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

CLAIMANTS: Erin L. Glennie; Bruce J.
Glennie

OBJECTOR: Daniel G. DeBuff

DCERT-0001-WC-2022

40A 184511-00

40A 184518-00

Certified From:

Department of Natural Resources and
Conservation
Office of Administrative Hearings

In the Matter of Application for Beneficial
Water Use Permit No. 40A 30105384 by Daniel
G. DeBuff and Sandra L. DeBuff

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER CLOSING AND REMANDING CASE**

J. Bruce Glennie and Erin L. Glennie (“Glennie”) claim water rights from two springs to irrigate land in Wheatland County. Glennie’s neighbor Daniel G. DeBuff (“DeBuff”) owns neighboring property. DeBuff applied to the Department of Natural Resources and Conservation (“DNRC”) for a new water use permit. Glennie objected to DeBuff’s application. DeBuff responded in part by arguing the Glennie’s water right claims are abandoned. The DNRC Office of Administrative Hearings certified the claims to the Water Court. The Court conducted an evidentiary hearing and now enters this Order to address the questions DNRC certified and the objections and issue remarks for these claims.

PROCEDURAL BACKGROUND

Following DNRC's certification, Glennie moved for summary judgment. The motion asked the Water Court to dismiss DeBuff's objections based on various claims and issue preclusion doctrines. The Water Court denied the motion. (Doc 20.00).

DeBuff moved for partial summary judgment seeking dismissal of Glennie's claim 40A 184518-00 based on non-perfection or abandonment. The Court also denied this motion on the basis that Glennie identified sufficient material facts as to water use to preclude summary judgment on the issue of abandonment. (Doc. 59.00).

The Court then set this case for an evidentiary hearing. The parties filed a joint proposed prehearing order,¹ which the Court adopted without modification at the prehearing conference. (Doc. 66.00). Each party proposed modified abstracts that were incorporated into the prehearing order as part of their contentions.

The hearing took place at the Golden Valley County Courthouse in Ryegate, Montana. The Court heard testimony from nine witnesses. DeBuff called Daniel DeBuff, Pat Riley, David Paugh, Larry Berg, and Neil Glennie. Glennie called Dean Holmes, Kent Heriem, Bruce Glennie, and Mark Brooke. The Court admitted DeBuff exhibits DB-1 through DB-35, DB-40, and DB-41. The Court also admitted Glennie Exhibits G-1 through G-23, G-27, and G-31 through G-35.

Following the hearing, the Court participated in a site visit. The parties then filed post-hearing proposed findings of fact, conclusions of law, and post-hearing briefs to address several legal issues. Based on the evidence before the Court, the Court issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. Setting.

1. Glennie and DeBuff own adjacent properties in Wheatland County, north of Shawmut (Shawmut is between Harlowton and Ryegate). The properties are south of the

¹ The proposed prehearing order does not have a document sequence number, but is included in the FCE docket in the docket entry for June 5, 2025, at 3:36 PM.

Big Snowy Mountains and north of the Musselshell River. DeBuff's property is north and generally upgradient from Glennie's.

2. Two separate springs provide the water sources for Glennie's water right claims. Both springs flow perennially and feed tributaries that ultimately drain to the Musselshell River. The water sources are within hydrologic Basin 40A, which covers the Musselshell River Basin above Roundup.

3. The easterly spring is referred to as the "Glennie Spring." Glennie Spring is on property Glennie owns in the SWNWSE of Section 2, Township 9 North, Range 17 East in Wheatland County. Water from Glennie Spring flows in an unnamed tributary to Cold Spring Creek. For purposes of these proceedings, Glennie Spring is the water source for water right claim 40A 184511-00.

4. The westerly spring is referred to as the "West Spring." The West Spring is in the NWNESW of Section 3, Township 9N, Range 17E. Glennie also owns this property. Water from the West Spring flows to an unnamed tributary of Timber Creek. Glennie Spring is the water source for water right claim 40A 184518-00.

B. Glennie Property.

5. In addition to owning property at the locations of the springs, Glennie also owns real property that includes land described as the places of use for claims 40A 184511-00 and 40A 184518-00. (Agreed Facts, ¶ 1). Glennie has owned the property since 2002. (Agreed Facts, ¶ 2).

6. Glennie acquired the property from Harold DeBuff. Harold DeBuff was Daniel DeBuff's brother. Harold DeBuff is now deceased. (Agreed Facts, ¶ 12).

7. Harold DeBuff bought the property from Swimming Woman Ranch in 1985. David Paugh owned Swimming Woman Ranch at the time of this conveyance. (Agreed Facts, ¶ 13). Although not necessarily important for purposes of this case, Swimming Woman Ranch appears to have been a corporate entity of some sort.

8. David Paugh took control of the property in 1982 when he acquired ownership of Swimming Woman Ranch from his grandfather John Mattson. (Agreed Facts, ¶ 14).

9. John Mattson bought the property in 1964. Before 1964, what is now the Glennie property was known as the “Giltinan Place” or David Giltinan ranch. (Agreed Facts, ¶ 15).

10. A.W. Ginther operated the property from some time before 1949 to about 1955-56.

11. On May 28, 1889, Henry H. Hedges acquired the SW of Section 2 and E2SE of Section 3, Township 9 North, Range 17 East, by a patent from the United States. (Ex. G-35). Glennie now owns this land, and it is within the decreed place of use for claim 40A 184511-00.

12. There are no facts to indicate any water rights ever were severed as part of any of these property transactions.

C. Glennie Water Right Claims and Historical Water Use.

Claim 40A 184511-00

13. Water right claim 40A 184511-00 describes the elements of Glennie’s claimed right to water from Glennie Spring. This claim describes a filed right based on a notice of appropriation filed in Fergus County by Wyllys A. Hedges on August 25, 1906. (Ex. G-02, at 5).²

14. The Hedges notice of appropriation claimed water from a spring called “Hedges Spring.” Hedges Spring is the same water source the parties refer to as “Glennie Spring,” and sometimes as the “East Spring.” (Agreed Facts, ¶ 6). The notice identified the priority date as the “first day of March 1888.” (Ex. G-02 (claim file), at 4; Agreed Facts, ¶ 5).

15. After the Water Use Act established a water right claim filing period, David Paugh filed a statement claim on behalf of Swimming Woman Ranch for the spring as part of the general adjudication of water rights in Montana. The statement claimed 40 miner’s inches (1.0 cfs) from Glennie Spring based on the Hedges notice of appropriation

² For the sake of brevity, the page number prefixes and leading zeros are omitted in exhibit references.

with a March 1, 1888 priority date.³ (Ex. G-02, at 2). Paugh testified that he measured the flow from the spring in preparation for the claim filing. (Tr. D1: 04:14:42-04:15:10⁴). The claim was then given claim number 40A 184511-00. (Agreed Facts, ¶ 14).

16. The Water Court included claim 40A 184511-00 in the Basin 40A Preliminary Decree issued on June 7, 2017. The Preliminary Decree abstract describes it as a filed right to use water from a spring for irrigation use with a March 1, 1888 priority date. The decree abstract identifies a single point of diversion with a headgate located in the SWNWSE of Section 2, Township 9 North, Range 17 East, Wheatland County, Montana. (Decree abstract; Agreed Facts, ¶ 4).

17. The abstract also describes a 225.00 acre place of use and identifies Glennie as the owner. The decreed place of use is smaller than the 290.00 acre place of use described on the claim form. The reduction apparently occurred when the Department of Natural Resources and Conservation (“DNRC”) verified the claim in preparation for the Basin 40A Temporary Preliminary Decree. The preliminary decree abstract does not contain any acreage or place of use issue remarks.

18. The preliminary decree abstract describes a flow rate of 1.00 cfs, which is consistent with how Paugh filed the claim. The abstract does not include any flow rate or flow rate to acreage ratio remarks.

19. Glennie Spring is a natural spring that discharges groundwater to the surface. No one introduced evidence to suggest the spring has been enhanced or otherwise developed.

20. Several witnesses testified that at some point a headgate was installed to control water flowing from the spring and to direct surface water to ditches constructed below the spring. Bruce Glennie replaced the headgate after acquiring the property. (Tr.

³ The claim form appears to have originally claimed the August 25, 1906 date of the notice filing as the priority date, but someone interlineated the form with the March 1, 1888 priority date. DeBuff does not object to the priority date.

⁴ The transcript (“Tr.”) citations are first to the hearing day (either “D1” or “D2”), then to the recording time within that day by hr:min:sec.

DI: 05:36:30-05:37:17). The current headgate also is depicted in a photograph contained in a report prepared by Glennie's expert Mark Brooke. (Ex. G-06, at 228).

21. In addition to replacing the headgate, Bruce Glennie also installed a 6-inch Parshall flume to measure flows from the spring. (Ex. G-06).

22. In 1949, the State Engineer prepared a Water Resource Survey ("WRS") for Wheatland County. Excerpts of maps from the WRS depict ditches leading in different directions from Glennie Spring. The ditches are labeled "Giltinian Flood Ditches." The ditch locations on the WRS map are generally similar to those on Exhibit G-09. The following is an excerpt from the WRS maps of this area:



(Ex. G-16).

23. The State Engineer's office prepared field notes as part of its work. The field notes indicate the Hedges Spring appropriation with its March 1, 1888 priority date was not in use as of October 7, 1948, the date the property was checked. (Ex. DB-010).

24. The field notes identify 129.00 acres irrigated at the time of the survey. (Ex. DB-014, at 1). The field notes are somewhat inconclusive because they describe irrigation from a source identified as "Living Springs Creek" but describe the ditch as the "Giltinan Ditch." Because the field notes show at least part of the place of use was irrigated, the field notes do not definitively establish a lack of irrigation from the spring.

25. Various witnesses testified about the system used to distribute water from Glennie Spring to the area described as the place of use. In general, the historical irrigation practices relied on a system that distributed water from the spring into several ditches. One of the ditches runs generally south from the spring, and the other runs west.

The westerly ditch eventually turns south and includes several lateral ditches. These ditches are depicted on Ex. G-09.

26. According to witness testimony at the hearing, the property owners and operators used splash dams to spread water across areas of the property that could be reached by gravity flow and subirrigation. These practices occurred fairly consistently over time. David Paugh also testified that he hauled wild hay off the property during at least one year. David Paugh also confirmed the location of the ditches depicted on Exhibit G-09 generally are accurate.

27. Paugh testified that he worked with his grandfather Mattson to irrigate the property. He described Mattson's irrigation practices as a somewhat "casual" style in which a tarp would be set in a ditch and left for a few days before being moved to a new location. After acquiring the property, Paugh continued these practices.

28. Larry Berg is a neighbor of Glennie's who testified about his first-hand knowledge of agriculture operations on the Glennie property from 1979, when Mattson owned the property, through the present. Berg owns 80.00 acres in Section 10, adjacent to and immediately south of the Glennie property. Berg must cross the Glennie property to reach his own property. Berg testified that he observed dams being placed in ditches to divert water onto the field. Berg also testified that when Harold DeBuff turned off the Glennie Spring headgate, water flow in the ditches ceased to the point that he could drive across the area and not become stuck. Berg also testified that he hayed the Glennie property on shares and grazed cattle on the stubble during the time Harold DeBuff owned the property.

29. Even though Berg has not actively hayed or grazed the Glennie property since Glennie acquired ownership of it, Berg has trailed his cattle across the property. Berg apparently has had the ability to observe Glennie's property for many years but did not testify about any long period of time when irrigation did not occur.

30. Dean Holmes is the grandson of Ginthner who leased the Glennie property until about 1955. Holmes testified that he recalled being on the property in the 1950s and

seeing dams in the ditch that run south from Glennie Spring. Holmes does not have a recollection of other irrigation efforts.

31. Dan DeBuff described the area near Glennie Spring as boggy and wet, which he attributed to a high groundwater table. DeBuff testified that this area did not require supplemental irrigation. DeBuff recalled seeing water in the ditches that lead from Glennie Spring, but attributed the water to elevated groundwater levels. DeBuff also characterized his observations of haying near the spring as “wild hay” that benefitted from subirrigation.

32. Dan DeBuff also testified about his recollection of observations made by his now-deceased brother Harold who owned and operated the Glennie property. Dan DeBuff did not recall Harold actively irrigating the property, but instead Harold farmed over ditches in connection farming small grains.

33. Kent Hereim owns property east of the Glennie property. Hereim also rented a house on the Glennie property when Harold DeBuff owned it. Hereim does not recall seeing active irrigation on the property.

34. Neil Glennie is Bruce Glennie’s brother. Neil Glennie testified that he was on the property for a short period of time after Harold DeBuff sold the property. He testified about some irrigation efforts from Glennie Spring, but they were fairly limited. Similar to Larry Berg, Neil Glennie did testify that when the Glennie Spring was turned on, water would be conveyed through the ditches to irrigate land via a method he termed “subirrigation.” Conversely, Neil Glennie also testified that if water was not conveyed through the ditches, the area would dry out.

35. DeBuff called Pat Riley as an expert witness. Riley worked in various supervisory and management capacities and as a water rights specialist for the Department of Natural Resources and Conservation. (“DNRC”). (Ex. DB-012). Riley made several site visits to the Glennie property and provided his opinions about historical irrigation in a report. Riley also testified at the hearing.

36. Riley testified that the Glennie property has a high groundwater table. However, Riley did not support this data with groundwater elevation measurement data to

demonstrate that the natural water table reaches the land surface or even the root zones of agricultural crops. Rather, Riley's testimony about the depth to the groundwater table was based on visual observations of water on the surface.

37. Riley also interpreted aerial photographs as depicting wild hay and dryland alfalfa. Riley testified that wild hay is a common crop in areas where natural subirrigation is present. Riley used the term "subirrigation" to describe a groundwater level sufficiently close to the surface to provide a benefit to plants.

38. Riley testified that the flow rate from the spring is insufficient to irrigate the entire 225.00-acre decreed place of use. Instead, as to this claim, Riley's report concludes only about 38.00 acres could feasibly have been irrigated. Riley also testified that the general topography of the place of use is quite uneven, so the flood irrigation method being used would not provide much irrigation benefit because water would drain to low spots.

39. Riley did not provide a ratio of the minimum gallons per minute per acre that feasibly could irrigate the place of use for this crop type.

40. Riley concluded in his report that the property does not appear to have been irrigated for at least 40 years. (Ex. DB-014, at 1).

41. Bruce Glennie testified that even if areas of the property are subirrigated, the subirrigation was attributable to diverting water from Glennie Spring down the ditches.

42. Mark Brooke, Glennie's hydrology expert testified that he measured flows from Glennie Spring ranging from 0.4 cfs (179.5 gpm) to 0.82 cfs (368 gpm).⁵ (Tr. D2: 01:46:43-01:48:00). These flow measurements are consistent with Parshall flume flow measurements taken by Glennie ranging from 0.56 cfs (251.3 gpm) to 0.88 cfs (394.9 gpm). (Ex. G-06, at 213). The measured flows do not exceed the 1.00 cfs flow rate decreed in the Preliminary Decree.

⁵ Montana water measurement standards call for flow rate to be expressed in units of gallons per minute ("gpm") rather than cubic feet per second ("cfs") when flow rates fall below one cfs. As converted, the flows measured by Brooke range from 251.3 gpm to 394.9 gpm.

43. Although Glennie’s expert witness Mark Brooke has not testified previously about aerial photograph interpretation, Brooke testified that he reviewed a series of aerial photographs, including information available from Google Earth. Brooke described these aerial photographs as consistent with the ditches depicted on the WRS maps.

44. Brooke prepared a series of exhibits showing the ditch network as of various dates. These exhibits include Ex. G-07 (showing the ditches on a 1979 USGS topographic map); Ex. G-08 (showing the ditch network and irrigated acreage on a 1986 color infrared aerial photograph); Ex. G-09 (similar from a 2019 aerial photograph). Brooke displayed Google maps with information included on aeriels from August 2022, June 2016, October 2013, July 2012, September 2009, August 2006, and December 2004. For each Google Earth aerial photograph, Brooke identified what he interpreted as Glennie’s ditch systems, color variations that indicate irrigation, and indications of haying or other agricultural operations within the place of use for claim 40A 184511-00. While Brooke does not have extensive experience specific to aerial photograph interpretation, the exhibits provide evidence of a consistent presence of a ditch network fed by Glennie Spring during the time periods indicated.

40A 184518-00

45. Water right claim number 40A 184518-00 is an irrigation claim for water from a spring with a point of diversion in the NESW of Section 3, Township 9 North, Range 17 East, Wheatland County, Montana. (Agreed Facts, ¶ 7). The parties call this spring the “West Spring.” (Agreed Facts, ¶ 9).

46. Claim 40A 184518-00 is based on a notice of appropriation filed by Wyllys A. Hedges. The notice claimed water from a certain spring described in the notice as “Myers Spring.” The notice described the priority date as the “first day of April 1886.” The notice was recorded in Fergus County on August 25, 1906. (Agreed Facts, ¶ 8).

47. David Paugh filed a statement of claim for this right on March 2, 1982. The statement of claim is for 40 miner’s inches (1.0 cfs) to irrigate 180.00 acres. The priority date on the claim form is April 1, 1886. The claim form appears to have been

interlineated by DNRC at some point from its original August 25, 1906 date. (Ex. G-04, at 61).

48. The Water Court included claim 40A 184518-00 in the Basin 40A Preliminary Decree. The Preliminary Decree abstract describes the claim as a filed right to use 1.0 cfs from a spring that is tributary to Timber Creek to irrigate 140.00 acres with an April 1, 1886 priority date.

49. The decree abstract also identifies Glennie as the claim owner. The abstract contains one issue remark:

THE POINT OF DIVERSION APPEARS TO BE INCORRECT. THE POINT OF DIVERSION APPEARS TO BE IN THE SWNESW SEC 3 TWP 9N RGE 17E WHEATLAND COUNTY.

50. DeBuff filed objections to both claims in the Water Court. No one else objected to claim 40A 184518-00. DeBuff's objection to the claim included alleged abandonment.

51. The West Spring flows perennially, but at a lower flow rate than Glennie Spring. As described by Glennie's expert witness Mark Brooke, the West Spring "appears to be perennial in nature and discharges water in sufficient amounts to cause water to flow downgradient and away from the initial spring source." (Ex. G-06, at 212).

52. Brooke testified that he measured flows from the West Spring ranging from 24 gpm (0.05 cfs) to 44 gpm (0.10 cfs), with higher flows during storm events. (Tr., D2: 01:48:10-01:48:20). These flow measurements are consistent with Parshall flume flow measurements taken by Glennie ranging from 0.56 cfs to 0.88 cfs. (Ex. G-06, at 213). The measured flows do not exceed the 1.00 cfs flow rate decreed in the Preliminary Decree.

53. According to Brooke, water from the West Spring can be used to actively irrigate a portion of Glennie's property "via operation of the irrigation ditches for surface irrigation or passively via naturally occurring subirrigation from water associated with this water right." (Ex. G-06, at 212).

54. Aerial photography indicated irrigation as of 1986. (Ex. G-06, at 212-13).

55. The WRS field notes that document the State Engineer’s WRS preparation work indicate the Meyers Spring appropriation with its April 1, 1886 priority date was not in use as of October 7, 1948, the date the property was checked. (Ex. DB-010).

56. Riley interprets the 1948 WRS as showing no irrigation on October 7, 1948. The excerpt from the WRS map reproduced above confirms this interpretation. The WRS field notes describe the NOA and water from “Myers Spring” as “not in use.” (Ex. DB-10, p. 1; Tr. D1 at 1:46:35 (Riley testimony)). The WRS published map also does not depict irrigation at the location of the spring or the place of use claimed under 40A 184518-00. (Ex. DB-9, p. 1; Tr. D1: 2:14:30-2:16:00 (Riley)).

57. DeBuff’s expert witness Pat Riley also testified about the West Spring water use. Based on review of aerial photographs and field investigations, Riley was not able to find any indication of current or recent irrigation. (Tr. D1: 2:37:00-2:40:00).

58. Riley’s report documents some limited flow measurements that reflect low flows. Riley testified that the preliminary decree abstract for the West Spring should have included an F185 issue remark indicating the flow rate is inadequate for the claimed purpose.⁶

59. A portion of the claimed place of use for water right claim 40A 184518-00 was enrolled in the Conservation Reserve Program (“CRP”) from at least October 1, 1997 through September 30, 2022. (Agreed Facts, ¶ 11).

CONCLUSIONS OF LAW

1. The Water Court has exclusive jurisdiction over all matters related to the adjudication of existing water rights. Section 3-7-224, MCA.

2. In this case the Court is exercising its jurisdiction via certification of water right claim nos. 40A 184511-00 and 40A 184518-00 from the DNRC under § 85-2-309(2), MCA. Under certification, all factual and legal issues related to the elements of each claim as each appears in the Basin 40A Preliminary Decree are to be adjudicated by this Court. Sections 85-2-309(2)(a) and 3-7-501(3), MCA.

⁶ The actual text of the F185 remark states: “THE CLAIMED FLOW RATE APPEARS TO BE INADEQUATE FOR THE CLAIMED PURPOSE.”

3. A properly filed statement of claim is prima facie proof of its contents. Section 85-2-227, MCA. Based on this standard, the Court begins with the assumption that Glennie’s statements of claim, as reflected by the Preliminary Decree abstracts, are accurate. DeBuff bears the burden to prove by a preponderance of evidence that any element of either of the two rights is incorrect. Rule 19, W.R.Adj.Rule. Likewise, to the extent Glennie seeks to modify any element of either claim, Glennie also bears the burden of proof as to that modification.

Claim 40A 184511-00

Claim 40A 184511-00 – Priority Date.

4. DeBuff contends the preponderance of evidence establishes that the Court should modify the claim 40A 184511-00 priority date from March 1, 1888 to December 31, 1949, and change the type of right from “filed” to “use.”

5. DeBuff’s priority date argument is based on the lack of irrigation described in the WRS field notes. Although the field notes document that irrigation was not occurring as of the date in 1948 when the examiner evaluated the property, the State Engineer found sufficient evidence to depict irrigated acreage on the WRS map. When coupled with fairly consistent testimony of ongoing irrigation efforts spanning many decades, along with construction and, at least periodic efforts at ditch maintenance, DeBuff did not prove a sufficient lack of irrigation prior to 1949 to justify modifying the priority date.

Claim 40A 184511-00 – Subirrigation.

6. DeBuff contends the preponderance of evidence establishes that the Court should recharacterize the claim 40A 184511-00 irrigation method as “subirrigation,” with corresponding modifications to the number of acres irrigated and the necessity of an information remark specifying that a right to subirrigation does not include the right to make calls on junior water users. The information remark DeBuff proposes would state:

THIS WATER RIGHT IS ALSO USED INCIDENTALLY FOR STOCKWATER PURPOSES. AS A NATURAL SUBIRRIGATION WATER RIGHT, THIS WATER RIGHT IS USED PASSIVELY AND DOES NOT AUTHORIZE THE OWNER TO SEEK

ENFORCEMENT OF THE RIGHT, INCLUDING ANY ABILITY
TO CALL OUT OTHER WATER RIGHTS BY PRIORITY.

7. The proposed abstract for Glennie included in the prehearing order contentions includes a proposed information remark stating (corrected for typos): “This water right also includes natural subirrigation as an incidental type of irrigation.”

8. DeBuff contends that the evidence supports these modifications because no active irrigation of the property occurs. (Doc. 70.00, at 3). Glennie contends no modifications should be made to any of the elements of claim 40A 184511-00, as decreed in the Preliminary Decree.

9. The preliminary decree abstract characterizes the irrigation type as “flood,” and includes an acreage limitation, and does not include an information remark. The preliminary decree abstract also does not contain a DNRC issue remark relating to subirrigation even though DNRC’s claim examination manual recognized subirrigation as an irrigation type that might require an issue remark. *See* Claim Examination Manual, at DNRC Water Rights Examination Manual, Ch. 2, pg. 38 (May 2013).

10. DNRC’s claim examination rules define “natural subirrigation” as “a naturally occurring high water condition that supplies water for crop use.” Rule 2(a)(44), W.R.C.E.R. The rules do not contain a definition of “subirrigation” without a modifying adjective. The main purpose of the definition in the rules is to allow water use meeting the “natural subirrigation” definition to be decreed without a flow rate, as DeBuff contends should be done in this case.

11. DNRC’s claim examination manual in use at the time Basin 40A was examined contains a more elaborate description that recognizes two distinct types of subirrigation for purposes of standardizing the source type:

- Natural subirrigation is land having a water table within reach of the crop root system. There is normally no specific point of diversion. The POU should equal the POD.
- Controlled subirrigation systems, such as ditches equipped with check dams to control the level of the water table, would require a specific POD.

DNRC Water Rights Examination Manual, Ch. 2, pg. 287 (May 2013). The manual goes on to describe how the distinction between natural subirrigation and controlled subirrigation affects the point of diversion and place of use elements (p. 308), the period of use (p. 381), the incidental type of irrigation (p. 399), and the flow rate (p. 410-411). The manual also describes “Natural Subirrigation” as “a *naturally occurring* high water table condition that supplies water for crop use.” DNRC Water Rights Examination Manual, Ch. 2, pg. 38 (May 2013).

12. Water use for subirrigation purposes has not received extensive analysis by the Water Court, but some threads do exist. In the case, *In re Stewart*, the Court described subirrigation as the

passive use of water on land adjacent to a stream. Subirrigation claims only have value when the water in the stream is high enough to saturate adjoining land sufficiently to stimulate plant growth. Subirrigation claims are essentially riparian rights that do not require active diversion of water. Because of their passive nature, subirrigation rights cannot be measured or effectively administered. The claimant of a subirrigation right has no control over how much water they receive and no ability to stop water usage in the event a call is placed on their right by a downstream user.

Case 41H-0057-R-2020, 2022 Mont. Water LEXIS 192. Based on this description, the Court removed flow rate and volume issue remarks and ordered the following information remark be put on the claim at issue:

NO FLOW RATE HAS BEEN DECREED FOR THIS USE OF NATURAL SUBIRRIGATION. THE OWNER OF THIS RIGHT MAY NOT USE THIS RIGHT TO PLACE A CALL ON OTHER WATER USERS.

13. For purposes of water rights administration, irrigation by natural subirrigation is a beneficial use of water but does not entitle the owner of the right to make calls on junior users or to insist that conditions that led to the natural subirrigation be maintained as they existed as of the date of the appropriation.

14. The evidence in this case supports describing the claim as “controlled subirrigation” rather than “natural subirrigation.” The evidence demonstrates that for many years the natural flow from Glennie Spring was diverted into at least two

constructed ditches. From these ditches, lateral ditches and splash dams were used to spread water over the land Glennie claims as the place of use. The description of water use fits more closely with flood irrigation that historically has occurred throughout Montana. To the extent the irrigation method raised the water table, it did so in a manner that was controlled by those operating the property. As such the claim fits the description of “controlled subirrigation” more closely. The claim examination manual indicates a flow rate should be decreed. (p. 411). DeBuff did not prove the flow rate should be constrained with the no-call limitation that applies to natural subirrigation.

Claim 40A 184511-00 – Flow rate.

15. Both parties provided evidence of flow rate measurements at a Parshall flume located shortly downstream from Glennie Spring. These flow measurements, essentially at the mouth of the spring without any upstream diversions, are somewhat less than what is decreed for claim 40A 184511-00. Neither party provided evidence to modify the decreed flow rate.

Claim 40A 184518-00

Claim 40A 184518-00 – Abandonment.

16. DeBuff contends the Court should terminate claim 40A 184518-00, Glennie’s West Spring claim, on the basis of abandonment.

17. The Water Court’s jurisdiction includes the determination of water rights abandonment at any time prior to entry of a final decree. Section 3-7-501(4), MCA. The Court has not yet issued a final decree for Basin 40A, so the Court has jurisdiction to address DeBuff’s abandonment contention regardless of whether it arises out of facts before or after July 1, 1973.

18. Under Montana law, a water right is subject to abandonment when an “appropriator or his successor in interest abandons or ceases to use the water for its beneficial use.” *Hoon v. Murphy*, 2020 MT 50, ¶ 30, 399 Mont. 110, 460 P.3d 849 (citation omitted). The test to determine whether a water right is abandoned focuses on the intent of the appropriator. *Featherman v. Hennessy*, 42 Mont. 535, 540, 113 P. 751, 753 (1911); *Thomas v. Ball*, 66 Mont. 161, 167, 213 P. 597, 599 (1923).

19. The Montana Supreme Court applies the abandonment standard as applied to existing (i.e. pre-July 1, 1973) water rights by presuming a long period of water nonuse establishes a rebuttable presumption of intent to abandon the water right. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983). The burden to prove a sufficiently long period of continuous nonuse to create this rebuttable presumption rests with the party asserting abandonment, in this case DeBuff. *In re Klamert*, 2019 MT 110, ¶ 15, 395 Mont. 420, 443 P.3d 379. If DeBuff proves a sufficiently lengthy nonuse period to create the presumption, the burden shifts to the appropriator – in this case Glennie – to prove a lack of intent to abandon. *In re Clark Fork Drainage (City of Deer Lodge)*, 254 Mont. 11, 16, 833 P.2d 1120, 1123 (1992). Ultimately, whether a water right is abandoned is a question of fact that depends on the “conduct, acts, and intent of the parties claiming the usufruct of the water.” *Heavirland v. State*, 2013 MT 313, ¶ 31, 372 Mont. 300, 311 P.3d 813 (quotation omitted).

20. For purposes of evaluating the period of nonuse, Montana law recognizes several contingencies that effectively qualify as constructive water use even though actual water use may not have occurred. For example, nonuse of water does not include those times when water is unavailable. *E.g.*, *Fed. Land Bank v. Morris*, 112 Mont. 445, 453, 116 P.2d 1007, 1010 (1941) (“the mere fact that, during a period of years, there was insufficient water capable of being reservoiried to irrigate lands, and only enough to water the stock, certainly does not present a question of abandonment”).

21. Additionally, and relevant to this case, periods of time when water rights with an irrigation purpose are not physically exercised when the place of use is covered by a CRP arrangement do not count as nonuse in an abandonment inquiry. Section 85-2-404(3), MCA.⁷ For claim 40A 184511-00, the CRP arrangement covered the period from 1997 to 2022.

⁷ Although subsections (1) and (2) of § 85-2-404, MCA, do not apply until the issuance of a final decree, this limitation does not apply to subsection (3). The Court therefore defers to the Legislature’s determination to excuse this category of non-use from the abandonment inquiry.

22. As applied to the facts of this case, DeBuff has not proved insufficient water use to shift the burden of proof to Glennie to prove lack of intent. Glennie acquired the property in 2022 when it went out of CRP and provided testimony of a variety of efforts to use claim 40A 184518-00 since that date.

23. As to the period prior to 1997, the evidence of nonuse is sketchy at best. While it is true that the claim does not appear to have been in use when the WRS was conducted in 1948, DeBuff did not provide evidence to prove the 1948 notes reflect a pattern of continuous nonuse.

24. Even if DeBuff had proved some segment of time without active irrigation, Glennie's witnesses provide enough testimony of periodic irrigation efforts from the West Spring to rebut any abandonment presumption that might otherwise exist.

Claim 40A 184518-00 – Purpose and related elements.

25. DeBuff contends the preponderance of evidence establishes that the Court should limit this claim to direct from source stock use at the mouth of the West Spring. Unlike claim 40A 184511-00, DeBuff argues there is no evidentiary basis to recognize claim 40A 184518-00 for any irrigation purpose, even subirrigation. To these ends, DeBuff asks the Court to make the following modifications to the elements of claim:

- a. Modify the purpose from irrigation to stock water;
- b. Modify the flow rate from 1.00 cfs to the narrative remark for direct from source stock water;
- c. Modify the diversion means from a headgate to direct from source;
- d. Limit the place of use to the NWNESW of Section 3, Township 9 North, Range 17 East.

26. In their proposed findings of fact and conclusions of law, Glennie suggests the flow rate for claim 40A 184518-00 should be reduced from 1.0 cfs to 44 gpm. (Doc. 69.00, at 22, ¶ 24). This amounts to a ten-fold decrease from the 1.0 cfs (448.8 gpm) flow rate on the Preliminary Decree abstract. At the same time, Glennie contends the acreage included in the claim 40A 184518-00 place of use should be increased from 140.00 acres to 187.9 acres based on Brooke's interpretation of the aerial photography.

27. The Court accepts Glennie's proposed modification of the flow rate based on the provisions of Rule 17(c) of the Water Right Adjudication Rules, which allows the Court to accept certain reductions to water right elements without further presentation of evidence. What this essentially means is Glennie agrees the maximum flow rate that may be diverted and used is 44 gpm. To the extent the spring flows at a higher rate, Glennie will not have the right to divert and use any amount in excess of 44 gpm.

28. The Court concludes that Glennie has not met their burden to prove an increase in the size of the place of use for several reasons. First, Glennie did not object to the place of use element during the Preliminary Decree objection period. Second, Glennie did not identify an increased size to the place of use as an issue in the prehearing order. Third, and most importantly, Glennie did not provide evidence describing a legal description or mapping to depict where the expanded acreage is located. Finally, Glennie did not explain how an increased amount of acreage can be irrigated with the reduced flow rate Glennie concedes.

29. DeBuff has not proved the remaining contentions as to the elements of claim 40A 184518-00. For the same reasons DeBuff has not proved abandonment, DeBuff also has not proved that the purpose of use should be changed from irrigation to stock water. Specifically, there is evidence of historical irrigation sufficient to maintain the claim as an irrigation right. Even though the flow may not irrigate the entire place of use every season, DeBuff did not overcome the proof that water has been moved around within the decreed place of use.

Claim 40A 184518-00 – Point of diversion.

30. Glennie contends that the legal description for the point of diversion for claim 184518-00 should be corrected from the NWNESW of Section 3, Township 9 North, Range 17 East, Wheatland County, Montana to the SWNESW of the same section.

31. The Court has authority under Rule 60(a), M.R.Civ.P. to make this clerical correction. DeBuff does not contest the correction.

32. Glennie proved that the point of diversion legal description should be corrected. The correction resolves the issue remark.

ORDER

Based upon the foregoing, it hereby is ORDERED that:

1. The flow rate for claim 40A 184518-00 is modified to 44.0 gallons per minute, and the point of diversion is modified to the SWNESW of Section 3, Township 9 North, Range 17 East, Wheatland County, Montana.
2. The issue remark is removed from claim 40A 184518-00.
3. All objections to claims 40A 184511-00 and 40A 184518-00 are DISMISSED as resolved.
4. All proceedings before the Water Court are CLOSED, and this case is returned to the Montana Department of Natural Resources and Conservation, Office of Administrative Hearings for further proceedings.

Post-decree abstracts of claims 40A 184511-00 and 40A 184518-00 are included with this Order to confirm that the modifications have been made in the State's centralized water rights record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

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

Water Right Number: 40A 184511-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ERIN L GLENNIE
5025 CHEROKEE TRL
BILLINGS, MT 59106-9666

J BRUCE GLENNIE
5025 CHEROKEE TRL
BILLINGS, MT 59106-9666

Priority Date: MARCH 1, 1888

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.00 CFS

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 225.00

Source Name: SPRING, UNNAMED TRIBUTARY OF COLD SPRING CREEK

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 | | SWNWSE | 2 | 9N | 17E | WHEATLAND |

Period of Diversion: MARCH 1 TO DECEMBER 1

Diversion Means: HEADGATE

Period of Use: MARCH 1 TO DECEMBER 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 | 160.00 | | SW | 2 | 9N | 17E | WHEATLAND |
| 2 | 10.00 | | SENESE | 3 | 9N | 17E | WHEATLAND |
| 3 | 31.00 | | SESE | 3 | 9N | 17E | WHEATLAND |
| 4 | 24.00 | | E2NW | 11 | 9N | 17E | WHEATLAND |

Total: 225.00

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

Water Right Number: 40A 184518-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: ERIN L GLENNIE
5025 CHEROKEE TRL
BILLINGS, MT 59106-9666

J BRUCE GLENNIE
5025 CHEROKEE TRL
BILLINGS, MT 59106-9666

Priority Date: APRIL 1, 1886

Type of Historical Right: FILED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 44.00 GPM

***Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 140.00

Source Name: SPRING, UNNAMED TRIBUTARY OF TIMBER CREEK

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 | | SWNESW | 3 | 9N | 17E | WHEATLAND |

Period of Diversion: MARCH 1 TO DECEMBER 1

Diversion Means: HEADGATE

Period of Use: MARCH 1 TO DECEMBER 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 | 10.00 | | S2NESW | 3 | 9N | 17E | WHEATLAND |
| 2 | 65.00 | | S2SW | 3 | 9N | 17E | WHEATLAND |
| 3 | 65.00 | | N2NW | 10 | 9N | 17E | WHEATLAND |

Total: 140.00