



- O-6: Photo winter pasture Steven's reservoir
- O-7: Photo Fortner reservoir with winter snow
- O-8: Photo Steven's reservoir in summer backing up water
- O-9: Photo Steven's reservoir showing our fence in summer
- O-10: Photo Steven's reservoir showing dirtwork on reservoir with geese

Permittee Stevens offered the following exhibits without objection which are hereby admitted:

- P-1: Stevens' Stockwater Permit
- P-2: Fortner's Water Right
- P-3: Distance between Reservoirs
- P-4: Stevens' Reservoir 2022
- P-5: Fortner's Reservoir 2022
- P-6: Stevens' Reservoir Watershed
- P-7: Fortner's Reservoir Watershed
- P-8: Stevens' Livestock Range
- P-9: Fortner's Pasture
- P-10: Fortner's Reservoir 2020
- P-11: Fortner's Reservoir 2016
- P-12: Fortner's Reservoir 2013
- P-13: Fortner's Reservoir 2011
- P-14: Fortner's Reservoir 2009
- P-15: Fortner's Reservoir 2006
- P-16: Fortner's Reservoir 2005

The hearing held on April 12, 2023, was recorded. In this Order, the hearing is referenced as "H.R. at [*minute:second*]." The DNRC file in this matter is referenced as "Application File at [*page*]".

### **ISSUE**

The issue in this case is whether Steven's Provisional Stockwater Permit adversely affects Fortner's Water Right No. 42C 180587.

Construction and permitting of a stockwater reservoir is unique in the operation of Montana water law. Under modern Montana law new appropriations must be permitted and only then may

the water be beneficially used. There are exceptions to the permitting requirements in § 85-2-306, MCA. The exempt stockwater pit or reservoir differs because the appropriator constructs the reservoir first and *then* files an application for a water right afterward. The usual statutory criteria for a water right do not apply. Pursuant to § 85-2-306(6), MCA:

A permit is not required before constructing an impoundment or pit and appropriating water for use by livestock if:

- (a) the maximum capacity of the impoundment or pit is less than 15 acre-feet<sup>1</sup>;
- (b) the appropriation is less than 30 acre-feet a year;
- (c) the appropriation is from a source other than a perennial flowing stream; and
- (d) the impoundment or pit is to be constructed on and will be accessible to a parcel of land that is owned or under the control of the applicant and that is 40 acres or larger.

Additionally, § 85-2-306(7), MCA, provides:

- (a) Within 60 days after constructing an impoundment or pit, the appropriator shall apply for a permit as prescribed by this part. Subject to (7)(b) [not applicable in the instant case], upon receipt of a correct and complete application for a stock water provisional permit, the department shall *automatically* issue a provisional permit. *If the department determines after a hearing that the rights of other appropriators have been or will be adversely affected*, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. (*emphasis provided*).

Beginning in late 2021 and continuing through spring and summer 2022, Stevens constructed an earthen dam across a coulee on his ranch between Broadus and Ashland, Montana. The toe of the dam is touching the property line of his downstream neighbor, Fortner. On September 12, 2022, Stevens filed an application for a water rights permit with DNRC for his newly completed reservoir.

Fortner requested a hearing in a letter received by the DNRC on December 13, 2022. The DNRC held a hearing on the matter on April 12, 2023.

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1. Water rights administration and this Order refer to “acre-feet” as a unit of measurement. An acre-foot of water is the amount of water that would cover an acre of land (43,560 square feet) one foot deep in water. It is equal to approximately 326,000 gallons.

## **GEOGRAPHY AND TOPOGRAPHY**

The relative geography of the Fortner and Stevens reservoirs is confusing. In DNRC's records the Fortner Reservoir has a source of "Sheep Creek," and the Stevens Reservoir has a source of "Unnamed Tributary of Sheep Creek." The unnamed tributary of Sheep Creek is nearly as large as the main stem of Sheep Creek. Both Sheep Creek and its tributaries are ephemeral or intermittent, and only contain water during periods of snowmelt or precipitation.

## **BURDEN OF PROOF**

Section 85-2-306, MCA, contains exceptions to permit requirements. Sections 85-2-306(6) and (7), MCA, contain the criteria for issuing a permit for a completed stockwater pit or reservoir, methods of challenging an issued permit, and the remedies that the Department is authorized to order upon a finding of adverse effect. Those criteria, methods, and remedies are separate and distinct from the general criteria, methods of challenge, and remedies found in §§ 85-2-302 and -311, MCA. In addition, § 85-2-311, MCA, places the burden of proof squarely on the applicant to fulfill the § 85-2-311, MCA, criteria. Section 85-2-302, MCA, specifically exempts section -306 from its sphere. Under §§ 85-2-306(6) and (7), MCA, a permit is automatically issued if it meets the criteria. The Department may then revoke or modify the permit after a hearing. The section does not specifically designate which party bears the burden of proof at a hearing, but it does not directly require the applicant to affirmatively act beyond the filing of a permit application.

In *Gollaher v. Pribyl*, Cause No. CDV-05-770, Order Re: Petition for Judicial Review (Mont. 8th Jud. Dist. Ct.) (Mar. 7, 2007), the Court found that § 85-2-306, MCA, is a stand-alone section and should not be analyzed in conjunction with sections -302 and -311. Citing § 26-1-401, MCA, which states that "[t]he initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side" and § 26-1-402, MCA, which states [e]xcept as otherwise provided by law, a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting" the Court affirmed the Department's decision that under §§ 85-2-306(6) and (7), MCA, the party asserting adverse effect bears the burden to prove to show adverse effect.

Having reviewed the Department's file for Provisional Permit No. 42C 30158569, and the evidence submitted at hearing, the Hearing Examiner makes the following:

## FINDINGS OF FACT

### The Fortner Reservoir

1. Fortner owns a reservoir created by an earthen dam across Sheep Creek and referred to in this Order as the Fortner Reservoir.
2. The Fortner Reservoir is permitted and protected by Water Right No. 42C 180587. This right is for an onstream reservoir filled with surface water from Sheep Creek with a period of diversion January 1 to December 31 and a priority date of December 31, 1963.
3. Fortner's Reservoir water right volume is quantified as "The amount of water consumptively used for stock watering purposes at the rate of 30 gallons per day per animal unit. Animal units shall be based on reasonable carrying capacity and historical use of the area serviced by this water source." O-3.
4. The Fortner Reservoir has been in place since at least 1963. O-3; H.R. at 18:59.
5. Fortner's cattle drink from the Fortner Reservoir. It is the only available water in a pasture of approximately 600 acres. H.R. at 17:36, 20:31.
6. The Fortner Reservoir is filled by runoff down Sheep Creek. H.R. at 19:33.
7. Fortner testified that he needs all the water coming down Sheep Creek until the Fortner Reservoir is filled. H.R. at 19:37.
8. When the Fortner Reservoir gets low, the reservoir gets boggy, and the cattle get stuck in mud before getting to the water. H.R. at 19:45.
9. Cattle have trouble drinking as the water gets lower because the edges become muddy and water quality deteriorates, leading to disease concerns, particularly outbreaks of coccidiosis. H.R. at 24:03.
10. Fortner moves cattle to the Fortner Reservoir pasture in June and cattle remain in the pasture until the forage runs out, generally in August. H.R. at 20:31.
11. Fortner must move cattle out of this pasture when the cattle can no longer get water from the Fortner Reservoir. This sometimes requires moving the cattle out before the forage in the pasture is completely utilized. H.R. at 27:40, 28:48.
12. The Fortner Reservoir "holds [water] pretty well, but it needs to be pretty full starting out [at the beginning of the summer]." H.R. at 21:40.

13. Some years the Fortner Reservoir does not fill. H.R. at 23:11.
14. Stevens introduced Exhibits P10-16, which are screenshots of Google Earth imagery from seven different years. The screenshots show the Fortner Reservoir. Most of the photos are from June, some are later in the year. H.R. at 48:26.
15. Stevens asked Fortner to review each and describe whether the photo depicted a year when the Fortner Reservoir was sufficient or insufficient for Fortner's needs in that particular year. Sufficient meant that the Fortner Reservoir contained enough water to enable a full grazing season in the Fortner Reservoir pasture. Insufficient meant the Fortner Reservoir water level did not support a full grazing season in the Fortner Reservoir pasture. (id.).
16. Fortner testified that the images of the years 2009, 2011, 2013, and 2020 showed insufficient water in the Fortner Reservoir. H.R. at 48:26.

### **The Stevens Reservoir**

17. During the summer of 2022, Stevens used a skid-steer and a tractor and slip scraper to build an earthen dam across an unnamed coulee on his ranch and create the Stevens Reservoir. The coulee is listed by the DNRC as "unnamed tributary of Sheep Creek". P-1.
18. Stevens filed an Application for Provisional Permit for Completed Stockwater Pit or Reservoir on September 12, 2022. Application; File.
19. On November 21, 2022, DNRC Billings Regional Office issued a permit for the Stevens Reservoir, Provisional Permit No. 42C 30158569, for 1.0 acre-feet with a priority date of September 1, 2022. P-1.
20. The Stevens Reservoir is an earthen dam with an earthen spillway. The dam does not have any outlet works that would allow the impoundment to be drained. Hearing Examiner observation site visit; O-6; O-8; O-9; and O-10.
21. Stevens Reservoir completely prevents all water from flowing down the Unnamed Tributary and into Sheep Creek and reaching the Fortner Reservoir unless Stevens' reservoir is completely full and water runs over the earthen spillway. The Stevens reservoir has only impounded water since late summer 2022, so no historic data exists to indicate whether the reservoir will fill.

## **Adverse Effect**

22. The Stevens and Fortner Reservoirs are approximately one-half mile apart if you draw a straight line. However, the coulee between them is sinuous and the actual distance water travels between the Stevens and Fortner Reservoirs is approximately one mile. P-3.

23. The Fortner Reservoir traditionally impounds all the water flowing down Sheep Creek.<sup>2</sup> But for the Stevens Reservoir all the water flowing down the unnamed tributary of Sheep Creek would end up in the Fortner reservoir. O-3.

24. The Fortner Reservoir is filled only by surface water. The total watershed which historically contributed exclusively to the Fortner reservoir was 435 acres. Now, the watershed contributing to the Stevens Reservoir is 106 acres which reduces the watershed contributing to the Fortner Reservoir to 329 acres. P-6; P-7.

25. I find that the surface water currently impounded in the Stevens Reservoir would otherwise continue to travel down the coulee and fill the Fortner Reservoir.

26. Fortner testified that in the last five years the Fortner Reservoir has run out of water at least once, specifically he remembered that he ran out of water in 2022 (HR at 49:27), and that he could not recall the exact years, but he conservatively estimated that the Fortner Reservoir ran out of water at least twice in the prior ten years. HR 1:03:28. Reviewing all the evidence in the record, I find that Fortner has met his initial burden to produce evidence of adverse effect. I find that during dry years, Fortner would be able to graze his pasture for a longer period of time if the water now captured in the Stevens Reservoir was instead allowed to pass to the Fortner Reservoir. HR at 1:03:28.

27. Stevens testified that if Fortner's reservoir had to be full before he impounded water in the Stevens Reservoir, he only would have been able to impound water in the Stevens Reservoir once in the last twenty years. H.R. at 1:05:22.

28. Based on Steven's testimony I find that if Stevens installed a bypass structure in the

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2. I recognize that there is probably water lost to evaporation and to infiltration into the soil, but the parties produced no relevant evidence and the file contains no relevant information so for the purposes of this Order I will assume that all water running down these coulees arrives at the Stevens Reservoir or the Fortner Reservoir.

Stevens Reservoir, he could only impound water one out of every twenty years.

### **CONCLUSIONS OF LAW**

29. Pursuant to § 85-2-306 (7), MCA, the Department is required to automatically issue a provisional permit for stockwater pit upon receipt of a correct and complete application in compliance with § 85-2-306(6), MCA. However, if the Department determines after a hearing that the rights of other appropriators have been or will be adversely affected, it may revoke the permit or require the permittee to modify the impoundment or pit and may then make the permit subject to terms, conditions, restrictions, or limitations that it considers necessary to protect the rights of other appropriators. Section 85-2-306(7), MCA. . *In Matter of Provisional Stockwater Permits Nos 42J-30064354 and 42J 30065027 Issued to Clarys Ranch, Final Order (August 29, 2014).*

30. Fortner is the party asserting a claim for relief in this matter and, therefore, bears the initial burden of production and persuasion. *Gollaher Ranch Co. v. Pribyl, Pet.Judicial Rev. 6 - 10; Montana Environmental Info. C'tr v. Montana Department of Environmental Quality*, 2005 MT 96, 112 P.3d 964 (In procedurally similar contested case proceeding conducted by DEQ, the Supreme Court concluded that the “party asserting a claim for relief bears the burden of producing evidence in support of that claim.”).

31. Once Fortner presents sufficient evidence, Stevens bears the burden of proving that there is no adverse effect. *In Matter of Provisional Stockwater Permit Nos. 41QJ 30006070 and 41QJ 30006071 Issued to Pribyl, Final Order, 3-6 (June 8, 2005).*

32. The Supreme Court has explained that the “unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holder from encroachment by junior appropriators adversely affecting those senior rights.” *Montana Power Co. v. Carey*, 211 Mont. 91, 685 P.2d 336 (1984).

33. An adverse effect occurs where a junior water user’s use or proposed use interferes with a senior water user’s ability to reasonably exercise his water right. A junior use that reduces or limits a senior’s ability to the use of water to which he would otherwise be entitled and able to put to use constitutes adverse effect. *Irion v Hyde*, 110 Mont. 570, 105 P.2d 666, 673-674 (1940).

34. A new appropriation on a source that would result in “constant call” by a senior constitutes adverse effect. *In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76 Hand 5830-76H by Bobby D. Cutler (DNRC Final Order 1987); In the Matter of Application for Beneficial*



*Water Use Permit No. 80175-s76H by Tintzmen (DNRC Final Order 1993); In the Matter of Application for Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company (DNRC Final Order 2006).*

35. Fortner holds a water right which is senior in priority to the water right held by Stevens at issue in this proceeding. FOF ¶¶ 2, 18.

36. Storage of water in the Stevens Reservoir which would otherwise reach the Fortner Reservoir represents a deprivation of water to which Fortner is legally entitled. Deprivation of water to which Fortner is legally entitled represents an encroachment by a junior water user and adversely affects Fortner's senior water rights. FOF ¶ 28; COL ¶ 35.

37. The Stevens Reservoir has no outlet structure and Stevens could not respond to a call from a downstream user without destroying the dam and reservoir. FOF ¶ 19.

38. If the Stevens Reservoir were modified with an outlet structure Fortner would be required to call Stevens nineteen out of twenty years. I conclude that this equates to constant call and that therefore an order to modify the Stevens Reservoir will not mitigate adverse effect to Fortner. FOF ¶ 30.

### **CONCLUSION**

For the foregoing reasons, this Hearing Examiner concludes that Steven's Provisional Permit No. 42C 301585697 adversely affects Fortner's Water Right No. 42C 180587 and is hereby **REVOKED**. Stevens is not legally authorized to impound water behind the Stevens Reservoir as described in this Order. Accordingly, within 90 days of this Order, Stevens must provide documentation, either in the form of photographic evidence or by affidavit, that the Stevens Reservoir is not impounding water. Said documentation should be sent to the DNRC, Billings Regional Office, Airport Business Park, 1371 Rimtop Dr., Billings, MT, 59105-1978.

### **NOTICE**

This *Final Order* is the Department's final decision in this matter. A Final Order may be appealed by a party who has exhausted all administrative remedies before the Department in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 11<sup>th</sup> day of July 2023.

/Original signed by Martin Balukas/

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### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 11<sup>th</sup> day of July 2023 by first class United States mail.

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