

Montana Water Court
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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-151880-00
)
) **Implied Claim:**
) 40A-W-214226-00
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CLAIMANT: Eliasson Ranch Company

OBJECTOR: Eliasson Ranch Company
 Maria Rodeghiero and Bruno Rodeghiero

FILED
JUN 28 2004
Montana Water Court

ORDER AMENDING AND ADOPTING MASTER'S REPORT

Pursuant to Montana Code Annotated, Section 85-2-233(5), claim 40A-W-151880-00 was assigned to Water Master Edward M. Dobson. On May 28, 1993, the Water Master issued a Master's Report for claim 40A-W-151880-00. Among other matters, the Master recognized implied claim 40A-214226-00.

On October 1, 1993, claimant Eliasson Ranch Company, through attorney Janice L. Rehberg of the Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P. law firm, and objectors

Bruno Rodeghiero and Maria Rodeghiero filed their Joint Comments to Master's Report. On the same day, Eliasson Ranch Company, through attorney Rehberg, also filed its Individual Comment. Several issues were raised by these comments and objections.

On December 26, 2002, the Water Court issued an Order granting the parties until February 24, 2003 to file any additional briefs, to request a hearing on the objections, and to file corrections to attorneys, parties, and/or mailing addresses listed on the service list. No briefs, corrections or requests for hearing were filed by the due date. Consequently, no hearing on the objections was held.

On May 2, 2003, Jason L. Harkins, attorney at law, filed a Notice of Appearance and Request for Additional Time to Comment. No opposition to the motion was filed and the comment period was extended to September 29, 2003. On June 24, 2003, the Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P. law firm and attorney Jason L. Harkins filed a Stipulated Notice of Withdrawal by which the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P. withdrew from the case. The Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P. law firm has been removed from the service list.

On September 29, 2003, the Eliasson Ranch Company, through attorney Jason L. Harkins, filed its Brief Comment. The Brief Comment requests an expansion of the period of use for claim 40A-W-151880-00. The request to expand the period of use was denied without prejudice by Order dated April 26, 2004.

Also in its Brief Comment, the Eliasson Ranch refers to Water Master Dobson's discussion of a Department of Natural Resources and Conservation (DNRC) Authorization to Change a point of diversion. The information in the record and the Master's Report regarding

the Eliasson Ranch Company's points of diversion was confusing. To help resolve the confusion, the Court issued a Request for DNRC Assistance on May 11, 2004 and requested the DNRC to consult with the parties and to file its recommendations on the points and means of diversion. On June 9, 2004, the DNRC, through Andy Brummond, filed its report and recommended specific points and means of diversion. The June 9 DNRC report indicates that Gary Eliasson and Bruno Rodeghiero had advised the DNRC that DNRC's recommended points and means of diversion were correct. The information in the DNRC report has been incorporated into this Order. Additionally, the original of the DNRC report has been placed in the 40A-W-151880-00 claim file, a copy placed in the 40A-W-214226-00 claim file, and a copy retained in the Case 40A-115 file.

The Court will now resolve the issues raised in the October 1, 1993 comments on claim 40A-W-151880-00 and implied claim 40A-W-214226-00. In those comments, the parties raised the following issues:

- 1) The Master's Conclusion of Law VI (discussing the significance of sworn statements of claim and attachments thereto when implied claims are being considered) is irrelevant, unnecessarily restrictive, and should be stricken.
- 2) The parties agreed with the Master's Conclusion of Law XI that point of diversion 2 and 3 should be removed from claim 40A-W-151880-00, but included on implied claim 40A-W-214226-00.
- 3) The means of diversion for implied claim 40A-W-214226-00, set forth in Conclusion of Law XI, should be "dam, headgate and pump."
- 4) An informational remark should be added to implied claim 40A-W-214226-00 stating that the "Entire Place of Use is East of Musselshell River."
- 5) A private agreement remark should be added to the abstract of claim 40A-W-151880-00.

The Court will address these five issues in two parts. Issues 1, 2, 3, and 4 are addressed in the discussion of implied claim 40A-W-214226-00. Issues 2 and 5 are addressed in the discussion of claim 40A-W-151880-00.

Implied Claim 40A-W-214226-00

In his report, the Water Master implies claim 40A-W-214226-00 from claim 40A-W-151880-00. The Master addresses the implied claim process in Conclusions of Law IV through VII and Conclusion XI. The Master's implied claim analysis is partially incorrect and is replaced with the following analysis.

Implied claims are intended to address those situations where a single statement of claim appears to contain more than one separate water right. Typically, the DNRC discovers implied claims during its claim examination process prior to the issuance of a Water Court decree. The DNRC normally requests Water Court authorization for an implied claim pursuant to Rule 6.IV of the Water Right Claim Examination Rules. Implied claims are usually created without contest.

Although Rule 6.IV generally applies to claims under examination by DNRC prior to issuance of a decree, the Water Court routinely cites to the Rule when it generates implied claims after the issuance of its decree. Where a single claim form contains multiple rights and has been timely filed, the Section 85-2-221, MCA statutory deadline for filing claims is satisfied for the multiple rights. See Water Right Claim Examination Rule 6.IV(3)(c).

While the Rule does not provide specific criteria, the Court generally relies on the information found on the face of the statement of claim form and any material in the attachments to the claim that helps clarify the information found on the face of the claim form. The most

common indicator for an implied claim is an overstatement of some element of the claim on a single statement of claim form, such as: listing points of diversion on two or more sources; listing two previously decreed rights with different priority dates on one claim form; combining the flow rates of multiple decreed rights on one claim; claiming a flow rate in excess of a previously decreed right; or combining multiple purposes such as irrigation, stock, and mining uses on one claim form.

Although the Court occasionally authorizes an implied claim based solely on the attachments to a statement of claim, the usual implied claim has evidence of two or more claims on the face of the parent statement of claim form. Generating an implied claim is intended to separate two or more water rights into separate claims so that they are accurately identified for adjudication and administration.

The generation of implied claims must come from the statement of claim as it was originally filed on or before the filing deadline of April 30, 1982. A statement of claim cannot be amended after the filing deadline or changed through the objection process to expand the elements of the filed statement of claim and thereby create the groundwork to add additional water rights through the implied claim process. The implied claim process cannot be used to circumvent the claim filing process in order to cure a failure to file a water right claim in a timely fashion. That practice would be contrary to the late claim provisions of the statutes. Section 85-2-221 and 85-2-225, MCA. *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210.

Under the facts in this case, it is appropriate to create an implied claim for the 14.10 acres irrigated east of the Musselshell River (more precisely identified by the Water Master in

Conclusion of Law XI). These 14.1 acres were included in the original statement of claim filed on April 22, 1982.

However, the Master's recommendation to double the flow rate out of the Musselshell River and thereby recognize a 5.5 cfs flow rate for claim 40A-W-151880-00 and a 5.5 cfs flow rate for claim 40A-W-214226-00 is not supported by the existing record. The 5.5 cfs flow rate can be used to irrigate land under claim 40A-W-151880-00 or it can be used to irrigate land under claim 40A-W-214226-00, but the record does not support a recommendation to divert 11 cfs from the Musselshell River to irrigate both places of use at the same time. An information remark shall be included on both claims to clarify the alternative use of both claims.

Based on the existing record, including the DNRC Recommendation Report filed June 9, 2004, Conclusion of Law XI of the Master's Report is AMENDED and implied claim 40A-W-214226-00 is modified and decreed as follows:

OWNERS: ELIASSON RANCH CO
16365 HWY 12 W
ROUNDUP MT 59072

SUTHERLAND LIVING TRUST
ROBERT R. SUTHERLAND, TRUSTEE
4394 BONITA RD
BONITA CA 91902

PRIORITY DATE: JUNE 10, 1929

TYPE OF HISTORICAL RIGHT: USE

PURPOSE: IRRIGATION

Type: FLOOD

FLOW RATE: 5.50 CFS

USE OF THIS FLOW RATE IS LIMITED TO THREE TIMES PER YEAR, THREE DAYS PER TIME, AT 5.50 CFS. MORE TIME MAY BE REQUIRED AT LOWER FLOWS.

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

Climatic Area: 2

MAXIMUM ACRES: 14.10

SOURCE: MUSSELSHELL RIVER

POINTS OF DIVERSION AND MEANS OF DIVERSION:

QTR. SEC. SEC. TWP. RGE. COUNTY

NESWNW 4 07N 25E MUSSELSHELL
Diversion Means: DIVERSION DAM
Ditch Name: RODEGHIERO DITCH

PERIOD OF USE: MAY 15 TO SEPT 24

PLACE OF USE FOR IRRIGATION:

ACRES QTR. SEC. SEC. TWP. RGE. COUNTY

001	8.60	E2NENW	4	07N	25E	MUSSELSHELL
002	<u>5.50</u>	W2NWNE	4	07N	25E	MUSSELSHELL
Total:	14.10					

ENTIRE PLACE OF USE IS EAST OF MUSSELSHELL RIVER

THE COMBINED DIVERTED FLOW RATE OF CLAIMS 40A-W-214226-00 AND 40A-W-151880-00-00 SHALL NOT EXCEED A TOTAL OF 5.50 CFS.

Claim 40A-W-151880-00

Based on the existing record, including the DNRC Recommendation Report filed June 9, 2004, Conclusion of Law X of the Master's Report is AMENDED and the flow rate, volume,

points and means of diversion, and place of use of claim 40A-W-151880-00 are modified as follows:

OWNERS: ELIASSON RANCH CO
16365 HWY 12 W
ROUNDUP MT 59072

SUTHERLAND LIVING TRUST
ROBERT R. SUTHERLAND, TRUSTEE
4394 BONITA RD
BONITA CA 91902

FLOW RATE: 5.50 CFS

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

POINTS OF DIVERSION AND MEANS OF DIVERSION:

QTR. SEC. SEC. TWP. RGE. COUNTY

SWSWSE 23 07N 24E MUSSELSHELL
Diversion Means: DIVERSION DAM
Ditch Name: NADERMAN DITCH

NWNWSW 04 07N 25E MUSSELSHELL
Diversion Means: PUMP

PLACE OF USE FOR IRRIGATION:

ACRES QTR. SEC. SEC. TWP. RGE. COUNTY

001 25.30 E2NE 5 07N 25E MUSSELSHELL
002 47.30 N2NW 4 07N 25E MUSSELSHELL
Total: 72.60

ENTIRE PLACE OF USE IS WEST OF MUSSELSHELL RIVER.

THE COMBINED DIVERTED FLOW RATE OF CLAIMS 40A-W-214226-00 AND 40A-W-151880-00-00 SHALL NOT EXCEED A TOTAL OF 5.50 CFS.

In the Joint Comments to Master's Report filed October 1, 1993, the Eliasson Ranch

Company, Bruno Rodeghiero, and Maria Rodeghiero agreed to include a private agreement remark on this claim. Therefore, the following information remark shall be added to the claim abstract:

CLAIMS 40A-W-151880-00 AND 40A-W-206914-00 ARE SUBJECT TO A PRIVATE AGREEMENT RECORDED IN MUSSEL SHELL COUNTY, MONTANA, IN BOOK 345 AT PAGE 12.

As the confusion over the points of diversion has been resolved, the Master's Conclusion of Law XII is not necessary and is not adopted.

ORDER

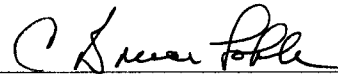
Pursuant to Montana Code Annotated, §85-2-233(5), claim 40A-W-151880-00 was assigned to Water Master Edward M. Dobson. The Water Master filed a report containing Findings of Fact and Conclusions of Law. In his report the Master implied claim 40A-W-214226-00 and modified claim 40A-W-151880-00. The Court has reviewed the Water Master's Findings and Conclusions.

Pursuant to Rule 53(e), Montana Rules of Civil Procedure, the Court **AMENDS** the Master's implied claim analysis, **AMENDS** the elements of implied claim 40A-W-214226-00, **AMENDS** the flow rate, volume, points and means of diversion, and place of use of claim 40A-W-151880-00, adds information remarks to both claims, and to the extent not otherwise modified herein, **ADOPTS** the Master's Report and

ORDERS that an **Abstract of Water Right Claim as Modified by the Montana Water Court** be served with this Order to confirm that the recommendations set forth in the Master's Report as **AMENDED** herein have been adopted for claims 40A-W-151880-00 and 40A-W-214226-00; and

ORDERS that the parties have until **July 30, 2004** to file comments and objections to this Order. If no comments or objections are filed by the specified date, the Court will conclude the parties agree with the resolution of these two claims and the modifications made here will be carried forward into the next decree.

DATED this 28 day of JUNE, 2004.



C. Bruce Loble
Chief Water Judge

CERTIFICATE OF SERVICE

I, Anna M. Burton, Clerk of Court of the Montana Water Court, hereby certify that a true and correct copy of the above **ORDER AMENDING AND ADOPTING MASTER'S REPORT** was duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

Eliasson Ranch Company
16393 Highway 12 West
Roundup MT 59072

Sutherland Living Trust
4394 Bonita Road
Bonita CA 91902

Gary Eliasson
PO Box 389
Roundup MT 59072

Maria Rodeghiero
Bruno Rodeghiero
PO Box 37
Roundup MT 59072

Donald J. Eliasson
16393 Highway 12 West
Roundup MT 59072

Roy C. Rodeghiero
PO Box 37
Roundup MT 59072

Jason L. Harkins, Attorney
Harkins Law Firm, P.C.
3021 6th Avenue N., Suite 205
Billings MT 59101

DATED this 28th day of June, 2004.



Anna M. Burton
Clerk of Court

Blind Copy to:

Andy Brummond, WRS
DNRC - Water Resources Regional Office
613 NE Main, Suite E
Lewistown MT 59457-2020

**ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT**

**MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40A 151880-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: ELIASSON RANCH CO
16365 HWY 12 W
ROUNDUP, MT 59072

SUTHERLAND LIVING TRUST
ROBERT R SUTHERLAND, TRUSTEE
4394 BONITA RD
BONITA, CA 91902

OWNERSHIP UPDATE PROCESSED TO ADD NEW OWNERS. THE WATER RIGHT MAY BE SPLIT INTO SEPARATE WATER RIGHTS AFTER FINAL DECREE UPON REQUEST OF THE OWNERS.

Priority Date: MAY 1, 1897

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 5.50 CFS

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

Climatic Area: 2 - MODERATELY HIGH

***Maximum Acres:** 72.60

Source: MUSSELSHELL RIVER

Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSWSE	23	7N	24E	MUSSELSHELL
Diversion Means: DIVERSION DAM						
2		NWNWSW	4	7N	25E	MUSSELSHELL
Diversion Means: PUMP						

DITCH NAME FOR DIVERSION NO. 01 IS: NADERMAN DITCH.

Period of Use: MAY 15 to SEPTEMBER 24

***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	25.30		E2NE	5	7N	25E	MUSSELSHELL
2	47.30		N2NW	4	7N	25E	MUSSELSHELL
Total:	72.60						

ENTIRE PLACE OF USE IS WEST OF MUSSELSHELL RIVER

Remarks:

AUTHORIZATION TO CHANGE POINT OF DIVERSION COMPLETED 06/07/83.

THE COMBINED DIVERTED FLOW RATE OF CLAIMS 40A-W-214226-00 AND 40A-W-151880-00 SHALL NOT EXCEED A TOTAL OF 5.50 CFS.

CLAIMS 40A-W-151880-00 AND 40A-W-206914-00 ARE SUBJECT TO A PRIVATE AGREEMENT RECORDED IN MUSSELSHELL COUNTY, MONTANA, IN BOOK 345 AT PAGE 12.

**ABSTRACT OF WATER RIGHT CLAIM
AS MODIFIED BY THE WATER COURT**

**MUSSELSHELL RIVER, ABOVE ROUNDUP
BASIN 40A**

IMPORTANT NOTICE

AN ASTERISK (*) HAS BEEN PLACED NEXT TO EACH ITEM CHANGED BY ORDER OF THE MONTANA WATER COURT AFTER ISSUANCE OF THE PREVIOUS DECREE.

Water Right Number: 40A 214226-00 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: ACTIVE

Owners: SUTHERLAND LIVING TRUST
ROBERT R SUTHERLAND, TRUSTEE
4394 BONITARD
BONITA, CA 91902

ELIASSON RANCH CO
16365 HWY 12 W
ROUNDUP, MT 59072

Priority Date: JUNE 10, 1929

Type of Historical Right: USE

***Purpose (use):** IRRIGATION

Irrigation Type: FLOOD

***Flow Rate:** 5.50 CFS

USE OF THIS FLOW RATE IS LIMITED TO THREE TIMES PER YEAR, THREE DAYS PER TIME, AT 5.50 CFS. MORE TIME MAY BE REQUIRED AT LOWER FLOWS.

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

Climatic Area: 2 - MODERATELY HIGH

***Maximum Acres:** 14.10

Source: MUSSELSHELL RIVER

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		NESWNW	4	7N	25E	MUSSELSHELL

Diversion Means: DIVERSION DAM

DITCH NAME: RODEGHIERO DITCH

***Period of Use:** MAY 15 to SEPTEMBER 24

***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	8.60		E2NENW	4	7N	25E	MUSSELSHELL
2	5.50		W2NWNE	4	7N	25E	MUSSELSHELL
Total:	14.10						

ENTIRE PLACE OF USE IS EAST OF MUSSELSHELL RIVER

Remarks:

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. W151880-00.

THE COMBINED DIVERTED FLOW RATE OF CLAIMS 40A-W-214226-00 AND 40A-W-151880-00 SHALL NOT EXCEED A TOTAL OF 5.50 CFS.