rights in the patent for Section 16. The Supreme Court agreed with the district court that the easement con-

veyed the water rights to Game & Fish and severed them from Section 16.

The Bentleys also contended that the conveyance was invalid and did not sever the water rights because the Board failed to petition the State Engineer's Office for change in use, change in point of diversion, enlargement of use, or change in place of use of the water. According to the court, the Bentleys overlooked the distinction between stored water and natural unstored streamflow. The Wyoming legislature determined that the severance of water rights that are for the direct use of the natural unstored streamflow from the lands, place, or purpose from which they are acquired is not permissible. However, the legislature also determined that acquisition of the use of stored reservoir water by agreement is permissible. In this case, Game & Fish validly acquired the water rights by agreement.

Lastly, the Bentleys claimed that the indications of an easement would not have alerted them to the transfer of water rights in the reservoir. The court found the claims that the Bentleys lacked notice unconvincing because they accepted an assignment of an equitable interest, which is subject to every imperfection and competing claim.

The court affirmed the judgment of the trial court, holding that the easement was valid, and found that the easement severed and conveyed the water rights associated with Section 16 to Game & Fish.

Kathleen Brady