

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

\* \* \* \* \*

<b>APPLICATION TO CHANGE WATER RIGHT ) NO. 42M 30162792 BY ) REVERSE E RANCH LLC )</b>	<b>PRELIMINARY DETERMINATION TO GRANT TEMPORARY CHANGE</b>
--	--

\* \* \* \* \*

On December 29, 2023, Reverse E Ranch LLC (Applicant) submitted Application to Change a Water Right, Additional Stock Tanks, No. 42M 30162792 to change Groundwater Certificate 42M 30162613 to the Billings Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of January 25, 2024. An Environmental Assessment for the Application was completed on January 30, 2024.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application to Change a Water Right Additional Stock Tanks, Form 606-ST
- Attachment: answers to criteria questions
- Maps: Diagram of pipeline system showing the sections, property ownership, point of diversion, pipeline, existing stock tank locations, and proposed stock tank locations
- Montana Department of Natural Resources and Conservation Trust Lands Management Division (TLMD) Authorization for Temporary Change in Appropriation Right for State Lease 1940 and 9154 signed by Applicant on December 10, 2023, by Scott Aye for the DNRC Area/Unit Office on December 18, 2023, and by Dennis Meyer on behalf of the DNRC TLMD Ag and Grazing Bureau on December 19, 2023
- Copies of Agricultural & Grazing Lease of State Lands Agreement Nos. 1940 and 9154 effective March 1, 2022, through February 29, 2032

- Copies of Affidavit of Assignment of State Agriculture & Grazing Lease Nos. 1940 and 9154 signed on August 5, 2022, transferring the leases from Ward Joel Jackson to Reverse E Ranch LLC
- Letter from Montana Sage Grouse Habitat Conservation Program dated November 30, 2023  
Information within the Department's Possession/Knowledge
- Water Right file for Groundwater Certificate 42M 30162613
- Memo dated January 2, 2024, from Jill Lippard, Water Resource Specialist, regarding property ownership and authority of Benjamin Jackson to sign and file the Application on behalf of all grantees indicated on the Personal Representative's Deed of Distribution recorded at the Prairie County Clerk and Recorder as Document No. 127332 on August 4, 2022, and a Transfer of Life Estate recorded at the Prairie County Clerk and Recorder as Document No. 127373 on August 18, 2022
- DNRC water rights database
- Email communication dated November 9, 2023, through December 20, 2023, between Aaron Kneeland, Land Use Specialist with the DNRC Eastern Land Office, and Jill Lippard, Water Resource Specialist, regarding the project and filing requirements to add the stock tanks on Trust Land to a water right

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AU means animal units; AF/YR means acre-feet per year; and POD means point of diversion.

### **WATER RIGHT TO BE CHANGED**

#### **FINDINGS OF FACT**

1. The Applicant seeks to change Groundwater Certificate 42M 30162613. The Groundwater Certificate has a priority date of December 18, 2023, for 5 GPM and up to 1.71 AF from a well for stock use. The period of diversion and period of use are April 1 through November 30. The point of diversion is in the SWSWSE Section 8, T13N, R49E, Prairie County. This well is connected to a pipeline system and supplies water to the stock tanks located in the

places of use described in Table 2. The place of use is located approximately 13 miles northwest of Terry, MT.

**Table 1. Water Right Proposed for Change**

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Volume</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>
42M 30162613	Stock	5 GPM	1.71 AF	04/01-11/30	SWSWSE Section 8, T13N, R49E Prairie County	7 POUs in Prairie County (see Table 2)	12/18/2023

**Table 2. Places of Use for Groundwater Certificate 42M 30162613**

	<b>Quarter Sections</b>	<b>Govt Lot</b>	<b>Section</b>	<b>Township</b>	<b>Range</b>
1	NWNWNW	4	4	12N	49E
2	SESESE		7	13N	49E
3	NESWNE		19	13N	49E
4	SWSESW		19	13N	49E
5	SWNWSW		29	13N	49E
6	NWNWNW	1	31	13N	49E
7	SESWSW	4	31	13N	49E

2. Groundwater Certificate 42M 30162613 is not supplemental to any other water rights. Groundwater Certificate 42M 30162613 is associated with Groundwater Certificate 42M 30162869 because they share the same point of diversion. Groundwater Certificate 42M 30162869 was filed by USA Department of Interior Bureau of Land Management (BLM) with consent from the Applicant for three stock tanks located on BLM property that are served by the same well. BLM was notified by the Applicant that they are filing for a change to add three additional stock tanks to 42M 30162613. No previous changes have been requested or authorized on Groundwater Certificate 42M 30162613.

## **CHANGE PROPOSAL**

### **FINDINGS OF FACT**

3. The Applicant proposes to change the place of use by adding stock tanks to Groundwater Certificate 42M 30162613. Groundwater Certificate 42M 30162613 is for stock use from a well located in the SWSWSE Section 8, T13N, R49E, Prairie County. This well is connected to a pipeline system which supplies water to the stock tanks located in the places of use described in Table 2. The flow rate used is 5 GPM and the volume used is up to 1.71 AF for 150 cattle from April 1 to November 30. The Applicant proposes a temporary change to add three stock tanks including one in Section 18, T13N, R49E and two in Section 36, T13N, R48E. The proposed tanks are located on property owned by the State of Montana Trust Lands Management Division (TLMD) and leased by the Applicant. These places of use are being added through this application to temporarily change an appropriation right to use the lessee's water right on school trust land for the duration of State Lease Nos. 1940 and 9154 pursuant to §§85-2-407 and -441, MCA.

4. The proposed tank in Section 18, T13N, R49E is on a parcel leased under Agricultural and Grazing Lease No. 9154 and the proposed tanks in Section 36, T13N, R48E are on a parcel leased under Agricultural and Grazing Lease No. 1940. The temporary change to add three places of use to Groundwater Certificate 42M 30162613 will be for the term of the leases and must be renewed when the leases are renewed in order for the Applicant to continue using these places of use. Agricultural and Grazing Lease Nos. 1940 and 9154 each took effect March 1, 2022, for a term of 10 years with an expiration date of February 29, 2032. In the instance temporary change authorization 42M 30162792 is not renewed, expires, or is terminated, Groundwater Certificate 42M 30162613 will be used in accordance with the terms set forth on the original version of the water right. The well will continue to serve the historical places of use described in Table 2. There will be no changes to point of diversion, period of diversion, period of use, flow rate, volume, or purpose. Float/shut-off valves will be used to control flow to the tanks. The proposed additional places of use are listed in Table 3.

**Table 3. Proposed Places of Use**

	<b>Quarter Sections</b>	<b>Section</b>	<b>Township</b>	<b>Range</b>
1	SESWNE	18	13N	49E
2	SWSWNE	36	13N	48E
3	SESESE	36	13N	48E

5. The following condition is proposed to satisfy the possessory interest criterion:

IN THE PRESENT CASE, THE APPLICANT IS THE OWNER OF GROUNDWATER CERTIFICATE 42M 30162613. THE APPLICANT PROPOSES TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. THE APPLICANT OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42M 30162613 ON THE STATE TRUST LAND FOR THE 10 YEAR DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42M 30162792, AND GROUNDWATER CERTIFICATE 42M 30162613 WILL REVERT TO THE ORIGINAL VERSION.

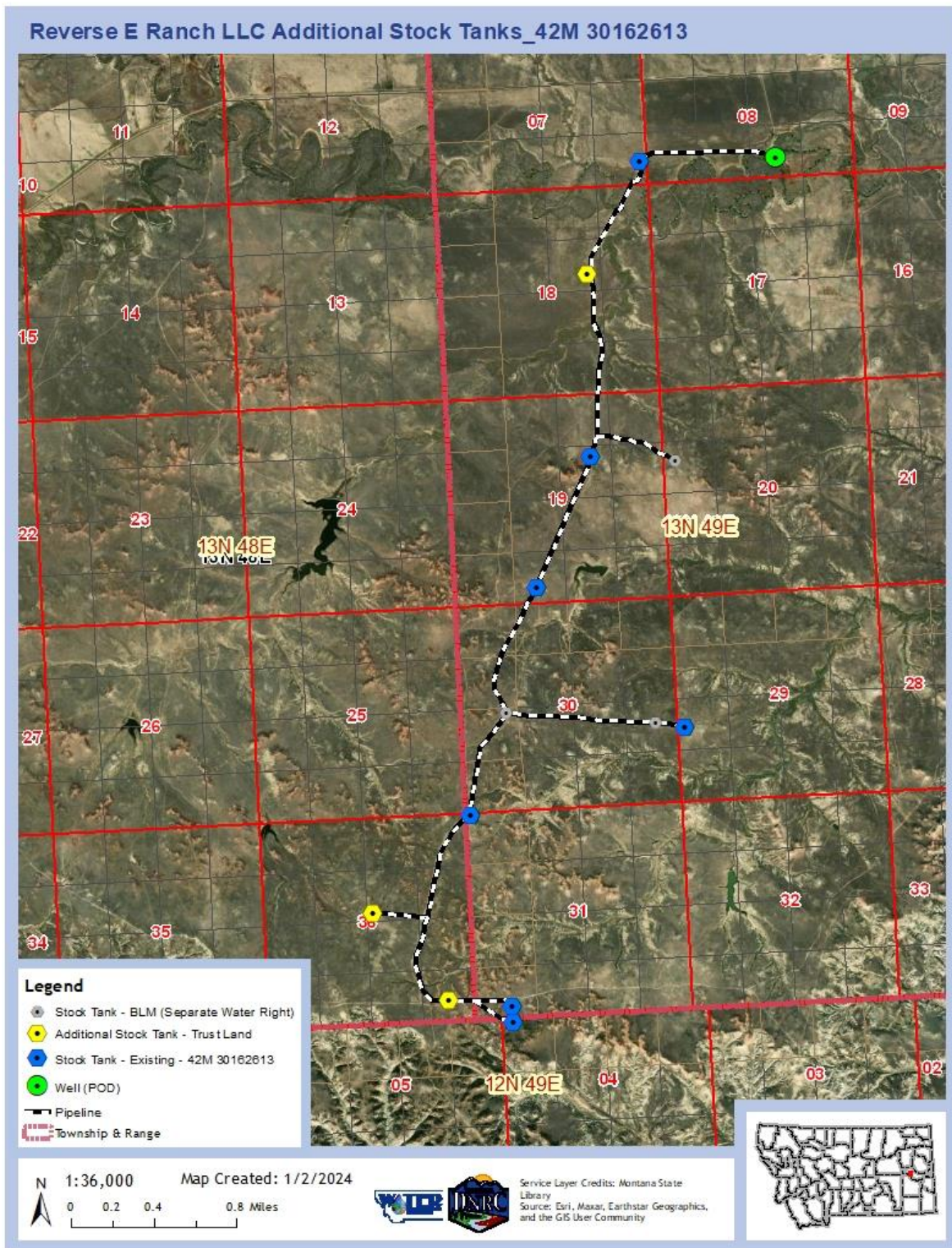


Figure 1: Map of Existing Use and Proposed Changes to Groundwater Certificate 42M 3162613

## **CHANGE CRITERIA**

6. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable criteria by a preponderance of the evidence, § 85-2-402, MCA. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. 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), (16), and (18) 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) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

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

(d) 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. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

7. In addition to the § 85-2-402(2), MCA, an applicant for a temporary change authorization must comply with the requirements and conditions set forth in § 85-2-407, MCA. Section 85-2-441, MCA, provides that a water right owner may temporarily apply water diverted from a well or developed spring located on private land to beneficial use on state trust land for the duration of a state land lease held by the water right owner. Pursuant to §85-2-407, MCA, a temporary change

may be approved for a period not to exceed 10 years. Upon expiration of the temporary change, the water right will automatically revert to its original terms. This temporary change may be renewed an indefinite number of times but may not exceed 10 years for each renewal. An application for renewal requires the written consent of the DNRC Trust Land Management Division.

8. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

## **HISTORICAL USE AND ADVERSE EFFECT**

### **FINDINGS OF FACT - Historical Use**

9. Groundwater Certificate 42M 30162613 is for stock use from a well (GWIC ID 184187) located in the SWSWSE Section 8, T13N, R49E, Prairie County, with a priority date of December 18, 2023.

10. The historical flow rate of 5 GPM is based on a volumetric measurement taken using a five-gallon bucket and stopwatch. This is consistent with the flow rate indicated on the well log. The flow rate of the well was tested at the time of drilling and at the time of filing in 2023. The Department finds the historical flow rate used is 5 GPM.

11. The appropriation is for stock use for 150 cattle (150 animal units) from April 1 to November 30 based on the Notice of Completion of Groundwater Development and information provided by the Applicant. The Department standard for stock use for a New Appropriation is 15 gallons per day (GPD) per animal unit (AU). Based on the DNRC Water Calculation Guide, stock use is calculated as Number of AU's x 0.17/365 X Days = AF/Period of Use. The consumptive use volume for this water right is calculated to be 1.71 AF (150 AU x .017/365 X 244 days = 1.71 AF). The Department finds the historical consumptive use to be 1.71 AF.

12. The Department considers stock use to be 100 percent consumptive. The Department finds the historical diverted volume to be 1.71 AF.

13. The well has been used to supply stock water on the Applicant's property since the well was completed and put to use in 2000. The well and the entire pipeline system were completed

before the Applicants family purchased the property in 2003. The Applicant indicated the system was an NRCS project completed in cooperation with the previous owner, Gene Buxcel, in 2000. While reviewing lease information with the DNRC Eastern Lands Office, the Applicant discovered that water rights for this well and pipeline system had never been filed. The priority date, December 18, 2023, is based on the date of filing of the Notice of Completion of Groundwater Development.

14. The Department finds the following historical use:

**Table 4. Historical use of Groundwater Certificate 42M 30162613**

<b>WR Number</b>	<b>Purpose</b>	<b>Flow Rate</b>	<b>Volume</b>	<b>Period of Use</b>	<b>Point of Diversion</b>	<b>Place of Use</b>	<b>Priority Date</b>
42M 30162613	Stock (150 AU)	5 GPM	1.71 AF	04/01-11/30	SWSWSE Section 8, T13N, R49E Prairie County	7 POUs in Prairie County (see Table 2)	12/18/2023

**FINDINGS OF FACT – Adverse Effect**

15. The historical use for Groundwater Certificate 42M 30162613 is for 5 GPM up to 1.71 AF for stock purposes for 150 AU from April 1 to November 30 (FOF 9-14). The Applicant proposes to supply water from the well to three additional stock tanks through a pipeline system. The herd size will not increase under the proposed change. Neither the flow rate nor the volume will increase as part of this change. There will be no change in the rate or timing of stock use. Only the place of use will change due to the addition of stock tanks. Water will be conveyed to the additional stock tanks through a pipeline so there will be no conveyance losses. The Applicant proposes to equip each stock tank with float/shut-off valves to control flow to the tanks. All tanks can be shut off via float valve or the hydrant shut-off valve. The Applicant can shut off the well pump if call is made. There are no plans or requirements to measure diversion or use from this system. The Department finds there will be no adverse effect as a result of this change.

**BENEFICIAL USE**

**FINDINGS OF FACT**

16. The Applicant proposes to use water for stock which is recognized as a beneficial use under the Montana Water Use Act. §85-2-102 (5), MCA.

17. The Applicant proposes to use 5 GPM flow rate and 1.71 AF diverted volume. This amount is supported by the historical beneficial use and Department standards. The Applicant proposes to use a 5 GPM pump which can adequately supply the system and support the beneficial use as described in FOF 10 and FOF 18-19. The volume of 1.71 AF is the maximum amount consumed for the Applicants' livestock operation as described in FOF 11.

### **ADEQUATE DIVERSION**

#### **FINDINGS OF FACT**

18. The point of diversion consists of a stock well, completed on July 20, 2000, and located in the SWSWSE of Section 8, T13N, R49E, Prairie County. The well depth is 180 feet with a static water level of 32 feet. A one horsepower pump operating at 5 GPM is set in the well at a depth of approximately 100 feet. The flow rate of the well was tested at the time of drilling and again in 2023 at 5 GPM. The pipeline system has operated adequately over the years using this flow rate. From the well, water is pumped into the pipeline system to the stock tanks. The conveyance pipeline consists of approximately 7 miles of 1.5-inch PVC buried to a depth of six feet. The pump is equipped with an adjustable timer and all stock tanks have float valves and hydrants that can be shut off at each tank to control the flow of water through the system. The additional tank proposed in Section 18 is a rubber tire tank and the two additional tanks proposed in Section 36 are round fiberglass tanks.

19. The well and pipeline system were installed in the year 2000, before the Applicants family purchased the property. The Applicant indicates that the system was an NRCS project completed when the previous owner, Gene Buxcel, owned the property. The Department finds that the proposed means of diversion is adequate.

### **POSSESSORY INTEREST**

#### **FINDINGS OF FACT**

20. 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.

21. Reverse E Ranch LLC has a remaining life estate interest in the private property where the well and places of use currently authorized on Groundwater Certificate 42M 30162613 are located. Benjamin Jackson, President of Reverse E Ranch LLC, is the manager of the life estate and has authority to sign the application on behalf of all legal owners for Groundwater

Certificate 42M 30162613. The remaining life estate interest was granted through a Personal Representative's Deed of Distribution recorded in Prairie County on August 4, 2022, and a Transfer of Life Estate recorded in Prairie County on August 18, 2022.

22. The additional places of use proposed are located on property owned by the State of Montana Trust Lands Management Division and leased by the Applicant. These places of use are being added through a temporary change in appropriation right to use the lessee's water right on school trust land for the duration of State Lease 1940 and 9154 pursuant to §§85-2-407 and -441, MCA. Authorizations for Temporary Change in Appropriation Right for each lease were signed by the Applicant on December 10, 2023, signed by Scott Aye for the DNRC Area/Unit Office on December 18, 2023, signed by Dennis Meyer for DNRC TLMD Ag and Grazing Bureau on December 19, 2023. Agricultural and Grazing Lease No. 1940 and 9154 each took effect March 1, 2022, for a term of 10 years with an expiration date of February 29, 2032. If the Applicant renews the leases, they must apply to renew the temporary change authorization to continue using these places of use.

23. The following condition is proposed to satisfy the possessory interest criterion:

IN THE PRESENT CASE, THE APPLICANT IS THE OWNER OF GROUNDWATER CERTIFICATE 42M 30162613. THE APPLICANT PROPOSES TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. THE APPLICANT OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42M 30162613 ON THE STATE TRUST LAND FOR THE 10 YEAR DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42M 30162792, AND GROUNDWATER CERTIFICATE 42M 30162613 WILL REVERT TO THE ORIGINAL VERSION.

## **CONCLUSIONS OF LAW**

### **HISTORIC USE AND ADVERSE EFFECT**

24. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).<sup>1</sup>

25. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for

---

<sup>1</sup> DNRC decisions are available at:  
[http://www.dnrc.mt.gov/wrd/water\\_rts/hearing\\_info/hearing\\_orders/hearingorders.asp](http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp)

their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429, 816 P.2d at 1057; Hohenlohe, at ¶¶43-45.<sup>2</sup>

26. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.<sup>3</sup> A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana

---

<sup>2</sup> See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

<sup>3</sup>A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).<sup>4</sup>

27. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g.*, Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909);

---

<sup>4</sup> Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[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 reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass’n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation”); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (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.); 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.)

Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G76l By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41l 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).<sup>5</sup>

28. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

29. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There

---

<sup>5</sup> The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43 (citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

30. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

31. Based upon the Applicant’s evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of Groundwater Certificate 42M 30162613 of 1.71 AF diverted volume and 5 GPM flow rate with a consumptive use of 1.71 AF. (FOF 9-14)

32. Based upon the Department’s comparative analysis of historic water use to water use under the proposed change, 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 15)

### BENEFICIAL USE

33. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §§85-2-102(5) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: “[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change 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, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

34. Applicant proposes to use water for stock which is a recognized beneficial use. §85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence stock use is beneficial and that the 5 GPM flow rate and 1.71 AF volume of water requested is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF 16-17)

### ADEQUATE MEANS OF DIVERSION

35. Pursuant to §85-2-402 (2)(b), 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. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the

resource. Crowley v. 6<sup>th</sup> Judicial District Court, 108 Mont. 89, 88 P.2d 23 (1939); 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).

36. 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);

37. Pursuant to §85-2-402 (2)(b), MCA, 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 18-19)

#### POSSESSORY INTEREST

38. Pursuant to §85-2-402(2)(d), 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. See also ARM 36.12.1802

39. The Applicant has proven by a preponderance of the evidence that it has a possessory interest or the written consent of the person with possessory interest, in the property where the water is to be put to beneficial use. (FOF 20-23)

#### PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 42M 30162792 should be granted subject to the following.

The Applicant may temporarily add three stock tanks to Groundwater Certificate 42M 30162613. The temporary change to add these places of use will be for the term of Agricultural and Grazing Lease Nos. 1940 and 9154 and must be renewed when the leases are renewed in order to continue using these places of use. Agricultural and Grazing Lease Nos. 1940 and 9154 each took effect March 1, 2022, for a term of 10 years with an expiration date of February 29, 2032. In the instance Temporary Change Authorization 42M 30162792 is not renewed,

expires, or is terminated, Groundwater Certificate 42M 30162613 will be used in accordance with the terms set forth on the original version of the water right per the condition below.

IN THE PRESENT CASE, THE APPLICANT IS THE OWNER OF GROUNDWATER CERTIFICATE 42M 30162613. THE APPLICANT PROPOSES TO TAKE WATER DIVERTED FROM THE WELL LOCATED ON PRIVATE PROPERTY, AND TEMPORARILY USE IT FOR STOCK USE ON STATE TRUST LAND FOR THE DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. THE APPLICANT OBTAINED WRITTEN CONSENT FROM THE DNRC TRUST LAND MANAGEMENT DIVISION TO TEMPORARILY USE GROUNDWATER CERTIFICATE 42M 30162613 ON THE STATE TRUST LAND FOR THE 10 YEAR DURATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154. EXPIRATION OR TERMINATION OF AGRICULTURAL & GRAZING LEASE OF STATE LANDS AGREEMENT NOS. 1940 AND 9154 WILL RESULT IN THE REVOCATION OF TEMPORARY CHANGE AUTHORIZATION 42M 30162792, AND GROUNDWATER CERTIFICATE 42M 30162613 WILL REVERT TO THE ORIGINAL VERSION.

The seven existing places of use for 42M 30162613 remain active. The point of diversion, period of diversion, period of use, flow rate and volume will not be changed. The additional places of use are:

	<b>Quarter Sections</b>	<b>Section</b>	<b>Township</b>	<b>Range</b>
1	SESWNE	18	13N	49E
2	SWSWNE	36	13N	48E
3	SESESE	36	13N	48E

## **NOTICE**

This Department will provide public notice of this Application 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. E.g., §§85-2-310, -312, MCA.

DATED this 1<sup>st</sup> day of March 2024.

/Original signed by Mark Elison/  
Mark Elison, Regional Manager  
Billings Regional Office  
Department of Natural Resources  
and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, by first class United States mail.

REVERSE E RANCH LLC

%BENJAMIN JACKSON

4709 IMPALA CT NW

MANDAN, ND 58554-1054

[DELIMBEROPERATOR@GMAIL.COM](mailto:DELIMBEROPERATOR@GMAIL.COM)

---

Billings Regional Office, (406) 247-4415