

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA

WILLS CATTLE COMPANY)	CASE NO. WC-2002-02
Plaintiffs)	<u>Certified From:</u>
v.)	Fourth Judicial District Court
)	Cause No. DV-01-755
WILLIAM J. SHAW and)	
E. KATHLEEN SHAW)	
Defendants)	
_____)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
 FOR THE TEMPORARY PRELIMINARY DECREE OF FORTY-TWO CLAIMS IN
 UNION CREEK AND LOWER ARKANSAS CREEK**

These Findings of Fact and Conclusions of Law are issued by the Chief Water Judge for inclusion in the Temporary Preliminary Decree of forty-one claims in Union Creek, a tributary of the Blackfoot River, and one claim in Lower Arkansas Creek, a tributary of Union Creek.

FINDINGS OF FACT

1. GENERAL ADJUDICATION OF EXISTING WATER RIGHTS

Montana is engaged in a general adjudication of existing water rights. An existing water right is a right to the use of water which would be protected under the law as it existed prior to July 1, 1973 and the term "existing right" includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law. Section 85-2-102(10), MCA. This action for the adjudication of existing water rights commenced on June 8, 1979 when the Montana Supreme Court issued its Order requiring the filing of statements of claim of

existing rights. Certain claims for existing rights were exempt from the filing process, but could be voluntarily filed. Section 85-2-222, MCA (1979). This Decree includes those "exempt" water right claims which were voluntarily filed, but does not include those "exempt" water right claims which were not filed.

2. CLAIMS INVOLVED IN THIS DECREE

On April 24, 2003, the Fourth Judicial District Court, the Honorable John W. Larson District Judge presiding, issued its Order in Cause DV-01-755 (modifying its previous Order) that:

the existing water right claims on Union Creek and existing water right claim 76F-B-214114-00 on Arkansas Creek, including the claims of the Plaintiff and Defendants, all of which are located within the Blackfoot River drainage (Basin 76F), are certified to the Montana Water Court pursuant to § 85-2-406(2)(b), MCA.

The certified claims were consolidated into Water Court Case No. WC-2002-02. The Water Court directed the Montana Department of Natural Resources and Conservation (DNRC) to examine the certified claims. This examination was conducted by the DNRC Missoula Regional Office. The examination was limited to Union Creek claims and claim 76F-B-214114-00.

The remainder of the claims in the Blackfoot River (Basin 76F) drainage are currently being examined by the DNRC State Wide Adjudication Team in Helena, established after the passage of House Bill 22 in the 2005 Montana Legislature (§§ 85-2-270 through 85-2-273, 85-2-276 through 85-2-283, MCA). As the DNRC predicts it will not complete its examination of the Blackfoot River drainage until December 2007, the Court is issuing this Decree at a time different than the issuance of the Blackfoot River (Basin 76F) Decree, pursuant to § 85-2-231(5), MCA.

There are forty-two claims for existing rights for irrigation and stock water in this Decree. Union Creek is the source of supply for forty-one claims. The source for the remaining claim (76F 214114-00) is an unnamed tributary of Union Creek, sometimes known as Lower Arkansas Creek. The forty-two claims for appropriation of water in this Decree are identified as follows:

76F 21139-00	76F 40417-00	76F 40422-00	76F 105128-00
76F 21140-00	76F 40418-00	76F 40544-00	76F 116152-00
76F 21977-00	76F 40419-00	76F 44313-00	76F 118521-00
76F 40004-00	76F 40420-00	76F 44316-00	76F 131039-00
76F 40005-00	76F 40421-00	76F 45420-00	76F 131040-00

76F 131041-00	76F 146861-00	76F 149572-00	76F 211899-00
76F 131042-00	76F 146862-00	76F 149999-00	76F 214069-00
76F 146850-00	76F 149566-00	76F 151035-00	76F 214114-00
76F 146852-00	76F 149567-00	76F 151039-00	76F 215676-00
76F 146858-00	76F 149568-00	76F 151041-00	
76F 146859-00	76F 149569-00	76F 169838-00	

A map of the Union Creek watershed is attached. The approximate locations of the points of diversion of the claims involved in this Decree are identified on the attached map. To distinguish between the Union Creek watershed and the entire Blackfoot River drainage (Basin 76F), the Union Creek watershed depicted on the attached map shall be referenced as basin 76FA.

3. SENIOR WATER RIGHTS

Judicial notice is taken of the fact that water rights exist on the Blackfoot River, on its tributaries and in adjoining basins or subbasins which may be senior to some of the rights decreed in Union Creek. Rights decreed herein may be subject to curtailment or cessation during times of water shortage in order to satisfy senior rights on the Blackfoot River or its tributaries, or in adjoining basins or subbasins.

4. DECREE ABSTRACTS AND INDEXES

In addition to these Findings and Conclusions, this Decree consists of one bound volume of computer-printed abstracts of each individual water right claim decreed in this basin. Included in this one volume is an Index designed to help people research and find water rights included in the Decree. The Index is composed of the following six sections:

- Source Name Index
- Owner Name Index
- Point of Diversion Index
- Priority Date Index
- Water Right Claim Identification Number Index
- Issue Remarks Index

A bound volume of the Decree and Index are located at the Department of Natural Resources and Conservation (DNRC) Water Resources Regional Office in Missoula, the DNRC central office in Helena, and at the Montana Water Court in Bozeman. This information is also available on the Internet, and on individual CDs available from the DNRC.

5. WATER RIGHT OWNER

A water right is decreed in the name of the claimant. If a water right transfer certificate or ownership update was properly filed and administratively processed prior to March 6, 2006, the Court issued the right in the name of the new owner. If a transfer certificate or ownership update is properly filed and administratively processed after that date, the new owner's name will appear in any subsequent decree. If a water right is split, the new owner's name will be added to the ownership record but, for the most part, the water right will not be split into separate ownerships until after the final decree is issued.

Some previously decreed water rights are claimed by more than one person. When the combined flow rate of such claims exceeds the previously decreed flow rate, each claimant is decreed the claimed flow rate, but a "decree exceeded" remark is added to each right noting the conflict.

6. SPECIFICS OF EXAMINATION PROCEDURE

The DNRC examined each claim for incomplete or inaccurate information in accordance with the Water Right Claim Examination Rules originally adopted by the Montana Supreme Court on July 7, 1987. These rules were amended by the Supreme Court's Orders of July 13, 1989 and December 18, 1990.

The specifics of each claim appear in the abstract of the water right. Each abstract of the claimed right includes (when the information was available):

- (a) The name and mailing address of the owner of the right;
- (b) The amount of water included in the right (all flow rates and volumes are measured at the point of diversion unless otherwise noted on the abstract);
- (c) The priority date of the right;
- (d) The purpose for which the right is used;
- (e) The place of use and a legal description of the land to which the right is appurtenant;
- (f) The source of water included in the right;
- (g) The point of diversion and means of diversion;
- (h) The inclusive dates during which the water is used each year;
- (i) Any other information necessary to define the nature and extent of the right.

If the claim did not include all the information required by § 85-2-224, MCA, and the information was not provided to the DNRC prior to issuance of this Decree, the right was decreed within the limits of the information submitted. Remarks were added to the abstracts flagging any unresolved issues.

7. MULTIPLE USES OF A WATER RIGHT

Historically, when a water right was decreed, a single water right may have been used for several purposes or uses. In this adjudication, the claimants were required to file separate claims for each use of the water right. Special claim forms were used for irrigation, stock water, domestic use and a catch-all form for all "other uses". As a result of this specific filing, each use of a water right is separately decreed. Therefore, a water right might be represented by two or more claims for these multiple uses. A remark noting the multiple use of a water right appears whenever irrigation, stock, domestic, and an "other use" claim are for the same right. The use of the right for several purposes does not increase the extent of the right, rather it decrees the right to alternate and interchange the use (purpose) of the water in accord with historical practices.

8. GUIDELINES

Guidelines were established in the Water Right Claim Examination Rules to aid in the examination of certain claimed flow rates and volumes. These guidelines are merely estimates of reasonable water use. Flow rates and volumes decreed according to these guidelines are not absolute; they are not unchangeable. They are subject to modification to accurately reflect a claimant's water right in its true and historical sense. "The quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use . . . the principle of beneficial use [being of] paramount importance." Allen v. Petrick, et al. (1924), 69 Mont. 373, 376-77, 222 P. 451, 452 as cited in McDonald v. State (1986), 220 Mont. 519, 536, 722 P.2d 598. There is no exact uniform rule for computing the duty or reasonable quantity of water to be applied for all cases alike.

9. IRRIGATION RIGHTS

Flow Rate. Direct flow irrigation rights are decreed by flow rate.

Flow rate is decreed in gallons per minute (gpm) or in cubic feet per second (cfs) instead of the traditional miner's inches. Section 85-2-103, MCA. One miner's inch is equivalent to 11.22 gpm. Forty miner's inches are equivalent to one cfs. The flow rate of a previously decreed water right is decreed as claimed although miner's inches are converted in the manner described.

Flow rates of rights based on a filed notice of appropriation or based on use shall not exceed a reasonable application rate. Based upon information and a recommendation provided by the DNRC, the Water Court finds that a reasonable application rate for direct flow irrigation is 17.00 gpm per acre (1.50 miner's inches per acre). On every claim where the submitted documentation clearly substantiates a flow rate in excess of 17.00 gpm per acre, it was so decreed. If a flow rate in excess of 17.00 gpm per acre was claimed, but not clearly substantiated, the flow rate was reduced to 17.00 gpm per acre and a remark noting the reduction was added to the water right claim abstract.

Volume. Volume is not decreed for direct flow irrigation rights unless a volume was established in a prior court judgment or decree, or where the Water Court determines that volume is necessary to adequately administer the particular water right. Section 85-2-234(6)(b), MCA.

Volume is decreed for rights which involve a reservoir. However, if it is determined that a reservoir is not a significant part of an irrigation system, volume is not decreed and a remark is added noting the system is primarily a direct flow irrigation system.

When volume is decreed, it is decreed in acre-feet per year. An acre-foot of water will cover one level acre to a depth of one foot.

Period of Use. Because the period of use can vary widely for each individual user, a claimed period of use that is reasonable is accepted unless it contradicts a previously decreed or documented period of use. If a period of use was not designated by the claimant or was not within the appropriate climatic zone guideline, an issue remark was added noting the problem.

Place of use.

A. Examination of Place of Use. The place of use of the right is designated by legal land description. Aerial photographs, Water Resource Surveys, field investigations and data submitted by the claimant are used by the DNRC to examine the claimed place of use. The resources actually used are specified on the DNRC's work sheet which is located in the claim

file. The place of use for irrigation is decreed as claimed. If, upon examination, the land did not appear irrigated or irrigable, a remark was added to the abstract noting the acreage discrepancy.

B. Supplemental Water Rights and Place of Use. Several water rights with different priority dates or different sources may be combined to supplement the irrigation requirements of all or part of the same acreage. Each right is limited to the flow rate and place of use of that right. The sum total flow rate of these rights shall not exceed the amount historically used for a beneficial purpose. Pursuant to the Court's Order Regarding Supplemental Rights Remarks filed August 13, 2004, the supplemental rights remarks in this decree are limited to Union Creek claims. The DNRC did not examine any supplemental relationship of the claims in this decree with non-Union Creek claims.

Point of Diversion and Means of Diversion. The point of diversion and means of diversion are decreed. The point of diversion is specifically designated by legal land description. Secondary points of diversion are noted in a remark when possible or necessary. In many cases, the claim and claimant's map (usually found in the claim file) will more specifically define the points of diversion. The means of diversion is reviewed and decreed as claimed unless a different means of diversion is apparent.

10. STOCK WATER RIGHTS

Volume. Unless otherwise directed by the Water Court, stock water claims are not decreed a specific volume. The limit of the right is based on a consumptive use of 30 gallons per day per animal unit. An animal unit is described as a cow/calf pair or equivalent. The number of animal units is limited to the reasonable carrying capacity of the area historically serviced by the water source. Such rights are limited to their historical beneficial use.

Flow Rate. The flow rates for stock water rights from wells, developed springs, pumps and gravity flow pipelines are governed by the diversion's capacity. If the claimed flow rate exceeds 35 gpm and the accompanying documentation or other data do not substantiate the flow rate, the flow rate is decreed as claimed and an issue remark is added noting the problem.

Rights involving stock drinking directly from surface water sources or a ditch system are not decreed a specific flow rate. Although not quantified by flow rate, such rights are limited to their historical beneficial use.

Point of Diversion. When a stock water use is direct from a surface water source, the legal land description for the point of diversion will be the same as that for the place of use.

Where there is a ditch, pipeline or off stream storage the legal land description for the point of diversion may differ from that for the place of use.

11. UNRESOLVED FACTUAL AND LEGAL ISSUES

The objection period provides an opportunity for all the parties in this Decree to raise any issue which needs to be resolved. All such issues may also be reviewed by the Water Court on its own motion or initiative. *See* In re "On Motion of the Water Court," Case WC-92-3, Order and Memorandum dated February 8, 1995.

Unresolved factual and legal issues have been noted by remarks on the individual claim abstracts. The Issue Remarks Index combines all these remarks into one index which is arranged numerically by water right claim number. Searching the Issue Remarks Index by water right claim number will identify all issue remarks that are noted on the individual claim abstracts. Any issue remarks that are not resolved through the objection process may be resolved by the Water Court as directed by § 85-2-248, MCA. Alternatively, the Water Court may defer the resolution of unresolved issue remarks until after issuance of the Blackfoot River (Basin 76F) decree.

The claimants of the water right claims in this Decree and other interested persons will be mailed a Notice of Entry of Temporary Preliminary Decree and Notice of Availability contemporaneously with the filing of these Findings and Conclusions. This "Notice of Availability" explains the objection process and sets a deadline for filing objections with the Montana Water Court.

If a water right claim receives no objection and is not reviewed by the Water Court on its own initiative or as directed by § 85-2-248, MCA, the claim will likely be entered into the Blackfoot River (Basin 76F) Decree without change. After all the objections and hearings on this Decree have been resolved and completed, the claims may be enforced and administered by the district court as authorized in § 85-2-406, MCA.

12. WITHDRAWN AND TERMINATED CLAIMS

Some water right claims have been withdrawn by the claimants and terminated in this basin prior to the issuance of this Decree. An abstract of each of these terminated claims is found in the bound volume of the computer-printed abstracts and all terminated claims are listed in the Decree indexes described in Finding 4. Terminated claims are noted as "WDRN" (Withdrawn) under the Version Status Column of the Decree indexes.

13. LATE CLAIMS

The Montana Supreme Court ordered the deadline for filing claims of existing water rights as 5:00 PM on April 30, 1982. Claims filed after this time and date were forfeited. *See Matter of the Adjudication of Yellowstone River Water Rights* (1992), 253 Mont. 167, 832 P.2d 1210.

The 1993 Montana Legislature provided for the conditional remission of the forfeiture of late claims. *See* § 85-2-221(3), MCA. Any remission of forfeiture will be conditioned upon the claimant meeting the requirements set by the Montana Legislature. *See*, generally, Water Court Order Setting Late Claim Administrative Costs and Expenses filed September 24, 1997, and Order Establishing Water Court Procedures on Late Claims filed December 8, 1997.

Late claims are included in this Decree. Objections may be filed on all issues.

Late claim abstracts contain the term "Late Claim:" followed by the letter "A" or "B". Late claim status is also identified on the Decree indexes. The "A" designation refers to late claims which are subordinate to all Indian and federal reserved water rights. The "B" designation refers to late claims which are subordinate to all Indian and federal reserved water rights and all timely filed claims. *See* § 85-2-221(3), MCA.

14. WATER RIGHT CLAIM IDENTIFICATION NUMBERS

The computer system containing the State's centralized water right database has undergone a major modification by the DNRC. In DNRC's former database system, water right claim numbers contained a letter identification code, such as W, A, B, U, or O. The letter identification code identified the claim as an "existing right" (W), a "late claim" (A or B), a "reserved" right (U), or a "terminated" claim (O).

In DNRC's new database, letter identification codes are no longer included in water right claim numbers. Each abstract generated by the new database identifies the type or the status of the right by a word or phrase. The term "Statement of Claim" replaces the "W" letter code. The term "Late Claim" followed by the designation of "A" or "B" identifies the existence and type of late claim. The term "Reserved" replaces the "U" letter code. The terms "Withdrawn" or "Dismissed" replace the "O" letter identification code.

This Decree was produced from DNRC's new database. Therefore, the water right claim numbers do not contain water right identification codes.

Based on these Findings of Fact, the Chief Water Judge makes the following:

CONCLUSIONS OF LAW

I

The Montana Water Court has jurisdiction and authorization to enter a Temporary Preliminary Decree for this group of forty-two claims pursuant to § 3-7-224(2), § 85-2-231, and § 85-2-406(2)(b).

II

These Findings of Fact, Conclusions of Law and the forty-two Abstracts of Water Right Claim define the nature and extent of the forty-two existing water rights claimed under Montana law and certified to the Water Court by the Fourth Judicial District Court. In accordance with § 85-2-231(3), MCA, and Rule 1.II(7) of the Water Right Claims Examination Rules adopted by the Montana Supreme Court, the forty-two claims identified in these Findings and Conclusions comprise a Temporary Preliminary Decree.

DATED this _____ day of March, 2006.

C. Bruce Loble
Chief Water Judge
Montana Water Court
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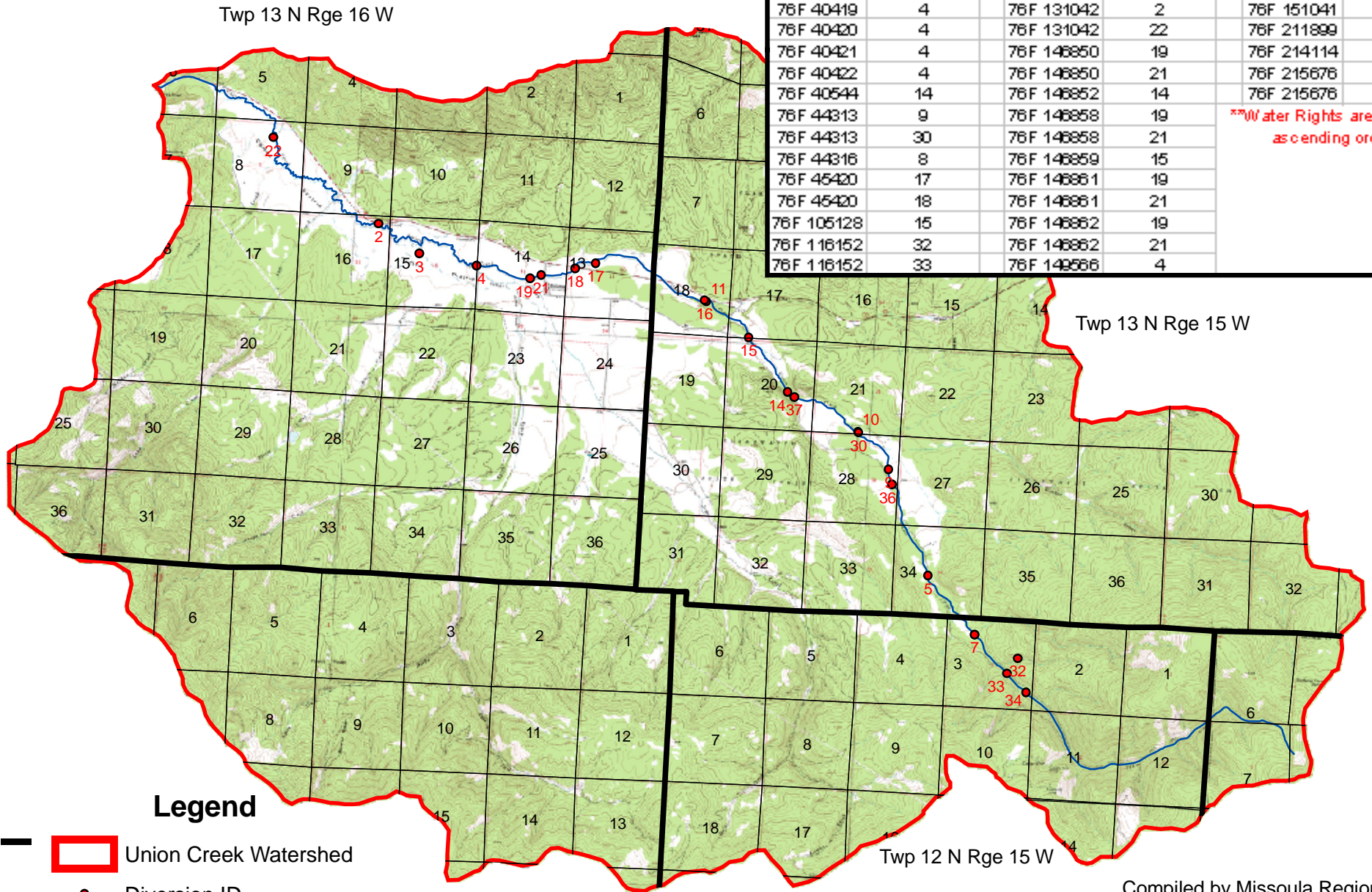
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UNION CREEK WATER COURT DECREE CASE # WC-2002-02

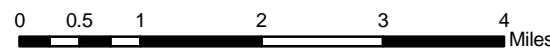
WR #	Diversion ID	WR #	Diversion ID	WR #	Diversion ID
76F 21139	11	76F 116152	34	76F 149567	2
76F 21140	11	76F 118521	10	76F 149568	2
76F 21977	15	76F 131039	2	76F 149569	4
76F 40004	5	76F 131039	22	76F 149572	4
76F 40005	5	76F 131040	2	76F 149999	36
76F 40417	4	76F 131040	22	76F 151035	16
76F 40418	4	76F 131041	2	76F 151039	37
76F 40419	4	76F 131042	2	76F 151041	37
76F 40420	4	76F 131042	22	76F 211899	5
76F 40421	4	76F 146850	19	76F 214114	3
76F 40422	4	76F 146850	21	76F 215676	5
76F 40544	14	76F 146852	14	76F 215676	7
76F 44313	9	76F 146858	19		
76F 44313	30	76F 146858	21		
76F 44316	8	76F 146859	15		
76F 45420	17	76F 146861	19		
76F 45420	18	76F 146861	21		
76F 105128	15	76F 146862	19		
76F 116152	32	76F 146862	21		
76F 116152	33	76F 149566	4		

**Water Rights are listed in ascending order.



Legend

-  Union Creek Watershed
-  Union Creek Watershed
-  Diversion ID
-  Union Creek



Compiled by Missoula Regional Office
for Montana Water Court
February 23, 2006