

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

IN THE MATTER OF THE ADJUDICATION OF THE)
EXISTING RIGHTS TO THE USE OF ALL THE)
WATER, BOTH SURFACE AND UNDERGROUND)
WITHIN THE MUSSELSHELL RIVER DRAINAGE AREA)
ABOVE ROUNDUP, INCLUDING ALL TRIBUTARIES)
OF THE MUSSELSHELL RIVER ABOVE ROUNDUP)
IN WHEATLAND, GOLDEN VALLEY, MEAGHER,)
FERGUS, MUSSELSHELL, SWEET GRASS, PARK,)
YELLOWSTONE, AND STILLWATER COUNTIES,)
MONTANA.)

CASE 40A-115
40A-W-151882-00

FILED

OCT 27 1993

CLAIMANT: Eliasson Ranch Company
OBJECTOR: Eliasson Ranch Company
 Maria Rodeghiero and Bruno Rodeghiero

Montana Water Court

MASTER'S REPORT

FINDINGS OF FACT

1. Eliasson Ranch Company filed direct flow flood irrigation Claim 40A-W-151882-00 for a flow rate of 3.125 CFS (125.00 miner's inches) and a volume of 121.70 acre feet per year on 29.80 acres with a priority date of May 1, 1897, as decreed to Albert Gerntholz in Lindstrand v. Jarrett, Musselshell County Case No. 5115 (June 2, 1952) (hereafter the 1952 decree), upon adjudication of water diverted from Musselshell River by Naderman dam and ditch. Harold O. Eliasson signed the Statement of Claim as president of Eliasson Ranch Company, claiming as successor in interest of Albert Gerntholz. Attached to the Statement of Claim is an incomplete copy of the 1952 decree, including and underscoring the Gerntholz right, but not including pages 5, 6, 7, 8, 15, 16, 17, and 18.

2. During routine examination of Claim 40A-W-151882-00, the Montana Department of Natural Resources and Conservation (DNRC) entered

the flow rate as 3.13 CFS because of computer program limitations. During verification of the elements of the claim, DNRC verified 31.00 acres irrigated but did not change the 29.80 acres claimed.

3. Eliasson Ranch Company filed a Notice of Objection as to volume, flow rate, place of use, and acres irrigated, alleging a total of 64.40 acres irrigated and a flow rate of 6.76 CFS. Attached to the Notice of Objection is a copy of Notice of Water Right executed October 29, 1900, by John P. Naderman and claiming a priority date of May 1, 1897, for 25.00 CFS, the original ditch right. Also attached to the Notice of Objection is a copy of part of an aerial photo adapted to indicated irrigation under this claim by means of Naderman ditch.

4. On October 16, 1987, a DNRC Water Rights Technician met with Donald J. Eliasson to discuss Claim 40A-W-151882-00 and certain other claims in this case. On October 26, 1987, the Water Rights Technician filed a Memorandum on that meeting indicating that the claimant "does not have any objection to the flow rates...." Apparently Donald J. Eliasson and Eliasson Ranch Company did not call to the attention of the Water Rights Technician the additional acres and flow rate cited in the claimant's objection.

5. On October 6, 1989, John D. Armstrong filed a Statement of Claim for a flow rate of 35.00 miner's inches (0.875 CFS) and a volume of 352.00 acre feet per year irrigating 34.60 acres in SE section 5 T7N R25E. This Statement of Claim was numbered 40A-W-214125-00 and remarked as filed late. Attached to the Statement of Claim 40A-W-214125-00 is a copy of part of an aerial photo adapted to indicated irrigation under this claim by means of Naderman ditch. The place of use identified is

the same place of use proposed to be added to Claim 40A-W-151882-00 in the Notice of Objection filed by Eliasson Ranch Company. Also attached to Statement of Claim 40A-W-214125-00 is a copy of the 1952 decree, upon adjudication of water diverted from Musselshell River by Naderman dam and ditch, indicating 35.00 miner's inches (0.875 CFS) decreed to Otto Finco and subject of late Claim 40A-W-214125-00.

6. On February 12, 1990, Eliasson Ranch Company filed a notarized letter as to Claim 40A-W-151882-00 and certain other claims in this case requesting the standard flood irrigation volume of 10.20 acre feet per acre per year in Claim 40A-W-151882-00. No change in flow rate was requested in this letter. The letter states that the ditch length for this claim is 7 miles.

7. This case was set to be heard in the Musselshell County Courthouse on April 10, 1990.

8. On March 30, 1990, Eliasson Ranch Company filed an Affidavit alleging a total 64.40 acres irrigated and a flow rate of 4.00 CFS based upon the 3.125 CFS (125.00 miner's inches) decreed to Albert Gerntholz and the 0.875 CFS (35.00 miner's inches) decreed to Otto Finco in the 1952 decree. The Affidavit indicates that the 3.125 CFS originally claimed by Eliasson Ranch Company is appurtenant to land owned by Eliasson Ranch Company and that the 0.875 CFS decreed to Otto Finco is appurtenant to land owned by John D. Armstrong and leased to Eliasson Ranch Co. since 1977. Simultaneously, Eliasson Ranch Company filed a Withdrawal of Objection conditioned on entry of the changes stated in the Affidavit. The hearing set for April 10, 1990, was vacated.

9. By letter of July 26, 1991, to the DNRC Water Resources Regional Office, the Water Master requested a standard verification of the 64.40 total acres now claimed.

10. On August 13, 1991, the DNRC Water Resources Specialist filed a Memorandum verifying 67.50 acres irrigated, 33.00 acres owned by Eliasson Ranch Company and 34.50 acres owned by John D. Armstrong.

11. On August 20, 1991, counsel for Eliasson Ranch Company filed a Clarification of Representation as to Notice of Appearance, requesting creation of an implied claim for the purpose of adjudicating the Notice of Objection filed by Eliasson Ranch Company in Claim 40A-W-151882-00.

12. On January 13, 1993, the Water Master filed a Master's Draft Report finding that no implied claim should be generated from Statement of Claim 40A-W-151882-00 and allowing until February 12, 1993, for comment.

13. Requests for enlargement of the comment period were granted, allowing until October 18, 1993, for the filing of comment on the Master's Draft Report.

14. On October 19, 1993, the claimant filed Comments of Eliasson Ranch Company on Master's Draft Report Filed January 13, 1993, stating as follows.

1. Claimant objects to Conclusion of Law No. IV, to the extent it suggests that an implied claim may only be granted if a review is requested by the DNRC. While the rules allow the DNRC to request review of a claim which the DNRC feels reflects an implied claim, there is no prohibition against parties to the adjudication raising the issue.

2. Claimant objects to Conclusion of Law No. V, to the extent it concludes that the standard of proof to support an implied claim is other than a preponderance of the evidence.

3. Claimant has testified that the land sought to be added to the claim is owned by John D. Armstrong and does not contest Mr. Armstrong's claim No. 40A-W-213215-00.

4. claimant believes, however, that there are sufficient grounds upon which to decree the implied water right: (1) the prior decree was attached to the claim and establishes the water right decreed to Otto Finco; (2) copies of the water resources survey were attached which reflect irrigation in the area asserted in the claimant's [sic] objection; and (3) the attached aerial photograph clearly shows areas of active and potential irrigation on the lands sought to be added by claimant/s [sic] objection. Based upon this information the water court could find an implied claim in the successor in interest to Otto Finco.

5. If an implied claim were granted, this claimant has no objection to the claim being issued in the name of John D. Armstrong.

6. If an implied claim is not decreed, then the irrigated acres and flow rate asserted in claimant's objection should be decreed in claim No. 40A-W-213215-00.

15. The Court notes that there is no claim 40A-W-213215-00. There is a claim 43A-W-213215-00 filed by Westling Ranch Inc. The claimant's Motion for Extension of Time filed September 17, 1993, indicates that the John D. Armstrong claim at issue is 40A-W-214125-00, filed after issuance of the Basin 40A Temporary Preliminary Decree.

CONCLUSIONS OF LAW

I.

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees pursuant to Mont. Code Ann. §85-2-233.

II.

The information entered upon the Statement of Claim and sworn to by the claimant is *prima facie* evidence pursuant to Mont. Code Ann. section 85-2-227. *Prima facie* validity may be overcome by other

evidence in the record.

III.

Upon review of the Memoranda, Affidavits, and Withdrawal of Objection, and Comments of Eliasson Ranch Company on Master's Draft Report filed, they have been considered in reaching the ultimate results in this case.

IV.

As to the request to generate an implied claim for the right decreed in 1952 to Otto Finco, an implied claim is defined in Rule 1.III(28) of the Water Right Claim Examination Rules as "a claim authorized by the water court to be separated and individually identified from multiple rights evident in one or more claims." Rule 6.IV(1) of the Water Right Claim Examination Rules states: "Whenever a single claim appears to contain more than one right, the claim will be sent by the Montana Department of Natural Resources and Conservation to the water court requesting a review for possible implied claims." No review was requested as to Claim 40A-W-151882-00. When no review is request by DNRC, the claimant may petition the Court for relief.

V.

The rules allow a claimant to secure an implied claim when it is clear from the claim that the claimant has more than one water right. The Water Court has power to create implied claims when a claim appears to contain more than one right.

VI.

The principal issue confronting the Court is what constitutes the claim for purposes of generation of an implied claim. There being

nothing entered on Statement of Claim 40A-W-151882-00 to connect the claim with the right decreed to Otto Finco, the claimant reaches to the documentation attached to Statement of Claim 40A-W-151882-00 to justify generation of an implied claim.

VII.

In Comments of Eliasson Ranch Company on Master's Draft Report, filed October 19, 1993, the claimant argues that the standard of proof for generation of an implied claim is a preponderance of the evidence, and that a preponderance of evidence may be found in documents attached to the Statement of Claim, in this instance copies of the prior decree, water resources survey, and aerial photo which, the claimant alleges, clearly show areas of active and potential irrigation on the lands sought to be covered in an implied claim. If the Court adopts the claimant's interpretation, the requirement for individual statements of claims under § 85-2-221 is meaningless. The filing by anyone of a copy of any prior decree, water resources survey, aerial photo, or part thereof, would be sufficient to establish under § 85-2-227 the *prima facie* validity of any use of water indicated in those documents. Therefore, the Court looks to the Statement of Claim to determine whether there is any information entered to support an implied claim. Once it has been determined that there is information on the Statement of Claim to support generation of an implied claim, the Court may look to the documentation attached to the original Statement of Claim to determine the elements of the implied claim.

VIII.

As to Statement of Claim 40A-W-151882-00, Eliasson Ranch

Company claimed a flow rate of 3.125 CFS (125.00 miner's inches), the flow rate decreed to Albert Gerntholz in the 1952 decree, and a volume of 121.70 acre feet per year used on 29.80 acres with a priority date of May 1, 1897. The Statement of Claim appears to claim only land owned by Eliasson Ranch Company. Neither John D. Armstrong as owner nor land owned by John D. Armstrong are evident in Statement of Claim 40A-W-151882-00. There is nothing on the Statement of Claim to suggest either an additional 35.00 miner's inches and 34.50 acres or connection to more than one decreed right.

IX.

To the extent that the claimant attempts to rely on the 1952 decree for an implied claim to the right decreed to Otto Finco, the pages of the 1952 decree relevant to Otto Finco (pages 5 and 15) were omitted from the copy of the decree attached to Statement of Claim 40A-W-151882-00. No implied claim may be generated even if the Court were to look to that attachment as *prima facie*.

X.

No implied claim should be generated from Statement of Claim 40A-W-151882-00, nor from the documents attached to Statement of Claim 40A-W-151882-00, for the right decreed to Otto Finco.

XI.

The Notice of Objection filed by Eliasson Ranch Company does not empower the Court to vest in Eliasson Ranch Company the right decreed to Otto Finco and succeeded to by John D. Armstrong.

XII.

The volume quantification should be removed from this direct

flow irrigation claim pursuant to Mont. Code Ann. § 85-2-234(6)(b)(i).

XIII.

Late claim 40A-W-214125-00 will be adjudicated in a manner consistent with the adjudication of all late claims. Nothing in Case 40A-115 is binding on the future adjudication of late claim 40A-W-214125-00.

XIV.

The Temporary Preliminary Decree abstract of Claim 40A-W-151882-00 should be changed in part to read as follows:

VOLUME: THE VOLUME OF THE RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

MAXIMUM ACRES: 33.00

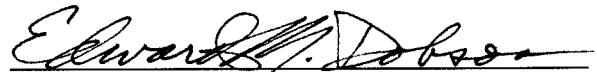
PLACE OF USE FOR IRRIGATION:

	<u>ACRES</u>	<u>QTR. SEC.</u>	<u>SEC.</u>	<u>TWP.</u>	<u>RGE.</u>	<u>COUNTY</u>
001	10.00	SWNE	5	07N	25E	MUSSELSHELL
002	17.00	NWSE	5	07N	25E	MUSSELSHELL
003	<u>6.00</u>	E2E2SW	5	07N	25E	MUSSELSHELL
Total:	33.00					

XV.

To the extent it is not withdrawn, the Notice of Objection filed by Eliasson Ranch Company is DISMISSED.

DATED this 27th day of October, 1993.


Edward M. Dobson
Water Master

CERTIFICATE OF SERVICE

I, Judith A. Salvas, Deputy Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above MASTER'S REPORT was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Eliasson Ranch Co.
A Montana Corporation
16393 Highway 12 West
Roundup, MT 59072

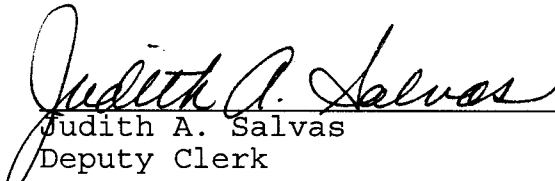
Maria Rodeghiero and
Bruno Rodeghiero
1313 - 1st St. East
Roundup, MT 59072

Donald J. Eliasson
P. O. Box 771
Roundup, MT 59072

Roy C. Rodeghiero
P. O. Box 448
Roundup, MT 59072

Jan Rehberg, Attorney
100 N. Park Ave., Suite 300
Helena, MT 59601-6263

DATED this *27th* day of *October*, 1993.



Judith A. Salvas
Deputy Clerk

MEMORANDUM

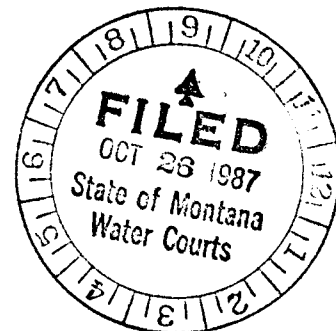
TO: Bill Dockins, Water Master

FROM: Gene Gibson, Water Rights Technician *EG*
Lewistown Water Rights Office

APPROVED BY: Larry Holman, Bureau Chief
Water Rights Bureau

DATE: October 20, 1987

SUBJECT: Flow rates and volumes for claim numbers 40A-W150529, 151880, 151881, 151882, and 151883 filed by Eliasson Ranch Co., Case No. 40A-115



Background

On October 2, 1987, Donald J. Eliasson called me to set up an appointment to review the flow rates and volumes on the above claims. Mr. Eliasson and I met on October 16, 1987, at 9:00 AM at the Lewistown Field Office. The following is a brief synopsis of what transpired during this meeting.

Flow Rate

Claim Numbers 40A-W150529, 151881, 151883

Mr. Eliasson stated that these claims required the claimed flow rate which is higher than the guideline established by the Water Court (see Table I below). I told Mr. Eliasson that there were two ways to justify a higher flow rate. The best quantification for a flow rate would be to measure it. If no water is being diverted through the system the flow rate capacity can be estimated from the irrigation system by using the slope-area method and the Manning formula.

Mr. Eliasson stated he would have the Musselshell County Soil Conservation Service do a measurement of his ditches and headgates. He will then submit this information to the Water Courts.

Table I: Flow Rate Comparison

Claim Number	Claimed Flow Rate	Water Court Guideline	Decreed Flow Rate
W150529-40A	333.33 gpm/acre	17 gpm/acre	17 gpm/acre
W151881-40A	53.33 gpm/acre	17 gpm/acre	17 gpm/acre
W151883-40A	37.78 gpm/acre	17 gpm/acre	17 gpm/acre

Claim Numbers 40A-W151880 and 151882

The flow rates for these two claims were already decreed once before in Musselshell County District Court, Case No. 5115. Mr. Eliasson does not have any objection to the flow rates (shown in Table II) for these claims.

Table II: Flow Rate Comparison

Claim Number	Claimed Flow Rate	Water Court Guideline	Decreed Flow Rate
W151880-40A	28.470 gpm/acre	17 gpm/acre	28.470 gpm/acre
W151882-40A	47.139 gpm/acre	17 gpm/acre	47.139 gpm/acre

Volumes

Mr. Eliasson stated that they had claimed volumes too low on the claims listed below. He thinks that to adequately irrigate the claimed places of use they would require the volume amount as established by the Water Court guideline.

Claim Number 40A-W150529

This claim is for a water spreading system in climatic area II. The claimant claimed 1.5 acre feet/acre. The guideline for this type of system is 2 acre feet/acre.

Claim Numbers 40A-W151880 and 151882

These claims are for flood systems in climatic area II. The claimant claimed 4.1 acre feet/acre. The guideline for this type of system is 10.2 acre feet/acre.