

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
1-800-624-3270 (In-state only)
(406) 586-4364
Fax: (406) 522-4131

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MADISON RIVER BASIN (41F)

IN THE MATTER OF THE ADJUDICATION)
OF THE EXISTING RIGHTS TO THE USE)
OF ALL THE WATER, BOTH SURFACE AND)
UNDERGROUND, WITHIN THE MADISON)
RIVER DRAINAGE AREA, INCLUDING ALL)
TRIBUTARIES OF THE MADISON RIVER)
IN BEAVERHEAD, GALLATIN AND MADISON)
COUNTIES, MONTANA.)
_____)

CASE NO. 41F-A-2
41F-W-007401-00

FILED
NOV 08 2002

Montana Water Court

CLAIMANT: James M. Guyette

OBJECTOR: Doris J. Bohrman; Robert J. & Janet M. Endecott; Valley Garden Ranch;
Bar LG Ranch; Thomas R. Miller; Curtis L. Gibbs; Lynn B. Owens;
Robert B. & Cora M. Goggins; Granger Ranches, LLP; Lawrence H. Gibbs;
Carol McMullin; United States of America (USDA Forest Service);
United States of America (Bureau of Reclamation);
United States of America (Bureau of Land Management)

**ORDER GRANTING IN PART AND DENYING IN PART GUYETTE
MOTION TO DISMISS
and
ORDER GRANTING MILLER, UNITED STATES OF AMERICA,
VALLEY GARDEN RANCH AND BAR LG RANCH MOTIONS
TO DISMISS GUYETTE MOTION TO AMEND**

On April 20, 2000 James M. Guyette ["Guyette"] filed a Motion to Amend
Temporary Preliminary Decree of Statement of Claim 41F-W-007401-00. Objections to
the Motion to Amend were filed by Curtis L. Gibbs, Lawrence H. Gibbs, Thomas R.
Miller, Granger Ranches LLP, Robert B. Goggins and Cora B. Goggins, Lynn R. Owens,
Valley Garden Ranch and Bar LG Ranch, Robert J. Endecott and Janet M. Endecott,
Doris J. Bohrman, United States of America (USDA Forest Service, USDI-Bureau of

Land Management, and USDI-Bureau of Reclamation), Carol McMullin, and Beaver Dam Ranch Partners. On February 2, 2001 Beaver Dam Ranch Partners filed an unconditional Withdrawal of Objection. At the July 10, 2001 Scheduling Conference, it was decided the proceedings would be bifurcated with the legal issues determined first, presented to the Court in the form of motions to dismiss. The factual issues raised by the objectors concerning the historical validity or accuracy of the right sought by the requested amendment would then be heard. Four motions to dismiss were filed.

On September 25, 2001 Guyette filed a Motion to Dismiss all of the objections filed except Thomas Miller's. On October 9, 2002 Valley Garden Ranch and Bar LG Ranch filed a Brief in Opposition to Motion to Dismiss. On October 12, 2001 Granger Ranches LLP filed a Brief in Opposition to Motion to Dismiss Regarding Standing. On October 12, 2001 the United States filed a Response to Motion to Dismiss Filed by Claimant James M. Guyette. Curtis L. Gibbs, Lawrence H. Gibbs, Robert B. Goggins and Cora B. Goggins, Lynn R. Owens, Robert J. Endecott and Janet M. Endecott, Doris J. Bohrman, and Carol McMullin did not respond to the Guyette Motion to Dismiss their objections. On November 2, 2001 Guyette filed a Brief in Opposition to Miller's and the USA's *et al.* Motion to Dismiss and in Response to Opposition to Guyette's Motion to Dismiss.

On September 28, 2001 Thomas Miller ["Miller"] filed a Motion to Dismiss Motion to Amend Temporary Preliminary Decree of Statement of Claim 41F-W-007401-00. On October 4, 2002 the Granger Ranches, L.L.P. Brief in Support of United States'

and Tom Miller's Motion to Dismiss was filed. On October 9, 2001 Lynn B. Owens ["Owens"] and Carol McMullin ["McMullin"] filed a statement supporting and incorporating by reference the Miller brief (contained within his Motion to Dismiss). On November 2, 2001 Guyette's Brief in Opposition to Miller's and the USA's *et al.* Motion to Dismiss and in Response to Opposition to Guyette's Motion to Dismiss was filed. No responses to the motion were filed by Curtis L. Gibbs, Lawrence H. Gibbs, Robert B. Goggins and Cora B. Goggins, Valley Garden Ranch and Bar LG Ranch, Robert J. Endecott and Janet M. Endecott, Doris J. Bohrman, and the United States of America. On November 16, 2001 Miller's Reply to Guyette's Brief in Opposition to Motion to Dismiss was filed. Miller's Reply states that he reserves his request for Rule 11 sanctions pending the Court's ruling on his underlying motion to dismiss. The request for sanctions is not addressed in this decision.

On September 28, 2001 the United States of America (USDA Forest Service, USDI-Bureau of Land Management, and USDI-Bureau of Reclamation) ["United States"] filed a Motion to Deny Amendment of Claim or Dismiss Amended Claim. On October 4, 2001 the Granger Ranches, L.L.P. Brief in Support of United States' and Tom Miller's Motion to Dismiss was filed. On October 9, 2001 Owens and McMullin filed a statement supporting and incorporating by reference the United States' brief in support of its Motion to Deny. On November 2, 2001 Guyette's Brief in Opposition to Miller's and the USA's *et al.* Motion to Dismiss and in Response to Opposition to Guyette's Motion to Dismiss was filed. No responses to the motion were filed by Curtis L. Gibbs, Lawrence

H. Gibbs, Robert B. Goggins and Cora B. Goggins, Valley Garden Ranch and Bar LG Ranch, Robert J. Endecott and Janet M. Endecott, and Doris J. Bohrman. On November 16, 2001 the United States filed its Reply Brief in Support of Motion to Deny Amendment of Claim or Dismiss Amended Claim.

On October 9, 2001 the Valley Garden Ranch and Bar LG Ranch Motion to Deny Amendment of Claim or Dismiss Claim was filed which adopted the briefs filed by Miller and the United States. No responses were filed by any of the other parties.

GUYETTE MOTION TO DISMISS

Rule 2(b) of the Montana Uniform District Court Rules states that "Failure to file Briefs may subject the motion to summary ruling. . . . Failure to file an Answer Brief by the adverse party shall be deemed an admission that the motion is well taken." Curtis L. Gibbs, Lawrence H. Gibbs, Robert B. Goggins and Cora B. Goggins, Robert J. Endecott and Janet M. Endecott, and Doris J. Bohrman did not file an Answer Brief or any other response to the Guyette Motion to Dismiss their objections nor did they file any responses to the Miller, United States, and Valley Garden Ranch and Bar LG motions opposing the Guyette motion to amend claim. Lynn R. Owens and Carol McMullin did not file Answer Briefs to the Guyette Motion to Dismiss but did file written concurrence with the Miller and United States Motions to Dismiss Guyette's Motion. Therefore, under Rule 2(b) of the Montana Uniform District Court Rules, the failures of Curtis L. Gibbs, Lawrence H. Gibbs, Robert B. Goggins and Cora B. Goggins, Robert J. Endecott and Janet M. Endecott, and Doris J. Bohrman to file an answer brief or any other response to

the Guyette Motion to Dismiss their objections are each deemed an admission that the Motion to Dismiss their objections is well taken, and it is

ORDERED that the Guyette Motion to Dismiss is GRANTED as to Curtis L. Gibbs, Lawrence H. Gibbs, Robert B. Goggins and Cora B. Goggins, Robert J. Endecott and Janet M. Endecott, and Doris J. Bohrman, their objections to the Guyette Motion to Amend Temporary Preliminary Decree of Statement of Claim 41F-W-007401-00 are DISMISSED, and after entry of this Order, their names shall be STRICKEN from the caption and service list for this case.

The remaining objectors are: Thomas R. Miller, Granger Ranches LLP, Lynn R. Owens, Valley Garden Ranch and Bar LG Ranch, the United States, and Carol McMullin. The Guyette Motion to Dismiss asserts that none of the objectors in this matter, except Miller, have standing to object to Guyette's Motion to Amend because none of them have claimed water rights in Birch Creek, and therefore, none face the possibility of being affected by Guyette's requested amendment of his Birch Creek claim.

In this particular matter, the Temporary Preliminary Decree stated that claim 41F 7401 00 was for an 1890 stock water right on Birch Creek. No objections to the claim were filed during the Temporary Preliminary Decree objection filing period. The preliminary decree for the Madison River basin is not yet scheduled to be issued and therefore, the next objection period for Madison River basin claims will not begin until years from now. The motion to amend is effectively a limited opportunity to change a claim outside the regular post-decree issuance objection period. Claimants who file

motions to amend their claims do not avoid scrutiny - their motions to amend are subject to objection just as their claims are in the decree. The standing requirements for regular post-decree issuance objectors should be applied to motion to amend claim objectors. Therefore, for motions to amend claim, the objector must meet the standing requirements specified in section 85-2-233(1)(a) and (b) Mont. Code Ann. and Rule 1.II(7) Water Court Procedures, Montana Supreme Court Rules.

Standing to file objections during the regular post-decree issuance objection filing period is governed by section 85-2-233 Mont. Code Ann. and Rule 1.II(7) Montana Supreme Court Claim Examination Rules. Section 85-2-233(1)(a) and (b) Mont. Code Ann. states:

Hearing on temporary preliminary decree or preliminary decree - procedure. (1) (a) For good cause shown and subject to the provisions of subsection (9), a hearing must be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

- (i) the department;
- (ii) a person named in the temporary preliminary decree or preliminary decree;
- (iii) any person within the basin entitled to receive notice under 85-2-232(1); or
- (iv) any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice under 85-2-232 if the claim or claims were from sources within the decreed basin.

(b) For the purposes of this subsection (1), "good cause shown" means a written statement showing that a person has an ownership interest in water or its use that *has been affected by the decree.* (emphasis added)

Rule 1.II(7) Water Court Procedures, Montana Supreme Court Claim Examination Rules

elaborates somewhat on standing to file an objection and states:

Upon objection to an interlocutory or preliminary decree by the Department, by a person named in the preliminary decree, or by any other person, for good cause shown, the Department or such person shall be entitled to a hearing thereon before the water judge. Such hearing shall be governed by the provisions of § 85-2-233, MCA.

For purposes of filing an objection, "good cause shown" shall include a written statement showing that one has a substantial reason for objecting, which means that the party has a property interest in land or water, or its use, that *has been affected by the decree* and that the objection is made in good faith, is not arbitrary, irrational, unreasonable or irrelevant in respect to the party objecting. Good cause shall be presumed for objections made by the DNRC in any proceeding. (emphasis added)

Both the statute and the rule use the language "has been affected by the decree." Water Court interlocutory decrees (temporary preliminary or preliminary decrees) are not enforceable and administrable until after the objections have been heard and the decree has been modified. Section 85-2-406(4) Mont. Code Ann. Therefore, if "has been affected by the decree" means an actual impairment of an objector's water right, such impairment would not yet have occurred during the objection filing period. "Has been affected by the decree" makes no sense if it means assessing an actual impact or impairment on the objector's claimed rights because until the decree is enforced, the claimed rights in the decree only represent potential impairment not existing impairment. Therefore, the language must be interpreted in its broadest sense. "Has been affected by the decree" simply means the objector has water right claims included in the decree. This broad interpretation recognizes the hydrological interconnection amongst all rights contained

within the basin for which a decree is issued. Therefore, the section 85-2-233(1) (a) and (b) Mont. Code Ann. standing requirements are 1) only certain persons as defined by that statute, and 2) a written statement that the objector also has water rights claimed in the decree (or water rights outside the decree which may be affected by the decree, such as a post July 1, 1973 certificate or permit issued by the DNRC.)

Rule 1.II(7) reiterates the statute, then notes an additional factor for good cause - the apparent intent of the objector. The objection must be made in good faith, not an arbitrary, irrational, unreasonable or irrelevant action taken by the objector. This portion of the standing analysis may include the specific hydrological interconnection or impact between the specific claim at issue and the objector's claimed rights, but the standard set - not arbitrary, irrational, unreasonable or irrelevant - is obviously low.

The statute and the rule clearly state that there are two requirements: 1) that only certain persons may object, and 2) that good cause be shown, and further, that good cause has two aspects a) the objector must have an interest in land or water affected by the decree and b) the objection must be made in good faith. In this matter, Guyette makes no assertions as to the first requirement that only certain persons may object or to the requirement that the objector has an interest in land or water affected by the decree. Guyette's assertions are that the objectors have not met the good faith requirement for good cause because: the objectors have not claimed any water rights out of Birch Creek; Birch Creek is not tributary to another stream; therefore, an amendment of Guyette's Birch Creek claim cannot impair any of the objectors' claimed water rights, and absent

such possible impairment, the objections are arbitrary, irrational, unreasonable or irrelevant. Guyette also asserts that the objectors did not base their objections on actual or potential impairment of their own claims, but on their general opposition to allowing motions to amend claims outside the regular objection process, and that this general opposition also fails to meet the standing requirements for good cause shown.

The Guyette Motion to Dismiss states that Birch Creek has not flowed into South Meadow Creek since 1866 as evidenced by Birch Creek's absence on the map exhibit from the Morrison v. Higbee South Meadow Creek litigation. This absence on the map from a case concerning South Meadow Creek and Leonard Creek water rights does not establish that there is no hydrological connection between Birch Creek and South Meadow Creek, and subsequently, no hydrological connection with the Madison and Missouri Rivers. The 1954 Madison County Water Resources Survey map for Townships 3 and 4 South, Range 2 West, includes Birch Creek and shows it terminating in the T. H. Vincent Ditch No. 2. It is not shown as a tributary to South Meadow Creek or any other stream. On the Statement of Claim form prepared by Ora A. Megee for claim 41F 7401 00, Mr. Megee stated that Birch Creek was "Tributary of none." Rose Megee's June 29, 1985 Affidavit is attached to Guyette's Motion to Amend and the complete text is included in the Miller Motion to Dismiss. Paragraph 3 of her Affidavit states: "At least since 1932, the remaining flow of water from Birch Creek has run into the main irrigation ditch which supplies the ranch. This ditch is known as the T. H. Vincent Ditch No. 2. Water from Birch Creek does not flow into any other source of water or any other

naturally flowing stream." The evidence before the Court indicates that the Birch Creek channel may not reach South Meadow Creek because Birch Creek runs into is the T. H. Vincent Ditch No. 2, but no evidence has been presented as to the natural course of Birch Creek prior to the construction of the T. H. Vincent Ditch No. 2. There has not been sufficient evidence presented to determine that there is *no* hydrological connection between Birch Creek and South Meadow Creek, and subsequently, Birch Creek and the Madison and Missouri Rivers.

The Guyette Motion to Dismiss does not include details of the objectors' claims such as their claimed sources and points of diversion. The United States' Responses to Motion states that it indeed has stock water claims on Birch Creek plus other claims in Basin 41F and in downstream basins (Missouri River). Although Guyette has not proven a hydrological disconnect between Birch Creek and South Meadow Creek, there could still be such a remote relationship between Guyette's claim and an objector's claim that any impairment is nearly impossible. Absent such details though, the Court cannot determine if any of the objections are arbitrary, irrational, unreasonable or irrelevant, and therefore, fail the good faith requirement for good cause shown. Absent any basis for finding that Granger Ranches LLP, Lynn R. Owens, Valley Garden Ranch and Bar LG Ranch, United States of America (USDA Forest Service, USDI-Bureau of Land Management, and USDI-Bureau of Reclamation), and Carol McMullin are outside the category of the certain persons who may object, that these objectors have no interest in land or water affected by the decree, and that their objections were not made in good faith, the Guyette

Motion to Dismiss these objectors due to their lack of standing to object cannot be granted. Therefore, it is

ORDERED that the Guyette Motion to Dismiss is DENIED as to Granger Ranches LLP, Lynn R. Owens, Valley Garden Ranch and Bar LG Ranch, United States of America (USDA Forest Service, USDI-Bureau of Land Management, and USDI-Bureau of Reclamation), and Carol McMullin.

**MILLER, UNITED STATES, and VALLEY GARDEN RANCH
AND BAR LG RANCH MOTIONS TO DISMISS OR DENY
GUYETTE MOTION TO AMEND**

The Miller Motion to Dismiss Motion to Amend Temporary Preliminary Decree of Statement of Claim 41F-W-007401-00 asserts that Guyette's Motion to Amend should be dismissed because it is not a proper amendment under section 85-2-233(6) Mont. Code Ann.; the requested amendment is not a proper amendment under Rule 15 M.R.Civ.P.; the requested amendment is actually either a forfeited claim under the late claim statutes or a post-July 1, 1973 change which should be pursued through the Montana Department of Natural Resources and Conservation; judicial estoppel precludes Guyette making such amendment; and Rule 11 sanctions should be ordered. The United States Motion to Deny Amendment of Claim or Dismiss Amended Claim asserts that Guyette's requested amendment is not a proper amendment under Rule 15 M.R.Civ.P. as it does not arise from the same "conduct, transaction, or occurrence" as the original statement of claim and therefore, cannot relate back to the original statement of claim. Valley Garden Ranch and Bar LG Ranch Motion to Deny Amendment of Claim or Dismiss

Amended Claim adopts the Miller and United States arguments.

Montana Supreme Court Claim Examination Rule 1.II(2), states that "[e]xcept where specifically provided for in these rules, the Montana Rules of Civil Procedure . . . govern the practice of the water courts."

Rule 6.III of the Montana Supreme Court Claim Examination Rules concerns the amendment of a statement of claim by the claimant *prior* to its first inclusion in a decree. This procedure is in accord with Rule 15(a) M.R.Civ.P. which allows a party to "amend the party's pleading once as a matter of course at any time *before* a responsive pleading is served." (emphasis added)

Prior to the enactment of subsection (6) of 85-2-233 Mont. Code Ann., the only way a claimant could change his statement of claim after the claim appeared for the first time in a decree (temporary preliminary or preliminary, depending on the basin) was to file an objection - the statutory mechanism designated for changing a claim after decree issuance. With the issuance of each decree, an objection filing deadline is set, and although the statute allows for that deadline to be extended, there is a final date by which all objections must be filed. There have been objections filed after the objection filing deadline and after issuance of the objection list. Whether filed by the claimant or by an adverse party, these objections are labeled and docketed as "late objections" and a late objection remark is added to the abstract of the claim as notice to all who see the abstract in the interim that a late objection has been filed. But, these late objections are *not* heard until *after* they receive the statutorily required basin-wide notice on the objection list

entered after the next decree objection period has closed.

The Water Court has allowed the amendment of a timely filed objection, the objector's pleading. As there is no adjudication statute or Montana Supreme Court Claim Examination Rule concerning this, the amendment of an objection is governed by Rule 15 M.R.Civ.P. which allow pleadings to be amended to conform to the evidence and for the amendments to relate back to the original filing of the pleading. For example, the objection only specifies two elements: flow rate and maximum acres irrigated. The objection list - the public notice of the objections filed - states that the flow rate and maximum acres irrigated are at issue. The settlement stipulation later filed by the claimant and the objector, or the evidence presented at trial without objection, substantiates changes to the priority date and the point of diversion. The Master's Report will include a specific conclusion of law that the objection was amended by agreement of the parties to include priority date and point of diversion. To provide interim notice, a remark is added to the abstract of the claim which alerts anyone else who looks at the abstract that the objection was amended to include these additional elements, and "[b]ecause these elements were not included on the objection list, any water user whose rights may be adversely affected by enforcement of these changes may petition the appropriate court for relief or may file an objection at the preliminary decree." Full, basin-wide notice of the amendments to the objection will be included on the objection list for the subsequent preliminary decree.

See Memorandum and Order Amending and Adopting Master's Report, Claims 76M-W-000494-00 and 76M-W-000495-00, filed May 17, 1993 ["Lynch Memorandum and

Order"] .

In 1997 the adjudication statutes were amended to provide only one objection period for all decrees issued after March 28, 1997 rather than two objection periods (one after the temporary preliminary decree and one after the preliminary decree). Sections 85-2-233(1)(c) and (d) Mont. Code Ann. The statute was also amended to create a counter-objection period for claimants to object to their objector's claims. Section 85-2-233(3) Mont. Code Ann. For decrees issued after March 28, 1997 there will not be a second objection period, so there is no second objection list on which amended objections can be given the full, basin-wide notice directed in the Lynch Memorandum and Order. The second notice opportunity which the Court has relied upon in allowing amended objections no longer exists for decrees issued after March 28, 1997. The companion amendment of section 85-2-233 to include the new provision at issue in this matter, subsection (6), addresses this by allowing the objector to file a motion to amend his timely filed objection and for a claimant to file a motion to amend his own claim. If such amendment might adversely affect other water rights, public newspaper notice is required plus any additional notice found necessary by the water court. Subsection (6) states in its entirety:

After issuance of a temporary preliminary decree or preliminary decree, notice of any motion to amend a statement of claim or a timely filed objection that may adversely affect other water rights must be published for 3 consecutive weeks in two newspapers of general circulation in the basin where the statement of claim or objection was filed. The notice must specify that any response or objection to the proposed amendment must be filed within 45 days of the date of the last notice.

The water judge may order any additional notice of the motion as the water judge considers necessary. The costs of the notice required pursuant to this subsection must be borne by the moving party.

Whether a motion to amend claim or a motion to amend objection, several points are readily understood: 1) this avenue to change a claim or objection is only available post-decree issuance, and implicitly, post-issuance of the objection list (a claimant would not file a motion to amend his claim during the objection filing period); 2) the statute only allows a party's amendment of his own pleading - only a claimant can file a motion to amend his own claim and only an objector can amend his own timely filed objection - it does not allow someone to file a motion to amend another party's claim or objection, and 3) if there is potential adverse impact on other water rights, public notice by newspaper publication and, perhaps, additional notice at the discretion of the court, is required.

There is no language in subsection (6) which states that it only applies to decrees issued after March 28, 1997. The amendments made to subsections (1)(b) and (c) of this same statute, specify that the class of claims to which the amendments apply are the claims in decrees issued after March 28, 1997, the date after which there would only be one objection period. Subsection (6) contains no such limitation. Therefore, subsection (6) applies to *all* temporary preliminary and preliminary decrees regardless of whether they were issued before or after March 28, 1997, and regardless of whether there will be second objection period. Therefore, by statute, a claimant may file a motion to amend his claim even though there will be a subsequent decree and objection period during which the claimant could, alternatively, file an objection to his claim.

A second contention of Miller, the United States, Valley Garden Ranch and Bar LG Ranch is that the scope of the amendment should be limited because of the limitations on amendment of pleading specified in Rule 15 M.R.Civ.P. Subsection (6) does not allow for the filing of objections. It only allows the filing of motions to amend certain pleadings by the pleader. The operative term "amend" is significant - it pulls Rule 15 amendment of pleadings, procedurally and substantively, into subsection (6). Section 1-2-106 Mont. Code Ann. Prior to enactment of subsection (6) , the Water Court was limited in its ability to allow post-decree issuance amendments of claims under Rule 15 because of the public notice requirements specified in the adjudication statutes, such notice being the procedural cornerstone for any general stream adjudication. Subsection (6) specifically incorporates post-decree issuance Rule 15 amendments but recognizes the expanded notice requirements of this ongoing general stream adjudication and adds a public notice procedure beyond that required in typical civil litigation. Subsection (6) does not otherwise limit or amplify the amendment process allowed under Rule 15 M.R.Civ.P. Therefore, other than the additional notice requirements, subsection (6) motions to amend are governed by Rule 15 M.R.Civ.P. and the Montana Supreme Court decisions concerning Rule 15 amendments.

Although leave to amend pleadings is to be freely given according to Rule 15 M.R.Civ.P. and Montana Supreme Court case law, a determination of whether the amendment relates back must be made first, then the various equitable objections against leave to amend are to be considered.

The scope of an amendment under Rule 15 is narrow. Rule 15(c) states that "[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." If the amendment of claim does not relate back to the original claim, the amendment cannot be made under Rule 15. The Montana Supreme Court has stated the following concerning the meaning of the language "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" in the following cases:

After reciting the same text from Rule 15(c) quoted above, the Prentice Lumber Company v. Hukill, 161 Mont. 8, 14 and 15 (1972) decision states:

We have not previously had occasion to construe this rule. Accordingly, we refer for guidance to Federal Rule 15(c) which contains identical language to that quoted above, and to federal court decisions construing its meaning and application. In speaking of Federal Rule 15(c), 1A Barron & Holtzoff, Federal Practice and Procedure, § 448, p. 757, has this to say:

"The general rule of 'relation back' is that a pleading may not be amended to allege a new or different claim or defense unless it arose out of, or is based upon or related to, the claim, transaction or occurrence originally set forth or attempted to be set forth. If the new claim or 'cause of action' meets this requirement, the amendment relates back to the time of the original filing so as to prevent the running of limitations which otherwise might bar the claim."

The following statement from 3 Moore's Federal Practice, § 15.15[3], pp. 1025-1027, delineates the type of amendments that will relate back:

" * * * Rule 15(c) is based on the concept that a party who is notified of litigation concerning a given transaction or occurrence has been given all the notice that

statutes of limitations are intended to afford. Thus, if the original pleading gives fair notice of the general fact situation out of which the claim or defense arises, *an amendment which merely makes more specific what has already been alleged*, such as by specifying particular acts of negligence under a general allegation of negligence, or remedies a defective pleading, will relate back even though the statute of limitations has run in the interim. Similarly, while it is still the rule that an amendment which states an entirely new claim of relief based on different facts will not relate back, if the pleading sufficiently indicates the transaction or occurrence on which the claim or defense is based, amendments correcting specific factual details, such as time and place, as well as other items, will relate back."

An amendment that changes only the legal theory of the action will relate back. 3 Moore's Federal Practice, § 15.15[3], p. 1028, and cases cited therein. It is equally clear that an amendment that adds another claim arising out of the same transaction or occurrence will relate back. 3 Moore's Federal Practice, § 15.15[3], p. 1029, and cases cited therein. (emphasis added)

After discussing the facts in another case, the Prentice decision states at page 16:

The reasoning of the court was that the general wrong suffered and the general conduct causing the wrong controlled the determination of whether a new and different claim was stated in the amended pleading, and that the specified conduct of defendant upon which plaintiff tries to enforce his claim is to be examined rather than the theory of law on which the action is brought.

The case of Lien v. Murphy Corp., 201 Mont. 488 (1982) involved an original complaint which alleged Murphy's hydrocarbon exploration and production pipes leaked oil and other products which increased the salinity level of the ground water and damaged Blue Ox's property. The original complaint was filed in 1971. In 1980 a motion to amend the complaint to include further damage to the land (amend from \$15,000

to \$750,000) and a change in legal theory (amend from negligence and lease violations to seven different theories of liability). The district court denied the motion to amend. In the discussion concerning whether the amendment would relate back, the Supreme Court stated:

Though the evidence shows additional leaks since the first filing, the occurrence is oil pollution of the underground water supply. New causes of action arising out of the same transaction, occurrence or event may be set forth in an amended pleading. 3 Moore's Federal Practice, §15.08, at 15-70 (1978).

Id. at 493. The Court then stated that the motion to amend the complaint should have been granted by the district court.

In Sooney v. Petrolane Steel Gas, Inc., 218 Mont. 418, 422- 423 (1985) the Court stated : "It will be seen from a reading of Rule 15(c), that an amended complaint relates back to the date of the original pleading when the amended pleading depends on *the same set of operative facts as contained in the original pleading.*" (emphasis added) See also Smith v. Butte-Silver Bow County, 266 Mont. 1, 10 (1994) in which the Supreme Court upheld the district court's refusal to allow amending the complaint because "the original complaint and the proposed amendment do not share the same operative facts."

So, for claim 41F 7401 00, what is the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" (the "operative facts") and does the requested amendment merely make "more specific what has already been alleged?"

Statement of Claim 41F 7401 00 was prepared by Claimant Ora Megee.

The claim states that the alleged right is owned by Ora A. Megee and Rose M. Megee; the use is for stock water; that the source is Birch Creek; the points of diversion are in the S2 section 35, T4S, R2W, the SW section 36, T4S, R2W, and the N2NW section 1, T5S, R2W; the means of diversion is direct; the total number of livestock served is 205 (200 cattle and 5 horses); the place of use is in the S2 section 35, T4S, R2W, the SW section 36, T4S, R2W, and the N2N2 section 1, T5S, R2W; the flow rate is 20.00 miner's inches; the total volume is 7.00 acre feet per year (3075 gallons per day); the period of use is year round, January 1 to December 31; it is a use right, and, although there is no priority date entry space on this older printed form, "1900" is written next to the "use right" checkoff. There are four documents attached to the Statement of Claim to support the claim. The first document is a notarized Statement of Successorship signed by Ora A. Megee "to certify that Ora A. Megee is successor in interest of the water right of Christian Richter. Dated June 3, 1890. Stock water Bk 85, pag 18 Patent. Section 35." The fourth document is a copy of the Homestead Certificate No. 455, dated June 3, 1890 and filed for record May 29, 1916 in Book 85 of Patents, on page 18, Records of Madison County. The Homestead Certificate is to Christian Richter for the W2SW section 36 and the E2SE of section 35, T4S, R2W consisting of 160 acres. The second and third attachments are copies of the maps for T3 & 4 S, R2W and for T5S, R 1 & 2W from the 1954 Madison County Water Resources Survey. The maps are marked with colored pencil and one is signed "Ora Megee McAllister, Mt." The markings on the maps outline the place of use

and match the legal description specified except only the W2SW section 36 is included rather than the entire SW section 36. Within this stock water place of use outline are portions of darkened areas which represent the private irrigation occurring on that same land. Birch Creek and T. H. Vincent Ditch No. 2 south and east of its juncture with Birch Creek are highlighted as they traverse the outlined place of use.

Guyette correctly points out that the old district court decrees and notices of appropriation may describe a single appropriation for multiple purposes. However, in this adjudication, each purpose had to be filed on a separate form: a green IRRIGATION form, a brown STOCK WATER form, a blue DOMESTIC form, and a red OTHER USES form. Ora Megee filled out a brown STOCK WATER form, stated that the use was stock water, stated that 205 animal units were serviced by the claimed right, and drew in the stock water place of use. What is particularly telling is that, as he outlined the stock water place of use, he saw the dark irrigated areas that he included and drew over, but did not file an irrigation claim for a Birch Creek irrigation right to service that irrigated acreage. There is no doubt that the right claimed by Ora A. Megee and Rose Megee is the June 30, 1890 Birch Creek stock water right appropriated by Christian Richter to service 205 animal units.

Guyette urges a broad interpretation of "conduct, transaction, or occurrence", a liberal scope for the "operative facts", such that the occurrence is simply Megees' water right from Birch Creek which uses T. H. Vincent Ditch No. 2, that the operative facts are a use right appropriation from Birch Creek utilizing T. H. Vincent

Ditch No. 2, owned by Megees and used on Megees' property. But Megees did not claim some vague Birch Creek use right appropriation for some purpose from sometime in the 1800s. Megees' claim is very clear. The Megees claimed the 1890 Birch Creek stock water right to service 205 animal units appropriated by Christian Richter in conjunction with his homestead. This is the occurrence set forth in the original pleading, these are the operative facts plead in Statement of Claim 41F 7401 00.

The Guyette Motion to Amend requests that Statement of Claim 41F 7401 00 be amended so that the right claimed is for irrigation of 215.00 acres in the SW 36 T4S, R2W, the N2SE of section 35 T4S, R2W, and the N2N2 of section 1 T5S, R2W; the priority date be changed to April 1, 1866; the flow rate be amended to the entire flow of Birch Creek; the period of use be amended to April 1 to November 4; the point of diversion be amended to the SWSWNE section 35, T4S, R2W, and the means of diversion be changed to ditch (T. H. Vincent Ditch No. 2). Alternatively, the Motion to Amend requests that all amendments be made except for the priority date, that it remain June 3, 1890 as it appeared in the Temporary Preliminary Decree. The only element not to be amended is the source and the type of historical right. The water right described in the motion to amend is an 1866 or 1890 Birch Creek irrigation water right to service 215 acres. The requested amendment does not merely make "more specific what has already been alleged." The requested amendment is an entirely different water right. The operative facts for the original claim are not the same as the operative facts for the requested amendment. The amendment requested by Guyette does not relate back to Statement of

Claim 41F 7401 00. Therefore, it is

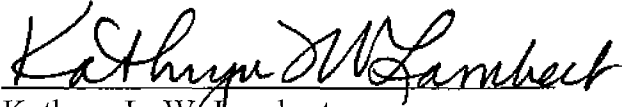
ORDERED that the Miller Motion to Dismiss Motion to Amend Temporary Preliminary Decree of Statement of Claim 41F-W-007401 (*except* the request for Rule 11 sanctions which was reserved by Miller), the United States Motion to Deny Amendment of Claim or Dismiss Amended Claim, and the Valley Garden Ranch and Bar LG Ranch Motion to Deny Amendment of Claim or Dismiss Claim are GRANTED and the Guyette Motion to Amend is DENIED as the amendment requested by Guyette does not relate back to Statement of Claim 41F 7401 00.

As the requested amendment does not relate back, analysis of the additional legal arguments raised in the Miller, United States, and Valley Garden Ranch and Bar LG Ranch Motions is not needed. In addition, proceedings on the factual issues raised by the objectors concerning the historical validity or accuracy of the right sought by the requested amendments is no longer required and will not be undertaken.

On October 11, 2001 Valley Garden Ranch and Bar LG Ranch filed an address change. Therefore, it is

ORDERED that the address for Valley Garden Ranch and Bar LG is changed as shown on the mailing list below.

DATED this 8 day of November, 2002.


Kathryn L. W. Lambert
Senior Water Master

CERTIFICATE OF MAILING

James M. Guyette
PO Box 220
McAllister MT 59740

Cindy Younkin, Attorney
Moore O'Connell & Refling PC
PO Box 1288
Bozeman MT 59771

Doris J. Bohrman
PO Box 184
McAllister MT 59740

Robert J. and Janet M. Endecott
PO Box 104
McAllister MT 59740

Valley Garden Ranch
Bar LG Ranch
% Harry B. Combs
PO Box 1509
Ennis MT 59729

Jeanne Matthews Bender
Holland and Hart
PO Box 639
Billings MT 59103-0639

Thomas R. Miller
PO Box 132
McAllister MT 59740

A. Suzanne Nellen
Attorney at Law
1800 W. Koch, Suite 5
Bozeman MT 59715

Curtis L. Gibbs
PO Box 174
Ennis MT 59729

Lynn B. Owens
PO Box 123
McAllister MT 59740

Robert B. and Cora M. Goggins
PO Box 268
Ennis MT 59729

Granger Ranches LLP
% Leanne Schraudner
Attorney at Law
3825 Valley Commons Drive, Ste 5
Bozeman MT 59718

Lawrence H. Gibbs
PO Box 57
McAllister MT 59740

Carol McMullin
PO Box 135
McAllister MT 59740

Karen McMullin
Attorney at Law
PO Box 55
Ennis MT 59729

Jody Miller, Special Assistant
U. S. Attorney
PO Box 7669
Missoula MT 59807

James J. Dubois, Attorney
Department of Justice
999 18th Street, Suite 945
Denver CO 80202