

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

APPLICATION TO CHANGE A WATER)	PRELIMINARY DETERMINATION TO GRANT CHANGE
RIGHT NO. 40C 30104443 BY BERGIN)	
LAND & LIVESTOCK, LTD.)	

On November 9, 2016, Bergin Land & Livestock, LTD (Applicant) submitted Application to Change a Water Right No. 40C 30104443 to change Statement of Claim No. 40C 208664 to the Lewistown Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department sent the Applicant a deficiency letter under §85-2-302, Montana Code Annotated (MCA), dated May 6, 2016. The Applicant responded with information, received by the Department on May 16, 2016. The Application was determined to be correct and complete on August 1, 2016. An Environmental Assessment for this Application was completed on August 15, 2016.

INFORMATION

The Department considered the following information in its decision.

Application as filed:

- Form 606 and attachments
- Maps and aerial photographs

Information Received after Application Filed:

- Applicant’s deficiency response, received May 16, 2016
- Verbal communication with Applicant on September 9, 2016 regarding possessory interest in the place of use (see memo in file).

Information within the Department’s Possession/Knowledge

- Water right records (Department-generated abstracts).

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change Statement of Claim No. 40C 208664, with an associated flow rate of 25.0 gallons per minute (GPM). The purpose of the claim is to water stock (500 animal units), with a priority date of December 31, 1943. The period of use is January 1 to December 31. The point of diversion is a well in the NENENE Sec. 20, T9N, R30E and the place of use is a stock tank located in the NENENE Sec. 20, T9N, R30E. This project is located about 6 miles east of the town of Musselshell, in Musselshell County, Montana. File.

WR Number	Purpose	Flow Rate	Volume	Period of Use	Point of diversion	Place of use	Priority date
40C 208664	Stock	25 gallons per minute	*30 GPD per AU	1/1-12/31	NENENE Sec. 20, T9N, R30E	NENENE Sec. 20, T9N, R30E	12/31/1943

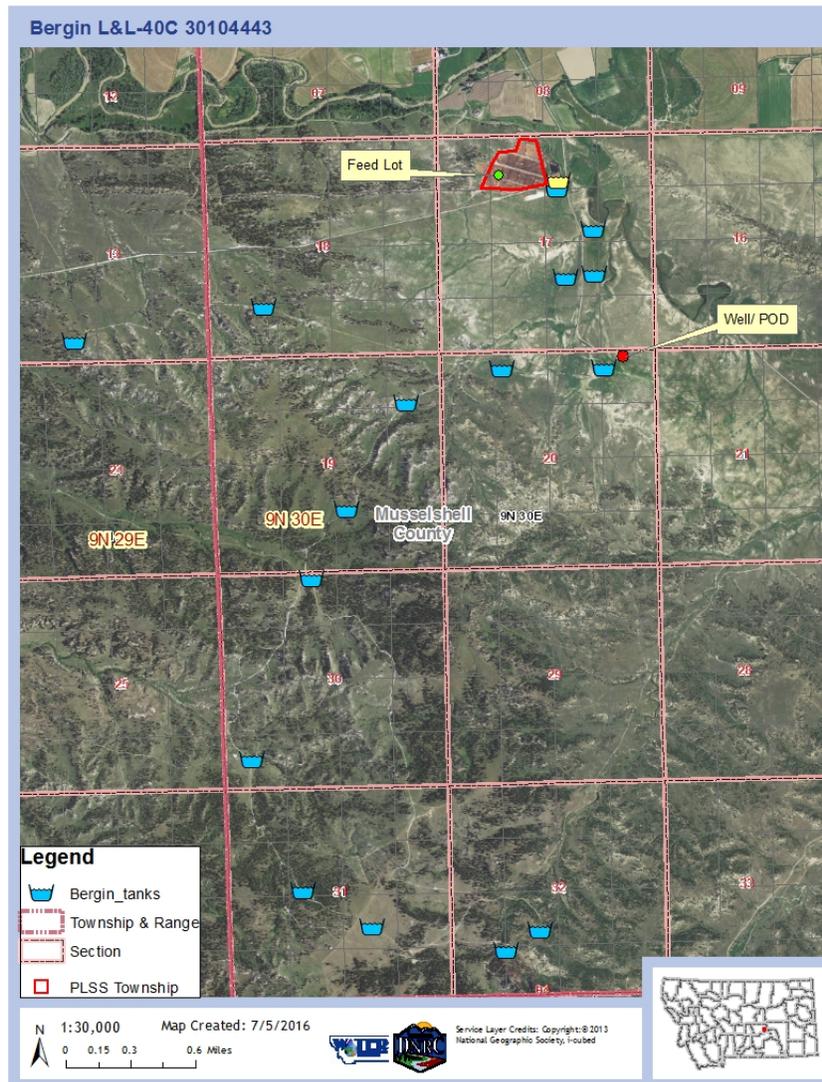
*The volume of 30 gallons per day per animal unit is based on a Montana Water Court adjudication standard.

CHANGE PROPOSAL

FINDINGS OF FACT

2. The proposed change is to add 16 new stock tanks to an existing groundwater well. The new stock tanks will be located in Sections 13 (T9N R29E), 17, 18, 19, 20, 30, 31, 32 in T9N, R30E. 500 cow/calf pairs were historically served by the source, and the same number of stock will be served by the proposed development. The additional stock tanks are part of a nine mile long pipeline. File.

POU Legal Land Descriptions							
9N 30E	SEC 17	SEC 18	SEC 19	SEC 20	SEC 30	SEC 31	SEC 32
	SW NW NE	NE SW SW	SW NE NE	NW NE NW	NW NE NW	SW SW SW	NW SW SW
	NW SW NE		SW NE SE	NW NE NE	NW SW SW	SE NW SE	SE NE SW
	SE SW NE						
	SE NW SE						
	SW NW SE						
9N 29E	SEC 13						
	SE SE SW						



§85-2-402, MCA, CRITERIA

GENERAL CONCLUSIONS OF LAW

3. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts.

4. Montana's change statute simply codifies western water law.¹ One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be

¹ Although Montana has not codified the law in the detail, Wyoming has, and the two states' requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Colorado follows a similar analysis under its requirement that a "change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

reduced to a lesser quantity because of the relatively limited actual historic use of the right.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

5. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, Final Order (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order (1992); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated).
6. The extent of the historic beneficial use must be determined in a change case. E.g., McDonald; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 - 57 (Colo., 1999). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA.

7. Consumptive use of water may not increase when an existing water right is changed. *In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor*, Final Order (2005); *In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.).

8. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., In the Matter of

Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

Historic Use:

FINDINGS OF FACT

10. According to Statement of Claim 40C 208664-00 and confirmed by Applicant, 500 animal units have historically used water from the well year-around.
11. For adjudication purposes the Water Court assigns a standard volume of 30 gallons per day (GPD) per animal unit (AU) to define the amount of water used for stock purposes. At 30 GPD/AU, the total annual appropriation is 16.9 AF per year (30 GPD X 500 AU X 366 days per year/ 325,851 gallons per acre foot of water). The Department finds the historic volume of water associated with stock purposes to be 30 GPD per AU, or up to 16.9 AF per year. File.
12. According to Bill Bergin, representative of Bergin Land and Livestock, the diversion means is a groundwater well that was once used to dewater underground mines to facilitate coal mining. He believes the well initially appropriated 300 GPM for mining purposes, but was then converted to a stock well at a rate of 25 GPM. During adjudication proceedings in the mid-1980s, the flow rate was reduced from a claimed 300 GPM to the 25 GPM rate by the computer due to no supporting documentation (25 GPM was decreed in the Basin 40C Temporary Preliminary Decree). File.
13. The Department finds the following historic use:

WR #	Priority Date	Diverted Volume	Flow Rate	Point of Diversion	Place of Use
40C 208664	12/31/1943	30 GPD per AU	25 GPM	NENENE Sec. 20, T9N, R30E	NENENE Sec. 20, T9N, R30E

CONCLUSIONS OF LAW

14. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted); *In the Matter of Application for Change in Appropriation of Water Right No. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

15. The Department finds the Applicant has proven by a preponderance of the evidence the historic use of Statement of Claim No. 40C 208664 to be 25.0 GPM up to 16.9 AF. (FOF No.

Adverse Effect:

FINDINGS OF FACT

16. The applicant is limited to the amount of water historically used, of no more than 500 AU. There will be no modification to the diversion works other than connecting the pipeline; therefore the flow rate diverted will not increase. File.
17. All stock tanks will be equipped with float valves that will automatically shut off water when the tanks are full. The Applicant will not be diverting more water than can be held by the stock tanks and thus there will not be waste or overflow associated with the system. Water will be diverted to the tanks only when the system requires refilling. Application.
18. The Department finds the use of water will not increase under the proposed system, and that no adverse effects will result from the change.

CONCLUSIONS OF LAW

19. The Applicant bears the affirmative burden of proving that proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation. §85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, Proposal for Decision, adopted by DNRC Final Order (2005).
20. The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 - 57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988). The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” Citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

... we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will

mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

21. Consumptive use of water may not increase when an existing water right is changed. E.g., *In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision* (DNRC Final Order 2003). Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC Proposal for Decision 2003), application subsequently withdrawn); *In The Matter of Application To Change A Water Right No. 43B 30002710 By USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 To Change Water Right Nos. 76H-108772 And 76H-1-8773 by North Corporation* (DNRC Final Order 2008).
22. The Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA.(FOF No. 18)

Beneficial Use

FINDINGS OF FACT

23. The Applicant proposes to use the stock-watering system for up to 500 animal units, with a total diverted/consumed volume of 16.9 AF and a flow rate of 25 GPM. The use of water for stock purposes is a beneficial use indicated in Montana Code Annotated. §85-2-102(4),

MCA. The volume is based on standards used for adjudication purposes of 30 gallons per day per animal unit. The flow rate is reasonable to supply the extensive length of system and number of stock tanks. The Department finds the proposed amounts of water and purpose for which the water will be used to be a beneficial use. File.

CONCLUSIONS OF LAW

24. Under the change statute, §85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§85-2-301 and 311(1)(d), MCA.
25. The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, DNRC Final Order (2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, Order on Motion for Petition for Judicial Review, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 By Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water use Permit*

No. 41H-30013678 by Baker Ditch Company (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

26. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., DNRC Proposal for Decision, adopted by DNRC Final Order (2005).
27. Applicant proposes to use water for stock purposes, which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by preponderance of the evidence stockwater is a beneficial use and that 16.9 AF of diverted volume and 25 GPM flow rate of water are the amounts needed to sustain the beneficial use. (FOF No. 23)

Adequate Diversion

FINDINGS OF FACT

28. The Applicant is adding 16 stock tanks to an existing system. The source of water is a well with a 5 HP pump that conveys 25 GPM of water in a nine mile long pipeline to the 17 total stock tanks. The pump is capable of supplying a flow rate of 25 GPM. The stock tanks will have a float valve system installed and diversion of water will cease when the tanks are full. The Department finds the means of diversion and construction and operation of the appropriation works are adequate. File.

CONCLUSIONS OF LAW

29. Pursuant to §85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); §85-2-312(1) (a), MCA; see also, *In the Matter of Application to Change a Water Right No. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit No. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right No. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 gpm, and maximum usage allowed during non-high water periods, is 144-247 gpm, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit No. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

30. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF No. 28).

Possessory Interest

FINDINGS OF FACT

31. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Bergin Land & Livestock, LTD has three stock tanks that are located within Foster Ranch and Feedlot LLC's property. One of the three tanks is located within a feedlot, and Mr. Bergin has the right to water stock from this tank and has provided a legal document as evidence of possessory interest. Stipulated Global Settlement Agreement and Mutual Release of Claims. Additionally, Bergin Land & Livestock, LTD has written permission from Foster Ranch and Feedlot LLC to utilize two other stock tanks on its property. Verbal communication with Bill Bergin on September 9, 2016, see memo in file. The Department finds that Applicant has possessory interest in the places of use, or written consent of the person with possessory interest. (Department file).

CONCLUSIONS OF LAW

32. Pursuant to §85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

33. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

34. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. §85-2-402(2)(d), MCA. (FOF No. 31)

Salvage Water

This Application does not involve salvage water.

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change a Water Right No. 40C 30104443 should be granted subject to the following. Sixteen additional places of use, (stock tanks), are authorized to be located in Sections 13 (T9N R29E),17,18,19,20,30,31, 32 (T9N, R30E), all in Musselshell County. The period of use is from January 1 through December 31, annually. The flow rate is 25 GPM with an associated annual volume that shall not exceed 16.9 AF per year.

NOTICE

This Department will provide public notice of this Application [as part of the combined application under §85-2-363, MCA] and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria [consistent with the combined application in §85-2-363, MCA]. E.g., §§85-2-310, -312, MCA.

DATED this 13th day of September, 2016.

/Original signed by Scott Irvin/
Scott Irvin, Regional Manager
Lewistown Regional Office
Department of Natural Resources and Conservation