

40A-0085-R-2020

September 22, 2021

Montana Water Court

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

CLAIMANT: Leonard Rinehart

40A-0085-R-2020

40A 5016-00

40A 5017-00

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

Claims 40A 5016-00 and 40A 5017-00 appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. The claims are owned by Leonard Rinehart. The claims did not receive objections, counterobjections, or notices of intent to appear but did receive issue remarks during the DNRC's claims reexamination.

FINDINGS OF FACT

1. Claims 40A 5016-00 and 40A 5017-00 are irrigation claims. The claims appeared in the Basin 40A Preliminary Decree with their means of diversion type as "multiple". The claims received the following issue remark:

THE CLAIMED MEANS OF DIVERSION MAY BE INCORRECT AND CANNOT BE CLARIFIED DUE TO LACK OF DATA.

2. On September 9, 2020, the Court ordered Mr. Rinehart to meet with personnel from the DNRC to resolve the means of diversion issue remark. On November 16, 2020, DNRC Water Resources Specialist Matt Schmidt filed his Memorandum in this matter. Mr. Schmidt summarized his conversation with Mr. Rinehart as follows:

During an October 28, 2020 phone call with claimant Leonard Rinehart, Rinehart stated that his property lies upland, off the stream and that he has no knowledge of any diversion from Halfbreed Creek in the area. He stated that he was concerned about his groundwater resources, which are not part of case 40A-0085-R-2020.

3. Mr. Schmidt stated that "More information is needed for DNRC to refine the means of diversion on these claims. ...DNRC has exhausted its resources including aerial photos and Water Resources Survey Notes that do not specify any information about the means of diversion of these claims."

4. Mr. Schmidt also found that:

DNRC continued to research the facts surrounding the case and found that the owner of record appears incomplete. Other property owners appear to own pieces of the water right's place of use. There appear to be about eight additional potential owners distributed across 27 geocodes.

5. In light of the potentially incomplete ownership records, Mr. Schmidt recommended that "[i]t may be prudent to pursue ownership updates in this case before issuing any recommendations regarding the DMIS issue remarks because there are potentially additional claimants who may be able to provide more information."

6. On January 13, 2021, based on Mr. Schmidt's Memorandum, the Court issued its *Order Providing Notice of Potential Ownership and Order Setting Filing Deadline*. The *Order* provided notice of potential ownership to 8 potential owners and required them to file an ownership update form (provided with the *Order*) by February 19, 2021. Nothing was filed by the deadline and to date there are no pending ownership updates in the DNRC Database. As stated in the *Order*, “[i]f ownership updates are not filed, the Court will move forward with resolving the issue remarks on the claims based on information provided by Mr. Rinehart.”

7. In addition to the means of diversion issue remark, claim 40A 5017-00 received the following issue remark:

THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE MAY BE QUESTIONABLE. DOCUMENTATION TO SUPPORT THE TYPE OF HISTORICAL RIGHT AND PRIORITY DATE WAS NOT SUBMITTED WITH THIS CLAIM.

8. It appears the DNRC mistakenly left this remark off of claim 40A 5016-00 because no documentation supporting the type of historical right and priority date were submitted for claim 40A 5016-00 either. Because there is no supporting documentation, there is no evidence clarifying the historically accurate means of diversion. The Statement of Claim for both claims simply checked every available means of diversion type.

9. There is no evidence in the claim files showing how water is diverted under either claim. Additionally, based on Mr. Rinehart's statements, it appears water may no longer be used under these claims. Without further information, the means of diversion and type of right/priority date issue remarks cannot be resolved, and the claims will be dismissed.

10. Based on this information, the Court set an order for Claimant (or the potential owners) to show cause why the claims should not be dismissed. On May 6, 2021, Brian Tatman filed a response to the show cause order. Although Mr. Tatman did not provide any information specifically addressing the issue remarks, he did provide some background on water use in this area. On May 7, 2021, the Musselshell County Board of County Commissioners filed a statement indicating that it could not identify the

basis on which they were flagged as a potential owner in this matter. Musselshell County will be left on the service list of this matter so they may track resolution of the issue remarks, however if they do not believe they have an ownership interest in these claims, no further participation by them is necessary.

11. On May 17, 2021, the Court held a status conference in this matter to identify the appropriate owners in this matter and discuss how best to move forward with this matter. Leonard Rinehart, Donna Marsh, and Mike Goffney (on behalf of Musselshell County) attended the status conference. Matt Schmidt of the DNRC also appeared. No other potential claimants participated in the call. No one on the call knew of anyone using these water rights. Mr. Rinehart confirmed that he has not used them.

12. On June 29, 2021, the Court ordered Mr. Rinehart and the potential owners to show cause why claims 40A 5016-00 and 40A 5017-00 should not be dismissed. The order stated that if nothing was filed by the deadline, the claims would be dismissed. Nothing was filed by the deadline.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is *prima facie* proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. *Prima facie* proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. 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.

4. If *prima facie* status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the *prima facie* status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

CONCLUSIONS OF LAW

1. The means of diversion issue remark overcomes the *prima facie* status of claims 40A 5016-00 and 40A 5017-00. There is no evidence in the claim files showing how water is diverted under either claim. Additionally, information provided by Mr. Rinehart shows water is no longer diverted under these claims.

2. Because the means of diversion issue remark overcomes the *prima facie* status of claims 40A 5016-00 and 40A 5017-00 and are unable to be resolved, combined with the information provided by Mr. Rinehart, claims 40A 5016-00 and 40A 5017-00 should be dismissed.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court dismiss claims 40A 5016-00 and 40A 5017-00.

A post decree abstract of each water right claim reflecting the recommended dismissal is attached to this Report.

Melissa Lockman
Water Master

Service via USPS Mail

Leonard Rinehart
424 N Alabama St
Butte, MT 59701-9032
406-496-4686 W
406-723-9258 H

Service via USPS Mail

Potential Owner
George Dale Marsh
4685 US Highway 87 S
Roundup, MT 59072-6911

Potential Owner

Owen & Andrea Thatcher
20 Stillwater St.
Roundup, MT 59072-6926

Potential Owner

Kim Baker
4655 US Highway 87 S
Roundup, MT 59072-6911

Potential Owner

Musselshell County
506 Main St.
Roundup, MT 59072-2426

Potential Owner

Brian Tatman
5 Stillwater St.
Roundup, MT 59072-6926

Potential Owner

Pamela Munyan
16 Stillwater St.
Roundup, MT 59072-6926

Potential Owner

Ronald J. McCleary
25 Stillwater St.
Roundup, MT 59072-6926

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

Water Right Number: **40A 5016-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners: LEONARD RINEHART
424 N ALABAMA ST
BUTTE, MT 59701 9032

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: HALFBREED CREEK

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 5017-00** STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: **DISMISSED**

Owners: LEONARD RINEHART
424 N ALABAMA ST
BUTTE, MT 59701 9032

Priority Date:

Type of Historical Right:

Purpose (Use): IRRIGATION

Flow Rate:

Volume:

Source Name: HALFBREED CREEK

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.