

Montana Water Court
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FILED
03/04/2024
Sara Calkins
CLERK
Montana Water Court
STATE OF MONTANA
By: Julia Romero
41K-0541-R-2023
White, Eugene
8.00

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
SUN RIVER BASIN (41K)
PRELIMINARY DECREE

CLAIMANTS: Gene J. Swanson; Oscar J. Swanson

CASE 41K-0541-R-2023

41K 133604-00

41K 133605-00

41K 133606-00

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 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

All water right claims that appeared in the Preliminary Decree for Sun River (Basin 41K) were subject to “issue remarks” resulting from pre-decree examination by the DNRC, objections, and counterobjections. Each of the above-captioned claims received issue remarks during the DNRC’s review of the claims.

FINDINGS OF FACT

1. Claim 41K 133604-00 received the following substantive issue remark:
IT APPEARS POINT OF DIVERSION NO. 1 MAY BE INCORRECT.
THE EXISTENCE OF A DIKE CANNOT BE CONFIRMED FROM
AVAILABLE DATE.

2. The above-captioned claims were consolidated into Case 41K-0541-R-2023 and an Order Setting Filing Deadline was issued by the Water Court for the claimants to provide information or evidence clarifying the historically accurate location of point of diversion No. 1 for claim 41K 133604-00.

3. On July 12, 2023, claimant Gene Swanson filed a *Response* which states that there is a concrete dam. However, nothing describing the location of point of diversion No. 1 for claim 41K 133604-00 was filed with the *Response*.

4. On September 22, 2023, the Water Court issued a second Order Setting Filing Deadline for the claimants to file information regarding the legal land description for point of diversion No. 1 for claim 41K 133604-00.

5. On December 14, 2023, DNRC Water Resources Specialist Dixie Brough filed a *Memorandum* in this matter. The *Memo* states that the DNRC received a map from the Swansons which denoted multiple point of diversion locations associated with claim 41K 133604-00. Ms. Brough's *Memo* states that the concrete dam appears to be associated with points of diversion Nos. 2 and 3. However, the location of a headgate appearing to be associated with point of diversion No. 1 was also denoted on the map in the SWSESW of Sec 28, Twp 19N, Rge 7W in Lewis and Clark County. Therefore, the DNRC recommends that the location of point of diversion No. 1 be modified from the SESWSW of Sec 28, Twp 19N, Rge 7W in Lewis and Clark County to SWSESW of Sec 28, Twp 19N, Rge 7W in Lewis and Clark County prior to the removal of the issue remark.

6. Each of the above-captioned claims received notice-type issue remarks from the DNRC during its claims reexamination.

PRINCIPLES OF LAW

1. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.
2. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the point of diversion issue remark appearing on claim 41K 133604-00. Based on the information included in Ms. Brough's *Memo*, point of diversion No. 1 should be modified as described in Finding of Fact No. 5 and the point of diversion issue remark should be removed from the claim.
2. The notice-type issue remarks appearing on each of the above-captioned claims served their notice purpose and should be removed from the claims.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Water Master recommends that the Court modify point of diversion No. 1 for claim 41K 133604-00 from the SESWSW of Sec 28, Twp 19N, Rge 7W in Lewis and Clark County to SWSESW of Sec 28, Twp 19N, Rge 7W in Lewis and Clark County and remove all issue remarks from the claims.

Post decree abstracts of the water right claim reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Gene J. Swanson
Oscar J. Swanson
P.O. Box 354
Augusta, MT 59410

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 133604-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: GENE J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0354

OSCAR J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0345

Priority Date: DECEMBER 31, 1895

Type of Historical Right: DECREED

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: 4 - MODERATELY LOW

Maximum Acres: 88.60

Source Name: ELK 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		SWSESW	28	19N	7W	LEWIS AND CLARK

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: DIKE

2		SWNWSE	28	19N	7W	LEWIS AND CLARK
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Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: WOODWARD DITCH

3		SWNWSE	28	19N	7W	LEWIS AND CLARK
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Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: WOODWARD DITCH

POINTS OF DIVERSION NO.2 AND 3 APPEAR TO REFER TO HEADGATES ON OPPOSITE BANKS OF ELK CREEK.

Period of Use: APRIL 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	8.70		SWSW	22	19N	7W	LEWIS AND CLARK
2	35.40		W2NW	27	19N	7W	LEWIS AND CLARK
3	39.20		E2	28	19N	7W	LEWIS AND CLARK
4	5.30		W2SESW	28	19N	7W	LEWIS AND CLARK
Total:	<u>88.60</u>						

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.

133604-00 133605-00 133606-00

THE SUN RIVER DECREE, CASE NO. 4742 IN CASCADE COUNTY, DECREES 5.30 ACRES FOR THIS RIGHT.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 133605-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: GENE J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0354

OSCAR J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0345

Priority Date: APRIL 15, 1887

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.00 CFS

***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:** 55.00

***Source Name:** ELK 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		SWNWSE	28	19N	7W	LEWIS AND CLARK

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: WOODWARD DITCH

THE HEADGATE FOR THIS WATER RIGHT IS ON THE RIGHT BANK OF ELK CREEK. THE RIGHT BANK IS DETERMINED BY FACING DOWNSTREAM.

Period of Use: APRIL 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	8.70		SWSW	22	19N	7W	LEWIS AND CLARK
2	35.40		W2NW	27	19N	7W	LEWIS AND CLARK
3	10.90		E2	28	19N	7W	LEWIS AND CLARK

Total: 55.00

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.

133604-00

133605-00

133606-00

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
SUN RIVER
BASIN 41K**

Water Right Number: 41K 133606-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: GENE J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0354

OSCAR J SWANSON
PO BOX 354
AUGUSTA, MT 59410-0345

Priority Date: DECEMBER 31, 1885

Type of Historical Right: DECREED

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: 4 - MODERATELY LOW

***Maximum Acres:** 45.00

***Source Name:** ELK 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		SWNWSE	28	19N	7W	LEWIS AND CLARK

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: WOODWARD DITCH

THE HEADGATE FOR THIS WATER RIGHT IS ON THE LEFT BANK OF ELK CREEK.
THE LEFT BANK IS DETERMINED BY FACING DOWNSTREAM.

Period of Use: APRIL 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		W2NW	27	19N	7W	LEWIS AND CLARK
2	37.50		E2	28	19N	7W	LEWIS AND CLARK
Total:	45.00						

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.

133604-00

133605-00

133606-00