

Montana Water Court
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ELECTRONICALLY FILED

41H-1153-R-2022

October 18, 2022

Montana Water Court

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

CLAIMANT: Elmer C. Smith Family Trust

CASE 41H-1153-R-2022
41H 154139-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court. Please review this Report carefully.

You may file a written objection to this Master's Report if you disagree or find errors with the Master's Findings of Fact, Conclusions of Law, or Recommendations. The above stamped date indicates the date this Master's Report was filed and mailed. Pursuant to Water Right Adjudication Rule 23, written objections to a Master's Report must be filed within **10 days** of the date the Report was filed. If this Master's Report was mailed to you, Rule 6(d) of the Montana Rules of Civil Procedure provides an additional 3 days to the 10-day objection period.

If you file an objection, you must mail a copy of the objection to all parties on the Service List found at the end of this 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 claim 41H 154139-00 appeared in the Preliminary Decree for the Gallatin River ("Basin 41H") with issue remarks resulting from pre-decree examination by the Department of Natural Resources and Conservation ("DNRC"). To address the issue remarks, the Water Court consolidated the claim into case 41H-1153-R-2022.

FINDINGS OF FACT

1. On September 20, 1982, original claimants Elmer C. Smith and Rozella J. Smith filed the Statement of Claim for claim 41H 154139-00, claiming 10.00 gallons per minute of Logger Creek water as a filed appropriation right. However, the claim appeared in the Basin 41H Temporary Preliminary Decree with the source listed as "unnamed tributary to West Gallatin River."
2. On July 20, 1995, Elmer C. Smith filed an amendment to correct the source of claimed 41H 154139-00 to Logger Creek.
3. Claim 41H 154139-00 appeared in the Basin 41H Preliminary Decree with the source listed as "Unnamed Tributary to Logger Creek" and the following issue remarks:
AN AMENDMENT WAS SUBMITTED ON 7/20/1995 REQUESTING TO AMEND THE SOURCE. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.
THE TYPE OF HISTORICAL RIGHT MAY BE QUESTIONABLE.
DOCUMENTATION SUBMITTED WITH THE CLAIM INDICATES A USE RIGHT.
4. To resolve the above issue remarks, the Water Court ordered Claimant Elmer C. Trust to state whether it wishes to pursue the 1995 Amendment and file evidence of the claimed historical right by October 13, 2022. The Court stated that if nothing was filed by the deadline, the Court would assume that claimant agrees with the 1995 Amendment, correct the claimed source, and modify the type of historical right to "use."

5. On October 7, 2022, Monte R. Smith, trustee of the Elmer C. Smith Family Trust, filed a response with the Water Court stating that he agrees with the source correction in the 1995 Amendment and changing the type of claimed historical right to “use.”
6. The Water Court can make the following changes to claim 41H 154139-00, and remove the associated issue remarks:
 - a. Source Name: **LOGGER CREEK**
 - b. Type of Historical Right: **USE**
7. Claim 41H 154139-00 also appeared with issue remarks regarding its late claim status and DNRC modifications to certain claim elements. The purpose of these issue remarks is to provide notice to other water users. No objections, notices of intent to appear, or counterobjections were filed. The issue remarks served their purpose and can be removed.

CONCLUSIONS OF LAW

1. The Water Court has exclusive jurisdiction to determine the extent of all water rights in Montana as they existed prior to July 1, 1973. *In re Deadman’s Basin Water Users Ass’n*, 2002 MT 15, ¶ 15; Section 3-7-501, MCA.
2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie status may be overcome by a preponderance of the evidence showing that an element of the claim is incorrect. 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.
3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248(2). The Court has authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.
4. When resolving issue remarks, the Water Court must weigh the issue remark and the information resulting in the issue remark against the claimed water right. Section 85-2-247(2), MCA. The Court is permitted to use information submitted by DNRC, the

statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

5. The Water Court is permitted to use information submitted by DNRC, the Statement of Claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims and resolve issue remarks. Section 85-2-231(2), MCA.
6. The source correction requested in the 1995 Amendment is supported by the prima facie Statement of Claim.
7. There is sufficient evidence in the claim file and information submitted by Claimant to process the source amendment, modify the type of historical right, and resolve the issue remarks on claim 41H 154139-00.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends the Water Court make the above-specified changes to claim 41H 154139-00. A Post Decree Abstract of Water Right Claim accompanies this Report to confirm the changes have been made in the State's centralized water right record system.

Julia J. Nordlund
Senior Water Master

Service via USPS Mail:

Elmer C. Smith Family Trust
Monte Smith, Roland Smith, Linda Smith
Tees
15214 Roseton Ave
Norwalk, CA 90650

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 154139-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Late Claim: B

Owners: SMITH ELMER C FAMILY TRUST
MONTE SMITH, ROLAND SMITH, LINDA SMITH TTEES
15214 ROSETON AVE
NORWALK, CA 90650

Priority Date: DECEMBER 31, 1956

Enforceable Priority Date: JUNE 30, 1973

CLAIM FILED LATE 09/20/1982 . AS MANDATED BY SECTION 85-2-221(3), MCA, THIS CLAIM IS SUBORDINATE, AND THEREFORE JUNIOR, TO ALL INDIAN AND FEDERAL RESERVED WATER RIGHTS AND ALL VALID TIMELY FILED CLAIMS BASED ON STATE LAW.

Type of Historical Right: USE

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 4.25 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: 0.25

Source Name: LOGGER 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		SESWSW	28	4S	4E	GALLATIN

Period of Diversion: MAY 1 TO OCTOBER 1

Diversion Means: HEADGATE

Ditch Name: BORROWS DITCH

Period of Use: MAY 1 TO OCTOBER 1

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	0.25		NESWSW	28	4S	4E	GALLATIN

Total: 0.25