

OCT 16 1990

IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
CLARK FORK RIVER BASIN ABOVE THE BLACKFOOT RIVER (76G)  
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Montana Water Court

IN THE MATTER OF THE ADJUDICATION OF	)	CASE 76G-374
THE EXISTING RIGHTS TO THE USE OF ALL	)	76G-W-090423-00
THE WATER, BOTH SURFACE AND UNDERGROUND	)	76G-W-124864-00
WITHIN THE CLARK FORK RIVER DRAINAGE	)	76G-W-124865-00
AREA ABOVE THE BLACKFOOT RIVER,	)	76G-W-124866-00
INCLUDING ALL TRIBUTARIES OF THE	)	76G-W-124868-00
CLARK FORK RIVER ABOVE THE BLACKFOOT	)	76G-W-124869-00
RIVER IN DEER LODGE, GRANITE, LEWIS	)	76G-W-124870-00
AND CLARK, MISSOULA, POWELL AND	)	76G-W-124876-00
SILVERBOW COUNTIES, MONTANA.	)	76G-W-126501-00
<hr/>		76G-W-126512-00
		76G-W-126571-00
		76G-W-126577-00
		76G-W-126634-00
		76G-W-126635-00

CLAIMANT: Montana Resources, Inc., Dennis Washington,  
Courtland Barney, George Hiritsco, Dale and Myles  
Carpenter, Jess Eighorn, Wilbur Hensler,  
Calvin T. Christian

ON MOTION OF MONTANA WATER COURT

OBJECTOR: Calvin T. Christian, Wilbur Hensler, Jess Eighorn,  
Granite County Water User's Assoc.(Esther McDonald),  
Montana Resources, Inc.

O R D E R


On May 14, 1990 the claimants Montana Resources, Inc.  
and Dennis Washington through their attorney of record, James  
Robischon, filed with the Court a Motion to Dismiss objections  
filed by Esther McDonald and the Granite County Water User's  
Association to certain claims in Basin 76G.

On September 24, 1990 the claimant Mt. Haggin Ranch, a  
partnership, through its attorney of record, Kirby Christian,  
filed an identical motion.

After careful consideration of the briefs filed and the oral arguments offered and pursuant to Rule 53(c) M.R. Civ. P., said Motions are hereby DENIED for the reasons set forth in the accompanying Memorandum.

FURTHER ORDERED that the matter shall be scheduled for hearing at a later date.

DATED this 16<sup>th</sup> day of October 1990.

  
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Water Master

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MEMORANDUM

STATEMENT OF THE CASE

Water right claims 76G-W-090423-00, 76G-W-124864-00, 76G-W-124865-00, 76G-W-124866-00, 76G-W-124868-00, 76G-W-124869-00, 76G-W-124870-00 and 76G-W-124876-00 were filed by the Atlantic Richfield Company (ARCO) in Basin 76G, the Clark Fork River Basin Above the Blackfoot River. These claims have been transferred to Montana Resources, Inc. and Dennis Washington.

Water right claims 76G-W-126501-00, 76G-W-126512-00, 76G-W-126571-00, 76G-W-126577-00, 76G-W-126634-00 and 76G-W-126635-00 were filed by the predecessors in interest to Mount Haggin Ranch, a partnership, and are generally for the same waters described in the above-mentioned Montana Resources, Inc. filings in Basin 76G.

The above-mentioned claims have been consolidated into Water Court Case No. 76G-374.

The decreed sources of the Montana Resources, Inc. claims as they appear in the Basin 76G Temporary Preliminary Decree are as follows:

76G-W-090423-00	Silver Lake
76G-W-124864-00	Storm Lake
76G-W-124865-00	Twin Lakes Creek
76G-W-124866-00	Unnamed Tributary of Warm Springs Creek and Beaver Dam
76G-W-124868-00	Storm Lake Creek
76G-W-124869-00	Storm Lake Creek
76G-W-124870-00	Silver Lake
76G-W-124876-00	Orofino Creek

The decreed sources of the corresponding Mount Haggin Ranch claims, as they appear in the Basin 76G Temporary Preliminary Decree are as follows:

76G-W-126501-00	Storm Lake Creek
76G-W-126512-00	Silver Lake
76G-W-126571-00	Storm Lake Creek
76G-W-126577-00	Storm Lake Creek
76G-W-126634-00	Storm Lake Creek
76G-W-126635-00	Silver Lake

Esther McDonald, on behalf of the Granite County Water User's Association, filed objections to the Montana Resources, Inc. claims 76G-W-090423-00, 76G-W-124864-00, 76G-W-124868-00, 76G-W-124869-00 and 76G-W-124870-00 concerning all elements of these claims, including the issue of abandonment.

Esther McDonald, on behalf of the Granite County Water User's Association, filed objections to the Mount Haggin Ranch claims 76G-W-126501-00, 76G-W-126512-00, 76G-W-126571-00, 76G-W-126577-00 and 76G-W-126634-00 concerning all elements of these claims, including the issue of abandonment.

On May 14, 1990, Montana Resources, Inc. filed a Motion to Dismiss the objections of Esther McDonald and the Granite County Water User's Association. This Motion was grounded upon lack of standing to object and insufficiency of the objections. Several briefs have been filed by Montana Resources, Inc. concerning this Motion. In the Reply Brief filed with the Court on June 6, 1990, Montana Resources, Inc. admitted that the objectors have standing concerning claim 76G-W-090423-00 as this claim is for a storage right in Georgetown Lake of water from Silver Lake. Therefore, this Memorandum will address the remaining claims and objections at issue.

On May 29, 1990, Esther McDonald and the Granite County Water User's Association filed a Brief in Opposition to Motion to Dismiss Objections. Other supplemental briefs have been filed by the objectors. Essentially, the objectors contend that they have standing to object based on the fact that they have water rights located in Basin 76GJ, the Flint Creek Basin. The source of the objectors' water rights is Georgetown Lake. Objectors contend that the "Silver Lake water distribution system" has intermingled the waters of Silver Lake, Storm Lake and Storm Lake Creek in Basin 76G with the waters of Georgetown Lake in Basin 76GJ. Therefore, the objectors contend they have standing to object to these claims in Basin 76G which claim as their source Silver Lake, Storm Lake and Storm Lake Creek.

On September 24, 1990 Mount Haggin Ranch filed with the Court a Motion to Dismiss the objections of Esther McDonald and the Granite County Water User's Association. This Motion paralleled the arguments and contentions set forth by Montana Resources, Inc.

On October 9, 1990, the objectors filed a Brief in Opposition which essentially echoed their previous contentions.

Oral argument was heard on September 14, 1990 at which counsel for all the parties appeared and participated.

#### ISSUES PRESENTED

I. Whether the standard for standing to object to these claims is for "good cause shown" or whether the "hydrologically connected" standard should be applied.

II. Whether Esther McDonald and the Granite County Water User's Association have standing to object to water right claims in Basin 76G, the Clark Fork River Basin Above the Blackfoot River, as water users in Basin 76GJ, the Flint Creek Basin.

III. Whether the objections filed by the objectors are sufficient on their face to comply with the statutory standards and Water Court Rules pertaining to form.

#### DISCUSSION

I. The statutory standard concerning standing to object, as expressed in Mont. Code Ann. Section 85-2-233, should be based on this statute as it appeared in November 1985 when the objections were filed.

In the various briefs filed in this matter, as well as during oral argument on the Motion to Dismiss Objections, much discussion has been made of whether the 1985 version or the 1989 language of Mont. Code Ann. Section 85-2-233 should control. This statute addresses the issue of standing of a party to object to a Temporary Preliminary Decree. After consideration of the issue, the applicable language of 85-2-233 as it appeared in November 1985 should control as this was the effective statute when the objections were filed.

In Montana, statutes are prospective in operation unless the clear intent of the legislature is that the law shall have retroactive effect. See Sullivan v. City of Butte, 65 Mont. 495, P. 301 (1922); City of Philipsburg v. Porter, 121 Mont. 188, 194, 190 P.2d 676 (1948); Neel v. First Fed. Sav. & Loan Assoc., 207 Mont. 376, 387, 675 P.2d 96 (1984).

The right to a hearing concerning a temporary preliminary or preliminary decree issued by the Water Court in a particular basin is governed by Mont. Code Ann. Section 85-2-233. The pertinent portion of the statute as to who has standing to object appeared in the 1985 statute as follows:

"(1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge." [Emphasis Supplied]

Mont. Code Ann. Section 85-2-233 (1979 as amended).

In the case at hand, Esther McDonald and the Granite County Water User's Association have no property interest, nor any water rights located in Basin 76G, and were not named in the decree. All the claims made by Montana Resources, Inc. and Mount Haggin Ranch are decreed in the Basin 76G Temporary Preliminary Decree. The claims of Esther McDonald and the Granite County Water User's Association are in Basin 76GJ.

In 1989, as a result of Senate Bill 169, Section 2, Mont. Code Ann. Section 85-2-233 was amended to read as follows:

"(1)(a) For good cause shown, a hearing shall 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 or preliminary decree;
- (iii) any person within the basin entitled to receive notice under 85-2-232(i); 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 his claim or claims were from sources within the decreed basin. [Emphasis Supplied]

Mont. Code Ann. Section 85-2-233(i)(a)(1989).

After review of the statutory language, and the legislative history of Senate Bill 169, the Court finds that there is no clear intent that 85-2-233, as amended in 1989, was to have any retroactive affect. Therefore, the standard to apply for standing to object to water right claims in the case at hand is contained in the language of 85-2-233 as it appeared in November 1985 when the objections were filed. The standard to be applied is for "good cause shown."

II. Esther McDonald and the Granite County Water User's Association have standing to object to these claims in Basin 76G because their water right claims in Basin 76GJ may be potentially adversely affected by the claims at issue in this case.

For the purposes of filing an objection in Water Court proceedings, "good cause shown" shall be made upon a showing that a party has a substantial reason for objecting. This means that a party has an interest which has been affected by the decree. Water Court Rule 6 (1983). In addition to the Water Court standard of "good cause", two alternative definitions have been offered by counsel for the parties in this case.



First, standing to sue (or to object), based on "good cause", may be shown if the party may suffer potential economic injury by the action. Second, standing may be based on "good cause" if it is shown that a party may be injuriously or adversely affected by the action. A showing of either of these two standards may show "good cause" for standing purposes.

In Montana, potential economic injury is a sufficient basis to allow a party to engage in an action. See Mont. Human Rights Div. v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982). Belth v. Bennett, 227 Mont. 341 345, \_\_\_P.2d \_\_\_ (1987).

In this case, Esther McDonald and the Granite County Water User's Assoc. have water rights located in Basin 76GJ, the Flint Creek Basin. The source of these water rights is from Georgetown Lake located in Basin 76GJ. The parties agree and the Court takes judicial notice that the waters of Basin 76GJ empty into the main stem of the Clark Fork River near Drummond, Montana. This is downstream from the entry of waters from Basin 76G into the Clark Frok River.

Because the waters of Basin 76G and Basin 76GJ eventually flow into the main stem of the Clark Fork River, the objectors may be potentially adversely or injuriously affected, or may suffer potential economic injury if any downstream Clark Fork River senior water rights or reserved rights make a "call" for water. In other words, because of the relation of Basin 76G to Basin 76GJ in the Clark Fork River Division the availability of water to downstream seniors may affect the objectors interest.

In Holmstrom Land Co. v. Newlan Creek Water District, 185 Mont. 409, \_\_\_P.2d\_\_\_ (1975), the Montana Supreme Court addressed the issue of standing to challenge water right decrees. Although the action was a district court decree, and not a water court action, and dealt with standing to appeal certain aspects of a water right decree, what the Court said about potential injurious affects of water right decrees is instructive. As the Court stated:

"A water right ... has a potentially injurious affect on ...(the appropriator) because the earlier appropriator could force...(the appropriator) to forego his water until the earlier water right has been completely satisfied."

Holmstrom, supra at 425.

In effect, downstream seniors on the Clark Fork River could make a "call" for water which may curtail upstream tributary users from having water available. This situation supports the proposition that the objectors may be potentially adversely affected, or suffer potential economic injury if the claims at issue are decreed. The objectors have an interest which may be affected by the Basin 76G Temporary Preliminary Decree. Therefore, the objectors have "good cause" to object to the water right claims at issue in this case.

III. The objections as filed by Esther McDonald and the Granite County Water User's Association are sufficient and comply with statutory standards and the Montana Rules of Civil Procedure.

The claimants contend that the objections filed by the objectors in this case are arbitrary, irrational, unreasonable and irrelevant. Montana Resources, Inc. Motion to Dismiss, pg. 2. The claimants contend that the objections as filed are insufficient and do not conform to Water Court Rule 1.II(7). Montana Resources, Inc., Memorandum in Support, pg. 2.

The Montana Rules of Civil Procedure govern Water Court proceedings. The Water Court also operates under specific Water Court procedures as defined in the Water Right Claims Examination Rules promulgated by the Montana Supreme Court on July 13, 1989. From May 10, 1983 to July 13, 1989 Water Court procedures were governed by the Rules of the Water Courts for the State of Montana.

The statutory guidelines of the objection procedure are defined in Mont. Code Ann. Section 85-2-233(3). The specifics of the objection procedure were set forth in Water Court Rule 6.

Essentially there are three requirements that an objection and request for hearing must satisfy:

- 1) The objection must be filed on forms provided by the Water Court, and be received by the objection deadline.
- 2) The objection shall have an attachment which states the aspect or element of the water right claim to which the objector disagrees.
- 3) The objection attachment shall set forth the grounds and evidence upon which the objection is based.

See Water Court Rule 6 (1983).

In Montana, notice pleading is all that is required. See Brothers v. Surplus Tractor Parts, 161 Mont. 412, 417, 506 P.2d 1362 (1973), Butte Country Club v. Metropolitan District, 164 Mont. 74, 77, 519 P.2d 408 (1974). Also, pleadings shall be concise and direct. R. H. Swartz Construction Specialties v. Hanrahan, 207 Mont. 105, 672 P.2d 1116 (1983).

An objection completed in conformance with the Water Court Rules meets the requirement of notice pleading. In the case at hand, the objections filed were properly completed on the forms provided by the Water Court. The objection forms and attachments were timely filed before the objection deadline.

The attachments to the objections set forth sufficient factual issues and elements of the claims to which the objectors disagree. Although the attachment mentioned potential issues beyond the Water Court's jurisdiction, this does not merit a finding that the objections are insufficient.

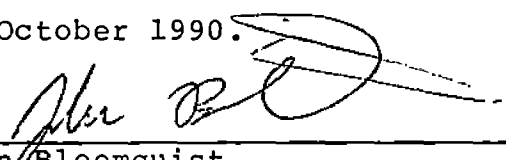
The objections filed by the objectors in this action are sufficient and in conformance with the statutory and procedural guidelines. The objections are not arbitrary, irrational or filed in bad faith.

#### CONCLUSION

The Motions to Dismiss the Objections of Esther McDonald and Granite County Water User's Assoc. filed by Montana Resources, Inc. and Mount Haggin Ranch claimants, should be denied. The objectors have standing as they have shown "good cause" to object. The objections as filed by the objectors are sufficient for notice pleading purposes and are not arbitrary,

irrational, nor were they filed in bad faith.

DATED this 16th day of October 1990.



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John Bloomquist  
Water Master