

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

CLAIMANTS: Janet Whelan; John H. Whelan; Patrick D. Whelan;
Wendy Jo Whelan

40A-0476-R-2020

40A 205276-00

40A 205277-00

40A 205278-00

40A 205279-00

40A 205280-00

40A 205281-00

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 to 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

Water Right Claims 40A 205276-00, 40A 205277-00, 40A 205278-00, 40A 205279-00, 40A 205280-00, 40A 205281-00 appeared in the Preliminary Decree for the Musselshell River, above Roundup (Basin 40A). These claims received issue remarks.

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination or by Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims did not receive any objections or notices of intent to appear.

The Court consolidated these claims into Water Court Case 40A-0476-R-2021. The consolidation order set a filing deadline by which Claimants were to file information resolving the issue remarks. Claimants filed a response on February 10, 2020.

FINDINGS OF FACT

1. Each above-captioned claim appeared with an issue remark indicating the relevant claim received an amendment submitted in 2016. The DNRC did not process these amendments.

2. Claim 40A 206279-00 also appeared with an issue remark indicating the DNRC could not confirm the claimed point of diversion.

3. Claimants’ response consists of a signed and notarized affidavit. The affidavit is signed by John H. Whelan, Wendy Jo Whelan, Janet L. Whelan, and Patrick D. Whelan.

4. Claimants state in their affidavit that the period of use for flood irrigation is year round and that stock are also watered on a year round basis.

5. Claimants state in their affidavit that the place of use for Claim 40A 205281-00 should be “3 acres more or less.” Claimants state the spring serves a main house, a guest house, a barn, a yard, a corral, and various water troughs.

6. The period of diversion for each above-captioned claim should be January 1 to December 31.

7. The following information remark should be added to Claims 40A 205276-00, 40A 205277-00, 40A 205278-00, 40A 205279-00, 40A 205280-00:

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT.

8. The number of households served by Claim 40A 205281-00 should be “2” and the maximum acres should be “3.00.”

9. The issue remarks should be removed from each above-captioned claim.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. 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.
2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.
3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.
4. Two purposes of one water right may be reflected on a single abstract if evidence demonstrates historical use. *See In Re VE Ranch*, 2015 Mont. Water LEXIS 19. Evidence of historical use.

CONCLUSIONS OF LAW

1. The changes described in the Findings of Fact may be made because the evidence in the record overcomes the prima facie status of each relevant claim by a preponderance of the evidence.
2. The evidence in the record and the proposed changes provide the Court with a sufficient basis to resolve and remove each issue remark from the above-captioned claims.
3. Claim 40A 206279-00 may be decreed without modification to the point of diversion because the issue remark does not overcome the prima facie status of the claim by a preponderance of the evidence.
4. The addition of a remark indicating the historical use of the water rights claimed by 40A 205276-00, 40A 205277-00, 40A 205278-00, 40A 205279-00, 40A

205280-00 for stock use is proper because the evidence demonstrates that each right has historically been used for both irrigation and stock watering.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state's centralized record system.

Colton J. Lauer
Water Master

Service via USPS Mail

Janet Whelan
John H Whelan
Patrick D Whelan
Wendy Jo Whelan
PO Box 236
Two Dot, MT 59085-0236

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

Water Right Number: 40A 205276-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: JULY 1, 1919

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 251.33 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 15.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		NESENW	23	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Period of Use: JANUARY 1 TO DECEMBER 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>
1	15.00		W2	23	10N	11E	MEAGHER

Total: 15.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

205276-00 205277-00 205278-00 205279-00 205280-00

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT

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

Water Right Number: 40A 205277-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: JULY 1, 1919

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.13 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 30.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		NENENW	23	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Period of Use: JANUARY 1 TO DECEMBER 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>
1	30.00		W2	23	10N	11E	MEAGHER

Total: 30.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

205276-00 205277-00 205278-00 205279-00 205280-00

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT

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

Water Right Number: 40A 205278-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: JULY 1, 1919

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.13 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 30.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		NENWNW	23	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Period of Use: JANUARY 1 TO DECEMBER 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>
1	30.00		W2	23	10N	11E	MEAGHER
Total:	30.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

205276-00 205277-00 205278-00 205279-00 205280-00

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT

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

Water Right Number: 40A 205279-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: JULY 1, 1919

Type of Historical Right: USE

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.13 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 30.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		NWNWNW	23	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Period of Use: JANUARY 1 TO DECEMBER 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>
1	30.00		W2	23	10N	11E	MEAGHER
Total:	30.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

205276-00 205277-00 205278-00 205279-00 205280-00

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT

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

Water Right Number: 40A 205280-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: MAY 1, 1910

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 282.74 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 5 - LOW

Maximum Acres: 45.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		SWNE	22	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Period of Use: JANUARY 1 TO DECEMBER 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>
1	10.00		NENE	22	10N	11E	MEAGHER
2	35.00		W2	23	10N	11E	MEAGHER
Total:	45.00						

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

205276-00 205277-00 205278-00 205279-00 205280-00

STOCK IS RECOGNIZED AS A VALID ADDITIONAL PURPOSE FOR THIS RIGHT

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

Water Right Number: 40A 205281-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: JANET WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

JOHN H WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

PATRICK D WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

WENDY JO WHELAN
PO BOX 236
TWO DOT, MT 59085 0236

Priority Date: MARCH 17, 1948

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 5.00 GPM

Volume: 1.50 AC-FT

Households: 2

Maximum Acres: 3.00

Source Name: SPRING, UNNAMED TRIBUTARY OF MORRIS CREEK

Source Type: GROUNDWATER

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		NWNWNW	23	10N	11E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: FLOWING

Period of Use: JANUARY 1 TO DECEMBER 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>
1	3.00		NESWNW	23	10N	11E	MEAGHER

Total: 3.00

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

203731-00 205281-00