

Montana Water Court  
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ELECTRONICALLY FILED

40A-0529-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

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CLAIMANTS: Christine A. Volf; Jeffrey T. Volf

**CASE 40A-0529-R-2021**  
40A 110098-00  
40A 110117-00

**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

### FINDINGS OF FACT

1. Claimants Christine A. Volf and Jeffrey T. Volf are the record-owners of irrigation claim 40A 110098-00.

2. Claim 40A 110098-00 was decreed with DNRC 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.

RESERVOIR RECORD 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.

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 171 TIMES THE CAPACITY OF THE RESERVOIR. FURTHER, DNRC IS UNCERTAIN IF THE TYPE OF IRRIGATION IS CORRECTLY REFLECTED. NATURAL SUBIRRIGATION TYPICALLY DOES NOT INVOLVE A MANMADE DIVERSION. DNRC IS UNCERTAIN IF A RESERVOIR RECORD SHOULD EXIST ON THIS CLAIM.

3. No objections were filed.

4. The Claimants were ordered to meet with a DNRC employee to address the volume issue remark decreed on claim 40A 110098-00.

5. On November 1, 2021, DNRC Water Resource Specialist Matt Schmidt filed a Memorandum stating he discussed the issue remark with Claimant Jeff Volf. A copy of the Memorandum is attached to this Report. According to Mr. Schmidt:

During an October 12, 2021 meeting with claimant Jeff Volf at the Lewistown DNRC office, Mr. Volf agreed that the decreed volume seemed excessive and expressed willingness to amend the volume of the claim down to the guideline of two fills per year. In other words, Mr. Volf expressed willingness to amend the volume of the claim from 109.60 down to 1.28 acre-feet per year. This amendment, if received and implemented by the Water Court, would resolve the first part of the two-part VMIS issue remark having to do with the excessive volume of the claim.

The second part of the VMIS issue remark is questioning the type of irrigation and how a manmade reservoir could be involved if the claim is truly "natural subirrigation". According to the Claimant, the impounded area of the reservoir contributes to subirrigation around the fringes of the reservoir pool. DNRC has determined that since the foliage surrounding the reservoir appears to be subirrigated in a way that wouldn't occur without the existence of the reservoir, the reservoir record should remain as part of the claim. Since the reservoir is not natural, the word "natural" should be removed from the irrigation type. Therefore, the irrigation type of claim 40A 110098-00 should be modified from "natural subirrigation" to "subirrigation".

Based on Mr. Schmidt's Memorandum, it appears he recommends that the volume for claim 40A 214570-00 be reduced to 1.28 acre-feet and that the irrigation type be changed to "subirrigation".

6. To determine whether Claimants Christine A. Volf and Jeffrey T. Volf agree with the proposed changes to claim 40A 214570-00, an Order was issued setting a deadline for the Claimants to agree or disagree that the claim be changed as follows:

Purpose (Use): IRRIGATION  
Irrigation Type: ~~NATURAL SUBIRRIGATION~~ CONTROLLED SUBIRRIGATION  
Volume: 1.28 ~~109.60~~ AC-FT

The Order indicated that if nothing was filed by the deadline, this Master would conclude the Claimants agree with the proposed changes and a Master’s Report will be issued. The following language was included in the Order:

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.

Nothing was filed by the deadline.

#### PRINCIPLES AND CONCLUSIONS OF LAW

1. The Water Court must 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.

4. The period of diversion and reservoir issue remarks decreed on claim

40A 110098-00 and the means of diversion issue remark decreed on claim 40A 110117-00 are notice-type issue remarks. As no objections were filed, no further proceedings are required.

#### RECOMMENDATIONS

1. Claim 40A 110098-00 should be changed as shown in Finding of Fact No. 6.

2. The issue remarks should be removed from the claims.

A Post Decree Abstract of Water Right Claim is served with the Report to confirm the terms of the claim in the state's centralized record system.

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Anika M. Stern  
Senior Water Master

#### **Service via USPS Mail:**

Christine A. Volf  
Jeffrey T. Volf  
PO Box 69  
Judith Gap, MT 59453-0069

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

**Water Right Number:** 40A 110098-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CHRISTINE A VOLF  
PO BOX 69  
JUDITH GAP, MT 59453 0069

JEFFREY T VOLF  
PO BOX 69  
JUDITH GAP, MT 59453 0069

**Priority Date:** AUGUST 31, 1948

**Type of Historical Right:** USE

**Purpose (Use):** IRRIGATION

**Irrigation Type:** CONTROLLED SUBIRRIGATION

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

**Volume:** 1.28 AC-FT

**Climatic Area:** 4 - MODERATELY LOW

**\*Maximum Acres:** 24.00

**\*Source Name:** UNNAMED TRIBUTARY OF NIEL CREEK

**Source Type:** SURFACE WATER

ALSO KNOWN AS WEST FORK NIEL CREEK

**\*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		NENSW	21	11N	17E	FERGUS

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

**Diversion Means:** DAM

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NENSW	21	11N	17E	FERGUS

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 11.00 FEET

**Depth:** 8.00 FEET

**Surface Area:** 0.20 ACRES

**Capacity:** 0.64 ACRE-FEET

**Period of Use:** MARCH 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>
1	24.00		W2SW	21	11N	17E	FERGUS
<b>Total:</b>	24.00						

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

**Water Right Number:** 40A 110117-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** CHRISTINE A VOLF  
PO BOX 69  
JUDITH GAP, MT 59453 0069

JEFFREY T VOLF  
PO BOX 69  
JUDITH GAP, MT 59453 0069

**Priority Date:** JUNE 30, 1948

**Type of Historical Right:** USE

**Purpose (Use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. 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 NIEL 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		SENESE	20	11N	17E	FERGUS

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

**Diversion Means:** DAM  
THE PERIOD OF DIVERSION HAS BEEN STANDARDIZED BY DNRC FOR THIS CLAIM.

**Reservoir:** ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENESE	20	11N	17E	FERGUS

**Diversion to Reservoir:** DIVERSION # 1

**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			SENESE	20	11N	17E	FERGUS

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

Lewistown Water Resources Regional Office



GREG GIANFORTE, GOVERNOR

PHONE: (406) 538-7459

613 NE Main St, Suite E  
Lewistown, MT 59457

ELECTRONICALLY FILED

MEMORANDUM

40A-0529-R-2021

November 1, 2021

DATE: October 27, 2021

CASE: 40A-0529-R-2021 (Claims 40A 110098-00, 40A 110117-00)

TO: Anika M. Stern  
Water Master

Montana Water Court

FROM: Matt Schmidt  
Water Resources Specialist

CLAIMANT(S): Christine A. Volf; Jeffrey T. Volf

INTRODUCTION:

The September 9, 2021 Order from the Montana Water Court required the Claimants to visit with DNRC to discuss resolution of the following single issue remark on the above-listed claim 40A 110098-00. It also requested the DNRC to provide a memorandum of recommendations on the results. Claimant Jeff Volf visited the Lewistown DNRC office on October 12, 2021 where a discussion took place and a path to resolving the remark was set.

MATERIALS REVIEWED:

Abstracts, scanned claim files, aerial photos, and topographic maps.



## Claim No. 40A 110098-00; Irrigation; Unnamed Tributary of Niel Creek, West Fork

### Issue Remarks:

#### VMIS:

THE CLAIMED VOLUME APPEARS TO BE EXCESSIVE FOR THE CLAIMED PURPOSE. THE CLAIMED VOLUME EQUALS 171 TIMES THE CAPACITY OF THE RESERVOIR. FURTHER, DNRC IS UNCERTAIN IF THE TYPE OF IRRIGATION IS CORRECTLY REFLECTED. NATURAL SUBIRRIGATION TYPICALLY DOES NOT INVOLVE A MANMADE DIVERSION. DNRC IS UNCERTAIN IF A RESERVOIR RECORD SHOULD EXIST ON THIS CLAIM.

### Discussion:

Statement of Claim 40A 214570-00 was filed on January 25, 1982 claiming irrigation rights to 40 acres sourced out of an Unnamed Tributary of Neil Creek with a claimed priority date of August 1918.

The VMIS issue remark was added during reexamination with a comment that the reservoir capacity is estimated by DNRC to be 0.64 acre-feet, and that with a decreed volume of 109.6 acre-feet, 171 reservoir fills would be required to satisfy the volume. A modern review of the reservoir estimation findings is consistent with the original findings that resulted in the reservoir dimensions reflected on current abstracts. These reservoir dimensions were critical factors in adding the VMIS issue remark, since the DNRC guideline for reservoir fills per year is two fills.

During an October 12, 2021 meeting with claimant Jeff Volf at the Lewistown DNRC office, Mr. Volf agreed that the decreed volume seemed excessive and expressed willingness to amend the volume of the claim down to the guideline of two fills per year. In other words, Mr. Volf expressed willingness to amend the volume of the claim from 109.60 down to 1.28 acre-feet per year. This amendment, if received and implemented by the Water Court, would resolve the first part of the two-part VMIS issue remark having to do with the excessive volume of the claim.

The second part of the VMIS issue remark is questioning the type of irrigation and how a manmade reservoir could be involved if the claim is truly “natural subirrigation”. According to the Claimant, the impounded area of the reservoir contributes to subirrigation around the fringes of the reservoir pool. DNRC has determined that since the foliage surrounding the reservoir appears to be subirrigated in a way that wouldn’t occur without the existence of the reservoir, the reservoir record should remain as part of the claim. Since the reservoir is not natural, the word “natural” should be removed from the irrigation type. Therefore, the irrigation type of claim 40A 110098-00 should be modified from “natural subirrigation” to “subirrigation”.

### Recommendation:

If the Court receives and implements an amendment from the Claimants amending the Volume of claim 40A 110098-00 from 109.60 acre-feet down to 1.28 acre-feet per year, and modifies the irrigation type from “natural subirrigation” to “subirrigation”, then DNRC recommends removal of the VMIS issue remark on the claim.

Date: October 27, 2021

Written by: \_\_\_\_\_

Matt Schmidt, Water Resources Specialist  
Lewistown Water Resources Regional Office

Date: October 27, 2021

Reviewed by: \_\_\_\_\_

Scott Irvin, Regional Manager  
Lewistown Water Resources Regional Office

Service List:

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