



Montana Legislative Services Division
Legal Services Office

TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: February 6, 2012
RE: Standing to object to water right claims before the Montana Water Court.

The question of who can object to a water right claim contained in a temporary preliminary or preliminary decree issued by the Water Court has been debated before the Legislature and the courts for the last several years. The debate culminated in the Montana Supreme Court's decision in *Montana Trout Unlimited v. Beaverhead Water Company*, 2011 MT 151, 361 Mont. 77, 255 P.3d 179, which was issued in June 2011. In the *Trout Unlimited* case, the Supreme Court overruled a decision from the Water Court that held that Trout Unlimited did not have standing (i.e., the right to make a claim or seek a judicial remedy) to file objections to the water right claims within the temporary preliminary decree for Basin 41D on the Big Hole River. At the request of the Water Policy Interim Committee, the following memo summarizes the *Trout Unlimited* decision and provides a description of the statutes at issue in the case. The memo also describes recent legislative efforts to clarify who can object to water right claims in the Water Court.

Section 85-2-233, MCA, requires the water judge, for good cause shown, to hold a hearing on any objection to a temporary preliminary or preliminary decree by: (1) the Department of Natural Resources and Conservation (DNRC); (2) a person named in the decree; (3) any person within the basin who is entitled to notice under § 85-2-232, MCA; (4) or any other person who claims the right to the use of waters that are hydrologically connected to sources within the basin and who is entitled to receive notice under § 85-2-232, MCA. For purposes of § 85-2-233, MCA, "good cause" is defined as a "written statement showing that a person has an ownership interest in water or its use that has been affected by the decree." "Ownership interest" is not defined in the adjudication statutes.

In 2007, the Water Court issued a temporary preliminary decree for Basin 41D on the Big Hole River. Trout Unlimited objected to several claims in the decree and requested a hearing. The Beaverhead Water Company and several other claimants moved to dismiss. Ultimately, the Water Court awarded judgment to the Beaverhead Water Company on the basis that Trout Unlimited could not satisfy the good cause requirement in § 85-2-233, MCA, because it could not demonstrate an ownership interest in the water or its use. Trout Unlimited had not filed any water right claims in the adjudication proceedings for Basin 41D or applied for or received a permit from the DNRC. Citing § 85-2-223, MCA, the Water Court also concluded that the DNRC and the Department of Fish, Wildlife, and Parks (FWP) were the only entities authorized to represent the public in the adjudication process.

On appeal, the Supreme Court held that there "is no statutory or regulatory restriction on who is entitled to file an objection to a claim of water right contained in a temporary preliminary decree" *Trout Unlimited*, ¶ 23. The Supreme Court addressed § 85-2-223, MCA, which provides that FWP "shall exclusively represent the public for purposes of establishing any prior and

existing public recreational use in existing [water] right determinations,” but concluded that Trout Unlimited was not seeking to establish public recreational rights in the use of water in the Big Hole River. *Trout Unlimited*, ¶ 19. Rather, according to the Supreme Court, state law did not prohibit organizations from seeking to generally enhance the amount of water available for fish habitat or recreational use. *Trout Unlimited*, ¶ 19.

The Supreme Court also addressed who could request a hearing on objections in water adjudication proceedings. As noted above, the Water Court concluded that Trout Unlimited did not have an ownership interest in a claim and was not entitled to a hearing on its objections based on the language of § 85-2-233, MCA, which defines “good cause” as an ownership interest in the water or its use. According to the Supreme Court, such an interpretation contradicted Article IX, section 3, of the Montana Constitution, which provides that all waters in Montana are the property of the state for the use of its people. The Supreme Court did not agree with the Water Court’s conclusion that Trout Unlimited had standing to object under common law principles but could not object based on the language of § 85-2-233, MCA, when the Montana Constitution and various statutes provide that the State’s water is a public resource that cannot be owned by individual users. *Trout Unlimited*, ¶ 33

At the Water Policy Interim Committee meeting in September 2011, Judge Loble addressed the *Trout Unlimited* decision and noted that the opinion may not have the far-reaching ramifications some have predicted. He stated that while the decision does have the potential to broaden the number of people or organizations who may participate in hearings before the Water Court, the reality of the adjudication process in the Water Court may balance out the number of objections or requests for hearings. Judge Loble indicated that Water Court proceedings are time intensive and require significant attention to deadlines and court rules. As a result, he does not anticipate a large number of objections or requests for hearings as result of the decision.

In addition, the decision in *Trout Unlimited* is confined to the facts presented in the case. The Supreme Court explained in the decision that Trout Unlimited “is a member conservation organization of anglers dedicated to the conservation, protection and restoration of coldwater fish . . .” and that Trout Unlimited had contributed funding to efforts to maintain minimum flows in the river. *Trout Unlimited*, ¶ 5. Another organization with a similar purpose may be able to object to claims before the Water Court, but the Supreme Court would have to expand its decision to allow other organizations with lesser interests to do so.

In 2011, Senator Hamlett introduced Senate Bill No. 356 to clarify the definition of “good cause shown” for a hearing on a temporary preliminary or preliminary decree before the Water Court. The bill revised the definition of “good cause shown” as follows: “(b) For the purposes of this subsection (1), “good cause shown” means a written statement showing that a person has an ownership interest in an existing water right, permit, certificate, or state water reservation under 85-2-316 that has been affected by the decree.” The Governor vetoed the bill on May 13, 2011, before the Supreme Court issued its decision in *Trout Unlimited*. In the veto message, the Governor stated that it was unlikely that the bill would survive a constitutional challenge because

it did not allow people or organizations with other interests, such as leasehold interests, to object to a water right claim in the Water Court. The Governor advocated for an amendment to the bill during the session that would have allowed an individual to have standing if he or she could demonstrate a real interest in the water right that was distinct from a general interest as a member of the public.

It is interesting to note, as a final matter, that the Supreme Court appeared to recognize that state law allows more individuals to object to applications for water rights issued by the DNRC than to water right claims in the Water Court. If a person wishes to object to an application for a post-1973 water right application filed with DNRC, § 85-2-308, MCA, provides that “[a] person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.”

The DNRC has adopted rules for objections to applications for water rights. With regard to standing, the DNRC’s rules provide that in order to establish standing, a person “must have property, water rights, or other interests that would be adversely affected were the application to be granted.” See Admin. R. Mont. 36.12.117(9)(g). The objection to the application must describe how his or her “property, water rights, or interests will be adversely affected.” *Id.* It is unclear why the statutes differ regarding objections to water right claims before the Water Court as opposed to applications for water rights before the DNRC, but this may be an area for consideration by the WPIC.

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