

Montana Water Court  
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ELECTRONICALLY FILED

40A-0130-R-2021

December 1, 2021

Montana Water Court

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

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CLAIMANT: Heiken Farms Inc.

OBJECTOR: State of Montana (Board of Land Commissioners)

**CASE 40A-0130-R-2021**  
40A 48646-00

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

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the 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**

Claim 40A 48646-00 appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. The claim is owned by Heiken Farms Inc. The claim received an objection from the State of Montana Board of Land Commissioners, Trust Land Management Division (TLMD). The claim also received several issue remarks. Issue remarks are notations identifying potential legal or factual issues with water rights and the Water Court is required to resolve these potential issues.

FINDINGS OF FACT

1. Claim 40A 48646-00 is a sprinkler irrigation claim for 455.00 acre-feet (AF) from Painted Robe Creek. The claimed water is diverted in the NWNWSW of Section 10, T5N, R22E, Golden Valley via a dam and onstream reservoir. The place of use was decreed as follows:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	30.00		SE	9	5N	22E	Golden Valley
2	<u>210.00</u>		W2	9	5N	22E	Golden Valley
Total:	240.00						

2. TLMD objected to the claim based on ownership. Based on *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985), TLMD stated that it should be added as a co-owner based on the following:

- The State of Montana acquired the majority of Place of Use ID No. 1 and all of Place of Use ID No. 2 on August 23, 1926.
- The GLO survey was accepted on December 29, 1883.
- The priority date of claim 40A 48646-00 is June 12, 1972.

3. The claim also received the following substantive issue remark:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 5 TIMES THE CAPACITY OF THE RESERVOIR.

4. On July 12, 2021, the parties filed their *Status Report*. The *Status Report* indicated the parties reached an agreement resolving TLMD's objection and requested that Claimant meet with the DNRC to resolve the volume issue remark.

5. Based on this information, the Court ordered Claimant to meet with DNRC to resolve the volume issue remark.

6. On October 8, 2021, Water Resources Specialist Matt Schmidt file his *Memorandum*. The *Memorandum* found it was reasonable that Claimant historically used a volume of 455.00 AF for irrigation and recommended the volume issue remark be removed from the claim.

7. Based on the information in the *Memorandum*, the annual yield of Painted Robe Creek far exceeds the claimed volume, and it is plausible that Claimant fills their reservoir several times each year. Additionally, the claimed volume of 455.00 AF for 240.00 acres of irrigation does not exceed the DNRC’s standard guideline for water use in climactic Area II.

8. Claim 40A 48646-00 also received the following notice-type issue remarks:

THE CLAIMANT DID NOT IDENTIFY THE PERIOD OF DIVERSION FOR THIS RIGHT. A PERIOD OF DIVERSION HAS BEEN ADDED TO MATCH THE PERIOD OF USE. IF NO OBJECTIONS ARE RECEIVED TO THE PERIOD OF DIVERSION OR PERIOD OF USE, THOSE ELEMENTS WILL BE DECREED AS SHOWN ON THIS ABSTRACT AND THIS ISSUE REMARK WILL BE REMOVED FROM THIS CLAIM.

MEANS OF DIVERSION AND RESERVOIR RECORD WERE MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

9. TLMD’s objection to claim 40A 48646-00 did not include the period of diversion or means of diversion. Because these elements did not receive objections, as stated in the text of the issue remarks, they will be removed from the claims.

#### 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. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. 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.

6. 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.

7. 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.

8. If a claimant agrees to reduce or limit a claim, the Water Court may accept the reduction or limitation without reviewing further evidence, unless an unresolved issue remark remains. Rule 17(c), W.R.Adj.R.

9. A lessee who makes an appropriation of water on school trust land does so on behalf of the State. *Dep't of State Lands v. Pettibone*, 216 Mont. 361, 368, 702 P.2d 948, 952 (1985).

10. The title to a water right appropriated on school trust land vests in the State. *Pettibone*, 216 Mont. at 376, 702 P.2d at 957.

11. Although certain land sections were given to the State by the federal government for school trust purposes in the Enabling Act, title could not vest until after the land was surveyed, the plat was approved by the proper federal authorities, and the State was admitted to the Union. (See *Clemmons v. Gillette*, 33 Mont. 321, 83 P. 879 (1905); *Powell County v. 5 Rockin' MS Angus Ranch, Inc.*, 324 Mont. 204, 102 P.3d 1210(2004)).

If, at the time of the appropriation, title was not vested in the State, the claim is properly owned by the private appropriator. A water right claim on State land may also be properly owned by a private appropriator if that private appropriator has compensated the State for the ownership of the water right claim.

## CONCLUSIONS OF LAW

1. TLMD and Claimant showed by a preponderance of the evidence that *Pettibone* applies to claim 40A 48646-00 and TLMD should be added as a co-owner to the claim.

2. Based on the information in the *Memorandum*, the volume issue remark does not overcome the prima facie status of the claim. The decreed volume of 455.00 AF is historically accurate and should remain on the claim. The volume issue remark should be removed.

3. The notice-type issue remarks served their notice purposes. Because the period of diversion and means of diversion elements did not receive objections, these remarks should be removed from the claim without changes to the elements.

## 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 claim reflecting the recommended changes is attached to this Report.

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Melissa Lockman  
Senior Water Master

### **Service via USPS Mail**

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### **Service via Electronic Mail**

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**Notice: Service List Updated 11.18.21**

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
MUSSELSHELL RIVER, ABOVE ROUNDUP  
BASIN 40A**

**Water Right Number:** 40A 48646-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** HEIKEN FARMS INC  
%GARY HEIKEN  
PO BOX 13  
BROADVIEW, MT 59015 0013  
  
MONTANA STATE BOARD OF LAND COMMISSIONERS  
TRUST LAND MANAGEMENT DIVISION  
PO BOX 201601  
HELENA, MT 59620 1601

**Priority Date:** JUNE 12, 1972

**Type of Historical Right:** FILED

**Purpose (Use):** IRRIGATION

**Irrigation Type:** SPRINKLER

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR.

**Volume:** 455.00 AC-FT

**Climatic Area:** 2 - MODERATELY HIGH

**Maximum Acres:** 240.00

**Source Name:** PAINTED ROBE CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWNWSW	10	5N	22E	GOLDEN VALLEY

**Period of Diversion:** APRIL 1 TO OCTOBER 31

**Diversion Means:** DAM

MEANS OF DIVERSION INCLUDES A PUMP.

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NWNWSW	10	5N	22E	GOLDEN VALLEY

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 13.00 FEET

**Depth:** 10.00 FEET

**Surface Area:** 23.70 ACRES

**Capacity:** 94.80 ACRE-FEET

**Period of Use:** APRIL 1 TO OCTOBER 31

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
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