

Montana Water Court
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40A-0525-R-2021

December 10, 2021

Montana Water Court

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

* * * * *

CLAIMANTS: Cooney Brothers Family Partnership; Gordon
L. Nash; Leta Cooney Nash

CASE 40A-0525-R-2021

40A 113114-00

40A 113140-00

40A 113144-00

OBJECTOR: Cooney Brothers Family Partnership

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

FINDINGS OF FACT

1. Cooney Brothers Family Partnership (Cooney Brothers) is the record owner of irrigation claim 40A 113114-00. Cooney Brothers, Gordon L. Nash, and Leta Cooney Nash are the record-co-owners of irrigation claims 40A 113140-00 and 40A 113144-00.

2. Cooney Brothers objected to claims 40A 113114-00 and 40A 113140-00.

3. Claim 40A 113114-00 was decreed with the following point of diversion:

1

SWNENW 10 5N 14E SWEET GRASS

and the following issue remark:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SENENW SEC 10 TWP 5N RGE 14E SWEET GRASS COUNTY.

4. Claim 40A 113140-00 was decreed with the following point of diversion:

1

NWNESE 36 6N 14E WHEATLAND

And the following DNRC issue remarks:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NENWSE SEC 36 TWP 6N RGE 14E WHEATLAND COUNTY.

AN AMENDMENT WAS SUBMITTED ON 08/30/2016 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

THE TIMELY FILED OBJECTION OF WILLIAM H. COONEY WAS AMENDED BY CONSENT OF THE PARTIES TO INCLUDE POINT OF DIVERSION. BECAUSE THIS ELEMENT 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.

5. Claim 40A 113144-00 was decreed with the following issue remark:

AN AMENDMENT WAS SUBMITTED ON 08/30/2016 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

6. An Order was issued on September 2, 2021, explaining that based solely on the issue remarks and the record, including the Amendments, it appears the following changes should be made to the claims in this Case:

Claim 40A 113114-00:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	SENENW	SWNENW	10	5N	14E	SWEET GRASS

Claim 40A 113140-00:

ID	Govt Lot	Qtr Sec	Sec	Twp	Rge	County
1	NENWSE	NWNESE	36	6N	14E	WHEATLAND

Claim 40A 113144-00:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	NWNE	NWSWSW	30	6N	15E	WHEATLAND

7. To provide time for Cooney Brothers to address its Objections to claims 40A 113114-00 and 40A 113140-00, and for the parties to address the issue remarks and Objections, an Order was issued. An October 8, 2021 deadline was set for the parties to file statements agreeing or disagreeing with the proposed point of diversion changes to claims 40A 113114-00, 40A 113140-00, and 40A 113144-00. The Order indicated that if nothing was filed by the October 8, 2021 deadline this Master would conclude the parties agree the above-described changes should be made to the claims in this Case.

Another deadline was set for Cooney Brother to file information addressing the Objections by December 3, 2021. The Order indicated that any proposed resolution to the Objections should include proposed abstracts and maps; additionally, all co-Claimants must agree to the proposed changes. The Order stated that if nothing is filed by the deadline, this Master will conclude that Cooney Brothers does not intend to prosecute its Objections and the Objection will be dismissed in the forthcoming Master's Report. Nothing was filed by the December 3, 2021 deadline.

The following language was included in the September 2, 2021 Order Setting Filing Deadline:

Failure to comply with the terms of this Order may result in sanctions, up to and including entry of default and termination of a water right claim or dismissal of objections. Rule 22, W.R.Adj.R.

8. This Master began drafting this Master's Report on December 4, 2021. The abstracts were sent for correction on the morning of December 6, 2021.

9. On December 6, 2021, Colleen A. Coyle, counsel for Cooney Brothers, filed a Filing to Address Issue Remarks and Objections. The December 6, 2021 filing is late.

PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court is required to address all issue remarks that appear on a claim as well as any objections the claim receives. Sections 85-2-233, 85-2-247, and 85-2-248, MCA.

2. A properly filed Statement of Claim for an existing water right is *prima facie* proof of its content. Section 85-2-227, MCA. This *prima facie* validity may be overcome by evidence showing that one or more elements of the claim are incorrect. This standard of proof applies to objectors or claimants objecting to their own water right claims. Rule 19, W.R.Adj.R., *Nelson v. Brooks*, 2014 MT 120; 375 Mont.86, 95; 329 P.3d 558, 564.

3. Pursuant to Rule 22, W.R.Adj.R., if a claimant, objector, or intervenor fails to appear at a scheduled conference or hearing or fails to comply with an order issued by the Water Court, the Water Court may issue such orders of sanction with regard thereto as are just. The parties did not meet the October 8, 2021 deadline or the December 3, 2021 deadline set in the Order Consolidating and Order Setting Filing Deadline.

RECOMMENDATIONS

1. Cooney Brothers' Objections to claims 40A 113114-00 and 40A 113140-00 should be dismissed.

2. Claims 40A 113114-00, 40A 113140-00, and 40A 113144-00 should be modified as showing in Finding of Fact No. 6.

3. The issue remarks should be removed from the claims in this Case.

Post Decree Abstracts of Water Right Claims are served with the Report to confirm that the recommended changes have been made in the DNRC's water rights database.

Anika M. Stern
Senior Water Master

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

Water Right Number: 40A 113114-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

***Owners:** COONEY BROTHERS FAMILY PARTNERSHIP
PO BOX 1905
HARLOWTON, MT 59036 1905

Priority Date: JUNE 2, 1902
Type of Historical Right: DECREED
Purpose (Use): IRRIGATION
Irrigation Type: FLOOD
Flow Rate: 1.70 CFS
***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE
***Maximum Acres:** 222.10
***Source Name:** FISH 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		SENENW	10	5N	14E	SWEET GRASS

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

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

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Otr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	134.40		N2	2	5N	14E	SWEET GRASS
2	3.50		NWNWSW	2	5N	14E	SWEET GRASS
3	62.20		E2	3	5N	14E	SWEET GRASS
4	5.50		W2NENE	10	5N	14E	SWEET GRASS
5	10.50		NWNE	10	5N	14E	SWEET GRASS
6	6.00		E2E2NW	10	5N	14E	SWEET GRASS
Total:	222.10						

PLACE OF USE PARCELS 002 AND 004 ARE OWNED BY WILLIAM H. COONEY.
PLACE OF USE PARCELS 001, 003, 005 AND 006 ARE OWNED BY FRANK J. COONEY.

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

Water Right Number: **40A 113140-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GORDON L NASH
PO BOX 267
HARLOWTON, MT 59036 0267

LETA COONEY NASH
PO BOX 267
HARLOWTON, MT 59036 0267

COONEY BROTHERS FAMILY PARTNERSHIP
PO BOX 1905
HARLOWTON, MT 59036 1905

Priority Date: MAY 1, 1903

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 359.00 GPM

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

Climatic Area: 3 - MODERATE

***Maximum Acres:** 208.00

***Source Name:** FISH 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		NENWSE	36	6N	14E	WHEATLAND

Period of Diversion: APRIL 15 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Otr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	72.00		S2	28	6N	15E	WHEATLAND
2	81.00		S2	29	6N	15E	WHEATLAND
3	36.00		SE	30	6N	15E	WHEATLAND
4	12.00		NE	31	6N	15E	WHEATLAND
5	2.00		N2N2	32	6N	15E	WHEATLAND
6	5.00		NWNW	33	6N	15E	WHEATLAND
Total:	208.00						

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

Water Right Number: **40A 113144-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners:
GORDON L NASH
PO BOX 267
HARLOWTON, MT 59036 0267

LETA COONEY NASH
PO BOX 267
HARLOWTON, MT 59036 0267

COONEY BROTHERS FAMILY PARTNERSHIP
PO BOX 1905
HARLOWTON, MT 59036 1905

Priority Date: DECEMBER 15, 1914

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 336.60 GPM

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

Climatic Area: 3 - MODERATE

***Maximum Acres:** 208.00

Source Name: SPRING, UNNAMED TRIBUTARY OF FISH CREEK

Source Type: GROUNDWATER

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		NWNE	30	6N	15E	WHEATLAND

Period of Diversion: APRIL 15 TO OCTOBER 1

Diversion Means: HEADGATE

Period of Use: APRIL 15 TO OCTOBER 1

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Otr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	72.00		S2	28	6N	15E	WHEATLAND
2	81.00		S2	29	6N	15E	WHEATLAND
3	36.00		SE	30	6N	15E	WHEATLAND
4	12.00		NE	31	6N	15E	WHEATLAND
5	2.00		N2N2	32	6N	15E	WHEATLAND
6	5.00		NWNW	33	6N	15E	WHEATLAND
Total:	208.00						