

Montana Water Court

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

\*\*\*\*\*

CLAIMANTS: Mary Faith Morris; Kirk R. & Elloise G. Warner  
Trust; Springwater Colony; Bar Nothing Ranch  
Trust

CASE 40A-0160-R-2021  
40A 202003-00  
40A 206005-00

**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. If 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

Claims 40A 202003-00 and 40A 206005-00 appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. Claim 40A 202003-00 is owned by Mary Faith Morris and the Kirk R & Elloise G Warner Trust. Claim 40A 206005-00 is owned by all of the Claimants listed above. The claims did not receive objections, counterobjections, or notices of intent to appear but did receive issue remarks during the DNRC's claims reexamination.

### FINDINGS OF FACT

#### **40A 202003-00**

1. Claim 40A 202003-00 is a flood irrigation claim that diverts water from Roberts Creek via a dam in the SENESW of Section 27, T10N, R15E, Wheatland County.

2. During preparation of the Basin 40A Preliminary Decree, the DNRC added a reservoir record to the point of diversion. The DNRC estimated the size of the reservoir as follows:

Dam Height:	12.00	FEET
Depth:	9.00	FEET
Surface Area:	13.00	ACRES
Capacity:	46.80	ACRE-FEET

3. Based on the estimated reservoir dimensions and the claimed volume of 835.70 acre-feet (AF), the DNRC placed the following issue remark on the claim:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 18 TIMES THE CAPACITY OF THE RESERVOIR.

4. During adjudication of the Basin 40A Temporary Preliminary Decree, claim 40A 202003-00 was called in on motion of the Water Court to address issues with the acres irrigated, volume, and flow rate. Based on the evidence available to the Water Court at that time, the volume was retained as it was claimed on the Statement of Claim – 835.70 AF.

5. The claim examiner's notes supporting the volume issue remark show that the only evidence supporting the issue remark is the fact that the claimed volume exceeds

the capacity of the reservoir. There is no evidence that the claimed volume is historically inaccurate.

6. On June 22, 2021, the Court ordered Claimants to file evidence supporting the historically accurate volume of claim 40A 202003-00 if they believed it was historically inaccurate. The Order stated that if nothing was filed by the deadline, the volume would remain as it appeared in the Basin 40A Preliminary Decree. Nothing was filed by the deadline.

7. Based on the information before the Court, it appears claim 40A 202003-00 is a direct flow irrigation claim. This means that the claim should have received a quantified flow rate rather than a quantified volume. However, flow rate did not appear as an element on the Basin 40A Preliminary Decree. To reflect the historical use of this claim, the following remark should be added to the volume of claim 40A 202003-00:

**PRIMARILY A DIRECT FLOW SYSTEM.**

#### **40A 206005-00**

8. Claim 40A 206005-00 is a stock claim from Roberts Creek and an unnamed tributary of Roberts Creek.

9. Under this claim, stock take water directly from the sources and from an onstream reservoir. Although Point of Diversion ID No. 8 includes a dam located in the NWNE of Section 36, T11N, R14E, Wheatland County, a reservoir record was not included. The claim received the following issue remark:

IT APPEARS THIS CLAIM MAY NEED A RESERVOIR RECORD. REVIEW OF THE CLAIM FILE AND AVAILABLE RESOURCES SUGGESTS A RESERVOIR IS INVOLVED. IF IT IS CONFIRMED A RESERVOIR IS INVOLVED WITH THIS WATER RIGHT, A RESERVOIR PERIOD OF DIVERSION QUESTIONNAIRE WAS SUBMITTED TO THE LEWISTOWN REGIONAL OFFICE ON 01/18/2017 CONFIRMING WATER IS DIVERTED FOR THE RESERVOIR FROM JANUARY 1 TO DECEMBER 31.

10. On January 17, 2017, Joe Hofer from Springwater Colony submitted a reservoir record to the DNRC with the following dimensions:

Dam Height:	12.00	FEET
Depth:	9.00	FEET
Surface Area:	11.70	ACRES
Capacity:	45.90	ACRE-FEET

11. According to the DNRC, the reservoir described by Mr. Hofer is used by a number of claims including claim 40A 206005-00.

12. On June 22, 2021, the Court ordered claimants to file evidence if they did not agree with Mr. Hofer's reservoir dimensions for Point of Diversion No. 8. The Order stated that if nothing was filed by the deadline, a reservoir record would be added to Point of Diversion No. 8 using the dimensions provided by Mr. Hofer. Nothing was filed by the deadline.

### **Notice-Type Issue Remarks**

13. Claim 40A 202003-00 received the following notice-type issue remark:

PRIORITY DATE WAS CHANGED FROM JUNE 30, 1973 TO DECEMBER 31, 1962, TO CONFORM TO THE EVIDENCE. BECAUSE PRIORITY DATE WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

14. No objections were filed to the priority date of claim 40A 202003-00. Therefore, the remark served its notice purpose, and the remark should be removed from the claim.

15. Claims 40A 202003-00 and 40A 206005-00 received the following notice-type issue remarks:

#### *40A 202003-00*

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.

#### *40A 2062005-00*

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.

SOURCE NAME AND POINT OF DIVERSION 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.

16. These notice-type issue remarks identify elements modified as a result of DNRC review pursuant to Montana Water Court reexamination orders. The remarks indicate that if no objections are filed, the elements of the claim will remain as they appear on the abstract and the remarks will be removed. Neither claim received objections.

## 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.

## CONCLUSIONS OF LAW

### **40A 202003-00**

1. The volume issue remark does not overcome the *prima facie* status of claim 40A 202003-00. The volume was previously adjudicated by the Water Court and there is no additional evidence showing the decreed volume is historically inaccurate. The volume should remain as it appeared in the Basin 40A Preliminary Decree and the

volume information remark described in Finding of Fact No. 7. This resolves the volume issue remark, and the remark should be removed from the claim.

#### **40A 206005-00**

2. The point of diversion issue remark overcomes the *prima facie* status of the claim. Based on the information provided by Mr. Hofer, a reservoir record should be added to Point of Diversion No. 8 with the dimensions provided in Finding of Fact No. 9. These modifications resolve the point of diversion issue remark, and the remark should be removed from the claim.

#### **Notice-Type Issue Remarks**

3. The priority date issue remark on claim 40A 202003-00 served its notice purpose and should be removed from the claim. The priority date should remain as it appeared in the Basin 40A Preliminary Decree.

4. The notice-type issue remarks in Finding of Fact No. 15 provide notice of the changes made after completion of the Temporary Preliminary Decree proceedings and prior to issuance of the Preliminary Decree. The remark does not raise unresolved issues that need to be addressed. No proceedings are required to resolve the remarks; the remarks should be removed from the abstracts.

#### **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 each water right claim reflecting the recommended changes is attached to this Report.

---

Melissa Lockman  
Senior Water Master

**Service via USPS Mail**

Bar Nothing Ranch Trust  
% Joel N & Elwood V Schwers Trustees  
PO Box 121  
Judith Gap, MT 59453-0121

Springwater Colony Inc  
% Joe Hofer  
PO Box 782  
Harlowton, MT 59036

Mary Faith Morris  
Kirk R & Elloise G Warner Trust  
Kirk R Elloise G Warner Trustees  
431 N Vermont Ave  
Glendora, CA 91741-2539

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

**Water Right Number:** **40A 202003-00** STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:**  
OKA GRASS RANCH LLC  
880 APOLLO ST  
SUITE 333  
EL SEGUNDO, CA 90245 4700

WARNER, KIRK R & ELLOISE G, TRUST  
KIRK R & ELLOISE G WARNER, TRUSTEES  
431 N VERNON AVE  
GLENDALE, CA 91741

**\*Priority Date:** DECEMBER 31, 1962

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** FLOOD

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

**Volume:** 835.70 AC-FT  
PRIMARILY DIRECT FLOW SYSTEM.

**Climatic Area:** 4 - MODERATELY LOW

**\*Maximum Acres:** 338.00

**Source Name:** ROBERTS 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		SENECA	27	10N	15E	WHEATLAND

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM  
MEANS OF DIVERSION INCLUDES A DITCH.

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENECA	27	10N	15E	WHEATLAND

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 12.00 FEET

**Depth:** 9.00 FEET

**Surface Area:** 13.00 ACRES

**Capacity:** 46.80 ACRE-FEET

**Period of Use:** APRIL 1 TO OCTOBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	90.00		SE	27	10N	15E	WHEATLAND
2	158.00		W2	34	10N	15E	WHEATLAND
3	90.00		N2	35	10N	15E	WHEATLAND
<b>Total:</b>	<b>338.00</b>						

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

**Water Right Number:** 40A 206005-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:**  
BAR NOTHING RANCH TRUST  
% JOEL N & ELWOOD V SCHWERS TRUSTEES  
PO BOX 121  
JUDITH GAP, MT 59453 0121  
  
OKA GRASS RANCH LLC  
880 APOLLO ST  
SUITE 333  
EL SEGUNDO, CA 90245 4700  
  
SPRINGWATER COLONY INC  
% JOE HOFER  
PO BOX 782  
HARLOWTON, MT 59036  
  
WARNER, KIRK R & ELLOISE G, TRUST  
KIRK R & ELLOISE G WARNER, TRUSTEES  
431 N VERNON AVE  
GLEN DORA, CA 91741

**Priority Date:** MAY 6, 1916  
**Type of Historical Right:** USE  
**Purpose (Use):** STOCK  
**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.  
**Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.  
**Source Name:** UNNAMED TRIBUTARY OF ROBERTS CREEK  
**Source Type:** SURFACE WATER  
**Source Name:** ROBERTS CREEK  
**Source Type:** SURFACE WATER  
**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Otr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2	2	9N	15E	WHEATLAND

**Source Name:** ROBERTS CREEK  
**Period of Diversion:** JANUARY 1 TO DECEMBER 31  
**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

2 NW 2 9N 15E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

3 E2 21 10N 15E WHEATLAND

**Source Name:** UNNAMED TRIBUTARY OF ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

4 SW 22 10N 15E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

5 27 10N 15E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

6 E2 34 10N 15E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

7 SW 35 10N 15E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

8 NWNE 36 11N 14E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** DAM

9 NENW 36 11N 14E WHEATLAND

**Source Name:** ROBERTS CREEK

**Period of Diversion:** JANUARY 1 TO DECEMBER 31

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Reservoir:** OFFSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
NWNE	36	11N	14E	WHEATLAND	

**Diversion to Reservoir:** DIVERSION # 8

**Dam Height:** 12.00 FEET

**Depth:** 9.00 FEET

**Surface Area:** 11.70 ACRES

**Capacity:** 45.90 ACRE-FEET

**Period of Use:** JANUARY 1 TO DECEMBER 31

**Place of Use:**

<b>ID</b>	<b>Acres</b>	<b>Govt Lot</b>	<b>Qtr</b>	<b>Sec</b>	<b>Twp</b>	<b>Rge</b>	<b>County</b>
1			E2	2	9N	15E	WHEATLAND
2			NW	2	9N	15E	WHEATLAND
3			SW	5	10N	15E	WHEATLAND
4			E2	6	10N	15E	WHEATLAND
5			E2	21	10N	15E	WHEATLAND
6			SW	22	10N	15E	WHEATLAND
7				27	10N	15E	WHEATLAND
8			E2	34	10N	15E	WHEATLAND
9			SW	35	10N	15E	WHEATLAND
10			N2	36	11N	14E	WHEATLAND
11			S2	31	11N	15E	WHEATLAND