

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-0478-R-2020
40A 203451-00
40A 203452-00
40A 203453-00
40A 203454-00

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

Water Right Claims 40A 203451-00, 40A 203452-00, 40A 203453-00, 40A 203454-00 appeared in the Preliminary Decree for the Musselshell River, above Roundup (Basin 40A). The 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. The claim did not receive any objections or notices of intent to appear.

The Court consolidated these claims into Water Court Case 40A-0478-R-2020 on February 4, 2020. The consolidation order set a filing deadline by which Claimants were to file responsive information. Claimants filed a response on February 21, 2020.

FINDINGS OF FACT

1. Each above-captioned claim appeared with an issue remark indicating the DNRC received an amendment submission in 2016.

2. Claims 40A 203453-00 and 40A 203454-00 also appeared with the following issue remarks:

DITCH NAME WAS 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.

IT IS UNCLEAR WHERE THE HISTORIC DIVERSION FOR POINT OF DIVERSION NO. 1 IS. IT APPEARS THE ORIGINAL DIVERSION WAS LOCATED IN THE N2SWSW SEC 20 TWP 8N RGE 13E WHEATLAND CO. MODERN PHOTOS HOWEVER SUGGEST THE ORIGINAL DITCH MAY HAVE BEEN CUT OFF BY RIVER MEANDERS.

THE PRIORITY DATE MAY BE QUESTIONABLE. THIS CLAIM IS FOR A FILED APPROPRIATION ON MUSSEL SHELL RIVER WITH A PRIORITY DATE PREDATING CASE NO. 1148, GOLDEN VALLEY COUNTY.

3. The amendment submission for Claim 40A 203451-00 reflects a request to modify the maximum acres element.

4. The amendment submission for Claim 40A 203452-00 reflects a request to modify the period of diversion, maximum acres, and period of use.

5. The amendment submissions for Claims 40A 203453-00 and Claim 40A 203454-00 reflect requests to modify the period of diversion, means of diversion, and period of use.

6. Claimants' February 21, 2020 filing is a sworn affidavit signed by John H. Whelan, Wendy Jo Whelan, Janet L. Whelan, and Patrick D. Whelan. Claimants state the following in the affidavit:

“Period of use for flood irrigation is from January 1 to December 31, of each year as the water is converted via various old ditches used since the 1800’s to flood existing lands and to water livestock on a year round [basis].”

7. Claimants’ further state in their affidavit:

Request Claims 40A 203451-00 and 40A 203452-00 maximum acres be increased to at least 5 acres as water is now and historically used in 3 homes, shops, barns, yards, and large gardens.”

8. Claimants request in the August 11, 2016 amendment form for Claim 40A 203452-00 that the periods of diversion and use be modified to year-round.

9. The periods of diversion and use should be “January 1 to December 31” for Claims 40A 203452-00, 40A 203453-00, and 40A 203454-00.

10. The maximum acres of Claim 40A 203451-00 should be 5.00 acres.

12. The following remark should be added to Claims 40A 203453-00 and 40A 203454-00:

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

13. The Court takes judicial notice of the 1949 Wheatland County Water Resources Survey (WRS).

14. Upon review, the WRS appears to support the claimed legal land description of Point of Diversion No.1 of Claims 40A 203453-00 and 40A 203454-00 (Two Dot Ditch) as it appears in the Preliminary Decree.

15. Claimants did not request any modifications to the legal land descriptions of the above-captioned claims.

16. No party objected to the priority date of any above-captioned claim.

17. The issue remarks should be removed.

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.

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 element on each claim.

2. The addition of a remark indicating the historical use of the water rights claimed by Claims 40A 203453-00 and 40A 203454-00 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 203451-00 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: APRIL 30, 1918

Type of Historical Right: USE

Purpose (Use): DOMESTIC

Flow Rate: 7.00 GPM

Volume: 4.00 AC-FT

Households: 2

Maximum Acres: 5.00

Source Name: GROUNDWATER

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		NWSWSW	22	8N	13E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	5.00		NWSWSW	22	8N	13E	WHEATLAND

Total: 5.00

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

Water Right Number: 40A 203452-00 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: AUGUST 31, 1960

Type of Historical Right: FILED

Purpose (Use): DOMESTIC

Flow Rate: 15.00 GPM

Volume: 2.00 AC-FT

Maximum Acres: 5.00

Source Name: GROUNDWATER

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		NWSWSW	22	8N	13E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: WELL

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	5.00		NWSWSW	22	8N	13E	WHEATLAND

Total: 5.00

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

Water Right Number: 40A 203453-00 STATEMENT OF CLAIM

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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: APRIL 1, 1892

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 6.00 CFS

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

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 439.00

Source Name: MUSSELSHELL RIVER

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		SWSESE	20	8N	13E	WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: TWO DOT DITCH

2		NESWSE	21	8N	13E	WHEATLAND
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: HARPER DITCH NO. 422

3 SWNWSW 22 8N 13E WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: HARPER DITCH NO. 421

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	22.00		SESE	22	8N	13E	WHEATLAND
2	32.00		SWSE	22	8N	13E	WHEATLAND
3	4.00		NWSW	22	8N	13E	WHEATLAND
4	32.00		SESW	22	8N	13E	WHEATLAND
5	33.00		SWSW	22	8N	13E	WHEATLAND
6	18.00		NENE	27	8N	13E	WHEATLAND
7	12.00		NWNE	27	8N	13E	WHEATLAND
8	6.00		NENW	27	8N	13E	WHEATLAND
9	23.00		NWNW	27	8N	13E	WHEATLAND
10	38.00		NENE	28	8N	13E	WHEATLAND
11	38.00		NWNE	28	8N	13E	WHEATLAND
12	40.00		SENE	28	8N	13E	WHEATLAND
13	40.00		SWNE	28	8N	13E	WHEATLAND
14	38.00		NENW	28	8N	13E	WHEATLAND
15	36.00		NWNW	28	8N	13E	WHEATLAND
16	27.00		S2NW	28	8N	13E	WHEATLAND
Total:	439.00						

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.

203453-00 203454-00 203455-00 203456-00

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

**WATER COURT
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MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A**

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Owners: JANET WHELAN
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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 31, 1885

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 15.00 CFS

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

Climatic Area: 4 - MODERATELY LOW

***Maximum Acres:** 439.00

Source Name: MUSSELSHELL RIVER

Source Type: SURFACE WATER

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<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSESE	20	8N	13E	WHEATLAND

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Ditch Name: TWO DOT DITCH

2		NESWSE	21	8N	13E	WHEATLAND
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Diversion Means: HEADGATE

Ditch Name: HARPER DITCH NO. 422

3 SWNWSW 22 8N 13E WHEATLAND

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: HEADGATE

Ditch Name: HARPER DITCH NO. 421

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	22.00		SESE	22	8N	13E	WHEATLAND
2	32.00		SWSE	22	8N	13E	WHEATLAND
3	4.00		NWSW	22	8N	13E	WHEATLAND
4	32.00		SESW	22	8N	13E	WHEATLAND
5	33.00		SWSW	22	8N	13E	WHEATLAND
6	18.00		NENE	27	8N	13E	WHEATLAND
7	12.00		NWNE	27	8N	13E	WHEATLAND
8	6.00		NENW	27	8N	13E	WHEATLAND
9	23.00		NWNW	27	8N	13E	WHEATLAND
10	38.00		NENE	28	8N	13E	WHEATLAND
11	38.00		NWNE	28	8N	13E	WHEATLAND
12	40.00		SENE	28	8N	13E	WHEATLAND
13	40.00		SWNE	28	8N	13E	WHEATLAND
14	38.00		NENW	28	8N	13E	WHEATLAND
15	36.00		NWNW	28	8N	13E	WHEATLAND
16	27.00		S2NW	28	8N	13E	WHEATLAND
Total:	439.00						

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203453-00 203454-00 203455-00 203456-00

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