

Montana Water Court  
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**FILED**

JUN 04 2020

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA  
YELLOWSTONE DIVISION  
LITTLE BEAVER CREEK BASIN (39FJ)  
PRELIMINARY DECREE

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CLAIMANT: Elvin C. Peabody Estate

OBJECTOR: United States of America (Department of Agriculture  
Forest Service)

**39FJ-R1**  
39FJ 4317-00

**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. Rule 23 of the Water Right Adjudication Rules requires written objections to a Master's Report be filed within 10 days of the date of the Master's Report. 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

Claim 39FJ 4317-00 appeared in the Preliminary Decree for Little Beaver Creek (Basin 39FJ) issued on November 1, 2018. The claim is owned by the Estate of Elvin C. Peabody. The claim received an objection from the United States of America Department of Agriculture, Forest Service (Forest Service) based on the point of diversion and place of use.

### FINDINGS OF FACT

1. On November 19, 2019, the Court held a status conference in this matter. Romney Philpott appeared on behalf of the Forest Service. Claimant did not appear.
2. Following the status conference, the Court ordered the Forest Service to file information regarding the specific modifications they are requesting to the claim. The Forest Service indicated that it would review the claim and determine whether refined legal land descriptions for the point of diversion and place of use were required or if an information remark would be sufficient. The Court also requested that the Forest Service file a map. The Forest Service provided the legal land descriptions for the refined place of use and noted that it was no longer seeking correction of the point of diversion.
3. According to their filing, the Forest Service's objection would be resolved by the following modifications to the place of use for claim 39FJ 4317-00:

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	<b>5</b>	NE	25	1N	57E	Carter
<b>2</b>	<b>8</b>		<b>25</b>	<b>1N</b>	<b>57E</b>	<b>Carter</b>
<b>3</b>	<b>9</b>		<b>25</b>	<b>1N</b>	<b>57E</b>	<b>Carter</b>
<b>4</b>	<b>10</b>		<b>25</b>	<b>1N</b>	<b>57E</b>	<b>Carter</b>
<b>5</b>		SW	<b>25</b>	<b>1N</b>	<b>57E</b>	<b>Carter</b>

4. The Forest Service also requested that the following information remark be added to the claim:

THE PLACES OF USE AND POINT OF DIVERSION ARE LOCATED ENTIRELY ON PRIVATE LAND.

5. Based on the information in the claim file, stock have historically taken the water claimed under claim 39FJ 4317-00 directly from the onstream reservoir. The onstream reservoir is located in Government Lot 5 of Section 25, T1N, R57E, Carter

County. There is no evidence in the claim file that claim 39FJ 4317-00 was historically used outside of Government Lot 5 of Section 25, T1N, R57E, Carter County.

6. On January 13, 2020, the Court ordered Claimant to show cause why the following modifications should not be made to the place of use:

<u>ID</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	<u>5</u>	<u>NE</u>	25	1N	57E	Carter

**THE PLACE OF USE AND POINT OF DIVERSION ARE LOCATED ENTIRELY ON PRIVATE LAND.**

Nothing was filed by the ordered deadline.

7. Claim 39FJ 4317-00 also received a notice-type issue remark regarding a modification to the means of diversion made by the DNRC during their reexamination of the claim. This remark served its notice purpose and should be removed from the claim.

#### PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. 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.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. 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.

6. The party seeking to overcome the prima facie status of a Statement of Claim bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

7. The Water Court is not bound by parties' settlement agreements. Any settlement reached by the parties is subject to review and approval by the Water Court. Rule 17(a), W.R.Adj.R.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

9. Sanctions applied against a claimant may include modification of a claim to conform with data provided by the DNRC, information obtained by the Court, or information included in an objection, or the entry of default and termination of a water right claim. Rule 11, W.R.Adj.R.

#### CONCLUSIONS OF LAW

1. The Forest Service showed by a preponderance of the evidence that the historical legal land description of Place of Use ID No. 1 should be Government Lot 5 of Section 25, T1N, R57E, Carter County.

2. Claimant failed to comply with the Court's prior orders. Rule 22, W.R.Adj.R.

3. Based on Conclusion of Law Nos. 1 and 2, the place of use for claim 39FJ 4317-00 should be modified to Government Lot 5 of Section 25, T1N, R57E, Carter County. The place of use for claim 39FJ 4317-00 should be modified accordingly and the information remark described in Finding of Fact No. 6 should be added to the claim. These modifications resolve the Forest Service's objection to claim 39FJ 4317-00.

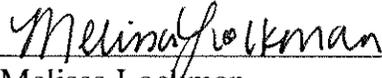
4. The notice-type issue remark served its notice purpose and should be removed from the claim.

#### RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

A post decree abstract of the water right claim reflecting the recommended changes is attached to this Report.

DATED this 4<sup>th</sup> day of June, 2020.

  
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Melissa Lockman  
Water Master

**Service via USPS Mail**

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