

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

\* \* \* \* \*

CLAIMANTS: Jeralee Heiken; Joseph C. Heiken

**CASE 40A-0104-R-2022**

40A 130867-00

40A 130868-00

40A 130869-00

**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**

The above-captioned claims appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. The claims are owned by Joseph and Jeralee Heiken. The claims did not receive objections, counterobjections, or notices of intent to appear but did receive issue remarks during the DNRC's claims reexamination. Issue remarks are notations identifying potential legal or

factual issues with water rights, and the Water Court is required to resolve these potential issues.

### FINDINGS OF FACT

#### **40A 130867-00**

1. Claim 40A 130867-00 appeared in the Basin 40A Preliminary Decree as a stock claim for stock drinking from a reservoir in the SENENE of Section 22, T10N, R19E, Golden Valley County.

2. The claim received the following issue remark:

THE POINT OF DIVERSION, RESERVOIR RECORD, AND PLACE OF USE ARE IN QUESTION. THERE DOES NOT APPEAR TO BE A RESERVOIR AT THE CLAIMED LOCATION. THE RESERVOIR APPEARS TO ACTUALLY BE LOCATED IN THE SENESW SEC 15 TWP 10N RGE 19E GOLDEN VALLEY CO.

3. The Court ordered Claimants to file evidence showing the historical location of the claimed reservoir if they did not agree with the DNRC's proposed corrections. The Order stated that if nothing was filed by the deadline, the point of diversion, reservoir record, and place of use would be corrected to the SENESW of Section 15, T10N, R19E, Golden Valley County. Nothing was filed by the deadline.

#### **40A 130869-00**

4. Claim 40A 130869-00 appeared in the Basin 40A Preliminary Decree as a flood irrigation claim that diverts water from Merrils Springs Creek via a headgate in the SWSENE of Section 2, T10N, R19E, Golden Valley County. The claim received the following issue remark:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE NESWNE SEC 2 TWP 10N RGE 19E GOLDEN VALLEY COUNTY.

5. The Court ordered Claimants to file evidence showing the historical location of the claimed headgate if they did not agree with the DNRC's proposed corrections. The Order stated that if nothing was filed by the deadline, the point of diversion would be corrected to the NESWNE of Section 2, T10N, R19E, Golden Valley County. Nothing was filed by the deadline.

#### **Notice-Type Issue Remarks**

6. The claims received the following notice-type issue remarks:

*40A 130867-00*

MEANS OF DIVERSION AND RESERVOIR RECORD WERE 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.

40A 130868-00

POINT OF DIVERSION 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.

7. The issue remarks identify elements modified as a result of DNRC review pursuant to Montana Water Court reexamination orders. The remarks indicate that if no objections are filed, the elements of the claim will remain as they appear on the abstract and the remarks will be removed. None of the claims received objections.

#### 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

#### **40A 130867-00**

1. The reservoir issue remark overcomes the prima facie status of claim 40A 130867-00. The evidence shows the historically accurate location of the claimed reservoir is the SENESW of Section 15, T10N, R19E, Golden Valley County. The point of diversion, reservoir record, and place of use should be modified accordingly. These modifications resolve the issue remark, and the remark should be removed from the claim abstract.

#### **40A 130869-00**

2. The point of diversion issue remark overcomes the prima facie status of claim 40A 130869-00. The evidence shows the historically accurate location of the claimed headgate is the NESWNE of Section 2, T10N, R19E, Golden Valley County. The point of diversion should be modified accordingly. This modification resolves the issue remark, and the remark should be removed from the claim abstract.

#### **Notice-Type Issue Remarks**

3. Each remark in Finding of Fact No. 6 provides notice of the changes made after completion of the Temporary Preliminary Decree proceedings and prior to issuance of the Preliminary Decree. The remarks do not raise unresolved issues that need to be addressed. No proceedings are required to resolve the remarks; the remarks should be removed from the abstracts.

### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

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

---

Melissa Lockman  
Senior Water Master

**Service via USPS Mail:**

Jeralee Heiken  
Joseph C. Heiken  
14946 Buffalo Trail  
Broadview, MT 59015

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

**Water Right Number:** 40A 130867-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** JERALEE HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

JOSEPH C HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

**Priority Date:** DECEMBER 31, 1953

**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 MERRILLS SPRINGS 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		SENE SW	15	10N	19E	GOLDEN VALLEY

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

**Diversion Means:** DAM

**Reservoir:** ONSTREAM **Reservoir Name:** HELMEY SPRING

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SENE SW	15	10N	19E	GOLDEN VALLEY

**Diversion to Reservoir:** DIVERSION # 1

**Dam Height:** 9.00 FEET

**Depth:** 8.00 FEET

**Surface Area:** 0.25 ACRES

**Capacity:** 0.80 ACRE-FEET

**Period of Use:** APRIL 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			SENE SW	15	10N	19E	GOLDEN VALLEY

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

**Water Right Number:** 40A 130868-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** JERALEE HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

JOSEPH C HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

**Priority Date:** JUNE 12, 1894

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**\*Flow Rate:** 1.21 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:** 32.00

**Source Name** DRY COULEE

**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		NENWSE	27	11N	19E	GOLDEN VALLEY

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** HEADGATE

**Ditch Name:** ALLEN DITCH (SEC 27 EAST)

2		NENWSE	27	11N	19E	GOLDEN VALLEY
---	--	--------	----	-----	-----	---------------

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** HEADGATE

**Ditch Name:** ALLEN DITCH (SEC 27 WEST)

**Period of Use:** MAY 1 TO SEPTEMBER 30

**\*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	7.00		W2NWNE	34	11N	19E	GOLDEN VALLEY
2	25.00		E2NW	34	11N	19E	GOLDEN VALLEY

**Total:** 32.00

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

**Water Right Number:** 40A 130869-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** JERALEE HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

JOSEPH C HEIKEN  
14946 BUFFALO TRAIL  
BROADVIEW, MT 59015

**Priority Date:** JULY 19, 1890

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 2.84 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:** 75.00

**Source Name** MERRILLS SPRINGS 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		NESWNE	2	10N	19E	GOLDEN VALLEY

**Period of Diversion:** MAY 1 TO SEPTEMBER 30

**Diversion Means:** HEADGATE

**Period of Use:** MAY 1 TO SEPTEMBER 30

**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	40.00		W2SW	1	10N	19E	GOLDEN VALLEY
2	25.00		NESE	2	10N	19E	GOLDEN VALLEY
3	10.00		E2NWNW	12	10N	19E	GOLDEN VALLEY
<b>Total:</b>	75.00						