

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 21-0079

EAST BENCH IRRIGATION DISTRICT; UNITED STATES OF AMERICA (Bureau of Land Management),
Claimants and Appellees,

EAST BENCH IRRIGATION DISTRICT; POINT ROCKS ANGUS RANCH INC.,
Objectors and Appellees,

MADISON VALLEY GARDEN RANCH, LLC,
Counterobjector and Appellees,

OPEN A RANCH, INC.,
Counterobjector and Appellant,

GEODUCK LAND & CATTLE, LLC; SMITH'S ELK MEADOWS RANCH, LLC,
Notice of Intent to Appear and Appellees,

BAR J RANCH; DAVIDE. & SHELLI SCHUETT; BALDY VIEW ENTERPRISES, LLC; WILLIAM C. MANCORONAL; ROXANNE E. MANCORONAL; JUSTICE D. DEVERS; WILLIAM R. GROSE; POINT OF ROCKS ANGUS RANCH, INC.; CLARK CANYON WATER SUPPLY,
Intervenors and Appellees.

**RESPONSE BRIEF OF WILLIAM C. GROSE
AND JUSTIN D. DEVERS**

**On Appeal from the Montana Water Court,
Case No. 41B-0265-P-2015
Hon. Russ McElyea, Chief Water Judge Presiding**

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Intervenors, Justin D. Devers and William R. Grose (“Intervenors”) by and through its undersigned counsel, hereby respond to Appellant Open A Ranch Inc.’s Opening Brief.

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the place of use of the CCWSC shareholders reflected on 41B-40854-00 should be limited to the acres identified in table G-23 of the Definite Plan Report for the East Bench Project, Montana Missouri River Basin Project, (“DPR”). *Appellant’s Opening Brief*, 45.

II. STATEMENT OF CASE

A hearing was held in this matter on January 13th through 16th, 2020 in Dillon, Montana. On December 24, 2020, the Water Court issued a Final Order in case 41H-0265-P-2015. Conclusion of Law No. 6 of the Final Order concluded that Clark Canyon Water Supply Company (“CCWSC”) shareholders may only use stored water on lands historically irrigated by pre-existing water rights. *Final Order*, 30. The Water Court came to this conclusion, having found the original intent of the USBOR was “to provide supplemental water to holders of existing water rights.” *Final Order*, 31. Open A Ranch, Inc. (“Open A”) appealed the Water Court’s Final Order arguing, in pertinent part, the place of use of CCWSC shareholders reflected on 41B-40854-00 should be limited to the acres identified in table G-23 of the Definite Plan Report for the East Bench Project, Montana Missouri River Basin Project, (“DPR”). *Appellant’s Opening Brief*, 45.

III. STATEMENT OF FACTS

This case involves the water rights stored in the Clark Canyon Reservoir. The water right providing stored water to shareholders in CCWSC, 41B 40854-00, is owned by the USA-Dept of Interior Bureau of Reclamation (“USBOR”).¹ *Final Order*, 2. “Homesteaders arrived in the Beaverhead valley early, and some of Montana’s oldest water right are found there.” *Final Order*, 3. Statements of Claim were filed with the DNRC in the 1980s to reflect existing uses of water. *Inv. Ex. 1-3* Transcr. D1, 139, D2, 80. These existing water rights appeared in the Preliminary Decree of the Beaverhead River Basin and have or will be subject to the adjudication process. *Inv. Ex. 1-3* and *Final Order*, 14 and 30. The adjudication process establishes historical use, including where these existing rights were put to beneficial use -- the place of use. *Open A Ex. 81*, Bates 3154 Transcr. D1, 6.

The Clark Canyon Dam was constructed in 1960 creating the Clark Canyon Reservoir. “CCWSC was formed to administer delivery of water from Clark Canyon Reservoir to private land and water right owners in the Beaverhead River basin.” *Order Granting MVGR, Point of Rocks Angus Ranch, and Intervenors’ Motion for Summary Judgment* (July 3, 2019), 7.

Pursuant to the 1958 Contract between the United States and CCWSC (“1958 Contract”), the parties agreed the United States would store all the flows of the Beaverhead River except for the amount released for maintenance of streamflow, to supply downstream rights of non-shareholders, and flood control. *Open A Ex. 35*, Bate 2459, Transcr. D1, 6. The contract further provided that shareholders of the CCWSC would be

¹ 41B 40854-00 serves the East Bench Unit. The East Bench Unit includes East Bench Irrigation District and the Clark Canyon Water Supply Company. Intervenors are Clark Canyon Water Supply Company shareholders.

first in priority to receive water in the amount of 4 acre-feet of water for each acre currently irrigated or for which there was a valid water right. *Final Order*, 12 (citing *Open A Ex. 35*, Bates 2459).

Since the inception of the reservoir, CCWSC shareholders used water released from the reservoir to irrigate their places of use as claimed under pre-existing water rights. *Final Order*, 15.

IV. STANDARD OF REVIEW

The Supreme Court reviews the Water Court's decisions using the same standards applied to district court decisions. *Teton Coop. Reservoir Co. v. Farmers Coop. Canal Co.*, 2018 MT 66, ¶ 19, 391 Mont. 66, 414 P.3d 1249. In cases involving the Water Court, the Supreme Court reviews the Water Court's findings to determine whether they are clearly erroneous and reviews the Water Court's conclusions of law to determine whether they are correct. *City of Helena v. Cmty. of Rimini*, 2017 MT 145, ¶ 12, 388 Mont. 1, 397 P.3d 1.

Open A is asking the Court to overturn the Water Court decision regarding the intended place of use of water right 41B 40854-00. The determination of the intent of a party is an issue of fact which can only be overturned should the Court determine the finding is clearly erroneous. *Flood v. Kalinyaprak*, 2004 MT 15, ¶37, 319 Mont. 280, 84 P.3d 27; *In Re Estate of Kuralt*, 2000 MT 359 ¶ 2, 303 Mont. 335, 15 P.3d 931; *City of Helena v. Cmty of Rimini*, 2017 MT 145 ¶12.

V. SUMMARY OF THE ARGUMENT

Open A appeals a number of findings and conclusions made in the Final Order. Intervenors respond solely to Open A's arguments that, pursuant to the holdings in *Bailey v. Tintinger*, 45 Mont. 154, 122 P.575

(1912) and *Curry v. Pondera County Canal & Reservoir Co.*, 2016 MT 77, 383 Mont. 93, 370 P.3d 440, the place of use of the CCWSC shareholders reflected on 41B-40854-00 should be limited to the acres identified in table G-23 of the Definite Plan Report for the East Bench Project, Montana Missouri River Basin Project, (“DPR”). *Appellant’s Opening Brief*, 30-31, 45.

Open A premises this argument on its contention that the intent must be bona fide and not a mere afterthought. *Appellant’s Opening Brief*, 30-31 (citing *Bailey*, 45 Mont. at 178, 122 P. at 583, and *Curry v. Pondera County Canal & Reservoir Co.*, 2014 Mont. Water LEXIS 20, 61-62 (Mont. Water Ct. April 25, 2014)). Open A then concludes the only evidence determinative of intent of the appropriator is table G-23 of the DPR. *Appellant’s Opening Brief*, 33-34.

Thus, Open A appears to argue this Court should hold the Water Court was clearly erroneous when it determined the place of use for 41B 40854-00 based on evidence other than table G-23 of the DPR including evidence that shows the intent of the USBOR at the time of the appropriation.

Curry held the place of use for water rights of public service corporations such as the USBOR should be determined by examination of the intent of the appropriator, both at the time of the appropriation and within a reasonable time after the completion of the project. *Curry*, ¶ 33. In *Curry*, the Court accounted for the intent of the public service corporation over 50 years after the appropriation. *Id.*

The record is sufficient to determine the place of use should not be limited to table G-23 of the DPR. The Water Court correctly followed the holding in *Bailey* and *Curry* when it determined the place of use for CCWSC shareholders under 41B 48054-00 based on the USBOR’s bona fide

intent. *Curry*, ¶25.

VI. ARGUMENT

A. THE WATER COURT WAS CORRECT WHEN IT CONCLUDED CCWSC SHAREHOLDERS MAY ONLY USE STORED WATER ON LANDS HISTORICALLY IRRIGATED BY PRE-EXISTING WATER RIGHTS.

Even though Open A acknowledges, “[w]hether an appropriation is made for a beneficial or useful purpose is a question for the court to determine based on the appropriator’s intent, and contemplated and actual use,” Open A indicates this Court should only consider table G-23 of the DPR to determine the extent of water right 41B 40854-00. *Appellant’s Opening Brief*, 30. (citing *Curry*, ¶ 25, *Toohey v. Campbell*, 24 Mont. 13, 17-18, 60 P.396, 397 (1900)). Open A implies all other evidence either qualifies as an act of the third party or does not reflect the bona fide intent of the USBOR and, therefore, under *Bailey* should not be considered by the Court. *Appellant’s Opening Brief*, 32.

The Water Court correctly weighed various pieces of evidence of the USBOR’s intent, including the DPR, to determine the extent of water right 41B 40854-00.

Weighing evidence of whether the intent of the appropriator is bona fide or not, is a finding of fact, which can only be overturned if it is clearly erroneous. *Flood*, 2004 MT 15, ¶37; *In Re Estate of Kuralt*, 2000 MT 359 ¶ 2; *City of Helena*, 2017 MT 145 ¶12.

In its opening brief, Open A did not provide any evidence or argument as to how the Water Court’s findings are clearly erroneous, nor does it explain why certain evidence of USBOR’s intent outside the DPR

was not bona fide and therefore improperly considered.² For this reason alone, Open A's request that the place of use of water right 41B 40854-00 be the land identified in table G-23 of the DPR should be denied.

The Water Court determined the place of use for the stored water reflected by 41B 40854-00 is land historically irrigated by pre-existing water rights. This determination was based on the USBOR's intent. The following evidence was used by the Court to support its finding:

1. the Notice of Appropriation;
2. the DPR;
3. the 1958 Contract between the USBOR and the CCWSC;
4. the Statement of Claim for Water Right 41B 40854-00;
5. the 2006 Contract between the USBOR and the CCWSC.

1. The Notice of Appropriation

The Notice of Appropriation provided in pertinent part:

The place of the intended consumptive use of the water hereby appropriated and claimed for domestic, livestock raising, irrigation, mining, industrial, municipal and other miscellaneous purposes is generally within the Beaverhead Valley in Beaverhead and Madison Counties, Montana in the general vicinity of Dillon, Montana.

Final Order, 15, (citing Claim File 41B 40854-00 at 2, US Ex.39, US 0957).

The language of the Notice of Appropriation provides a broad description listing the "general vicinity of Dillon, Montana." This language unambiguously shows, at the time of the appropriation, the intent of the USBOR was not to limit water stored in the Clark Canyon reservoir to the place of use specifically listed in table G-23 of the DPR.

² To provide such arguments or point to such evidence in its reply brief would deny Intervenors the opportunity to respond to Open A's argument.

2. The DPR

Open A asks this Court, to conclude that only table G-23 of the DPR represents the bona fide intent of the appropriator. The DPR itself shows that the bona fide intent of the USBOR, at the time of the appropriation, was not to limit the place of use identified in table G-23 of the DPR. Rather the DPR's Summary Sheets states, "Existing canal and ditch systems will be used to deliver water to the presently irrigated land in the valley." *Open A Ex. 28*, I, Transcr. D1, 6.

The DPR further provides:

With the storage that is planned on the Beaverhead River, more land can be irrigated, present farm operations can be stabilized and improved, and the expense of pending water-right litigation can be a real contribution to the entire economy of the area.

Open A Ex. 28, 3 Transcr. D1, 6.

The use of water on historically irrigated land outside the land identified in table G-23 is not an indication of third parties using the water for unintended purposes, rather it is the use of water as intended in the DPR- to irrigate "presently irrigated land to further the economic viability of the area and improve present farming operations." To limit use of stored water to only land identified in table G-23 of the DPR would in fact inhibit the growth, improvement, and stability of the existing farm operations, and would not reflect what was intended at the time of the appropriation.

Further, Open A itself recognized that the DPR was not a definitive study of the place of use of the land irrigated by CCWSC shareholders, but rather "[t]he recommendations in the DPR were based on estimates made to assess project feasibility." *Opening Statement of Mike Cusick*, Transcr. D1, 7; also see *Final Order*, 22; *Testimony of Rita Frasure*, Transcr. D1, 23;

Testimony of Jerry Mallon, Transcr. D2, 136; *Testimony of Jerry Mallon*, Transcr. D4, 136. Ultimately, the Water Court found after 4 days of testimony and an extensive review of hundreds of pages of documents that table G-23 of the DPR was just one attempt to identify land irrigated with stored water. *Final Order*, 30. Thus, the table G-23 is not determinative.

The Water Court's finding that CCWSC shareholders may only use stored water on lands historically irrigated by pre-existing water rights rather than be limited to the land identified in table G-23 of the DPR is not clearly erroneous.

3. 1958 Contract

The 1958 Contract shows the USBOR's bona fide intent, at the time of the appropriation, was for stored water to be used on lands irrigated by pre-existing water rights. The 1958 Contract provides that first in priority is water for "each acre of land now irrigated by shareholders of the Company and for such additional acres with valid water rights on the date of this contract as may be owned by persons now or hereafter shareholders of the Company." *Open A Ex. 35*, Bates 2458 Transcr. D1, 6 as paraphrased in *Final Order*, 12.

The Water Court determined:

The 1958 and 2006 contracts between the United States, EBID, and CCWSC also demonstrated the intent of the parties regarding the scope of irrigation. These contracts guided operation of the project for decades and none of them enunciated the limits now sought by Open A.

Final Order, 24.

Based on explicit statements in the 1958 Contract, the Water Court's finding that the place of use for CCWSC shareholders is limited to use of

stored water on lands historically irrigated by pre-existing water rights is not clearly erroneous and should not be overturned.

4. Statement of Claim for Water Right

On December 10, 1981, the USBOR filed a Statement of Claim for storage of water in Clark Canyon Reservoir, claiming a place of use of 52,760 acres for CCWSC. *Final Order*, 15, (citing *Claim File* 41B 40854-00 at 2, *US Ex.39*, US 0957). The acreage claimed on the original Statement of Claim form does not reflect table G-23 of the DPR.

Since the Statement of Claim was filed for an area larger than the acreage identified in table, the 1981 Statement of Claim also supports the Water Court's conclusion that table G-23 of the DPR was not determinative. Rather, the USBOR intended stored water from Clark Canyon Reservoir be used on many more acres than identified in table G-23. Based on the intent evidenced by the Statement of Claim, the Water Court's finding that CCWSC shareholders may only use stored water on lands historically irrigated by pre-existing water rights is not clearly erroneous and should not be overturned.

5. 2006 Contract

The USBOR's intent follows from the time of the appropriation through to the 2006 Contract with CCWSC. The 2006 Contract identified shareholder land as acreage "entitled to receive water under a valid water right claim or permit issued by the State of Montana." *Final Order*, 14 (citing *EBID Ex. 10*, Bates 213). The acres delineated in the 2006 Contract are much more extensive than those in table G-23 of the DPR. Thus, the intent of the 2006 Contract is not consistent with an intent to restrict irrigation to acreage referenced in the DPR. *Final Order*, 24-25, (citing

EBID Ex. 10, Bates 213-214).

The 2006 Contract supports the Water Court's finding that CCWSC shareholders may use water on an area larger than the acreage identified in table G-23 of the DPR. Based on the intent evidenced by the 2006 Contract, the Water Court's finding that CCWSC shareholders may only use stored water on lands historically irrigated by pre-existing water rights is not clearly erroneous and should not be overturned.

CONCLUSION

The Water Court's determination that the place of use of 41B 40854-00 for water stored in the Clark Canyon Reservoir and used by CCWSC shareholders is the lands historically irrigated by pre-existing water rights was based on its examination of the appropriator's intent. This finding is not clearly erroneous as it is supported by the record and should be affirmed.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Response Brief of William C. Grose and Justin D. Devers is double-spaced; is printed with a proportionately spaced Georgia text typeface of 14 points using Microsoft Word 2010; and has a word count of 3,957.

RESPECTFULLY submitted this 20th day of August, 2021.

River and Range Law, PLLC

By: *Dana Elias Pepper*

CERTIFICATE OF SERVICE

I hereby certify that, on this day of 20th of August 2021, a true and correct copy of the foregoing document was duly served upon the persons listed below by email.

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