

Montana Water Court

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

\*\*\*\*\*

CLAIMANTS: Erica Borbe; Dennis S. Voss

ON MOTION OF THE MONTANA WATER COURT

**CASE 40A-0351-R-2022**

40A 201242-00

40A 201261-00

40A 201263-00

40A 201270-00

40A 201272-00

**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, conclusions 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 to 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**

Water Right Claims 40A 201242-00, 40A 201261-00, 40A 201263-00, 40A 201270-00, and 40A 201272-00 appeared in the Preliminary Decree for the Musselshell

River, above Roundup (Basin 40A). These claims received issue remark. Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination or by Water Court order. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. These claims did not receive any objections or notices of intent to appear.

Further proceedings are not necessary. However, for organizational purposes, the Court consolidates these claims into Water Court Case 40A-0351-R-2022.

### **FINDINGS OF FACT**

1. Claims 40A 201261-00 and 40A 201263-00 each appeared with the following issue remarks:

THE SOURCE MAY BE INCORRECT. IT APPEARS FROM AVAILABLE DATA IN THE CLAIM FILE, THE SOURCE NAME SHOULD ACTUALLY BE UNNAMED TRIBUTARY OF MUSSELSHELL RIVER.

THE TIMELY FILED OBJECTION OF THOMAS M. DENHAM WAS AMENDED BY HIS SUCCESSORS IN INTEREST, DENNIS S. VOSS AND ERICA BORBE, TO INCLUDE SOURCE. BECAUSE THIS ELEMENT WAS NOT INCLUDED ON THE OBJECTION LIST, ANY WATER USER WHOSE RIGHTS MAY BE ADVERSELY AFFECTED BY ENFORCEMENT OF THIS CHANGE MAY PETITION THE APPROPRIATE COURT FOR RELIEF OR MAY FILE AN OBJECTION AT THE PRELIMINARY DECREE.

2. Claim 40A 201270-00 appeared with the following issue remark:

THE SOURCE MAY BE INCORRECT. IT APPEARS FROM AVAILABLE DATA IN THE CLAIM FILE, THE SOURCE NAME SHOULD ACTUALLY BE UNNAMED TRIBUTARY OF MUSSELSHELL RIVER.

3. Claim 40A 201272-00 appeared with the following issue remarks:

THIS CLAIM SHOULD BE CALLED IN ON MOTION OF THE WATER COURT TO RESOLVE THE ISSUES OF SOURCE AND POINT OF DIVERSION.

THE SOURCE MAY BE INCORRECT. IT APPEARS THE SOURCE NAME SHOULD ACTUALLY BE UNNAMED TRIBUTARY OF MUSSELSHELL RIVER.

4. Claims 40A 201242-00 was called in on motion of the Water Court by an order issued September 12, 2018. The order called in the claim to address potential issues related to the Montana Supreme Court's decision in *Department of State Lands v. Pettibone*.

5. Claim 40A 201242-00 was dismissed by the Court on February 21, 1996. *See Order Amending and Adopting Master's Report, Case 40A-205, Feb. 21, 1996.*

6. Each source name of Claims 40A 201261-00 and 40A 201263-00 was set by a previous Water Master during adjudication of the Temporary Preliminary Decree. *See Notice of Filing of Master's Report, Case 40A-205, Aug. 18, 1993; Order Adopting Master's Report, Feb. 21, 1996. See also, Notice of Filing of Master's Report, Case 40A-227, March 19, 1992; Order Adopting Master's Report, April 13, 1992.*

7. The Court called in Claim 40A 201272-00 on its on motion by an order issued September 12, 2018. The Court called in the claimed source name, point of diversion, and means of diversion pursuant to the issue remark on the claim.

8. A previous Water Master initially intended to postpone making changes requested by the claimants to the source name and point of diversion of Claim 40A 201272-00. *See Notice of Filing of Master's Report, Case 40A-236, June 26, 1990.* The Court subsequently made the requested changes resulting in the claim's current appearance in the Preliminary Decree. *See Order Adopting Master's Amended Report, April 30, 1992.* It appears the issues regarding source name, point of diversion, and means of diversion were resolved.

9. The issue remarks should be removed from the above-captioned claims.

#### **APPLICABLE LAW**

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. 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.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

### **CONCLUSIONS OF LAW**

1. The above-captioned claims may be decreed without modification to any substantive elements because the issues raised by the issue remarks were addressed by the Court in previous proceedings.

2. The information in the record provides the Court with a sufficient basis to resolve and remove each issue remark from each above-captioned claim.

### **RECOMMENDATIONS**

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. Post-decree Abstracts of Water Right Claims are served with this Report to confirm the recommended changes have been made in the state's centralized record system.

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Colton J. Lauer  
Water Master

### **Service via USPS Mail:**

Erica Borbe  
Dennis S. Voss  
PO Box 297  
Two Dot, MT 59085

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

**Water Right Number:** 40A 201242-00 STATEMENT OF CLAIM

**Version:** 2 -- POST DECREE

**Status:** DISMISSED

**Owners:** DENNIS S VOSS  
PO BOX 297  
TWO DOT, MT 59085 0297  
  
ERICA BORBE  
PO BOX 297  
TWO DOT, MT 59085 0297

**Priority Date:**

**Type of Historical Right:**

**Purpose (use):** STOCK

**Flow Rate:**

**Volume:**

**Source Name:** GROUNDWATER

**Source Type:** GROUNDWATER

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

**Period of Use:**

**Place of Use:**

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**Remarks:**

THIS CLAIM WAS DISMISSED BY ORDER OF THE WATER COURT DURING ADJUDICATION OF THE TEMPORARY PRELIMINARY DECREE ON 02/21/96.

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

**Water Right Number:** 40A 201261-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** DENNIS S VOSS  
PO BOX 297  
TWO DOT, MT 59085 0297

ERICA BORBE  
PO BOX 297  
TWO DOT, MT 59085 0297

**Priority Date:** AUGUST 1, 1883

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. 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:** SPRING, UNNAMED TRIBUTARY OF TOLL 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		NESWNW	9	7N	13E	WHEATLAND

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

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** JANUARY 1 TO DECEMBER 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			NESWNW	9	7N	13E	WHEATLAND

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

**Water Right Number:** 40A 201263-00 STATEMENT OF CLAIM

**Version:** 3 -- POST DECREE

**Status:** ACTIVE

**Owners:** DENNIS S VOSS  
PO BOX 297  
TWO DOT, MT 59085 0297

ERICA BORBE  
PO BOX 297  
TWO DOT, MT 59085 0297

**Priority Date:** AUGUST 1, 1883

**Type of Historical Right:** USE

**Purpose (use):** STOCK

**Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. 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:** SPRING, UNNAMED TRIBUTARY OF TOLL 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		SWNENW	9	7N	13E	WHEATLAND

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

**Diversion Means:** LIVESTOCK DIRECT FROM SOURCE

**Period of Use:** JANUARY 1 TO DECEMBER 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			SWNENW	9	7N	13E	WHEATLAND

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

**Water Right Number:** 40A 201270-00 STATEMENT OF CLAIM

**Version:** 4 -- POST DECREE

**Status:** ACTIVE

**Owners:** DENNIS S VOSS  
PO BOX 297  
TWO DOT, MT 59085 0297

ERICA BORBE  
PO BOX 297  
TWO DOT, MT 59085 0297

**Priority Date:** FEBRUARY 8, 1890

**Type of Historical Right:** FILED

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 246.84 GPM

**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:** 14.40

**Source Name:** UNNAMED TRIBUTARY OF TOLL CREEK

**Source Type:** SURFACE WATER

SPRING AT NENWSE SEC 8 TWP 07N RGE 13E HYDROLOGICALLY RELATED TO SOURCE, NATURAL CHANNEL USED AS CARRIER FROM SPRING TO HEADGATE.

**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		SESENW	4	7N	13E	WHEATLAND

**Period of Diversion:** MAY 15 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Period of Use:** MAY 15 TO OCTOBER 15

**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	7.50		NWNE	4	7N	13E	WHEATLAND
2	3.10		NENW	4	7N	13E	WHEATLAND
3	3.80		SENW	4	7N	13E	WHEATLAND
<b>Total:</b>	<b>14.40</b>						

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**Remarks:**



THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

201270-00            201272-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

201270-00	201272-00	201273-00	201274-00	201277-00	201280-00
201282-00	201283-00	201284-00	201286-00	201287-00	201289-00
201290-00	201291-00	201292-00	201293-00	201294-00	201295-00

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

**Water Right Number:** 40A 201272-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** DENNIS S VOSS  
 PO BOX 297  
 TWO DOT, MT 59085 0297  
 ERICA BORBE  
 PO BOX 297  
 TWO DOT, MT 59085 0297

**Priority Date:** FEBRUARY 8, 1890  
**Type of Historical Right:** FILED  
**Purpose (use):** IRRIGATION  
**Irrigation Type:** FLOOD  
**Flow Rate:** 247.00 GPM  
**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:** 14.40  
**\*Source Name:** UNNAMED TRIBUTARY OF TOLL CREEK  
**Source Type:** SURFACE WATER  
 SPRING HYDROLOGICALLY RELATED TO SOURCE AT NESWNW SEC 9 TWP 07N RGE 13E; NATURAL CHANNEL IS USED TO CARRY WATER TO HEADGATE.

**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		SENENW	4	7N	13E	WHEATLAND

**Period of Diversion:** MAY 15 TO OCTOBER 15

**Diversion Means:** HEADGATE

**Period of Use:** MAY 15 TO OCTOBER 15

**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	7.50		NWNE	4	7N	13E	WHEATLAND
2	3.10		NENW	4	7N	13E	WHEATLAND
3	3.80		SENEW	4	7N	13E	WHEATLAND
<b>Total:</b>	<b>14.40</b>						

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**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

201270-00            201272-00

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

201270-00	201272-00	201273-00	201274-00	201277-00	201280-00
201282-00	201283-00	201284-00	201286-00	201287-00	201289-00
201290-00	201291-00	201292-00	201293-00	201294-00	201295-00