

ELECTRONICALLY FILED

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

41B-4009-S-2020

July 20, 2021

Montana Water Court

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
BEAVERHEAD RIVER - BASIN 41B

CLAIMANTS: Black Slough LLC; Foster Land & Cattle

41B-4009-S-2020

41B 88643-00

41B 88644-00

41B 30151587

41B 30151588

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 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 mail 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

INTRODUCTION

Water rights claims 41B 88643-00 and 41B 88644-00 appeared in the Preliminary Decree for the Upper Missouri Division—Beaverhead (Basin 41B). The Water Court consolidated the water rights into Water Court case 41B-4009-S-2020 to consider the September 30, 2020 Memorandum filed by the Montana Department of Natural Resources and Conservation (DNRC) to split ownership of the water rights between seller, Black Slough LLC, and buyer, Forest Land & Cattle. Attached to the Memorandum are DNRC Ownership Update Divided Interest forms, warranty deeds, and maps supporting the requested splits.

On July 1, 2021, Suenram & Bergeson filed a Notice of Appearance for Black Slough LLC, as well as additional information requested by the court.

The Water Court presently considers whether to split the water rights claims.

ISSUES

1. *Whether the Water Court should split water right 41B 88643-00 consistent with the split request and information filed by the parties.*
2. *Whether the Water Court should split water right 41B 88644-00 consistent with the split request and information filed by the parties.*

APPLICABLE LAW

“The Montana [W]ater [C]ourt has a statutory obligation and the exclusive authority to adjudicate claims of existing water rights.” Rule 1(a), W.R.Adj.R. DNRC’s express duty in the adjudication process is to identify potential issues with water rights and to provide factual analysis to the Water Court prior to decree issuance. Rules 1(b) and 2(a), W.R.C.E.R. The Water Court is not bound by the W.R.C.E.R. or the technical assistance provided by the DNRC. Rules 1(b) and 2(a), W.R.C.E.R.

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. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. 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, 357 Mont. 438, 240 P.3d 628. The party seeking to overcome the prima facie status of a statement of claim, including a claimant objecting

to his or her own claim, bears the burden of proof. *Nelson v. Brooks*, 2014 MT 120, ¶¶ 34, 37, 375 Mont. 86, 329 P.3d 558.

The Water Court may split a water right into separate claims, by request or on its own initiative, at any time prior to the entry of the final decree. Rule 26, W.R.Adj.R. A split does not increase any element of an original water right, but serves to accurately reflect the current proportional ownership of the claimed acres irrigated, place of use, volume, and flow rate. Accordingly, a split does not have the potential to adversely affect other water users' water rights and does not trigger additional notice pursuant to § 85-2-233(6), MCA, MCA. *Circle S Ranch, Inc.*, 2019 Mont. Water LEXIS 8 at ** 4-5. Remarks identifying that a division of a claim occurred may be added to the claims. Rule 26, W.R.Adj.R.

DISCUSSION

1. Whether the Water Court should split water right 41B 88643-00 consistent with the split requests and information filed by the parties.

The parties requested the Water Court to split the flow rate, maximum acres, and place of use for water right claim 41B 88643-00 consistent with the Memorandum filed with the court.

Water right claim 41B 88643-00 is a decreed flood-irrigation claim for surface water diverted from Black Slough by four points of diversion: (ID No. 1) a dike on Black Slough Ditch in the SESWSE of Section 5, Township 6S, Range 8W, Beaverhead County; (ID No. 2) a pipeline on Beehive Ditch in the NENESW of Section 5, Township 6S, Range 8W, Beaverhead County; (ID No. 3) a pump in the NENENE of Section 8, Township 6S, Range 8W, Beaverhead County; and (ID No. 4) a pipeline on Island Ditch in the SWSENE of Section 9, Township 6S, Range 8W, Beaverhead County. The originally claimed flow rate associated with the water right claim is 7.50 cubic feet per second (CFS)—for use on 172 total maximum acres in the Beaverhead County. The split request indicates seller Black Slough LLC would like to retain 2.64 CFS of the originally claimed flow rate for use on 60.5 total maximum acres in Beaverhead County, and convey 4.86 CFS of the originally claimed flow rate to buyers Forest Land & Cattle for use on 111.5 total maximum acres.

The filed Memorandum, map, and warranty deed support that the requested split accurately reflects current ownership of the underlying places of use and the proportions

of water appurtenant. The information provided by the parties is complete and sufficient to accurately split water right 41B 88643-00. The Water Court therefore generates claim 41B 30151587, splitting the originally claimed flow rate between parent claim 41B 88643-00 and child claim 41B 30151587. The parent claim will remain in the ownership of Black Slough LLC and the child claim will be assigned to Forest Land & Cattle Co.

The post-decree abstracts for the parent and child claims will reflect the following owners, flow rates, total maximum acres, points of diversion, and places of use, as well as information remarks indicating the court authorized the split:

Claim 41B 88643-00 (parent)

Owner: **Black Slough LLC**

Flow Rate: **2.64 CFS**

Maximum Acres: **60.5**

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	7.00		NENE	8	6S	8W	BEAVERHEAD
2	5.00		S2NWNW	9	6S	8W	BEAVERHEAD
3	34.00		SENW	9	6S	8W	BEAVERHEAD
4	9.50		SWNW	9	6S	8W	BEAVERHEAD
5	5.00		NENESW	9	6S	8W	BEAVERHEAD

Total: 60.50

Remarks:

**SPLIT CLAIM NO. 41B 30151587 WAS AUTHORIZED AND
GENERATED BASED ON INFORMATION IN THIS CLAIM.**

Claim 41B 30151587 (child)

Owner: **Forest Land & Cattle**

Flow Rate: **4.86 CFS**

Maximum Acres: **111.50**

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	26.00		SESW	4	6S	8W	BEAVERHEAD
2	1.00		SWSWSW	4	6S	8W	BEAVERHEAD
3	8.00		SESE	5	6S	8W	BEAVERHEAD
4	5.00		NENE	8	6S	8W	BEAVERHEAD
5	39.00		NENW	9	6S	8W	BEAVERHEAD
6	31.00		NWNW	9	6S	8W	BEAVERHEAD
7	1.00		N2SENW	9	6S	8W	BEAVERHEAD
8	0.50		SWNW	9	6S	8W	BEAVERHEAD

Total: 111.50

Remarks:

**THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT
BASED ON INFORMATION IN CLAIM NO. 41B 88643-00.**

Elements not addressed by this Water Master's Report will remain unchanged and will appear identical between the parent and child claims.

Because the preliminary decree abstracts indicate water rights claims 41B 88642-00 and 41B 88643-00 are multiple uses of the same water right, the court asked the parties to clarify whether the court should also split water right 41B 88642-00. In response, Black Slough LLC asserts water right claim 41B 88642-00:

is a stock water right, under single ownership in the name of Black Slough, LLC. While one of the places of use identified for this water right includes a legal land description of the NENE, Sec 9, T6S, R8W, this place of use is identified specifically for the Black Slough property located within that place of use. Foster Land & Cattle does also have property located within the NENE, Sec 9, T6S, R8W, however, Foster also has a separate stock water right, under single ownership, specifically 41B 88639-00 . . . As such no split of Black Slough's stock water right was requested or necessary.

Thus, the Water Court does not split water right claim 41B 88642-00.

2. *Whether the Water Court should split water right 41B 88644-00 consistent with the Memorandum and information filed by the parties.*

The parties requested the Water Court to split the flow rate, maximum acres, and place of use for water right claim 41B 88644-00 consistent with the Memorandum filed with the court.

Water right claim 41B 88644-00 is a decreed flood-irrigation claim for surface water diverted from an unnamed tributary of Black Slough, also known as Middle Slough, by two points of diversion: (ID No. 1) a pump in the NENENE of Section 8, Township 6S, Range 8W, Beaverhead County; and (ID No. 2) a dike in the NWNENE of Section 8, Township 6S, Range 8W, Beaverhead County. The originally claimed flow rate associated with the water right claim is 6.4 CFS for use on 170 total maximum acres in Beaverhead County. The Memorandum indicates seller Black Slough LLC would like to retain 2.20 CFS of the originally claimed flow rate for use on 58.50 total maximum acres in Beaverhead County, and convey 4.2 CFS of the originally claimed flow rate to buyers Forest Land & Cattle for use on 111.5 total maximum acres.

The filed Memorandum, map, and warranty deed support that the requested split accurately reflects current ownership of the underlying places of use and the proportions of water appurtenant. The information provided by the parties is complete and sufficient to accurately split water right 41B 88644-00. The Water Court therefore generates claim 41B 30151588, splitting the originally claimed flow rate between parent claim 41B 88644-00 and child claim 41B 30151588. The parent claim will remain in the ownership of Black Slough LLC and the child claim will be assigned to Forest Land & Cattle Co. The post-decree abstracts for the parent and child claims will reflect the following owners, flow rates, total maximum acres, and places of use, as well as information remarks indicating the court authorized the split:

Claim 41B 88644-00 (parent)

Owner: **Black Slough LLC**

Flow Rate: **2.20 CFS**

Maximum Acres: **58.50**

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	8.00		NENE	8	6S	8W	BEAVERHEAD
2	5.00		S2NWNW	9	6S	8W	BEAVERHEAD
3	32.00		SENW	9	6S	8W	BEAVERHEAD
4	11.50		SWNW	9	6S	8W	BEAVERHEAD
5	2.00		NENESW	9	6S	8W	BEAVERHEAD

Total: 58.50

Remarks:

**SPLIT CLAIM NO. 41B 30151588 WAS AUTHORIZED AND
GENERATED BASED ON INFORMATION IN THIS CLAIM.**

Claim 41B 30151588 (child)

Owner: **Forest Land & Cattle**

Flow Rate: **4.20 CFS**

Maximum Acres: **111.50**

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>QtrSec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	26.00		SESW	4	6S	8W	BEAVERHEAD
2	1.00		SWSWSW	4	6S	8W	BEAVERHEAD
3	8.00		SESE	5	6S	8W	BEAVERHEAD
4	6.00		NENE	8	6S	8W	BEAVERHEAD
5	39.00		NENW	9	6S	8W	BEAVERHEAD
6	31.00		NWNW	9	6S	8W	BEAVERHEAD
7	0.50		N2SENW	9	6S	8W	BEAVERHEAD

Total: 111.50

Remarks:

**THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT
BASED ON INFORMATION IN CLAIM NO. 41B 88644-00.**

Elements not addressed by this Water Master's Report will remain unchanged and will appear identical between the parent and child claims.

RECOMMENDATIONS

This Water Master recommends the Water Court to split water rights claims 41B 88643-00 and 41B 88644-00 consistent with its findings of fact and conclusions of law above. Attached to this Master's Report are post decree abstracts of the parent and child water rights claims to reflect the changes made.

Kirsa Shelkey
Water Master

Service via USPS Mail:

~~Black Slough LLC~~
Tawna Chery
119 W Bowman Dr
Kalispell, MT 59901

Foster Land & Cattle
PO Box 40
Ririe, ID 83443

Note: Service List Updated 7-8-21

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BEAVERHEAD RIVER
BASIN 41B**

Water Right Number: 41B 88643-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: BLACK SLOUGH LLC
119 W BOWMAN DR
KALISPELL, MT 59901 6868

Priority Date: DECEMBER 31, 1908

Type of Historical Right: DECREEED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.64 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

***Maximum Acres:** 60.50

Source Name: BLACK SLOUGH

Source Type: SURFACE WATER
ALSO KNOWN AS BACK SLOUGH (DECREE 5513)

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		SESWSE	5	6S	8W	BEAVERHEAD
Period of Diversion: APRIL 1 TO NOVEMBER 15						
Diversion Means: DIKE						
Ditch Name: BLACK SLOUGH DITCH						
2		NENESW	5	6S	8W	BEAVERHEAD
Period of Diversion: APRIL 1 TO NOVEMBER 15						
Diversion Means: PIPELINE						
Ditch Name: BEEHIVE DITCH						
3		NENENE	8	6S	8W	BEAVERHEAD
Period of Diversion: APRIL 1 TO NOVEMBER 15						
Diversion Means: PUMP						
4		SWSENW	9	6S	8W	BEAVERHEAD
Period of Diversion: APRIL 1 TO NOVEMBER 15						
Diversion Means: PIPELINE						
Ditch Name: ISLAND DITCH						
Period of Use: APRIL 1 TO NOVEMBER 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	7.00		NENE	8	6S	8W	BEAVERHEAD
2	5.00		S2NWNW	9	6S	8W	BEAVERHEAD
3	34.00		SEnw	9	6S	8W	BEAVERHEAD
4	9.50		SWNW	9	6S	8W	BEAVERHEAD
5	5.00		NENESW	9	6S	8W	BEAVERHEAD
Total:	60.50						

Remarks:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE MULTIPLE USES OF THE SAME RIGHT. THE USE OF THIS RIGHT FOR SEVERAL PURPOSES DOES NOT INCREASE THE EXTENT OF THE WATER RIGHT. RATHER IT DECREES THE RIGHT TO ALTERNATE AND EXCHANGE THE USE (PURPOSE) OF THE WATER IN ACCORD WITH HISTORICAL PRACTICES.

88642-00 88643-00

SPLIT CLAIM NO. 41B 30151587 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BEAVERHEAD RIVER
BASIN 41B**

Water Right Number: 41B 88644-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: BLACK SLOUGH LLC
119 W BOWMAN DR
KALISPELL, MT 59901 6868

Priority Date: DECEMBER 31, 1908

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 2.20 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 58.50

Source Name: UNNAMED TRIBUTARY OF BLACK SLOUGH

Source Type: SURFACE WATER
ALSO KNOWN AS MIDDLE SLOUGH

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		NENENE	8	6S	8W	BEAVERHEAD
Period of Diversion:		APRIL 15 TO OCTOBER 19				
Diversion Means:		PUMP				
2		NWNENE	8	6S	8W	BEAVERHEAD
Period of Diversion:		APRIL 15 TO OCTOBER 19				
Diversion Means:		DIKE				
Period of Use:		APRIL 15 TO OCTOBER 19				

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	8.00		NENE	8	6S	8W	BEAVERHEAD
2	5.00		S2NWNW	9	6S	8W	BEAVERHEAD
3	32.00		SENW	9	6S	8W	BEAVERHEAD
4	11.50		SWNW	9	6S	8W	BEAVERHEAD
5	2.00		NENESW	9	6S	8W	BEAVERHEAD
Total:	58.50						

Remarks:

SPLIT CLAIM NO. 41B 30151588 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BEAVERHEAD RIVER
BASIN 41B**

Water Right Number: 41B 30151587 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Status: ACTIVE

Owners: FOSTER LAND & CATTLE
PO BOX 40
RIRIE, ID 83443 0040

Priority Date: DECEMBER 31, 1908

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 4.86 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 111.50

Source Name: BLACK SLOUGH

Source Type: SURFACE WATER
ALSO KNOWN AS BACK SLOUGH (DECREE 5513)

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		SESWSE	5	6S	8W	BEAVERHEAD
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	DIKE					
Ditch Name:	BLACK SLOUGH DITCH					
2		NENESW	5	6S	8W	BEAVERHEAD
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	PIPELINE					
Ditch Name:	BEEHIVE DITCH					
3		NENENE	8	6S	8W	BEAVERHEAD
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	PUMP					
4		SWSENW	9	6S	8W	BEAVERHEAD
Period of Diversion:	APRIL 1 TO NOVEMBER 15					
Diversion Means:	PIPELINE					
Ditch Name:	ISLAND DITCH					
Period of Use:	APRIL 1 TO NOVEMBER 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	26.00		SESW	4	6S	8W	BEAVERHEAD
2	1.00		SWSWSW	4	6S	8W	BEAVERHEAD
3	8.00		SESE	5	6S	8W	BEAVERHEAD
4	5.00		NENE	8	6S	8W	BEAVERHEAD
5	39.00		NENW	9	6S	8W	BEAVERHEAD
6	31.00		NWNW	9	6S	8W	BEAVERHEAD
7	1.00		N2SENW	9	6S	8W	BEAVERHEAD
8	0.50		SWNW	9	6S	8W	BEAVERHEAD
Total:	111.50						

Remarks:

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41B 88643-00.

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
BEAVERHEAD RIVER
BASIN 41B**

Water Right Number: 41B 30151588 STATEMENT OF CLAIM
Version: 1 -- ORIGINAL RIGHT
Status: ACTIVE

Owners: FOSTER LAND & CATTLE
PO BOX 40
RIRIE, ID 83443 0040

Priority Date: DECEMBER 31, 1908

Type of Historical Right: DECREED

Purpose (Use): IRRIGATION
Irrigation Type: FLOOD

Flow Rate: 4.20 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT
PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 3 - MODERATE

Maximum Acres: 111.50

Source Name: BLACK SLOUGH
Source Type: SURFACE WATER
ALSO KNOWN AS MIDDLE SLOUGH

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		NENENE	8	6S	8W	BEAVERHEAD
Period of Diversion:		APRIL 15 TO NOVEMBER 19				
Diversion Means:		PUMP				
2		NWNENE	8	6S	8W	BEAVERHEAD
Period of Diversion:		APRIL 15 TO NOVEMBER 19				
Diversion Means:		DIKE				
Period of Use:		APRIL 15 TO NOVEMBER 19				

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	26.00		SESW	4	6S	8W	BEAVERHEAD
2	1.00		SWSWSW	4	6S	8W	BEAVERHEAD
3	8.00		SESE	5	6S	8W	BEAVERHEAD
4	6.00		NENE	8	6S	8W	BEAVERHEAD
5	39.00		NENW	9	6S	8W	BEAVERHEAD
6	31.00		NWNW	9	6S	8W	BEAVERHEAD
7	0.50		N2SENW	9	6S	8W	BEAVERHEAD
Total:	111.50						

Remarks:

THIS SPLIT CLAIM WAS AUTHORIZED BY THE WATER COURT BASED ON INFORMATION IN CLAIM NO. 41B 88644-00.