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FILED

JUN 18 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
LOWER MISSOURI DIVISION  
MUSSELSHELL RIVER BELOW ROUNDUP BASIN (40C)  
PRELIMINARY DECREE

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CLAIMANT: Turley Ranch

OBJECTOR: Turley Ranch

40C-R248  
40C 123507-00  
40C 123510-00  
40C 123542-00  
40C 128627-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. Because this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. *If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.*

## MASTER'S REPORT

The above-captioned claims appeared in the Preliminary Decree for the Musselshell River, Below Roundup (Basin 40C) issued on June 7, 2017. The claims are owned by Turley Ranch. The claims received self-objections from Claimant Turley Ranch and received issue remarks during the DNRC's claims examination. The claims were consolidated into Case 40C-R248 to resolve the self-objections and issue remarks.

### FINDINGS OF FACT

#### 40C 123507-00

1. On November 14, 2019, the Court set a filing deadline for Claimants to submit information or evidence supporting their self-objection and addressing the issue remark on the claim pertaining to the means of diversion for claim 40C 123507-00.
2. On January 7, 2020, Claimant filed a *Notice of Filing of Additional Information/Evidence*. Claimant's *Notice* included a DNRC map, a topographic map, and the Statement of Claim for claim. However, the information submitted did not address historical use pertaining to flow rate, period of use, or the location of the second point of diversion listed in Claimant's self-objection.
3. On January 27, 2020, the Court set a show cause filing deadline for claimants to submit information or evidence of *historical* use of the right pertaining to the aforementioned elements listed on the self-objection.
4. On February 24, 2020, Claimant filed an *Affidavit of Michael P. Turley, Notice of Filing of Evidence Regarding Claim 40C 123507-00* containing ten pictures depicting historical use of the right, and a proposed abstract for claim 40C 123507-00. In his *Affidavit*, Michael P. Turley states that for his entire life, 60 years at the time of filing, use of claim 40C 123507-00 has been at least from April 1 through October 15. Additionally, Mr. Turley asserts that the information contained in the *Proposed Abstract* is true according to his personal knowledge. The proposed abstract requests the addition of a second point of diversion consistent with the self-objection filed by Claimant on

December 1, 2017. The *Proposed Abstract* suggests the addition of a second point of diversion as follows:

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENESW	14	9N	29E	Musselshell
<b><u>2</u></b>		<b><u>NWNWSE</u></b>	<b><u>14</u></b>	<b><u>9N</u></b>	<b><u>29E</u></b>	<b><u>Musselshell</u></b>

5. Multiple discrepancies between the Claimant’s self-objection, *Affidavit*, *Notice of Filing*, and *Proposed Abstract* regarding the flow rate and second point of diversion prompted a telephone discussion between the Court and counsel for Claimant, Michael F. McGuiness. Subsequent to the phone call, Claimant filed an *Eratta to Affidavit of Michael P. Turley and Notice of Amended Proposed Abstract for Claim 40C 123507-00*. The *Eratta to Affidavit* denotes that Mr. Turley mistakenly identified the township for the points of diversion in claim 40C 123507-00 as 29N rather than 9N as reflected in the *Proposed Abstract*. Similarly, the *Eratta to Proposed Abstract* Corrects the mistakenly listed flow rate of 1,200 cfs on both the self-objection and *Proposed Abstract* to 1,100 gpm.

6. Claim 40C 123507-00 also received an issue remark stating that the means of diversion might be incorrect and could not be confirmed with available data. Claimants self-objections reiterates that water is pumped at the points of diversion. The *Proposed Abstract* filed and also referred to in the *Affidavit* also lists a pump as the means of diversion.

40C 123510-00

7. Claimants filed a self-objection on December 1, 2017 for claim 40C 123510-00. The self-objection states that the purpose of the right, listed on the abstract as fish and wildlife, was incorrect and should be changed to a stock water right.

8. On November 14, 2019, the Court set a filing deadline for Claimants to submit information or evidence supporting their self-objection.

9. On January 7, 2020, Claimant filed a *Notice of Filing of Additional Information/Evidence* pertaining to case 40C-R248. However, the information submitted did not address Claimant’s self-objection to claim 40C 123510-00.

10. On January 27, 2020, the Court set a show cause filing deadline for Claimant to submit information or evidence of *historical* use of the right regarding the purpose of right element listed on the self-objection.

11. On February 24, 2020, Claimant filed an *Affidavit of Michael P. Turley, Notice of Filing of Evidence Regarding Claim 40C 123510-00* containing six pictures depicting historical use of the right, and a proposed abstract for claim 40C 123510-00. In his *Affidavit*, Mr. Turley states that for the entirety of his life, 60 years at the time of filing, claim number 40C 123510-00 has been used to water livestock and that he had personally “observed horses and bulls using this water right for as long as I can recall.” Additionally, the pictures attached to the *Notice of Filing* depict evidence of livestock in the area associated with claim 40C 123510-00.

12. Claim 40C 123510-00 also received multiple notice-type issue remarks.

40C 123542-00

13. Claim 40C 123542-00 received the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE DITCH CANNOT BE IDENTIFIED WITH AVAILABLE DATA.

14. On November 14, 2019, the Court set a filing deadline for Claimant to submit information or evidence regarding the point of diversion for claim 40C 123542-00.

15. On January 7, 2020, Claimant filed a *Notice of Filing of Additional Information/Evidence*. Claimant’s *Notice* included a DNRC map. However, the information submitted may have been intended to address Claimant’s self-objection to one of the other claims in the case.

16. On January 27, 2020, the Court set a show cause filing deadline for Claimant to submit information or evidence of *historical* use of the right regarding the issue remark pertaining to the point of diversion.

17. On February 24, 2020, Claimant filed an *Affidavit of Michael P. Turley* and *Notice of Filing of Evidence Regarding Claim 40C 123542-00* containing sixteen pictures

depicting historical use of the right. In his *Affidavit*, Mr. Turley states that historically legal land description should be SESESW Section 14, T29, R29E, Musselshell County.

18. Due to a discrepancy between the *Affidavit* and the Preliminary Decree abstract, a telephone conference between the Court and counsel for Claimant, Michael McGuinness took place after the filing of the *Affidavit*. Subsequently, Claimant filed an *Errata to Affidavit of Michael P. Turley*. The *Errata* denotes that Mr. Turley mistakenly identified the township for the points of diversion in claim 40C 123542-00 as 29N rather than 9N. The proposed modification to the point of diversion for 40C 123542-00 would be as follows:

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	<u>SESESWSWSESW</u>		14	9N	29E	Musselshell

40C 128627-00

19. Claimants filed a self-objection on December 1, 2017 for claim 40C 128627-00. The self-objection states that the purpose of the right, listed on the abstract as fish and wildlife, was incorrect and should be changed to a stock water right.

20. On November 14, 2019, the Court set a filing deadline for Claimants to submit information or evidence supporting their self-objection.

21. On January 7, 2020, Claimant filed a *Notice of Filing of Additional Information/Evidence* pertaining to case 40C-R248. However, the information submitted did not address Claimant's self-objection to claim 40C 128627-00.

22. On January 27, 2020, the Court set a show cause filing deadline for Claimant to submit information or evidence of *historical* use of the right regarding the purpose of right element listed on the self-objection.

23. On February 24, 2020, Claimant filed an *Affidavit of Michael P. Turley* and *Notice of Filing of Evidence Regarding Claim 40C 128627-00* containing seven pictures depicting historical use of the right. In his *Affidavit*, Mr. Turley states that for as long as he could recall, claim number 40C 128627-00 has been used to provide water to livestock and that "[i]n fact, I can recall that my grandmother used the water right to provide water for her sheep. Due to its elevation, the place of use was easier for the sheep to get to than

other water sources.” Additionally, the pictures attached to the *Notice of Filing* depict evidence of livestock in an about the area associated with claim 40C 128627-00.

### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

5. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

6. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

7. Notice is required to other water users if a motion to amend will adversely affect other water rights. Section 85-2-233(6), MCA.

8. A claimant asserting an amendment to its claim has the burden to show that the historical use of the claim is accurately reflected by the requested amendment. *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

9. The Court may correct a clerical mistake found in a judgment, order, or other part of the record on motion or on its own, with or without notice. Rule 60(a), M.R.Civ.P.

### CONCLUSIONS OF LAW

#### 40C 123507-00

1. The evidence in the record is sufficient to resolve the self-objections and issue remarks placed on claim 40C 123507-00.

2. The combination of the information and evidence submitted in Claimant's *Notices of Evidence, Affidavit, Proposed Abstract, Errata to Affidavit, and Amended Proposed Abstract* more accurately reflects the historical usage for claim 40C 123507-00. Therefore, the point of diversion should be modified as described in Finding of Fact No. 4. The flow rate should be modified as described in Finding of Fact No. 5. The period of diversion and period of use should be modified to reflect historical usage from April 1 to October 15. These modifications do not have the reasonable potential to adversely affect other water rights as they are a correction to the abstract which does not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this modification is not required.

3. The evidence shows by a preponderance that the means of diversion for claim 40C 123507-00 should be modified from "dam" to "pump" as stated in Finding of Fact No. 6. This modification resolves the means of diversion issue remark placed on the claim from the DNRC.

4. The notice-type issue remark on claim 40C 123507-00 served its notice purpose and should be removed from the claim.

#### 40C 123510-00

5. Claimant's *Affidavit* and *Notice of Filing of Evidence* have shown by a preponderance of the evidence that the claim has historically been used as a stock water claim. The purpose of right element should be modified as described in Finding of Fact No. 11.

6. The notice-type issue remarks appearing on claim 40C 123510-00 served their notice purpose and should be removed from the claim.

40C 123542-00

7. Claimant's *Affidavit, Notice of Filing of Evidence, and Errata to Affidavit* has shown by a preponderance that the point of diversion should be modified to reflect the changes outlined in Finding of Fact No. 18. This modification resolves the issue remark placed on the claim by the DNRC. The modification does not have the reasonable potential to adversely affect other water rights as it is a correction to the abstract which does not make any change to the actual historical use of the claimed right on the ground. Notice by publication of this modification is not required.

40C 128627-00

8. Claimant's *Affidavit and Notice of Filing of Evidence* show by a preponderance that the historical use for claim 40C 128627-00 is as a stock water right rather than a fish and wildlife right. The purpose of right element should be modified according to the description listed in Finding of Fact No. 23.

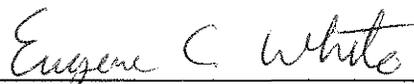
9. The notice-type issue remark on claim 40C 128627-00 served its notice purpose and should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claims reflecting the recommended changes is attached to this Report and a copy of the maps depicting the corrected places of use have been placed in the claim files.

DATED this 18<sup>th</sup> day of June, 2020.

  
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Eugene C. White  
Water Master

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