

FILED

MAR 10 2017

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA

GENE R. CURRY, CHERYL S. CURRY, and CURRY
CATTLE CO.,

Plaintiffs, Counterclaim-Defendants
and Appellants,

vs.

PONDERA COUNTY CANAL
AND RESERVOIR CO.,

Defendant, Counter-Claimant,
Appellee and Cross-Appellant.

Case No. WC-2006-01

Certified From:
Ninth Judicial District Court
Cause No. DV-05-32

ORDER REVISING SERVICE AREA

I. STATEMENT OF THE CASE

This matter is before the Water Court on remand from the Montana Supreme Court. The issue on remand is removal of the Birch Creek Flats from the service area for water rights owned by the Pondera County Canal and Reservoir Company (Pondera). The plaintiffs and appellants are Gene R. Curry, Cheryl S. Curry, and Curry Cattle Co. (Curry).

Trial of this matter occurred before a Water Master. At trial, Pondera asserted that an area known as the Birch Creek Flats was irrigated using water from Pondera's system. On this basis, Pondera asserted the Birch Creek Flats should be included within its service area.

Curry argued that Pondera only delivered water to the Flats to accommodate its neighbors, and that the Flats should not be part of Pondera's service area. The Water Master concluded that Pondera had supplied non-shareholder neighbors on the Birch Creek Flats with water to honor their senior rights. The Master also concluded that this

accommodation did not entitle Pondera to claim a service area that included the Flats. Pondera objected to the Master's decision, and the Chief Water Judge added the Flats to Pondera's service area. Curry appealed addition of the Flats to Pondera's service area.

The Montana Supreme Court held that Montana's Constitutions and interpretations in case law "clearly show[] a steadfast commitment to recognizing the ability to appropriate water for its ultimate use by a third party." *Curry v. Pondera Cnty. Canal & Reservoir Co.*, 2016 MT 77, ¶ 25, 383 Mont. 93, 370 P.3d 440.¹ The Supreme Court stated Pondera's water rights, which were developed for sale or use by third parties, "were perfected upon the completion of the water distribution system" and that the "boundaries of the service area are then subject to the project as it was developed and completed... ." *Curry*, ¶¶ 46, 48.

The Supreme Court also noted that a right perfected upon completion of a distribution system can be lost by nonuse like any other water right. "The right thus obtained may be lost by abandonment or nonuser for an unreasonable time, but cannot be made to depend for its existence in the first instance upon the voluntary acts of third parties... ." *Curry*, ¶ 29 (quoting *Bailey v. Tintinger*, 45 Mont. 154, 177-178, 122 P. 575, 583 (1912) (internal citations omitted)).

The Supreme Court reversed and remanded "to remove the inclusion of the Flats from the service area and to retabulate the bounds of the service area to the extent the removal of the Flats affects the acreage assessment." *Curry*, ¶ 56. The Supreme Court offered two distinct options for re-tabulation of the Flats on remand. "[T]he Flats were either not included in the project *or* Pondera's lack of issuance of stock to water users on the Flats prior to 1973 equates to nonuse in the area." *Curry*, ¶ 56 (emphasis added). In accordance with the Supreme Court's direction, the objective on remand is to revise Pondera's service area in the Birch Creek Flats.

The parties also requested corrections to a variety of elements which are not within the scope of the remand. The Court will not address those issues at this time.

¹ The Constitutional provisions referenced by the Supreme Court were Mont. Const. art. III, § 15 (1889) and Mont. Const. art. IX, § 3 (1972), both of which recognize that the sale or rental of water to others is a beneficial use.

II. ISSUES

1. What are the boundaries of the Birch Creek Flats?
2. How should Pondera's rights be revised to account for removal of the Flats from the service area.

III. NOTE ON INTERLOCUTORY NATURE OF DECISION

The water rights involved in this certification case have not been through the adjudication process. These water rights are located in the Two Medicine River Basin (Basin 41M). The Preliminary (and first) Decree for Basin 41M was issued in March 2015. Basin 41M was then subject to an objection period, a counterobjection period, and a notice of intent to appear period. These deadlines have passed. The process of consolidating Basin 41M rights into cases and addressing the issue remarks and objections received by the claims has now begun.

In *Curry*, the Supreme Court acknowledged the interlocutory nature of the Water Court's decision, stating that it would "not definitively determine the size of the service area in this Opinion and at this stage in the adjudication process," and noting that the description of the service area (minus the Flats) was sufficient for the purposes of the certification order. *Curry*, ¶ 50.

IV. FINDINGS OF FACT

Defining the Flats for the purpose of removing it from Pondera's service area requires more than just an examination of topography. The Supreme Court's direction on remand clearly indicates that the removal of the portion of the service area referred to as "the Flats" is to be based on legal principles. To avoid confusion, the term "Birch Creek Flats" is used to refer to the topographical region, while "the Flats" is used as a term of art to refer to the portion of land that should be removed from Pondera's service area.

The Flats have been defined in various ways, with both Curry and Pondera supplying different descriptions in prior briefing. Curry initially stated the Flats consisted of approximately 8,000 acres. "By designating the Birch Creek Flats as part of Pondera's service area, Pondera was able to add approximately 8,000 acres to its irrigation system... ." Brief of Appellants, Gene R. Curry, Cheryl S. Curry, and Curry

Cattle Co. at 29-30 (March 4, 2015). After remand, Curry expanded its definition of the Flats to include approximately 45,000 acres.

Pondera went the other direction. In proposed findings of fact, it defined the Flats more broadly than Curry, but reduced its description of the size of the Flats after remand. Despite these differences, both parties assert that the first step on remand is to establish a boundary for the Flats. This approach is sensible. Revising Pondera's service area therefore begins with identifying the geographical area generally known as the Birch Creek Flats. Once the Birch Creek Flats are defined, the criteria supplied by the Supreme Court must be used to determine Pondera's service area.

The Birch Creek Flats are shown on topographic maps produced by the United States Geological Survey. USGS maps are common in water cases because they use contour lines to show terrain features, and because they provide names for the features they portray. These maps uniformly show the Birch Creek Flats as an arc of land lying south of Birch Creek, north of the Valier Highway, and west of Highway 89. The contour intervals in this area are widely separated, indicating flat terrain.

Topo maps only show the Birch Creek Flats north of the Valier Highway, but topography indicates the Birch Creek Flats extend south of the Valier Highway and west of Highway 89. Looking southward, the terrain changes at Cartwright Coulee, which forms a clear line of demarcation between the plain to the north and more complex lands to the south. The same is true to the west, where Birch Creek forms a similar natural boundary. Using topography as a guideline, Cartwright Coulee marks the southern boundary of the Birch Creek Flats, and Birch Creek marks the northern and western boundary.

The portrayal of the Birch Creek Flats on topographic maps is corroborated by other evidence. Not surprisingly, testimony from witnesses indicates the Birch Creek Flats were aptly named.² Looking at topography and applying the ordinary meaning of

² The testimony of Lewis Carroll included the following exchange:

Q: Do you know why they call it the Flats?

A: Cuz it's pretty flat, yeah.

Trial Transcript, Day 1, p. 7, ll. 4-5.

the word “flat” leads to the conclusion that the area identified as the Birch Creek Flats on topo maps is accurate, with the addition of lands south of the Valier Highway and west of Highway 89.

The history of irrigation on the Birch Creek Flats is mixed. Some areas cannot be reached using Pondera’s system, other areas have been irrigated using Pondera’s system from the early days of the project, and still others could technically be irrigated using Pondera’s water but were actually irrigated using other means.

Construction of Pondera’s distribution system was complete by 1921, and the project was approved by the Carey Land Board in 1953. The B Canal was part of that system from the very early days of the project.³

Water use in some areas occurred using private water rights that were not part of Pondera’s system. Identifying these competing private rights is important because the business model for Carey Act projects was to sell water to owners of unirrigated land. In keeping with that economic objective, Pondera did not target sale of water to land that was already under irrigation. Lands irrigated from the Kingsbury Ditch and the Ryan Lauffer Ditch fall into this category.

The Atwood Report helps identify lands that were not intended to be targets for the sale of project water. The Report was written in 1916, before the project was complete, to establish the size of the project based on water availability. The Atwood Report describes the irrigation rights on neighboring properties as competitors because they reduced the amount of water available for project use. Several of these competing water rights served lands in the Birch Creek Flats. Pondera acquired some competing rights early in the project and they became part of the project’s water supply. Other rights were never acquired, were acquired much later, or served lands outside the Birch Creek Flats.

Several of these competing rights were the subject of contracts entered between Pondera and private water right holders in the 1990s and 2000s. While some of the water

³ Examples of irrigation with the B Canal can be found in Exhibit P-27, which shows usage in 1900 and 1901.

rights acquired by Pondera were delivered using Pondera's infrastructure (namely the B Canal), some of the other acquired water rights irrigated lands that could not be reached from the Pondera system as it was originally developed. After acquiring those rights, Pondera began delivering water using the Kingsbury Ditch and the Ryan Lauffer Ditch. Neither ditch was part of the original project.

V. DISCUSSION AND ANALYSIS

Defining "the Flats" requires application of the factors identified by the Supreme Court: "[T]he Flats were either not included in the project or Pondera's lack of issuance of stock to water users on the Flats prior to 1973 equates to nonuse." *Curry*, ¶ 56.

The first factor involves an assessment of intent as manifest by the initial scope of the project. The second requires an enquiry into non-use of water. The Supreme Court held that "the boundaries of the service area are ... subject to the project as it was developed and completed..." *Curry*, ¶ 48. Whether specific lands were part of Pondera's system depends initially on whether those areas were within the reach of Pondera's system at the date of completion.

The boundaries of the system are also subject to "the fundamental tenets of water law in this state" including the consequences of nonuse or abandonment. *Curry*, ¶ 48. However, issues of non-use or abandonment were not raised in the appeal before the Supreme Court, nor are they before this Court on remand. *See Curry*, ¶ 34. Because issues of nonuse and abandonment are not before the Water Court, the service area will be defined without taking potential abandonment into consideration. The following analysis therefore focuses on defining the Flats as the portion of Pondera's current service area that was not included in the Project as it existed when it was completed, or areas that were not intended to be part of the project.

Pondera's claimed service area includes the entirety of the Birch Creek Flats. Pondera's claims are entitled to prima facie status, meaning that the claimed service area can only be overcome by a preponderance of the evidence. Where there is not enough evidence to determine that a particular section of land currently within the service area *cannot* be irrigated from the B Canal, that land will remain in the service area.

There is a preponderance of evidence to support removing 18,068 acres from Pondera's service area. This evidence includes admissions by Pondera that certain areas cannot be irrigated from the B Canal. There is also evidence that lands within the Birch Creek Flats were irrigated with private rights claiming either the Kingsbury Ditch or the Ryan Lauffer Ditch as their means of conveyance. Some of these private rights were not transferred to Pondera until the 1990s and 2000s.⁴ Additionally, the 18,068 acres encompasses the lands owned by Curry, which have been irrigated using private rights.

The following area, totaling 18,068 acres, will be removed from the service area:⁵

- All land in T30N, R7W that is currently included in the service area
 - ID Nos.: 539-553
- Sections 19, 29, 30, 31 and 32 in T30N, R6W
 - ID Nos.: 523, 531-534
- Sections 5 and 6 in T29N, R6W
 - ID Nos.: 292-293
- Sections 1-9 and 17 in T29N, 7W
 - ID Nos.: 324-332, 340

Curry agrees that the 18,068 acres described above should be removed but argues for the removal of many additional acres. Curry has not produced evidence overcoming the prima facie status of Pondera's service area beyond the 18,068 acres. Curry asserts that property owned by the Birch Creek Water Company and the Birch Creek Colony should be removed. However, that property was irrigated with water from the B Canal for many years. John Westenberg detailed the historic 1964 flood that washed out most Birch Creek diversions downstream of the B Canal. Exhibit P-5. After the 1964 flood, the Birch Creek Colony and the Birch Creek Water Company used the B Canal for their

⁴ These rights include claims transferred to Pondera from Kingsbury Colony, Kingsbury Ditch Company and Wallace Bradley. For example, claim 41M 199792-00 (transferred from Kingsbury Ditch Company); claims 41M 42049-00 and 41M 42051-00 (transferred from Wallace Bradley). Exhibits C-58 and C-60.

⁵ The ID Nos. refer to the Place of Use IDs on the original version of the water right abstracts depicting the service area. These IDs correspond to the legal descriptions to be removed from the original version of the abstracts.

diversions. They also claimed the B Canal as their means of conveyance when filing their water rights.

Curry also argues that all private lands not identified as Carey Act lands should be removed because Pondera was a Carey Act project. This argument ignores the many references in the record to inclusion of private, non-Carey Act lands within project boundaries. Curry's proposed standard is inconsistent with the project's history, and if adopted and applied to the project as a whole, would harm owners of shares who have used project water for decades without interruption.

Curry makes several other arguments for adopting its expanded post-remand definition of the Flats, citing Pondera County Water Resources Survey maps for support. The WRS maps identified irrigation in a specific year, but they were not intended to answer the question now before the Court, which is identification of a service area. The presence or absence of irrigation according to the WRS does not by itself address the complex question of intent, nor does it enable the Court to identify lands within the reach of Pondera's system that were not irrigated the year the WRS was completed.

Perhaps most importantly, this interlocutory certification action has now been ongoing for ten years and the circumstances in place at the beginning of this case no longer exist. A Preliminary Decree including Birch Creek has been issued, the objection period has closed, objections have been filed, the counterobjection and notice of intent to appear periods have closed, and Water Masters in this basin have consolidated cases and are ready to begin setting initial status and scheduling conferences. The adjudication process has now begun on Birch Creek. That process will almost certainly require that many of the issues addressed here will be re-litigated in the future.

Interim remedies that were once sought because the adjudication was years away now have the potential to cause harm by prolonging the adjudication, and wasting both public and private resources. In addition, continuing an enquiry into the scope of Pondera's service area creates the likelihood of parallel and potentially conflicting actions. Given this potential for conflict, the correct forum for filling in evidentiary gaps

regarding the scope of Pondera's service area, if they exist, is in the upcoming general adjudication of rights on Birch Creek.

VI. CONCLUSION

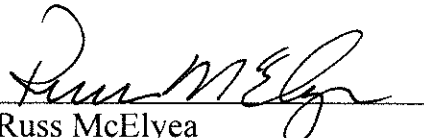
1. The Birch Creek Flats is a geographic area east and south of Birch Creek. The Supreme Court decided that lands within the Flats are not within Pondera's service area and identified the initial scope of the project and the lands it could irrigate as an important factor for determining how Pondera's service area should be modified.

Pondera did not include certain lands in the Birch Creek Flats as part of its original project. These lands could not be reached by Pondera's infrastructure and were already served by competing rights, or were not part of the area Pondera intended to include within its service area.

2. Pursuant to the Supreme Court's order on remand, Pondera's service area is modified by removing 18,068 acres identified above. Water right abstracts are attached to confirm the changes have been made in the DNRC database.

At this time, the Court declines to address any additional issues which are outside the scope of the remand.

DATED this 10th day of March, 2017.


Russ McElyea
Chief Water Judge

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