

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

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CLAIMANT: Daly Realty Co.

ON MOTION OF THE MONTANA WATER COURT

CASE 40A-0421-R-2022
40A 198318-00

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

Claim 40A 198318-00 appeared in the Preliminary Decree for the Musselshell River above Roundup (Basin 40A) issued on June 7, 2017. The claim is owned by Daly Realty Co. The claim 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

1. Claim 40A 198318-00 appeared in the Basin 40A Preliminary Decree as a municipal claim that diverts water from a spring via a headgate in the NENWNW of Section 29, T10N, R9E, Meagher County.

2. The claim received the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

3. Claim 40A 198318-00 is based on a filed appropriation. However, the DNRC was unable to locate the claimed headgate and no buildings appear on the topographic and aerial maps reviewed by DNRC. In the claim file, there is a note from the DNRC stating the following:

Attached are the scanned documents we discussed. I spoke with Becky at the Meagher Co DOR office today. She said Copperopolis was to become a mining town when originally platted years ago (I did not ask her the year the plat was recorded). I do not see any buildings on the topo and aerial maps.

4. On January 18, 2022, the Court ordered Claimant to file information supporting the historical location of the claimed headgate. Nothing was filed by the deadline.

5. Based on the DNRC's inability to locate the claimed headgate and to locate any buildings on the topographical and aerial maps of the claimed place of use, the Court ordered Claimant to show cause why claim 40A 198318-00 should not be dismissed. The Order stated that if nothing was filed by the deadline, claim 40A 198318-00 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.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R. Sanctions applied against a claimant may include modification of a claim to conform with data provided by the DNRC, information obtained by the Court, or information included in an objection, or the entry of default and termination of a water right claim. Rule 11, W.R.Adj.R.

CONCLUSION OF LAW

1. The point of diversion issue remark overcomes the prima facie status of claim 40A 198318-00. The evidence in the claim file shows claim 40A 198318-00 was not perfected. Based on the evidence in the claim file and Rule 22, W.R.Adj.R., claim 40A 198318-00 should be dismissed.

RECOMMENDATIONS

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

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

Melissa Lockman
Senior Water Master

Service via USPS Mail:

Daly Realty Co.
% Bitterroot Stock Farm Inc.
170 S 2nd
Hamilton, MT 59840

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

Water Right Number: **40A 198318-00** STATEMENT OF CLAIM

Version: 4 -- POST DECREE

Status: **DISMISSED**

Owners: DALY REALTY CO
 %BITTERROOT STOCK FARM INC
 170 S 2ND
 HAMILTON, MT 59840 0000

Priority Date:

Enforceable Priority Date:

Type of Historical Right:

Purpose (use): MUNICIPAL

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.