

Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
1-800-624-3270  
(406) 586-4364  
(406) 522-4131 fax  
watercourt@mt.gov

FILED

JUN 11 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: Robert A. Brewer

39FJ-R26  
39FJ 35582-00

**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 35582-00 appeared in the Preliminary Decree for Little Beaver Creek (Basin 39FJ) issued on November 1, 2018. The claim is owned by Robert Brewer. The claim did not receive objections, counterobjections, or notices of intent to appear but did receive issue remarks during the DNRC's claims reexamination.

### FINDINGS OF FACT

1. Claim 39FJ 35582-00 is a water spreading claim that uses two dikes – one located in the SESWSW of Section 35, T2N, R56E, Carter County and one located in the SWSWNW of Section 2, T1N, R56E, Carter County.
2. During the DNRC's reexamination of the claim, the DNRC added an issue remark stating that they were unable to confirm the location of the claimed dikes.
3. On December 12, 2019, the Court ordered Claimant to work with the DNRC to attempt to resolve the point of diversion issue remarks.
4. On February 26, 2020, Water Resource Specialist Brandy Gray filed a *Memorandum* in this matter.
5. Ms. Gray's *Memorandum* states that although Claimant contacted her as ordered, he did not supply information to help resolve the issue remarks.
6. Based on Ms. Gray's review of contemporary aerial photographs, the dikes are in their claimed location.

### 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. 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.

6. 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.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

#### CONCLUSIONS OF LAW

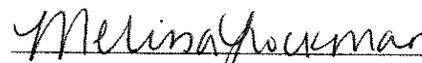
1. The point of diversion issue remarks fail to overcome the prima facie status of claim 39FJ 35582-00. The Statement of Claim and the *Memorandum* support the originally claimed locations of the dike. There is no evidence in the claim file, other than the issue remarks themselves, that disputes these legal land descriptions.

#### 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 11<sup>th</sup> day of June, 2020.

  
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Melissa Lockman  
Water Master

**Service via USPS Mail**

Robert A Brewer  
2300 County Rd 294  
Carbon, TX 76435