

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

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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. )  
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CASE NO. 41F-A-2

41F-W-007401-00

**FILED**

**FEB 19 2004**

**Montana Water Court**

CLAIMANT: James M. Guyette

OBJECTOR: Valley Garden Ranch; Bar LG Ranch; Thomas R. Miller;  
Lynn B. Owens; Granger Ranches, LLP; 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 DENYING MOTION FOR RULE 11 SANCTIONS**

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 which included a motion for sanctions pursuant to Rule 11 Mont.R.Civ.P. On November 8, 2002 the Order granting various motions to dismiss was entered which noted that the Order did not address the sanctions motion. On January 23, 2003 an Order Setting Deadline was issued for Miller to either prosecute or withdraw the motion for sanctions. On February 24, 2003 Miller filed a Motion for Rule 11 Sanctions. On March

10, 2003 James M. Guyette ["Guyette"] filed a Response to Motion for Rule 11 Sanctions.

Rule 11 of the Montana Rules of Civil Procedure states:

**Signing of pleadings, motions, and other papers - sanctions.**

Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. *The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon such person who signed it, a representative party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (emphasis added)

Miller argues that the Guyette motion to amend was frivolous, meritless, and futile given that the evidentiary support for the motion is the Affidavit of Rose Megee which clearly contradicts the motion to amend, that Guyette has tried everything possible to move his priority ahead of Miller, that the "actions by Mr. Guyette's counsel have caused undue

delay, bad faith, dilatory motive on the part of the movant, failure to cure deficiencies by amendments previously filed, undue prejudice to Mr. Miller by virtue of allowing these amendments and futility of the amendment," and that the Court found that "[t]he requested amendment is an entirely different water right." Miller requests that the Court review Rose Megee's Affidavit and agree that the Affidavit "directly contradicts what Guyette's attorney was attempting to accomplish," and requests attorney's fees and costs as well as the necessary hearing to determine the fees and costs.

Guyette responds that the scope of amendments under section 85-2-233(6) Montana Code Annotated (subsection 6 enacted in 1997) was a threshold issue, that the motion to amend was warranted under the law and was based on a good faith argument that the amendment of claim should be made to correct the Temporary Preliminary Decree, and that "[p]arties should not be penalized for attempting to amend their claims simply because their motions are not granted."

In this ongoing general adjudication, people who own existing water rights had to file statements of claim for those rights by the filing deadline. The statements of claim can be changed by the claimants prior to decree issuance. Prior to 1997, in order to change any facet of a claim *after* it was issued in a water court decree, an objection to the claim had to be filed or the claim had to be called in on motion of the water court. There are no limitations on the character of the changes that can be made through the objection or on motion process as long as the claim represents a water right as it existed prior to

July 1, 1973 and as long as the changes are proved by sufficient evidence which contradicts and overcomes the prima facie claim. Through the objection process a water right claim can be changed, hypothetically, from a 1950 stockwater right on Jones Creek to an 1870 irrigation right on Smith Creek as long as all notice requirements and the burden of proof are met. In 1997 a third mechanism to change a claim after decree issuance was authorized by statute - a motion to amend. As discussed in the November 8, 2002 Order the motion to amend is not the same as an objection. The scope of allowable changes is substantially narrower. Wholesale changes to a claim cannot be made through a motion to amend. Rule 15 Mont.R.Civ.P. restricts the scope of the changes to the conduct, transaction, or occurrence set forth in the original pleading or, in other words, the "same set of operative facts as contained in the original pleading," and the amendment "merely makes more specific that which has already been alleged." *Sooey v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422-423 (1985) and *Prentice Lumber Company v. Hukill*, 161 Mont. 8, 15 (1972). Prior to the November 8, 2002 Order, there had been neither cause nor request to define the scope of the changes allowable in the motion to amend process.

In this case, the Guyette claim as filed by Ora Megee and Rose Megee is for an 1890 Birch Creek right for 20 miner's inches and 7 acre feet per year, to water 205 animal units, taken directly from the source rather than diverted out through a headgate, ditch, or pump, for use year round. The motion to amend requests that the claim be changed to an 1866 Birch Creek right for the entire flow of Birch Creek to irrigate 215

acres by water diverted through the T. H. Vincent Ditch No. 2, for use from April 1 to November 4. Alternatively, the motion to amend requests that the priority date remain at 1890. The changes requested in the Guyette motion to amend exceed the allowable scope of changes. The motion to amend was denied because the requested amendments did not arise from the same set of operative facts or merely make the original statement of claim more specific, hence the Court's conclusion quoted in the Miller motion for sanctions that "[t]he requested amendment is an entirely different water right." Because there had been no Court ruling that the scope of allowable changes through the motion to amend process is different than the scope of allowable changes through the objection or on motion process, the scope of the changes requested in the Guyette motion to amend were not unreasonable.

Miller states in the motion for sanctions that Guyette has tried every way possible to make his Birch Creek water right senior to Miller's. Guyette has also filed a late claim 41F 214810-00 for an 1866 Birch Creek for 3 cfs (120 miner's inches) to irrigate 229 acres by water diverted through the T. H. Vincent Ditch No. 2, for use from April 1 to November 4. The late claim was not included in the Temporary Preliminary Decree but will be included in the Preliminary Decree and will be subject to objection. The Preliminary Decree issuance date is not yet set and could be several years away. If the claim as filed survives the objection process intact, it still is a late claim which means it is subordinate to all federal and Indian reserved rights and all timely filed claims, and

may be subordinate to certain permits and reservations. So the only way for Guyette to secure a Birch Creek right which would be senior to Miller's is through the motion to amend process or the objection process, and as the objection process won't be initiated for several more years, the motion to amend process was the quicker mechanism to try. Guyette's decision to try to amend the claim now instead of changing by objection later is not unreasonable per se. Again, absent a ruling restricting the scope of motions to amend, it was not an unreasonable action to take.

Miller also argues that the actual changes requested in the motion to amend are so outrageous, unfounded in fact, and belied by the very evidence offered by Guyette to support the changes, that the motion to amend was not well grounded in fact, was an abuse of process, and caused needless litigation. The sufficiency of the evidence presented by Guyette was not addressed and no decision was made as to whether the requested amendment accurately reflected a bona fide existing water right. The previous decision simply reiterated the requested changes in order to determine first whether the motion could even be allowed under Rule 15 Mont.R.Civ.P. Because there never was a hearing on the merits of the requested amendments, there is not a complete record in this matter as to the historical evidence which Guyette might have presented. Although the other parties clearly were consternated if not outraged at the requested amendments as shown in their objections as well as their statements and demeanor at the May 24, 2001 scheduling conference in Virginia City, the facts upon which they based their conclusions are not of

record absent a full evidentiary hearing at which their evidence and argument are presented. The record in this matter is exceedingly limited because the motion was decided on procedural grounds rather than factual, evidentiary grounds.

The particular argument raised by Miller is that the Affidavit of Rose Megee, attached to the motion to amend as evidence supporting the motion, actually contradicts the requested priority date amendment. The Affidavit states that she first came to the ranch in the spring of 1932, that "Birch Creek flows from the Miller Ranch onto this ranch," and that "[t]he Miller Ranch has prior water rights in Birch Creek." The next sentence states that "*[a]t least since 1932, the remaining flow of Birch Creek has run into the main irrigation ditch which supplies the ranch.*" (emphasis added) The clear import of this language is that the Megee rights are junior to the Miller rights and that the Megee water comes out of the flow remaining after Miller's use. The Affidavit contains no evidence of use prior to 1932, so it is not evidence of the 1866 date. Miller's Birch Creek claims (41F 9257-00 for domestic use and 41F 9258-00 for irrigation use) both have a priority date of January 1, 1920. Based on the clear language of Rose Megee's Affidavit that Miller is senior, the Megee priority date could not precede January 1, 1920. April 1, 1866 precedes January 1, 1920, so the requested priority date amendment to April 1, 1866 is contradicted by the very Affidavit attached to support the motion to amend. However, the motion to amend includes an alternative - no amendment of the priority date, it would continue as June 3, 1890 as claimed by Megees. Even this date does not

comply with the priority scheme specified by Rose Megee. The Affidavit of Rose Megee does not support the 1866 date and contradicts the current 1890 date as both predate the Miller rights which she clearly states are senior to the Megee rights.

Guyette argues that "at least since 1932" leaves the door open to some date prior to 1932. However, the clear language of the Affidavit indicates that even if prior to 1932 it must still be junior to Miller's 1920 priority date. The threshold evidence presented by Guyette does not support the requested priority date amendment. However, the Affidavit does state that Megees used Birch Creek to irrigate about 215 acres through the T. H. Vincent Ditch No. 2. Although the priority date amendment is not supported by the Affidavit, it appears some of the other requested amendments are.

The Affidavit is not cited in the motion to amend as support for the 1866 priority date. The motion to amend only notes that the Affidavit indicates that Birch Creek flows into the T. H. Vincent Ditch No. 2 and has done so since at least 1932. The motion states that an 1866 date is requested because Megees also own an 1866 South Meadow Creek decreed right which is diverted through the T. H. Vincent Ditch No. 2. The South Meadow Creek decree was entered in 1912 in *Morrison v. Higbee*, Cause No. 1183, Madison County. The motion also argues that the map which accompanies the 1912 decree shows the T. H. Vincent Ditch No. 2 traveling the same course as it does today. The motion concludes that Birch Creek water has been commingled with the South Meadow Creek water in the T. H. Vincent Ditch No. 2 since 1866, so the priority



date for the Birch Creek water should also be 1866. Standing alone, this is not an unreasonable assertion ungrounded in fact. However, the assertion is belied by Rose Megee's Affidavit statement that Miller is senior to Megee. The assertion and the Affidavit are inconsistent.

The Montana Supreme Court has held the following about the requirements of Rule 11:

Next, as recognized by the language of the Rule itself, Rule 11 does not require a guarantee or certification that every detailed fact has been thoroughly investigated and proved to be correct. . . . Rule 11 sanctions have been imposed sparingly in Montana and only where a party has failed to make reasonable inquiry into the facts and law and, thus, has failed to meet the objective reasonableness standard.

*Temple v. Chevron, U.S.A., Inc.*, 254 Mont. 455, 464 (1992). Guyette made reasonable inquiry: securing the Affidavit of Rose Megee concerning her knowledge of the historical use and reviewing the *Morrison v. Higbee* records. The assertion based on the *Morrison v. Higbee* records is not unreasonable as noted above. But the result of the inquiry into Rose Megee's knowledge includes her statement that Miller is senior to Megees so the Guyette assertion that Megee priority date should be 1866, some 56 years senior to Miller, is not well founded on the inquiry made by Guyette as presented in the motion to amend. Therefore, a portion of the motion to amend - the request to amend priority date - is not well grounded in fact although the remainder of the motion to amend the purpose, flow rate, volume, place of use, point of diversion, means of diversion, and period of use appear to be well grounded in fact based on the inquiry presented in the motion itself.

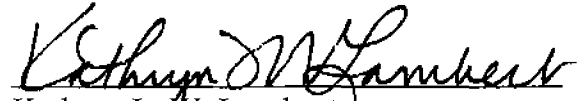
Having found that the priority date amendment requested in the motion to amend is not well grounded, the second requirement must also be met. The second requirement is that the not-well-grounded-assertion "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." The Miller motion for sanctions notes ongoing litigation between Miller and Guyette but there is no indication in the record that the motion to amend was filed for the purpose of harassing or causing any delay. Guyette's objective - securing a senior priority date - is obviously a real benefit to Guyette, not some trivial advantage which affords an opportunity to engage Miller in litigation. It certainly did not cause delay as the motion to amend is its own proceeding. It did not delay anything. Within this matter itself, the priority date is but one of the requested amendments, albeit clearly the pre-eminent element amongst the requested amendments. The priority date always was part and parcel of the whole motion to amend. Including priority date in addition to the other elements did not needlessly increase the cost of litigating the motion to amend because the factual merits were never litigated. This matter never progressed to that stage. The motion to amend was decided on procedural grounds not factual grounds. Without the full evidentiary record the Court cannot ascertain whether 1866 is the valid priority date or not, and if not, whether Guyette's continued assertion of that date through trial would have been appropriate or sanctionable under Rule 11.

Therefore, there is insufficient basis for finding that the motion to amend

was interposed for an improper purpose such harassment or causing unnecessary delay or needless increase in the cost of litigation and it is

ORDERED that the Motion for Rule 11 Sanctions is DENIED.

DATED this 19 day of February, 2004.

  
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