



Montana Legislative Services Division

Legal Services Office

TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: March 5, 2012 (revised)
RE: Secondary ditch easements after *Musselshell Ranch Co. v. Seidel-Joukova*.

In August 2011, the Montana Supreme Court issued its decision in *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, 362 Mont. 1, 261 P.3d 570, in which the Court concluded that property owners *unreasonably* interfered with a ditch easement holder's secondary easement right to maintain the ditch when the property owners placed a culvert and rock bridge in the ditch. Statutory law, however, does not require an inquiry into the reasonableness of the interference, providing instead that no person may encroach on or interfere with an easement used for irrigation. Because the decision has ramifications for the enforcement of ditch rights, the Water Policy Interim Committee requested a summary of the *Musselshell Ranch* case for its March 2012 meeting.

In *Musselshell Ranch*, the Supreme Court addressed whether a landowner could leave a culvert and rock bridge in an irrigation ditch over the objection of the Musselshell Ranch Company (MRC) and other landowners who receive water from the ditch. The case centers on the concept of a "secondary easement," which provides that the holder of a ditch easement also has a secondary easement to enter another's property to maintain the ditch.

According to the facts presented in the Supreme Court's opinion, MRC diverts water from the Musselshell River through an irrigation ditch known as the Cooley-Goffena ditch. The original owners began diverting water through the ditch in the late 1800s. MRC is owned by the Goffena family, which shares the ditch with the Cooley family. The Goffenas irrigate over 300 acres of land with water from the ditch and use the majority of the available water.

The location of the ditch has been moved over the years, primarily for large construction projects, including a road widening project in 2002. As part of the road widening project, the state obtained an easement in favor of MRC to alter the location of the ditch on land that is now owned by the defendant in the case, Nataliya Seidel-Joukova (Joukova). Before Joukova obtained the property, the state installed an access gate allowing access to the property from the highway. A dispute between MRC and Joukova about the gate ultimately ensued, but it was not until 2009 that the dispute over the ditch itself arose when individuals performing maintenance on the ditch for MRC discovered that Joukova had installed a culvert and rock bridge in the ditch.

Ultimately, litigation was initiated by MRC to require Joukova to remove the culvert and bridge because they interfered with MRC's right to maintain the ditch. Although there was no question that MRC retained a primary and secondary easement, the latter being for ditch maintenance, the District Court concluded that Joukova could continue using the access provided by the highway and the road along the ditch bank and that she did not have to remove the culvert and bridge installed in the ditch. The District Court reasoned that the culvert and ditch did not unreasonably

interfere with MRC's secondary easement rights.

The Supreme Court overturned the District Court's decision and held that Joukova's construction of the culvert and ditch interfered with MRC's secondary easement rights. However, instead of basing its decision on statutory law, which provides that no person may encroach on or interfere with an easement used for irrigation, the Supreme Court held that the construction of the bridge and culvert "constituted an unreasonable interference with MRC's easement rights." *Musselshell Ranch Co.*, ¶ 32.

In addressing the case, the Supreme Court recognized that both case law and § 70-17-112, MCA, embody the right of secondary easements in the context of ditches in Montana. In general, a secondary easement is appurtenant (or attached) to the primary easement and allows the holder to take actions necessary to ensure the full enjoyment of the easement itself. Section 70-17-112, MCA, provides as follows:

- 70-17-112. Interference with canal or ditch easements prohibited.** (1) A person with a canal or ditch easement has a secondary easement to enter, inspect, repair, and maintain a canal or ditch.
- (2) No person may encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.
- (3) The provisions of subsection (2) do not apply if the holder of the canal or ditch easement consents in writing to the encroachment or impairment.
- (4) Each canal or ditch easement obtained by prescription or conveyance is included within the scope of this section. Nothing in this section establishes a secondary easement where none existed prior to April 14, 1981. This section does not affect contracts or agreements concluded prior to April 14, 1981.
- (5) If a legal action is brought to enforce the provisions of this section, the prevailing party is entitled to costs and reasonable attorney's fees.

However, in addition to recognizing the secondary easement concept and that § 70-17-112, MCA, prohibits persons from encroaching on or interfering with a canal or ditch used for irrigation, the Supreme Court concluded "that the common law governs determination of the location and scope of the secondary easement." *Musselshell Ranch Co.*, ¶ 14. Therefore, according to the Supreme Court, its cases providing that secondary easements must be exercised in a reasonable manner also apply in the context of secondary ditch easements. The Supreme Court stated that "[t]he balancing of rights suggested by these general rules incorporates a standard of reasonableness: whether the servient owner's use unreasonably interferes with the easement rights." *Musselshell Ranch Co.*, ¶ 19.

Justice Nelson agreed in the result of the decision – that the District Court erred in not requiring Joukova to remove the culvert and ditch – but disagreed strenuously with the Supreme Court's application of common law principles of reasonableness in the context of secondary ditch

easements when § 70-17-112, MCA, does not require such an inquiry. In addition to a disagreement over statutory interpretation with the majority, Justice Nelson stated that “individuals must be able to open the Montana Code Annotated and rely on the plain language of the statutes contained therein.” *Musselshell Ranch Co.*, ¶ 57. Justice Nelson argued that the Supreme Court took language from other cases that have nothing to do with ditch easements to reach its conclusion in spite of § 70-17-112, MCA, and that “[w]hether there is interference, and whether that inference [sic] is unreasonable, is not part of the statutory calculus and, thus, is not relevant.” *Musselshell Ranch Co.*, ¶ 75.

Despite the concerns raised by Justice Nelson in his dissent, the reasonableness standard articulated by the majority in the MRC case will guide future disputes over ditch easements. In addition, § 70-17-112, MCA, must now be read along with the Supreme Court’s other cases that analyze whether a particular interference with an easement is reasonable. Following this decision, some interference or encroachment upon a ditch easement may be allowed, even though § 70-17-112, MCA, prohibits such actions. The Supreme Court specifically stated that “[s]ome permanent encroachments may not justify a finding of unreasonable interference.” *Musselshell Ranch Co.*, ¶ 27.

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