

Montana Water Court
PO Box 1389
Bozeman, MT 59771-1389
(406) 586-4364
1-800-624-3270
watercourt@mt.gov

40A-0401-R-2020

July 1, 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: Checkerboard Cattle Company LLC; **State of
Montana Board of Land Commissioners**

OBJECTORS: State of Montana Board of Land Commissioners

ON MOTION OF THE MONTANA WATER COURT

CASE 40A-0401-R-2020
40A 29662-00
40A 45699-00
40A 45701-00
40A 188789-00
40A 197970-00

Implied Claim:
40A 30151527

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

Water Right Claims 40A 45699-00, 40A 45701-00, 40A 188789-00, and 40A 197970-0 appeared in the Preliminary Decree for the Musselshell River, above Roundup (Basin 40). The claims received issue remarks as a result of the Department of Natural Resources and Conservation's (DNRC) preparation for the Decree. The claims also received objections filed by the State of Montana.

The Court consolidated these claims into Water Court Case 40A-0401-R-2020 on September 4, 2020. The Consolidation order set an initial status conference for October 13, 2020. The parties agreed upon a settlement deadline, and the Court issued an order setting such deadline on October 13, 2020. The parties filed a stipulation with the Court on January 8, 2021.

FINDINGS OF FACT

1. Each above-captioned claim, except Claim 40A 197970-00, appeared with an issue remark stating the claim would be called in on motion of the Court pursuant to an order dated March 2, 1987.

2. Claim 40A 188789-00 also appeared with an issue remark stating that the DNRC modified the means of diversion. The remark states that it may be removed absent objections.

3. Claim 40A 197970-00 appeared with three issue remarks. One issue remark states that an overlapping ownership remark should be added to the claim because Claims 40A 197970-00, 40A 197976-00, and 40A 215235-00 claim overlapping places of use with different owners. The second issue remark states that the DNRC modified the means of diversion and reservoir record. The remark states that it may be removed absent objections. The third issue remark states that the claimed volume appears to be excessive for the claimed purpose.

4. The January 8, 2021 stipulation is signed by representatives of both parties. Attached to the stipulation are proposed abstracts. There does not appear to have been overreaching, misrepresentation, or fraud in the execution of this stipulation.

Claim 40A 45699-00

5. The parties agree that Point of Diversion/ Place of Use No. 3 is located on land owned by the State of Montana.

6. The parties agree that the Government Land Office Survey of Section 36, T9N, R10E, Meagher County was accepted on October 27, 1873 and that ownership in that section vested with the State on November 8, 1889.

7. The priority date of this claim is December 31, 1900.

8. The parties agree to, and request the Court implement, the generation of an implied claim in the name of the State of Montana using Point of Diversion/ Place of Use No. 3.

9. An implied claim should be generated as requested, and this claim shall be numbered Claim 40A 30151527. The implied claim shall have the same elements as Claim 40A 45699-00 except for the following:

Ownership: Montana, State of, Montana Board of Land Commissioners
Trust Land Management Division
PO Box 201601
Helena, MT 59620

POD/POU: S2 of Section 36, T9N, R10E, Meagher County

Claim 40A 45701-00

10. The parties agree that the claimed place of use in Section 36, T9N, R10E, Meagher County is owned by the State of Montana.

11. This is the same Section 36 discussed in Finding of Fact No. 6.

12. The priority date of Claim 40A 45701-00 is May 25, 1930.

13. The parties agree that this claim should be dismissed as it is redundant of Claim 40A 29662-00 owned by the State of Montana.

14. The parties agree that Claim 40A 29662-00 contains a typographical error. The parties agree, and the State of Montana requests, that Claim 40A 29662-00 should be modified so that the point of diversion and place of use is described as SWNENE of said Section 36.

15. Claim 40A 45701-00 should be dismissed.

16. Claim 40A 29662-00 should be added to this case.

17. The requested modification would not likely have an adverse effect on other water right owners in the area or the basin.

18. The point of diversion and place of use of Claim 40A 29662-00 should be described as SWNENE of Section 36, T9N, R10E, Meagher County.

Claim 40A 188789-00

19. The parties agree that the claimed place of use is located on land owned by the State of Montana.

20. The parties agree that the Government Land Office Survey was accepted on March 4, 1884 and that title to the land vested in the State on September 28, 1907.

21. The priority date of Claim 40A 188789-00 is August 1, 1954. The

22. The parties agree Claim 40A 188789-00 should be dismissed. Accordingly, the claim should be dismissed.

Claim 40A 197970-00

23. The parties agree that Place of Use Nos. 16, 17, and 18 are located on land owned by the State of Montana.

24. The parties agree that the Government Land Office survey for this parcel was accepted on March 4, 1887 and that title to the land Vested in the State on September 28, 1907.

25. The priority date of Claim 40A 197970-00 is June 28, 1920.

26. The parties request the Court add the State of Montana as a co-owner of Claim 40A 197970-00.

27. The parties agree that the volume of this claim has historically been 500 acre feet. This figure is a reduction from 706.32 acre feet.

28. The parties request the Court modify the acreage of Place of Use Nos. 16 and 17 as follows:

16 8.00

17 9.00

29. The parties request the Court modify the Total Acres and Maximum Acres figure to “202.00” acres.

30. The requested modifications to the acreage elements of this claim are reductions.
31. The State of Montana should be added as co-owner to Claim 40A 197970-00.
32. The volume should be reduced to 500.00 acre feet.
33. The acreage of Place of Use Nos. 16 and 17 should be reduced to 8.00 and 9.00 acres respectively.
34. The maximum acres and total acres figures should be reduced to 202.00 acres.
35. 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 State of Montana holds title to water rights perfected on state school trust lands if the water right was perfected after the State gained title to the land. See *Department of State Lands v. Pettibone*, 216 Mont. 361, 702 P.2d 948 (1985).

3. An implied water right claim, or implied claim, “is a claim authorized by the water court to be separated and individually identified from multiple rights evident in one or more claims.” W.R.C.E.R. 2(a)(33). The Water Court “is precluded from generating an implied claim for an additional purpose where the statement of claim and supporting documents make no reference to such use, even if the claimant attests to historical use of the water right for this additional purpose.” *In Re VE Ranch, Inc.*, Water Court Case 40J-261, January 23, 2015, p. 8.

4. The Water Court has the authority to hear all objections to the elements of any claim included in a Court issued Temporary Preliminary Decree or Preliminary Decree. Section 85-2-233, MCA.

5. 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.

CONCLUSIONS OF LAW

1. The evidence in the record is sufficient to support generating Implied Claim 40A 30151527 as requested.

2. The evidence in the record is sufficient to support dismissing Claims 40A 45701-00 and 40A 188789-00.

3. The Court may modify Claim 40A 29662-00 without ordering basin wide notice because the requested amendment will not likely adversely affect other water right owners in the basin.

4. The Court may modify Claim 40A 197970-00 as requested without analysis as to the burden of proof because the requested modifications are reductions.

5. The Court may modify Claim 40A 29662-00 as requested because the evidence in the record overcomes the prima facie status of the claim by a preponderance of the evidence.

6. The evidence in the Record provides the Court with a sufficient basis to resolve and remove each issue remark from each above-captioned claim.

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:

Last Order:

Checkerboard Cattle Company LLC
315 Groveland St
Orlando, FL 32804
(407) 645-2500 W
(407) 509-3950 C
(406) 572-3443 H
bcorino@masseyservices.com
hlm@checkerboardcc.com

Service Via Electronic Mail:

Michael JL Cusick
Cusick, Farve, Mattick & Refling, P.C.
PO Box 1288
Bozeman, MT 59771-1288
(406) 587-5511
office@cmrlawmt.com

~~Kirsten Madsen~~
Michele L. Snowberger
Montana Attorney General
Agency Legal Services Bureau
PO Box 201440
Helena, MT 59620
(406) 444-2026
BLCWaterCourt@mt.gov

Note: Caption and Service List Updated 3-3-21

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

Water Right Number: **40A 29662-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: APRIL 1, 1930

Type of Historical Right: FILED

Purpose (Use): STOCK

Flow Rate: 8.50 GPM

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: SPRING, UNNAMED TRIBUTARY OF MUSSELSHELL RIVER, NORTH FORK

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		SWNENE	36	9N	10E	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			SWNENE	36	9N	10E	MEAGHER

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

Water Right Number: 40A 45699-00 STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: ACTIVE

Owners: CHECKERBOARD CATTLE COMPANY LLC
315 GROVELAND ST
ORLANDO, FL 32804 4052

Priority Date: DECEMBER 31, 1900

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: GREEN CANYON

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		E2	35	9N	10E	MEAGHER
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
2		W2	35	9N	10E	MEAGHER
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
3		E2	31	9N	11E	MEAGHER
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						
4		W2	31	9N	11E	MEAGHER
Period of Diversion: JANUARY 1 TO DECEMBER 31						
Diversion Means: LIVESTOCK DIRECT FROM SOURCE						

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			E2	35	9N	10E	MEAGHER
2			W2	35	9N	10E	MEAGHER

3

E2 31 9N 11E MEAGHER

4

W2 31 9N 11E MEAGHER

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

Water Right Number: **40A 45701-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: CHECKERBOARD CATTLE COMPANY LLC
 315 GROVELAND ST
 ORLANDO, FL 32804 4052

Priority Date:

Type of Historical Right:

Purpose (Use): STOCK

Flow Rate:

Volume:

Source Name: SPRING, UNNAMED TRIBUTARY OF MUSSELSHELL RIVER, NORTH FORK

Source Type: GROUNDWATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

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

Water Right Number: **40A 188789-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: CHECKERBOARD CATTLE COMPANY LLC
 315 GROVELAND ST
 ORLANDO, FL 32804 4052

Priority Date:

Type of Historical Right:

Purpose (Use): STOCK

Flow Rate:

Volume:

Source Name: UNNAMED TRIBUTARY OF MUSSELSHELL RIVER, NORTH FORK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

Period of Use:

Place of Use:

Remarks:

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT.

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

Water Right Number: **40A 197970-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: CHECKERBOARD CATTLE COMPANY LLC
315 GROVELAND ST
ORLANDO, FL 32804 4052

MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: JUNE 28, 1920

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

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

Volume: 500.00 AC-FT

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 202.00

Source Name: FLAGSTAFF 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		NENENE	13	9N	9E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: DAM

MEANS OF DIVERSION INCLUDES A HEADGATE.

Reservoir: ONSTREAM **Reservoir Name:** HOLLIDAY FLAGSTAFF
RESERVOIR

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	NE	13	9N	9E	MEAGHER

Diversion to Reservoir: DIVERSION # 1

Dam Height: 41.00 FEET

Depth: 38.00 FEET

Surface Area: 18.72 ACRES

Capacity: 250.00 ACRE-FEET

SEE THE RESERVOIR WORKSHEET IN THE CLAIM FILE FOR ADDITIONAL
RESERVOIR DATA.

Period of Use: MAY 1 TO OCTOBER 1

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	14.00		SESE	7	9N	10E	MEAGHER
2	24.00		SWSE	7	9N	10E	MEAGHER
3	21.00		SESW	7	9N	10E	MEAGHER
4	10.00		SWSW	7	9N	10E	MEAGHER
5	4.00		NESE	8	9N	10E	MEAGHER
6	5.00		NWSE	8	9N	10E	MEAGHER
7	11.00		SESE	8	9N	10E	MEAGHER
8	22.00		SWSE	8	9N	10E	MEAGHER
9	10.00		E2SW	8	9N	10E	MEAGHER
10	13.00		SWSW	8	9N	10E	MEAGHER
11	3.00		SESE	9	9N	10E	MEAGHER
12	23.00		SWSE	9	9N	10E	MEAGHER
13	10.00		SESW	9	9N	10E	MEAGHER
14	5.00		SWSW	10	9N	10E	MEAGHER
15	9.00		NWNW	15	9N	10E	MEAGHER
16	8.00		NENE	16	9N	10E	MEAGHER
17	9.00		NWNE	16	9N	10E	MEAGHER
18	1.00		NENW	16	9N	10E	MEAGHER
Total:	202.00						

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.

197969-00 197970-00 197972-00 197973-00 197976-00 197977-00
197978-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE ASSOCIATED WHICH MEANS THE RIGHTS SHARE THE SAME PLACE OF USE.

81943-00 197970-00 197972-00 197973-00 197976-00 197977-00

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.

197966-00 197970-00 198007-00

APPLICATION FOR CHANGE RECEIVED 03/07/1989 FOR CHANGE IN POINT OF DIVERSION. APPLICATION FOR CHANGE RECEIVED 03/07/1989 IS TERMINATED. SEE 40A 73809-00.

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

Water Right Number: **40A 30151527** STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners: MONTANA STATE BOARD OF LAND COMMISSIONERS
TRUST LAND MANAGEMENT DIVISION
PO BOX 201601
HELENA, MT 59620 1601

Priority Date: DECEMBER 31, 1900

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: GREEN CANYON

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		S2	36	9N	10E	MEAGHER

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

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			S2	36	9N	10E	MEAGHER