

Environmental Assessment & Public Notice for Public Comment

- **Environmental Assessment &
supporting documents**
- **Public Notice for Public Comment
package**
 - Notice Area List
 - Notice Area Map
 - Form Checklist
 - PN- Letter to applicant
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**Environmental Assessment &
Public Notice for Public
Comment**

NOTICE AREA FOR PUBLIC COMMENT

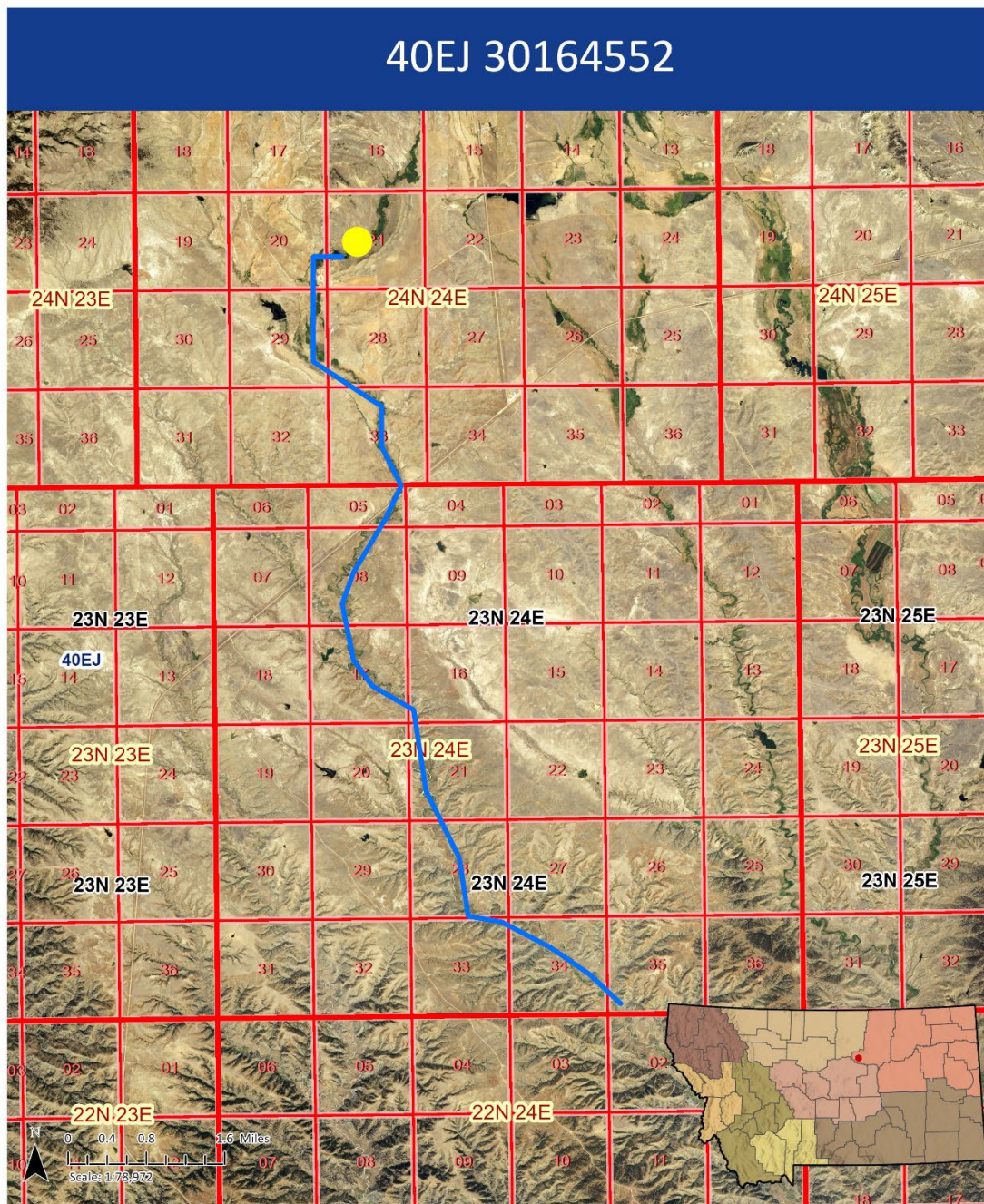
Application No. **40EJ 30164552** Regional Office # 7

Applicant's Name **Shane Schwenke, Thornhill Ranch Partnership, American Prairie Foundation**

Indian Reservation ☐ Yes ☒ No If yes, Reservation _____

Irrigation District ☐ Yes ☒ No If yes, District _____

Specialist **Ashley Kemmis** Date **4/29/2025**



Map Created: 4/25/2025
Author: Ashley Kemmis,
Water Resource Specialist
Elements depicted on this map are for illustrative
purposes and have not been surveyed by the
Department. MSN PLSS:
2017 Aerials:



Water Right Owner	Water Right # (Basin, ID, and Number)
Applicant:	
Shane Schwenke, Thornhill Ranch Partnership, American Prairie Foundation	40EJ 30103397
1BIA	
1DSL	
1FWS	
1FWP	
2FWP	
1PPL	
1NWE	
1WQB	
7GLS	
1BOR	
1 CRP	
AMERICAN PRAIRIE FOUNDATION	40EJ 22332 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22356 00
SQUARE BUTTE GRAZING ASSN	40EJ 30164220
AMERICAN PRAIRIE FOUNDATION	40EJ 22359 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22330 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22331 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22360 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22329 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22358 00
AMERICAN PRAIRIE FOUNDATION	40EJ 30319 00
AMERICAN PRAIRIE FOUNDATION	40EJ 30321 00
AMERICAN PRAIRIE FOUNDATION	40EJ 30322 00
AMERICAN PRAIRIE FOUNDATION	40EJ 22333 00
USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	40EJ 30142030
USA (DEPT OF INTERIOR BUREAU OF LAND MGMT)	40EJ 30142029
Published: PHILLIPS COUNTY NEWS	
Remarks: The Department has determined the area of potential impact as the 9-mile reach beginning from the proposed point of diversion at SWNWSW, Section 21, T24N, R24E, Philips County, and ending where Siparyann Creek crosses the Charles M Russel National Wildlife Refuge boundary in Gov't Lot 4, NWNW Section 2, T22N, R24E.	

**If owner listed twice, only one notice sent*

Montana Department of Natural Resources and Conservation
Water Resources Division
Water Rights Bureau

ENVIRONMENTAL ASSESSMENT
For Routine Actions with Limited Environmental Impact

Part I. Proposed Action Description

1. Applicant/Contact name and address: Shane Schwenke
Thornhill Ranch Partnership
2210 Power Plant Ferry RD
Zortman, MT 59546

American Prairie Foundation
PO Box 908
Bozeman, MT 59771-0908
2. Type of action: Application to Change Water Right – Additional Stock Tanks – No. 40EJ 30164552
3. Water source name: Siparyann Creek
4. Location affected by project: Section 20 and 18, T24N, R24E, Phillips County
Section 13, T24N, R23E, Phillips County
5. Narrative summary of the proposed project, purpose, action to be taken, and benefits: The DNRC shall issue a change authorization if an applicant proves the criteria in 85-2-402 MCA are met.

THE APPLICANT PROPOSES TO ADD 5 STOCK TANKS TO PROVISIONAL PERMIT 40EJ 30103397. A TOTAL OF 14 STOCK TANKS WILL BE SUPPLIED BY THIS WATER RIGHT. THE ADDITIONAL STOCK TANKS ARE LOCATED IN SECTION 18 AND 20, T24N, R24E AND SECTION 13, T24N, R23E, PHILLIPS COUNTY. THE WATER RIGHT WILL CONTINUE TO DIVERT 20 GALLONS PER MINUTE AND 16.1 ACRE-FEET PER YEAR.
6. Agencies consulted during preparation of the Environmental Assessment:
(include agencies with overlapping jurisdiction)
 - US Fish & Wildlife Service
 - Montana Natural Heritage Program
 - Montana Department of Fish, Wildlife, & Parks
 - Montana Department of Environmental Quality
 - USDA Web Soil Survey
 - National Wetlands Inventory

Part II. Environmental Review

1. Environmental Impact Checklist:

PHYSICAL ENVIRONMENT

WATER QUANTITY, QUALITY AND DISTRIBUTION

Water quantity - *Assess whether the source of supply is identified as a chronically or periodically dewatered stream by DFWP. Assess whether the proposed use will worsen the already dewatered condition.*

Siparyann Creek is not identified as a chronically or periodically dewatered stream by the Montana Department of Fish, Wildlife & Parks.

Determination: No significant impact.

Water quality - *Assess whether the stream is listed as water quality impaired or threatened by DEQ, and whether the proposed project will affect water quality.*

Siparyann is not listed on the 2020 Montana 303(d) list

Determination: No significant impact.

Groundwater - *Assess if the proposed project impacts ground water quality or supply. If this is a groundwater appropriation, assess if it could impact adjacent surface water flows.*

Adding five stock tanks to the stock water system while maintaining the same flow rate and volume should have no significant impact on groundwater in the area.

Determination: No significant impact.

DIVERSION WORKS - *Assess whether the means of diversion, construction and operation of the appropriation works of the proposed project will impact any of the following: channel impacts, flow modifications, barriers, riparian areas, dams, well construction.*

The diversion means consists of a 2 HP FPS Series Five submersible pump that will pump water out of an existing irrigation reservoir at a rate of 20 gpm through a buried 1.5-inch PVC line that travels roughly 300 yards and tees into an existing buried pipeline that travels under Siparyann Creek to the tanks. The pipelines are buried roughly 6 feet deep. There will be no barriers or constructions installed in this project that will impact the channel or stream flows.

Determination: No significant impact.

UNIQUE, ENDANGERED, FRAGILE OR LIMITED ENVIRONMENTAL RESOURCES

Endangered and threatened species - Assess whether the proposed project will impact any threatened or endangered fish, wildlife, plants or aquatic species or any “species of special concern,” or create a barrier to the migration or movement of fish or wildlife. For groundwater, assess whether the proposed project, including impacts on adjacent surface flows, would impact any threatened or endangered species or “species of special concern.”

The Montana Natural Heritage Program identified a list of 6 species of concern within and surrounding the location of the additional stock tanks listed below. None are identified as threatened or endangered with the United States Fish, and Wildlife Service (USWS) and Bureau of Land Management (BLM). The stock tanks are in the following locations:

- NENENW, Sec. 18, T24N, R24E
- SESWSE Sec. 18, T24N, R24E
- NWNWNE, Sec. 20, T24N, R24E
- NESWNE, Sec. 13, T24N, R23E
- SWSESSEW, Sec. 13, T24N, R23E

Species Group	Common Name	Scientific name
Birds	Greater Sage-Grouse	Centrocercus urophasianus
Birds	Long-billed Curlew	Numenius americanus
Mammals	Spotted Bat	Euderma maculatum
Birds	Sage Thrasher	Oreoscoptes montanus
Vascular Plants	Scribner's Ragwort	Senecio integerrimus var. scribneri
Fish	Northern Redbelly Dace	Chrosomus eos

The project is located within a General Habitat/Core Area for sage grouse which is listed as a sensitive species by the BLM. The BLM classifies a portion of this area as a Priority Habitat Management Area. Executive Orders 12-2015 and 21-2015 require Applicants to consult with the Montana Sage Grouse Habitat Conservation Program. Review letter dated September 5, 2024, by the Program found that the Applicant’s activities are not expected to result in direct habitat loss to sage grouse and will not be assessed mitigation.

The proposed project was previously issued a beneficial water use permit by the DNRC with a priority date of August 11, 2015, and construction was completed by the Applicant. A project completion notice was received on October 13, 2016, and verified by the Department on November 18, 2016. The 5 additional stock tanks were installed as early as 2001 under water right 40EJ 30000128. Because the ground disturbance associated with this project is already complete, no new impact to any threatened or endangered fish, wildlife, plants, or aquatic species is expected from this proposed change authorization.

Determination: No significant impact.

Wetlands - Consult and assess whether the apparent wetland is a functional wetland (according to COE definitions), and whether the wetland resource would be impacted.

There are no wetlands identified near the five additional stock tanks.

Determination: No significant impact.

Ponds - *For ponds, consult and assess whether existing wildlife, waterfowl, or fisheries resources would be impacted.*

According to the U.S. Fish and Wildlife Service National Wetlands Mapper, the freshwater pond habitats near the additional, five stock tanks are identified as a PABFh.

- System **Palustrine (P)**: The Palustrine System includes all nontidal wetlands dominated by trees, shrubs, persistent emergents, emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5 ppt. It also includes wetlands lacking such vegetation, but with all of the following four characteristics: (1) area less than 8 ha (20 acres); (2) active wave-formed or bedrock shoreline features lacking; (3) water depth in the deepest part of basin less than 2.5 m (8.2 ft) at low water; and (4) salinity due to ocean-derived salts less than 0.5 ppt.
- Class **Aquatic Bed (AB)**: Includes wetlands and deepwater habitats dominated by plants that grow principally on or below the surface of the water for most of the growing season in most years.
- Water Regime **Semi Permanently Flooded (F)**: Surface water persists throughout the growing season in most years. When surface water is absent, the water table is usually at or very near the land surface.
- Special Modifier **Diked/Impounded (h)**: These wetlands have been created or modified by a man-made barrier or dam that obstructs the inflow or outflow of water.

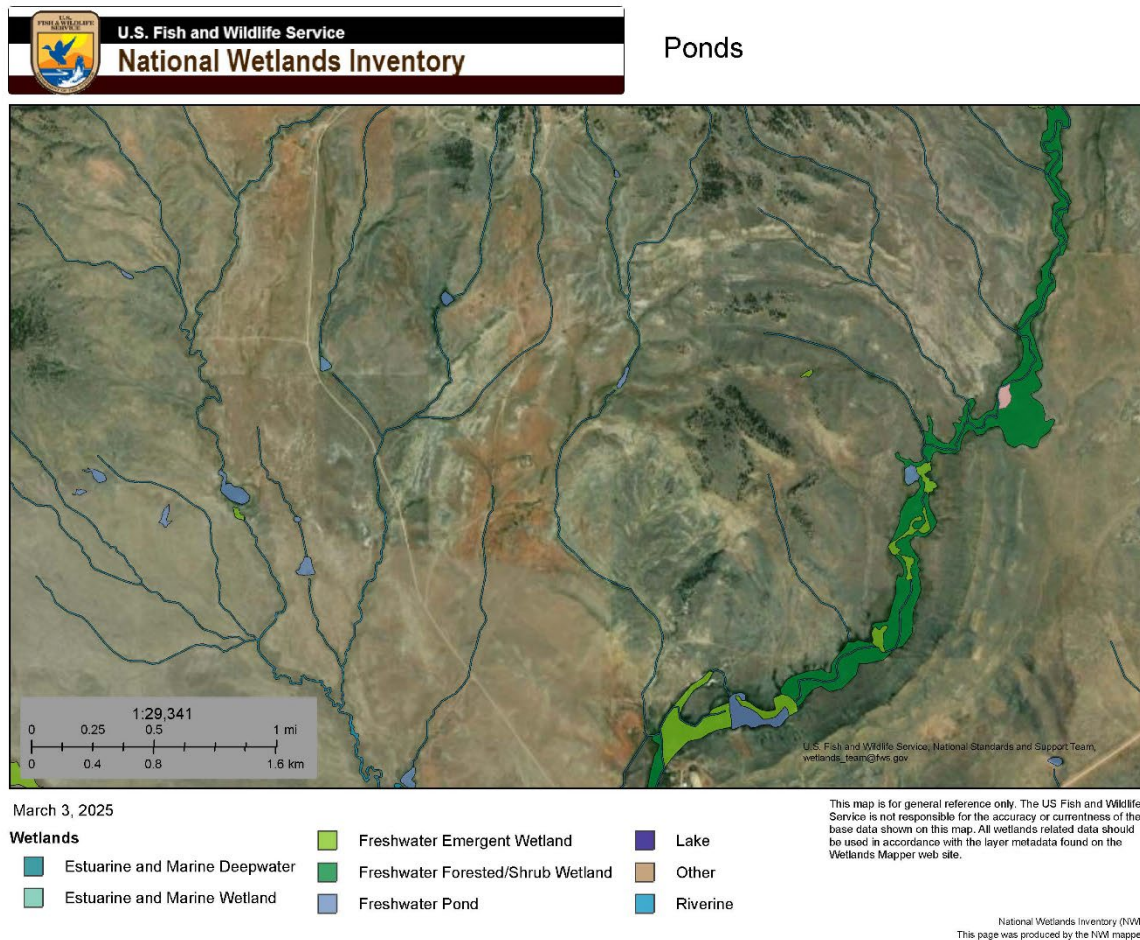


Figure 1: Area Ponds

The additional stock tanks are adjacent to land used for agricultural purposes and have already been developed. Because the project has already been completed, there is no significant impact expected to existing ponds.

Determination: No significant impact.

GEOLOGY/SOIL QUALITY, STABILITY AND MOISTURE - *Assess whether there will be degradation of soil quality, alteration of soil stability, or moisture content. Assess whether the soils are heavy in salts that could cause saline seep.*

According to the NRCS Web Soil Survey, the soil types at the following locations are:

- NENENW, Sec. 18, T24N, R24E
 - Majority Bascovy-Neldore clay – not prime farmland, 2-8% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)
 - Minority Neldore-Bascovy clay - not prime farmland, 8-25% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)
- SESWSE Sec. 18, T24N, R24E
 - Marvan-Vanda clays – not prime farmland, 0-8% slopes, well drained, and moderately saline to strongly saline (8.0 to 16.0 mmhos/cm)

- NWNWNE, Sec. 20, T24N, R24E
 - Majority Cabbart-Twilight-Yawdim association – not prime farmland, 8-35% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)
 - Minority Kobase-Megonot silty clay loams – farmland of statewide importance, 2-8% slopes, well drained, and nonsaline to slightly saline (0.0 to 3.9 mmhos/cm)
- NESWNE, Sec. 13, T24N, R23E
 - Majority cool-Neldore-Rock outcrop association – not prime farmland, 15-60% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)
 - Minority Bascovy-Neldore clays – not prime farmland, 2-8% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)
- SWSESW, Sec. 13, T24N, R23E
 - Neldore-Bascovy clay - not prime farmland, 8-25% slopes, well drained, and nonsaline to slightly saline (0.0 to 4.0 mmhos/cm)

The additional stock tanks are adjacent to land used for agricultural purposes and have already been developed. Because the project has already been completed, there is no significant impact expected to the soil.

Determination: Issuance of this change authorization is unlikely to have significant impact on soil quality, alteration of soil stability, or moisture content.

VEGETATION COVER, QUANTITY AND QUALITY/NOXIOUS WEEDS - *Assess impacts to existing vegetative cover. Assess whether the proposed project would result in the establishment or spread of noxious weeds.*

Because the ground disturbance associated with this project has already been completed, new vegetative disturbance is not expected from the proposed change authorization. Control of noxious weeds will be the responsibility of the property owner.

Determination: No significant impact.

AIR QUALITY - *Assess whether there will be a deterioration of air quality or adverse effects on vegetation due to increased air pollutants.*

Because the project has already been completed, no air quality impact is expected.

Determination: No significant impact.

HISTORICAL AND ARCHEOLOGICAL SITES - *Assess whether there will be degradation of unique archeological or historical sites in the vicinity of the proposed project if it is on State or Federal Lands. If it is not on State or Federal Lands simply state NA-project not located on State or Federal Lands.*

Determination: Not applicable, project not located on State or Federal Lands.

DEMANDS ON ENVIRONMENTAL RESOURCES OF LAND, WATER, AND ENERGY - *Assess any other impacts on environmental resources of land, water and energy not already addressed.*

Determination: No other potential impacts have been identified.

HUMAN ENVIRONMENT

LOCALLY ADOPTED ENVIRONMENTAL PLANS AND GOALS - *Assess whether the proposed project is inconsistent with any locally adopted environmental plans and goals.*

Determination: No known environmental plans or goals will be significantly impacted by this project.

ACCESS TO AND QUALITY OF RECREATIONAL AND WILDERNESS ACTIVITIES - *Assess whether the proposed project will impact access to or the quality of recreational and wilderness activities.*

Determination: No access or recreational activities will be significantly impacted by this project.

HUMAN HEALTH - *Assess whether the proposed project impacts on human health.*

Determination: This project will have no significant impact on human health.

PRIVATE PROPERTY - *Assess whether there are any government regulatory impacts on private property rights.*

Yes ___ No X *If yes, analyze any alternatives considered that could reduce, minimize, or eliminate the regulation of private property rights.*

Determination: No significant impact.

OTHER HUMAN ENVIRONMENTAL ISSUES - *For routine actions of limited environmental impact, the following may be addressed in a checklist fashion.*

Impacts on:

- (a) Cultural uniqueness and diversity? No significant impacts identified.
- (b) Local and state tax base and tax revenues? No significant impacts identified.
- (c) Existing land uses? No significant impacts identified.
- (d) Quantity and distribution of employment? No significant impacts identified.
- (e) Distribution and density of population and housing? No significant impacts identified.
- (f) Demands for government services? No significant impacts identified.
- (g) Industrial and commercial activity? No significant impacts identified.
- (h) Utilities? No significant impacts identified.

- (i) Transportation? No significant impacts identified.
- (j) Safety? No significant impacts identified.
- (k) Other appropriate social and economic circumstances?

2. ***Secondary and cumulative impacts on the physical environment and human population:***

Secondary Impacts No significant impacts.

Cumulative Impacts No significant impacts.

3. ***Describe any mitigation/stipulation measures:*** None

4. ***Description and analysis of reasonable alternatives to the proposed action, including the no action alternative, if an alternative is reasonably available and prudent to consider:***

The only other viable alternative would be the no action alternative in which the Department would not authorize this application to change the water right and add additional stock tanks.

PART III. Conclusion

1. ***Preferred Alternative:*** Issue a change authorization if the applicant proves the criteria in §85-2-402, MCA are met.

2. ***Comments and Responses***

3. ***Finding:***

Yes___ No X Based on the significance criteria evaluated in this EA, is an EIS required?

If an EIS is not required, explain why the EA is the appropriate level of analysis for this proposed action: No significant impacts have been identified.

Name of person(s) responsible for preparation of EA:

Name: Ashley Kemmis

Title: Water Resource Specialist

Date: March 6, 2025

Draft Preliminary Determinations

- Draft PD
- Draft PD cover letter
- Updated Draft PD
- Updated Draft PD cover letter
- Any correspondence with the applicant regarding the draft PDs

Draft Preliminary Determinations

THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

Glasgow Water Resources Regional Office
222 6th St South
PO Box 1269
Glasgow, MT 59230-1269
(Office) 406-228-2561
(Desk) 406-808-7075
ashley.kemmis@mt.gov

April 29, 2025

Shane Schwenke/Thornhill Ranch Partnership
2210 Power Plant Ferry Rd
Zortman, MT 59546

Subject: Updated Draft Preliminary Determination to Grant Water Right Change Application No. 40EJ 30164552

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has reviewed any information submitted to your application during the granted extension. This review consists of an updated evaluation of the criteria for issuance of a Change authorization found in §85-2-402, MCA. The Department has preliminarily determined that the criteria are met, and this application should be granted. A copy of the updated Draft Preliminary Determination (PD) to Grant your application is attached.

The Department will prepare a notice of opportunity to provide public comment per §85-2-307(4), MCA. If no public comments are received, the Department will issue the updated Draft PD as final pursuant to §85-2-307(5)(c), MCA. If public comments are received, the Department will consider the public comments and issue a non- draft PD within 30 days of the closing date of the public comment period.

Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, appearing to read "Ashley Kemmis".

Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division



DNRC.MT.GOV

CC: American Prairie Foundation



THE MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

GOVERNOR GREG GIANFORTE



DNRC DIRECTOR AMANDA KASTER

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April 29, 2025

American Prairie Foundation
PO Box 908
Bozeman, MT 59771-0908

Subject: Updated Draft Preliminary Determination to Grant Water Right Change Application No. 40EJ 30164552

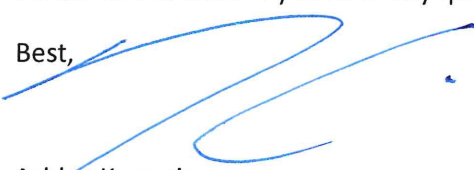
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Please let me know if you have any questions.

Best,



Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division



DNRC.MT.GOV

CC: Shane Schwenke/Thornhill Ranch Partnership



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

APPLICATION TO CHANGE WATER RIGHT – ADDITIONAL STOCK TANKS-- NO. 40EJ 30164552 by SHANE SCHWENKE, THORNHILL RANCH PARTNERSHIP AND AMERICAN PRAIRIE FOUNDATION) DRAFT PRELIMINARY DETERMINATION) TO GRANT CHANGE
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On September 30, 2024, Shane Schwenke and Thornhill Ranch Partnership (Applicant) submitted Application to Change Water Right--Additional Stock Tanks No. 40EJ 30164552 to change Water Right No. 40EJ 30103397 to the Glasgow 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 November 8, 2024. American Prairie Foundation was added as an Applicant on January 13, 2025. An Environmental Assessment for this Application was completed on March 6, 2025. The Applicant submitted a request for extension of time per § 85-2-307(3), MCA on March 25, 2025, to which the Department granted seven days to submit additional information. The Applicant submitted additional information on March 25, 2025.

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
- Maps: Department created map on Montana Spatial Data Infrastructure (MSDI) National Agricultural Imagery Program (NAIP) 2017 aerial photos
- Letter from Montana Sage Grouse Habitat Conservation Program dated September 5, 2024

Information Received after Application Filed

- Email from William Moore of DMS Natural Resources, LLC, dated March 25, 2025, regarding typographical errors in the Draft PD and clarification that there are two stock tanks in the place of use NWNWNE Section 20, T24N R24E.

Information within the Department's Possession/Knowledge

- Provisional permit file for 40EJ 30103397

- Ownership Update #268398 filed by American Prairie Foundation on December 5, 2024 including 40EJ 30103397

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, part 4, MCA).

For the purposes of this document, 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; AC means acres; AU means animal units; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the place of use of Provisional Permit No. 40EJ 30103397 in this Application. Provisional Permit No. 40EJ 30103397 is appropriated for 20 GPM flow rate and 16.1 AF diverted volume from Siparyann Creek via means of a pump for the purpose of stock use for 900 AU. The period of use and the period of diversion are October 1 to March 31. The point of diversion is in the SWNWSW, Section 21, T24N, R24E, Philips County and water is conveyed to nine stock tanks by means of a pipeline.

Table 1: Water Right Proposed for Change							
Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
40EJ 30103397	20 GPM	16.1 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks) SESENW, Sec. 17, 24N, 24E SENENW, Sec. 17, 24N, 24E NENENW, Sec. 17, 24N, 24E NENWNW, Sec. 17, 24N, 24E	SWNWSW, Section 21, T24N, R24E, Philips County	August 11, 2015

					NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)		
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2. There are no supplemental water rights for the place of use and no previous changes have been requested or authorized on Provisional Permit 40EJ 30103397.

3. A project completion notice was received on October 13, 2016, for Provisional Permit 40EJ 30103397 and was verified by the Department on November 18, 2016.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the POU by adding six stock tanks on five places of use to Provisional Permit 40EJ 30103397 for stock use with a flow rate of 20 GPM for 16.1 AF out of Siparyann Creek. The period of use and the period of diversion are October 1 to March 31.

5. These six stock tanks were previously supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but have been disconnected from the wells due to inadequate flow. The Applicant requested to remove the six tanks from the place of use of Groundwater Certificates 40EJ 30000128 and 40EJ 30052429 on September 27, 2024. The Department issued the reduced versions on October 4, 2024.

6. If authorized, the proposed change will add these five POUs to Provisional Permit 40EJ 30103397. The remaining elements of the permit will remain the same, as described in Table 2.

Table 2: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Period of Diversion	Period of Use
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E SESWSE Sec. 18, T24N, R24E NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks) NESWNE Sec. 13, T24N, R23E SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Philips County	20 GPM	10/01-3/31	10/01-3/31

7. The 606-ST application to change a water right was initially submitted by Shane Schwenke and Thornhill Ranch Partnership on September 30, 2024. A portion of the place of use was sold to American Prairie Foundation in the fall of 2024. In a warranty deed provided to the DNRC with the water right ownership update #268398 received on December 5, 2024, a provision for co-ownership of the water right/change authorization for provisional permit 40EJ 30103397 was expressed. American Prairie Foundation was added as an Applicant after DNRC received their signature on the application on January 13, 2025.

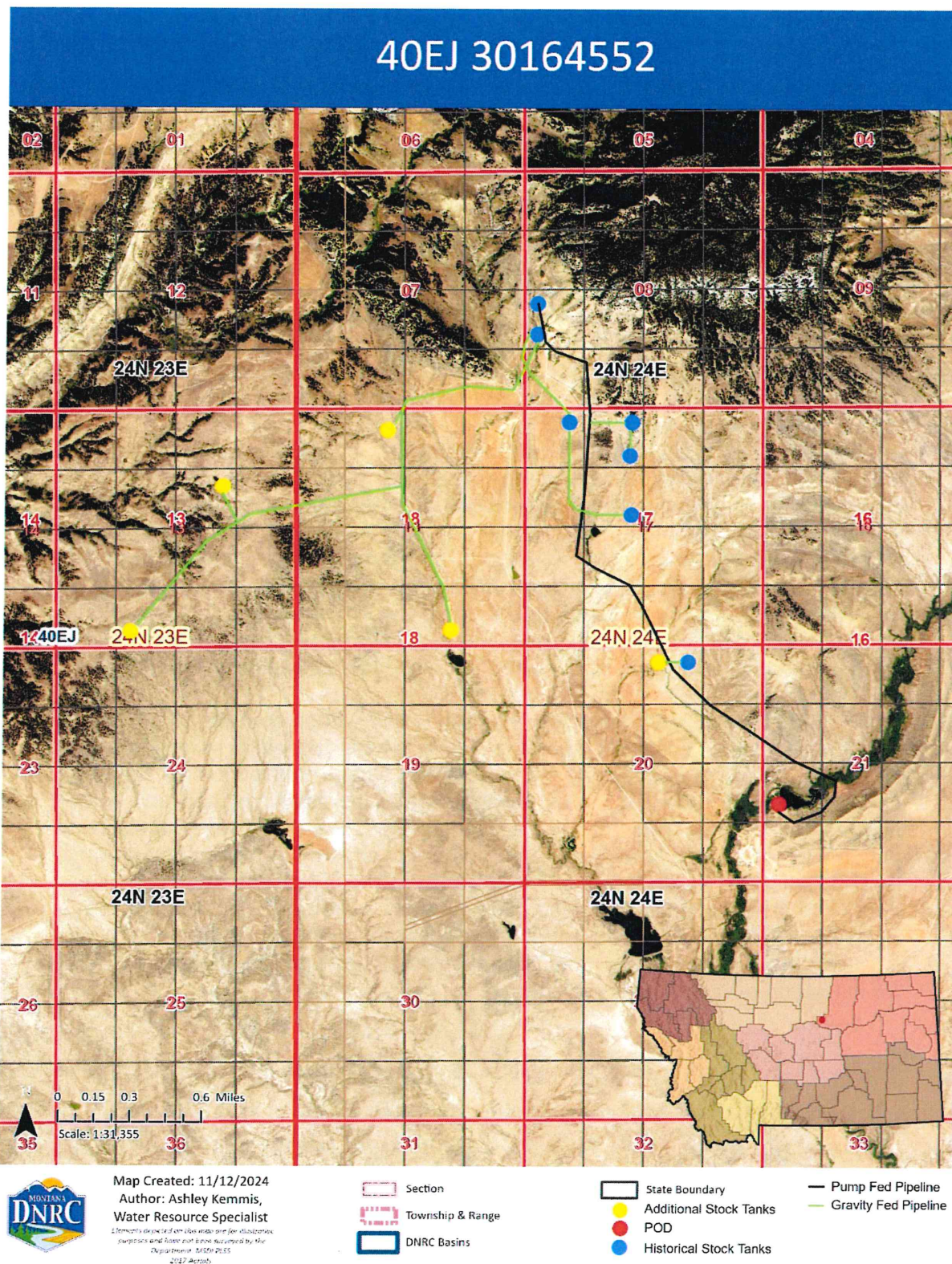


Figure 1. Map of Proposed and Historical Stock Tanks

CHANGE CRITERIA

8. The Department is authorized to approve a change if the Applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. *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 probable 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.

9. 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*, ¶¶ 29-31; *Town of Manhattan*, ¶ 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

10. Per ARM 36.12.1902(1)(c), historic information for a certificate of water right must be described as it was used at the filing date of the completion notice (date October 13, 2016). As of October 13, 2016, the pump historically diverted 20 GPM and 16.1 AF of water to supply 900 AU. ARM 36.12.115(2)(c) designates year-round consumptive use for 1 animal unit (AU) at 0.017 AF per year, which equates to a consumptive volume of 7.63 AF ($900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days/365 days}$). Because the pump ran continuously to prevent freezing and to adequately serve nine stock tanks, the total system diverted water at 20 GPM up to 16.1 AF annually. Overflow water that was not consumed by stock was discharged back into Siparyann Creek through a 1-mile-long drain line. The Department has determined that stock use is 100% consumptive; therefore 7.63 AF is the total consumed volume, and 16.1 AF is the total diverted volume. See Table 3 for a summary of historical use.

Table 3: Historic Use for Provisional Permit 40EJ 30103397								
Priority Date	Water Right Number	Flow Rate	Diverted Volume	Consumed Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion
August 11, 2015	40EJ 30103397	20 GPM	16.1 AF	7.63 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks) SESENW, Sec. 17, 24N, 24E SENENW, Sec. 17, 24N, 24E NENENW, Sec. 17, 24N, 24E NENWNW, Sec. 17, 24N, 24E NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)	SWNWSW, Section 21, T24N, R24E, Philips County

ADVERSE EFFECT

FINDINGS OF FACT

11. Provisional permit No. 40EJ 30103397 was filed for stock use serving 900 AU from October 1 to March 31 using a flow rate of 20 GPM. The diverted volume of 16.1 AF is needed for the Applicant to meet the beneficial use. No additional animal units will be grazed under the

Draft Preliminary Determination to Grant

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Application to Change Water Right No. 40EJ 30164552

proposed change. By connecting the six stock tanks to the existing permit, the Applicant would ensure that water reliably reaches these six tanks. Therefore, the proposed application will not exceed the historic consumptive volume of 7.63 AF and the historic diverted volume of 16.1 AF. A summary of the proposed change is shown in Table 4.

Table 4: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Proposed Consumptive Volume	Proposed Diverted Volume
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E SESWSE Sec. 18, T24N, R24E NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks) NESWNE Sec. 13, T24N, R23E SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Philips County	20 GPM	7.63 AF	16.1 AF

12. Each tank can be shut off via float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow reduction is needed.
13. If a call is made, the Applicant has the ability to stop flow with the shut-off valves and cease pumping to the additional tanks.

BENEFICIAL USE

FINDINGS OF FACT

14. The Applicant has historically used water for stock use from October 1 to March 31. Stock use is recognized by the Department as a beneficial use of water and has a water use standard of 0.017 AF/AU/YR. The Applicant has historically watered 900 AU, which equates to a consumptive volume of 7.63 AF ($900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days}/365 \text{ days}$). The Applicant will continue to run the pump continuously at 20 GPM (0.045 CFS) for the requested 182 days to prevent freezing, for a total diverted volume of 16.1 AF per year ($0.045 \text{ CFS} * 1.98 \frac{\text{AF}}{\text{Day} * \text{CFS}} * 182 \text{ days}$).
15. The requested flow rate is necessary to ensure optimal operation of the pipeline during the winter and adequately supply 15 stock tanks (9 historically and 6 proposed). The additional

stock tanks used to be supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but were disconnected due to inadequate pressure. The Applicant stated that these tanks would be more reliably fed by the proposed gravity-fed pipeline.

16. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

17. Water is diverted from Siparyann Creek at a single diversion point at SWNWSW, Section 21, T24N, R24E, Philips County using a 2-HP FPS Series Five submersible pump (Model 20F2S4-PE). The system will feed a total of 15 rubber, winterized stock tanks (9 historically and 6 proposed) via a 1.5-inch PVC pipeline that is buried 6-ft deep. There are float tank valves at each stock tank with a small valve to allow for circulation and prevent freezing. Each tank can be shut off via the float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow rate reduction is needed.

18. The pump conveys water up to Section 8 via the 1.5-inch PVC pipeline (see Figure 1). The proposed POUs will be supplied by an additional pipeline that runs from Section 8 through Section 18, T24N, R24E. Water is gravity fed through this additional portion (Section 8 to 18) where the ground elevation decreases by approximately 185-ft. The pipeline branches in Section 18, T24N, R24E, to serve the two tanks in Section 13, T24N, R23E. A drain line runs from Section 8 down to Section 17 in T24N, R24E. This is used to relieve spillover water when all tanks are full. Water returns to the Siparyann Creek from this drain line.

19. The Department finds the proposed means of diversion is adequate.

POSSESSORY INTEREST

FINDINGS OF FACT

20. The Applicants signed the affidavit on the application form affirming the Applicants have 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.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

21. 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*, ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied).¹

22. 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 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*

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>

Royston, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.²

23. 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*, ¶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.³ 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*, ¶¶ 44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana 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

² 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).

³A 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. Section 85-2-234, MCA

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).⁴

24. 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*, ¶ 44; *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); *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; ARM 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

⁴ 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.)

subsequent water users).⁵

25. 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 ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

26. 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 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).

⁵ 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, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

27. 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. ARM 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. ARM 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. ARM 36.12.1901 and 1903.

28. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 40EJ 30103397 to be a diverted volume of 16.1 AF, a historically consumed volume of 7.63 AF, and flow rate of 20 GPM. (FOF 10)

29. Based upon the Applicant's comparative analysis of historic water use and 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. Section 85-2-402(2)(a), MCA. (FOF Nos. 11-13)

BENEFICIAL USE

30. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) 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 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (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).

31. Applicant proposes to use water for stock use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence stock use is a beneficial use and that 16.1 acre-feet of diverted volume and 20 GPM flow rate of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule. Section 85-2-402(2)(c), MCA (FOF Nos. 14-16).

ADEQUATE MEANS OF DIVERSION

32. 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. 6th 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).

33. *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);

34. 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 Nos. 17-19)

POSSESSORY INTEREST

35. 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.

36. 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. (FOF No. 20).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right—Additional Stock Tanks No. 40EJ 30164552 should be granted subject to the following.

The Department has determined that the Applicant may add six stock tanks to Water Right 40EJ 30103397 in the following places of use:

Proposed additional stock tanks

- NENENW, Sec. 18, T24N, R24E
- SESWSE Sec. 18, T24N, R24E
- NWNWNE, Sec. 20, T24N, R24E (2 Stock Tanks)
- NESWNE Sec 13, T24N, R23E
- SWSESW, Sec. 13, T24N, R23E

The point of diversion in SWNWSW, Sec. 21, T24N, R24E, Phillips County and original places of use (listed below) on Water Right No. 40EJ 30103397 will remain unchanged. The period of use and period of diversion are October 1 to March 31. The flow rate is 20 GPM and the diversion volume is 16.1 AF per year for stock use.

Historical stock tanks

- SWNWSW, Sec. 8, 24N, 24E
- SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks)
- SESENW, Sec. 17, 24N, 24E
- SENENW, Sec. 17, 24N, 24E
- NENENW, Sec. 17, 24N, 24E
- NENWNW, Sec. 17, 24N, 24E
- NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 29th day of April, 2025.



Lih-An Yang, Manager
Glasgow Regional Office

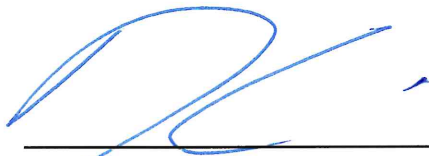
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 29th day of April, 2025, by first class United States mail.

SHANE SCHWENKE
THORNHILL RANCH PARTNERSHIP
2210 POWER PLANT FERRY RD
ZORTMAN, MT 59546

AMERICAN PRAIRIE FOUNDATION
PO BOX 908
BOZEMAN, MT 59771-0908

A handwritten signature in blue ink, consisting of a large, stylized 'R' followed by a horizontal line and a small flourish.

GLASGOW Regional Office, (406) 228-2561



Glasgow Water Resources Regional Office
222 6th St South
PO Box 1269
Glasgow, MT 59230-1269
(Office) 406-228-2561
(Desk) 406-808-7075
ashley.kemmis@mt.gov

March 26, 2025

American Prairie Foundation
PO Box 908
Bozeman, MT 59771-0908

Subject: Request for extension of time to submit additional information for Water Right Change Application No. 40EJ 30164552

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has granted your request for an extension of time for the purpose of submitting additional information for the consideration of Water Right Change Application No. 40EJ 30164552

You have 7 days to submit additional information to the Glasgow Regional Office. Please note that additional information submitted may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401. Should the Department consider additional information submitted to be an amendment to the application, the applicant will be required to submit an Application Amendment Form (Form 655).

Pursuant to §85-2-307(3)(b), MCA, the Department shall issue an updated Draft Preliminary Determination (PD) within 60 days of the earliest date of either the extension deadline set, or the Department's receipt of written notice from Applicant attesting that all information to be considered has been submitted to the Department.

If the Department's updated Draft PD is to deny the application, you will be notified, and your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be denied, per §85-2-310(1), MCA.

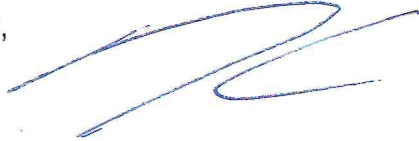


If the Department's updated Draft PD is to grant the application or to grant the application in modified form, you will be notified, and the Department will then prepare a notice of opportunity to provide public comment on the updated Draft PD to Grant or Grant in Modified Form, per §85-2-307(4), MCA.

If you determine you do not intend to further pursue this application, you can request the application to be withdrawn at any time during this process.

Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division

CC: Shane Schwenke/Thornhill Ranch Partnership
DMS Natural Resources, LLC via email





Glasgow Water Resources Regional Office
222 6th St South
PO Box 1269
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ashley.kemmis@mt.gov

March 26, 2025

Shane Schwenke/Thornhill Ranch Partnership
2210 Power Plant Ferry Rd
Zortman, MT 59546-9608

Subject: Request for extension of time to submit additional information for Water Right Change
Application No. 40EJ 30164552

Dear Applicant,

The Department of Natural Resources and Conservation (Department or DNRC) has granted your request for an extension of time for the purpose of submitting additional information for the consideration of Water Right Change Application No. 40EJ 30164552

You have 7 days to submit additional information to the Glasgow Regional Office. Please note that additional information submitted may be considered an amendment to your application, which may reset application timelines pursuant to ARM 36.12.1401. Should the Department consider additional information submitted to be an amendment to the application, the applicant will be required to submit an Application Amendment Form (Form 655).

Pursuant to §85-2-307(3)(b), MCA, the Department shall issue an updated Draft Preliminary Determination (PD) within 60 days of the earliest date of either the extension deadline set, or the Department's receipt of written notice from Applicant attesting that all information to be considered has been submitted to the Department.

If the Department's updated Draft PD is to deny the application, you will be notified, and your application will be forwarded to the DNRC Hearings Unit to schedule a hearing to show cause why your application should not be denied, per §85-2-310(1), MCA.



If the Department's updated Draft PD is to grant the application or to grant the application in modified form, you will be notified, and the Department will then prepare a notice of opportunity to provide public comment on the updated Draft PD to Grant or Grant in Modified Form, per §85-2-307(4), MCA.

If you determine you do not intend to further pursue this application, you can request the application to be withdrawn at any time during this process.

Please let me know if you have any questions.

Best,

A handwritten signature in blue ink, appearing to read 'AK', is positioned above the typed name.

Ashley Kemmis
Water Resource Specialist
Water Rights Bureau
Water Resources Division

CC: American Prairie Foundation
DMS Natural Resources, LLC via email



[EXTERNAL] RE: Draft Preliminary Determination to Grant Water Right Change Application No. 40EJ 30164552

From moore dmsnaturalresources.com <moore@dmsnaturalresources.com>

Date Tue 3/25/2025 2:58 PM

To Yang, Lih-An <Lih-An.Yang@mt.gov>; Kemmis, Ashley <Ashley.Kemmis@mt.gov>

Cc Stephenson, Deborah <Stephenson@dmsnaturalresources.com>; Beckie Williams <beckie@americanprairie.org>; Garrett Budds <garrett@americanprairie.org>

Hi Ashley & Lih-An,

Thanks for the confirmation. Per our discussion this morning, American Prairie Foundation (APF) would like to formally request a 7-day extension to fix the typographical errors in the preliminary determination to grant for change application 40EJ 30164552. It is our understanding that the requested 7-day extension will be adequate for DNRC to re-issue the preliminary determination to grant incorporating the typographical corrections. APF also is clarifying that there are two stock tanks located in one of the proposed legal land descriptions.

1. FOF 28, Pg. 13 – PDG states that historic diverted and consumed volumes are both 16.1 AF. However, in the historic use section the consumed volume is calculated as 7.63 AF. It appears that the consumed volume in FOF 28 should be corrected to 7.63 AF as calculated in historic use FOF 10 (also see adverse effect FOF 11).
2. FOF 31, Pg. 14 – PDG states “Applicant has proven by a preponderance of the evidence X is a beneficial use...” Also includes text in brackets stating “[add if applicable: “and is within the standards set by DNRC Rule/other standard”].” The “X” in the first sentence, and the text in brackets, appears to be place holder / form text that was not updated for this specific application. It appears that this text should be removed or filled in for this specific application.
3. American Prairie Foundation would like to clarify that there are two stock tanks, located side by side, in the proposed legal land description in the NWNWNE of Section 20, T24N R24E.

APF has not specifically discussed these corrections with Shane Schwenke. However, based on APF’s prior discussions with Shane Schwenke, APF does not anticipate Shane Schwenke to have any concerns with these minor clerical corrections.

Please let us know if you have any questions!

Thanks!
Will

William Moore

DMS Natural Resources, LLC

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Bozeman, MT 59718

Office: 406-582-4988

Cell: 406-595-9455

moore@dmsnaturalresources.com

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

APPLICATION TO CHANGE WATER RIGHT – ADDITIONAL STOCK TANKS-- NO. 40EJ 30164552 by SHANE SCHWENKE, THORNHILL RANCH PARTNERSHIP AND AMERICAN PRAIRIE FOUNDATION) DRAFT PRELIMINARY DETERMINATION) TO GRANT CHANGE
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On September 30, 2024, Shane Schwenke and Thornhill Ranch Partnership (Applicant) submitted Application to Change Water Right--Additional Stock Tanks No. 40EJ 30164552 to change Water Right No. 40EJ 30103397 to the Glasgow 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 November 8, 2024. American Prairie Foundation was added as an Applicant on January 13, 2025. An Environmental Assessment for this Application was completed on March 6, 2025.

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
- Maps: Department created map on Montana Spatial Data Infrastructure (MSDI) National Agricultural Imagery Program (NAIP) 2017 aerial photos
- Letter from Montana Sage Grouse Habitat Conservation Program dated September 5, 2024

Information within the Department's Possession/Knowledge

- Provisional permit file for 40EJ 30103397
- Ownership Update #268398 filed by American Prairie Foundation on December 5, 2024 including 40EJ 30103397

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, part 4, MCA).

For the purposes of this document, 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; AC means acres; AU means animal units; and AF/YR means acre-feet per year.

WATER RIGHTS TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks to change the place of use of Provisional Permit No. 40EJ 30103397 in this Application. Provisional Permit No. 40EJ 30103397 is appropriated for 20 GPM flow rate and 16.1 AF diverted volume from Siparyann Creek via means of a pump for the purpose of stock use for 900 AU. The period of use and the period of diversion are October 1 to March 31. The point of diversion is in the SWNWSW, Section 21, T24N, R24E, Philips County and water is conveyed to nine stock tanks by means of a pipeline.

Table 1: Water Right Proposed for Change							
Water Right Number	Flow Rate	Volume	Purpose	Period Of Use	Place Of Use	Point Of Diversion	Priority Date
40EJ 30103397	20 GPM	16.1 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks) SESENW, Sec. 17, 24N, 24E SENENW, Sec. 17, 24N, 24E NENENW, Sec. 17, 24N, 24E NENWNW, Sec. 17, 24N, 24E NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)	SWNWSW, Section 21, T24N, R24E, Philips County	August 11, 2015

2. There are no supplemental water rights for the place of use and no previous changes have been requested or authorized on Provisional Permit 40EJ 30103397.

3. A project completion notice was received on October 13, 2016, for Provisional Permit 40EJ 30103397 and was verified by the Department on November 18, 2016.

CHANGE PROPOSAL

FINDINGS OF FACT

4. The Applicant proposes to change the POU by adding five stock tanks to Provisional Permit 40EJ 30103397 for stock use with a flow rate of 20 GPM for 16.1 AF out of Siparyann Creek. The period of use and the period of diversion are October 1 to March 31.
5. These five stock tanks were previously supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but have been disconnected from the wells due to inadequate flow. The Applicant requested to remove the five tanks from the place of use of Groundwater Certificates 40EJ 30000128 and 40EJ 30052429 on September 27, 2024. The Department issued the reduced versions on October 4, 2024.
6. If authorized, the proposed change will add these 5 POUs to Provisional Permit 40EJ 30103397. The remaining elements of the permit will remain the same, as described in Table 2.

Table 2: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Period of Diversion	Period of Use
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E SESWSE Sec. 18, T24N, R24E NWNWNE, Sec. 20, T24N, R24E NESWNE Sec. 13, T24N, R23E SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Philips County	20 GPM	10/01-3/31	10/01-3/31

7. The 606-ST application to change a water right was initially submitted by Shane Schwenke and Thornhill Ranch Partnership on September 30, 2024. A portion of the place of use was sold to American Prairie Foundation in the fall of 2024. In a warranty deed provided to the DNRC with the water right ownership update #268398 received on December 5, 2024, a provision for co-ownership of the water right/change authorization for provisional permit 40EJ 30103397 was expressed. American Prairie Foundation was added as an Applicant after DNRC received their signature on the application on January 13, 2025.

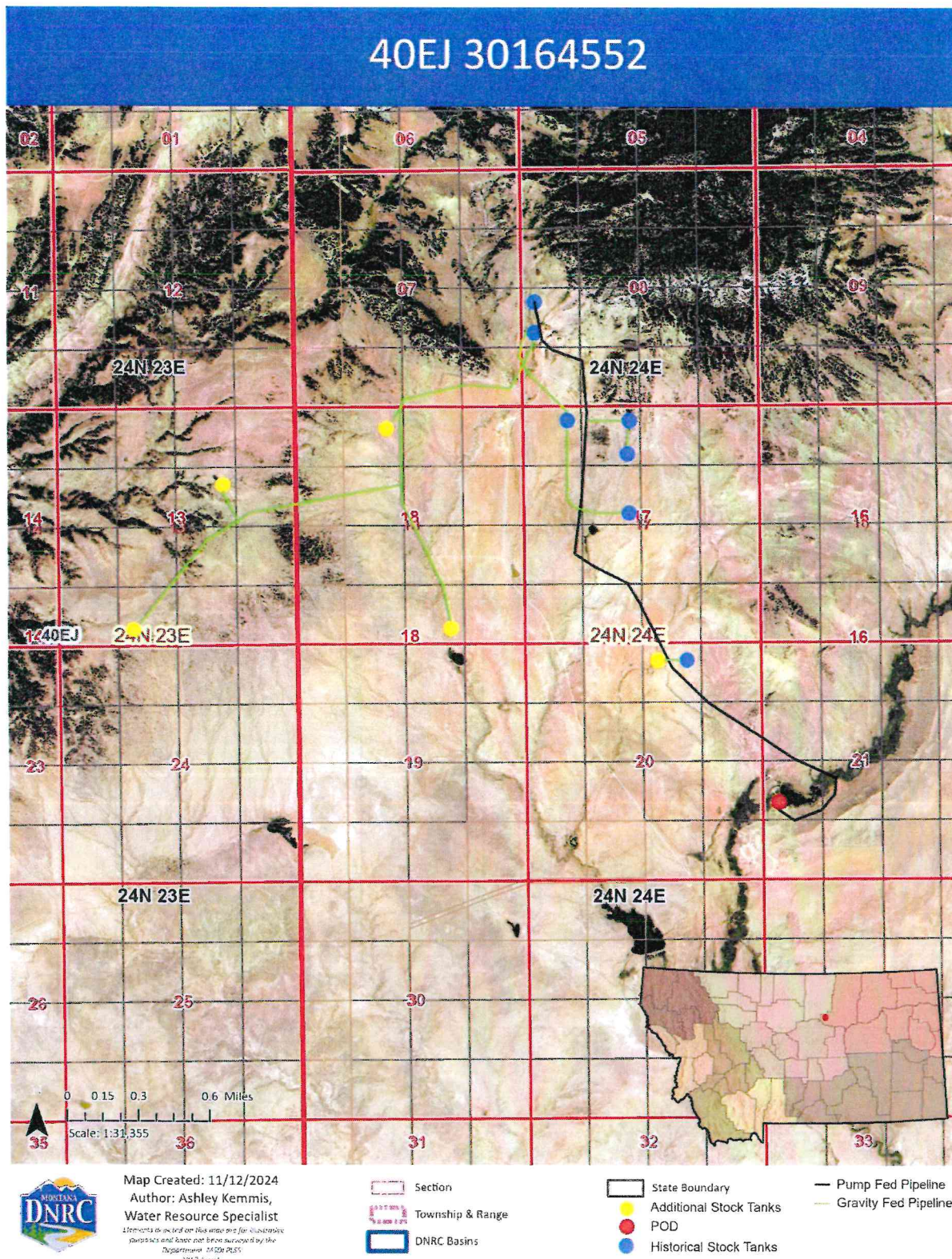


Figure 1. Map of Proposed and Historical Stock Tanks

CHANGE CRITERIA

8. The Department is authorized to approve a change if the Applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. *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 probable 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.

9. 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*, ¶¶ 29-31; *Town of Manhattan*, ¶ 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

10. Per ARM 36.12.1902(1)(c), historic information for a certificate of water right must be described as it was used at the filing date of the completion notice (date October 13, 2016). As of October 13, 2016, the pump historically diverted 20 GPM and 16.1 AF of water to supply 900 AU. ARM 36.12.115(2)(c) designates year-round consumptive use for 1 animal unit (AU) at 0.017 AF per year, which equates to a consumptive volume of 7.63 AF ($900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days/365 days}$). Because the pump ran continuously to prevent freezing and to adequately serve nine stock tanks, the total system diverted water at 20 GPM up to 16.1 AF annually. Overflow water that was not consumed by stock was discharged back into Siparyann Creek through a 1-mile-long drain line. The Department has determined that stock use is 100% consumptive; therefore 7.63 AF is the total consumed volume, and 16.1 AF is the total diverted volume. See Table 3 for a summary of historical use.

Table 3: Historic Use for Provisional Permit 40EJ 30103397								
Priority Date	Water Right Number	Flow Rate	Diverted Volume	Consumed Volume	Purpose	Period Of Use	Place Of Use	Point(S) Of Diversion
August 11, 2015	40EJ 30103397	20 GPM	16.1 AF	7.63 AF	Stock	10/01-3/31	SWNWSW, Sec. 8, 24N, 24E SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks) SESENW, Sec. 17, 24N, 24E SENENW, Sec. 17, 24N, 24E NENENW, Sec. 17, 24N, 24E NENWNW, Sec. 17, 24N, 24E NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)	SWNWSW, Section 21, T24N, R24E, Philips County

ADVERSE EFFECT

FINDINGS OF FACT

11. Provisional permit No. 40EJ 30103397 was filed for stock use serving 900 AU from October 1 to March 31 using a flow rate of 20 GPM. The diverted volume of 16.1 AF is needed for the Applicant to meet the beneficial use. No additional animal units will be grazed under the

proposed change. By connecting the five stock tanks to the existing permit, the Applicant would ensure that water reliably reaches these five tanks. Therefore, the proposed application will not exceed the historic consumptive volume of 7.63 AF and the historic diverted volume of 16.1 AF. A summary of the proposed change is shown in Table 4.

Table 4: Summary of Proposed Change							
Water Right No.	Proposed Purpose	Animal Units	Proposed Additional Place of Use	Proposed Point of Diversion	Proposed Flow Rate	Proposed Consumptive Volume	Proposed Diverted Volume
40EJ 30103397	Stock	900	NENENW, Sec. 18, T24N, R24E SESWSE Sec. 18, T24N, R24E NWNWNE, Sec. 20, T24N, R24E NESWNE Sec. 13, T24N, R23E SWSESW, Sec. 13, T24N, R23E	SWNWSW, Section 21, T24N, R24E, Phillips County	20 GPM	7.63 AF	16.1 AF

12. Each tank can be shut off via float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow reduction is needed.

13. If a call is made, the Applicant has the ability to stop flow with the shut-off valves and cease pumping to the additional tanks.

BENEFICIAL USE

FINDINGS OF FACT

14. The Applicant has historically used water for stock use from October 1 to March 31. Stock use is recognized by the Department as a beneficial use of water and has a water use standard of 0.017 AF/AU/YR. The Applicant has historically watered 900 AU, which equates to a consumptive volume of 7.63 AF ($900 \text{ AU} * 0.017 \frac{\text{AF}}{\text{AU/YR}} * 182 \text{ days}/365 \text{ days}$). The Applicant will continue to run the pump continuously at 20 GPM (0.045 CFS) for the requested 182 days to prevent freezing, for a total diverted volume of 16.1 AF per year ($0.045 \text{ CFS} * 1.98 \frac{\text{AF}}{\text{Day} * \text{CFS}} * 182 \text{ days}$).

15. The requested flow rate is necessary to ensure optimal operation of the pipeline during the winter and adequately supply 14 stock tanks (9 historically and 5 proposed). The additional

stock tanks used to be supplied by Groundwater Certificates 40EJ 30052429 and 40EJ 30000128 but were disconnected due to inadequate pressure. The Applicant stated that these tanks would be more reliably fed by the proposed gravity-fed pipeline.

16. The Department finds that the flow rate and volume requested are reasonable and necessary for the proposed beneficial use.

ADEQUATE DIVERSION

FINDINGS OF FACT

17. Water is diverted from Siparyann Creek at a single diversion point at SWNWSW, Section 21, T24N, R24E, Philips County using a 2-HP FPS Series Five submersible pump (Model 20F2S4-PE). The system will feed a total of 14 rubber, winterized stock tanks (9 historically and 5 proposed) via a 1.5-inch PVC pipeline that is buried 6-ft deep. There are float tank valves at each stock tank with a small valve to allow for circulation and prevent freezing. Each tank can be shut off via the float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow rate reduction is needed.

18. The pump conveys water up to Section 8 via the 1.5-inch PVC pipeline (see Figure 1). The proposed POUs will be supplied by an additional pipeline that runs from Section 8 through Section 18, T24N, R24E. Water is gravity fed through this additional portion (Section 8 to 18) where the ground elevation decreases by approximately 185-ft. The pipeline branches in Section 18, T24N, R24E, to serve the two tanks in Section 13, T24N, R23E. A drain line runs from Section 8 down to Section 17 in T24N, R24E. This is used to relieve spillover water when all tanks are full. Water returns to the Siparyann Creek from this drain line.

19. The Department finds 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.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

21. 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*, ¶ 10 (an appropriator's right only attaches to the amount of water actually taken and beneficially applied).¹

22. 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 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*

¹ DNRC decisions are available at: <https://dnrc.mt.gov/Directors-Office/HearingOrders>
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Application to Change Water Right No. 40EJ 30164552

Royston, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.²

23. 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*, ¶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.³ 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*, ¶¶ 44-45; *Town of Manhattan v. DNRC*, Cause No. DV-09-872C, Montana 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

² 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).

³ 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. Section 85-2-234, MCA

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).⁴

24. 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*, ¶ 44; *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); *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; ARM 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

⁴ 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.)

subsequent water users).⁵

25. 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 ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

26. 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 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).

⁵ 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, 198 P.3d 219, (citing *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

27. 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. ARM 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. ARM 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. ARM 36.12.1901 and 1903.

28. Based upon the Applicant's evidence of historic use, the Applicant has proven by a preponderance of the evidence the historic use of 40EJ 30103397 to be a diverted volume of 16.1 AF, a historically consumed volume of 16.1 AF, and flow rate of 20 GPM. (FOF 8)

29. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows 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. Section 85-2-402(2)(a), MCA. (FOF Nos. 9-10)

BENEFICIAL USE

30. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) 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 (Mont. 1st Jud. Dist. Ct.) (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,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (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).

31. Applicant proposes to use water for stock use which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence X is a beneficial use and that 16.1 acre-feet of diverted volume and 20 GPM flow rate of water requested is the amount needed to sustain the beneficial use [add if applicable: “and is within the standards set by DNRC Rule/other standard”]. Section 85-2-402(2)(c), MCA (FOF Nos. 11-13).

ADEQUATE MEANS OF DIVERSION

32. 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. 6th 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).

33. *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);

34. 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 Nos. 14-16)

POSSESSORY INTEREST

35. 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.

36. 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. (FOF No. 17).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right—Additional Stock Tanks No. 40EJ 30164552 should be granted subject to the following.

The Department has determined that the Applicant may add five stock tanks to Water Right 40EJ 30103397 in the following places of use:

Proposed additional stock tanks

- NENENW, Sec. 18, T24N, R24E
- SESWSE Sec. 18, T24N, R24E
- NWNWNE, Sec. 20, T24N, R24E
- NESWNE Sec 13, T24N, R23E
- SWSESW, Sec. 13, T24N, R23E

The point of diversion in SWNWSW, Sec. 21, T24N, R24E, Phillips County and original places of use (listed below) on Water Right No. 40EJ 30103397 will remain unchanged. The period of use and period of diversion are October 1 to March 31. The flow rate is 20 GPM and the diversion volume is 16.1 AF per year for stock use.

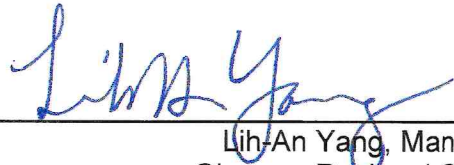
Historical stock tanks

- SWNWSW, Sec. 8, 24N, 24E
- SENWSW, Sec. 8, 24N, 24E (2 Stock Tanks)
- SESENW, Sec. 17, 24N, 24E
- SENENW, Sec. 17, 24N, 24E
- NENENW, Sec. 17, 24N, 24E
- NENWNW, Sec. 17, 24N, 24E
- NENWNE, Sec. 20, 24N, 24E (2 Stock Tanks)

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 7th day of March, 2025.

A handwritten signature in blue ink, appearing to read "Lih-An Yang", is written over a horizontal line.

Lih-An Yang, Manager
Glasgow Regional Office

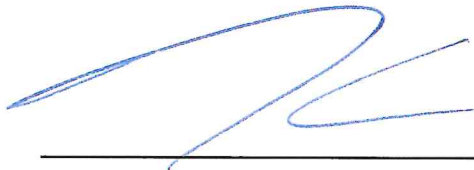
Montana Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 7th day of March, 2025, by first class United States mail.

SHANE SCHWENKE
THORNHILL RANCH PARTNERSHIP
2210 POWER PLANT FERRY RD
ZORTMAN, MT 59546

AMERICAN PRAIRIE FOUNDATION
PO BOX 908
BOZEMAN, MT 59771-0908

A handwritten signature in blue ink, consisting of a stylized 'R' followed by a horizontal line and a small flourish.

GLASGOW Regional Office, (406) 228-2561

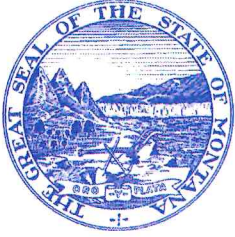
Processing Materials

- Work copies of applicant-submitted information
- Deficiency letter
- Deficiency response
- Correct & complete determination
- Any correspondence with the applicant after application receipt and prior to sending the Draft PD

Processing Materials

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

Glasgow Water Resources Regional Office



GREG GIANFORTE, GOVERNOR

222 6TH ST SOUTH
PO BOX 1269

PHONE: (406) 228-2561

GLASGOW, MONTANA 59230-1269

November 8, 2024

Shane Schwenke & Thornhill Ranch Partnership
2210 Power Plant Ferry Rd
Zortman, MT 59546

Subject: Correct and Complete Application for Change No. 40EJ 30164552

Dear Applicant,

The Department of Natural Resources and Conservation (Department) has determined that your application is correct and complete pursuant to ARM 36.12.1601. Please remember that correct and complete **does not mean that your application will be granted.** The purpose of this letter is to indicate that the Department has enough information to analyze your water right application.

The Department will issue a Draft Preliminary Determination document and Technical Analyses within 120 days of the date of this letter per §85-2-307(2)(b), MCA.

Following issuance of the Draft Preliminary Determination, you (Applicant) will have 15 business days to request an extension of time to submit additional information, if desired pursuant to §85-2-307(3)(a), MCA.

If no extension of time is requested and the Draft Preliminary Determination decision is to grant your application or grant your application in modified form, the Department will prepare a notice of opportunity to provide public comment, per §85-2-307(4)(a), MCA.

If no extension of time is requested and the Draft Preliminary Determination decision is to deny your application, the Department will adopt the Draft Preliminary Determination as the final determination per §85-2-307(3)(d)(ii), MCA.

If the pending land transfer is completed before the Draft Preliminary Determination, an agreement/easement for the shared point of diversion will be needed. Two proposed places of use are also on the land being sold. The new owner may need to be added as an Applicant/co-owner during the ownership update process.

If you have any questions or concerns about the application process, please contact me.

Best,

A handwritten signature in blue ink, appearing to read "Ashley Kemmis".

Ashley Kemmis
Water Resource Specialist
Glasgow Regional Office
Ashley.kemmis@mt.gov
406-808-7075

40EJ 30164552



Hair, Daniel

Chat

Shared



Hair, Daniel 12:15 PM



Hi Ms. Yang, Daniel from the Sage Grouse Program here. Thought I would reach out regarding your question rather than emailing

Looking back at your Project for those stock tanks, that was just a clerical change to add the existing stock tanks to the water rights

Even better to have that one moving to its true location on private land vs BLM

Since the letter was just updating the water rights with the existing stock tanks, theres no additional consultation needed

12:21 PM

Perfect. Thank you Daniel for letting me know! 😊



Ms Yang
10/30/2024

Sage grouse letter Project No. 6758

From Yang, Lih-An <Lih-An.Yang@mt.gov>
Date Wed 10/30/2024 10:10 AM
To Hartman, Therese <THartman@mt.gov>
Cc djwood@blm.gov <djwood@blm.gov>; Kemmis, Ashley <Ashley.Kemmis@mt.gov>

Good morning Therese:

Hope this email finds you well. I wanted to update a stock tank location discussed in our Sept. 5, 2024 review letter for Project No. 6758, Shane Schwenke application:

My consultation request had included a stock tank in SWNENW Section 19, T24N R24E, which is BLM. The Applicant discovered that this legal description is incorrect—the tank is located on his private land in SESWSE Section 18, T24N R24E. The DNRC will proceed to process his water right application with this corrected legal description. I hope this clears the BLM from the sage grouse consideration for this project.

I'm also hoping that a redo of the consultation is not necessary because the Sept. 5 review already assessed Section 18? Please let me know if this is not the case.

I appreciate your assistance! Please feel free to reach out if you have any questions. Have a good day,



Lih-An Yang | Regional Manager
Glasgow Water Resources Regional Office
Montana Department of Natural Resources and Conservation
222 6th St S/PO Box 1269 Glasgow, MT 59230-1269
OFFICE: 406-228-2561 **DESK:** 406-808-7076 **EMAIL:** lih-an.yang@mt.gov
[Website](#) | [Facebook](#) | [X \(Twitter\)](#) | [Instagram](#)
How did we do? Let us know here: [Feedback Survey](#)

Application Materials

- Application
- Any information submitted with Application including maps

Application Materials



606-ST: APPLICATION TO CHANGE A WATER RIGHT Additional Stock Tanks

Complete this form to add stock tanks to a water right, move existing stock tanks, or change to stock tanks from an instream direct water right. This form can only be used for water rights which have an existing stock purpose listed.

FILING FEE \$400.00

This form cannot be used if the amount of water diverted from the source or the number of animal units will be increased.

Received

SEP 30 2024

DNRC Water Resources
Glasgow Regional Office

FOR DEPARTMENT USE ONLY

Application No. 30164552 Basin 40EJ
Date Received 9/30/24
Time 11:01 (AM) / PM
Rec'd by AK
Fee Rec'd \$ 400.00 Check No. 5174
Deposit Receipt # 61152504427
Payor (if different from Applicant name(s))
Thornhill Ranch Partnership
Refund \$ _____ Date _____

Applicant Name SHANE SCHWENKE + THORNHILL RANCH PARTNERSHIP
Mailing Address 2210 POWER PLANT RD City ZORTMAN State MT Zip 59546
Phone Numbers: Home _____ Work FERRY Cell 406-839-6391
Email Address thornhillranch@gmail.com

Contact Person: ☐ Contact is Applicant ☐ Contact is Consultant ☐ Contact is Attorney ☐ Contact is Other

Contact Name _____
Mailing Address _____ City _____ State _____ Zip _____
Phone Numbers: Home _____ Work _____ Cell _____
Email Address _____

NOTE: If a contact person is identified as an attorney, all communication will be sent only to the attorney unless the attorney provides written instruction to the contrary. If a contact person is identified as a consultant, employee, or lessee, the individual filing the water right form or objection form will receive all correspondence and a copy may be sent to the contact person.

CHANGE APPLICATION INFORMATION

This application may only be used for the following:

- A change to allow stock tanks to be added to a livestock direct from source right which does not increase the livestock use. The maximum allowable flow rate for this change will be 35 GPM.
- A change which adds additional stock tanks to an existing stock watering system and does not increase historical use.
- A change which moves stock tank locations on an existing stock watering system and does not increase historical use.

If you are adding a stock tank rather than having the animals drink from the source, you can divert water to the tank, but the diversion must shut off when the tank is full. If you will not have an automatic shut off on the tank, overflow water must be immediately directed back to the source.

If you are increasing the number of animal units using the stock watering system, please consult your regional Water Resources Office on how to proceed.

You must provide a written notice of the application to each owner of an appropriation right sharing the point of diversion or means of conveyance (canal, ditch, flume, pipeline, or other constructed waterway).

- Have you sent this notice? ☒ N/A ☐ Yes ☐ No If no, your application cannot be deemed correct and complete until you have sent the notice. § 85-2-302 (4)(c), MCA

ST.1 APPLICATION DETAILS

ST.1.A Identify the water right number(s) proposed for change:

40EJ 30103397

If you do not have a DNRC water right number, you may have an existing exempt water use. Water for stock use from groundwater sources (well or developed spring) or drinking directly from a surface water source were exempt from the general adjudication filing requirements for claims of existing water rights if they met either of the following criteria:

- For wells, the water was put to use prior to January 1, 1962, or if water was put to use between January 1, 1962, and July 1, 1973, and a notice was filed in the courthouse records.
- For stock drinking directly from the source, the water was put to use prior to July 1, 1973.

If your stock use meets one of the above criteria, complete this form and a Non-Filed Water Project Addendum. The addendum can be obtained from the DNRC Website. <http://www.dnrc.mt.gov/wrd/>. If your use does not meet these criteria, call the regional office serving your area.

ST.1.B How many stock tanks do you wish to add through this change? 5

ST.1.C Will the existing place of use continue to be used? Yes

ST.1.D What are the number and type of stock that will be watered on the proposed stock watering system?

900 Type CATTLE # _____ Type _____ # _____ Type _____

ST.1.E Place of Use: Please provide the following: SEE ATTACHED

GEOCODE(S) of the place of use (17 digits) _____

If there are multiple places of use, list the geocode for each parcel on an attached sheet. The geocodes can be found at the County Clerk and Recorder's Office or by visiting <http://svc.mt.gov/msl/mtcadastral>.

LEGAL LAND DESCRIPTION: Include additional places of use on a separate sheet.

____ 1/4 ____ 1/4 ____ 1/4 Sec ____ Twp ____ N/S Rge ____ E/W County _____
____ 1/4 ____ 1/4 ____ 1/4 Sec ____ Twp ____ N/S Rge ____ E/W County _____
____ 1/4 ____ 1/4 ____ 1/4 Sec ____ Twp ____ N/S Rge ____ E/W County _____

ST.1.F Attach a narrative explaining specific details of the requested change to the water right(s) and why it is being requested. Please label attachment **ST.1.F Application Details**.

ST.1.G ☐ Yes ☒ No Are you proposing to change all of the water right(s) associated with the place of use? If no, attach an explanation of why not and how those rights will be operated to ensure no increase in use. Please label attachment **ST.1.G Application Details**.

ST.1.H ☐ Yes ☒ No Are you proposing to add stock tanks on State of Montana school trust land? If yes, you must include a copy of written approval from DNRC Trust Lands Management Division. A change authorization to add stock tanks on school trust land will be temporary for the duration of the lease term. Throughout this application, make clear which tanks are on school trust land. You may use the same application to add permanent stock tanks on private land and temporary stock tanks on school trust land.

ST.2 ADEQUATE DIVERSION MEANS AND OPERATION

ST.2.A How will water be diverted from the source?

☐ Well ☒ Pump ☐ Gravity Flow ☐ Other 2-HP FPS SERIES 5

ST.2.B Identify the flow rate you will be diverting: 20 GPM

ST.2.C How was the diverted flow rate determined? PREVIOUSLY DETERMINED
IN PERMIT 40EJ 30103397

ST.2.D Provide evidence to show that the flow rate will be adequate for the new/proposed system. Please label attachment **ST.2.D Adequate Diversion Means and Operation**.

ST.2.E ☒ Yes ☐ No Will a pipeline be used to convey water to the new tanks? If no, please explain the new means of conveyance. _____

ST.2.F Provide design plans for the proposed stock tank system from the point of diversion to the place of use (tanks). Include pump information, pipe size, pipe length, pipe material, any valves or booster pumps used, depth pipelines will be buried, etc. Please label the attachment **ST.2.F Adequate Diversion Means and Operation**.

ST.3 MAP

ST.3.A Provide a map or maps depicting the historical and proposed water system. Aerial photos may be available from DNRC, NRIS, NRCS, USGS, or other sources. Depending on the size of the project, one map showing all items listed below may be acceptable. If using one map, be sure to indicate which tanks are currently authorized and which tanks are being added via this change.

- Note the section corners, township, range, and add a north arrow to the map for all maps submitted.
- Historical Use - for each water right being changed, provide a map depicting the historical point(s) of diversion, means of conveyance, and stock tank locations.
- Proposed Use - provide a map which clearly identifies the proposed point(s) of diversion, means of conveyance, and stock tanks which are being added via this change. For partial changes, the map should reflect the entire water right including the proposed change and the remaining historical use.

ST.4 HISTORICAL USE

Historical diverted volume will be calculated using DNRC standards for the right(s) to be changed.

ST.4.A What is the historical number and type of livestock served under the water right(s) to be changed?

900 Type Cattle # _____ Type _____ # _____ Type _____

ST.4.B What is the historical diverted flow rate of your stock watering system? 20 GPM

ST.4.C How was the flow rate determined? Hand tested + pump curves

ST.4.D Attach a description of the historical operation of the stock watering system. Include information on diversion operation, means of conveyance (size, type), booster pumps, and any control structures such as valves, discharge piping, etc. Please label attachment **ST.4.D Historical Use**

ST.5 ADVERSE EFFECT

ST. 5.A ☒ Yes ☐ No Will float or shut off valves be used to control flow into the new tank(s)? If yes, attach information on what types of valves will be used and where they will be located. Please label attachment **ST.5.A Adverse Effect**.

ST.5.B If no, how will flow into the tanks be controlled? _____

ST.5.C Attach an explanation of how your diversion can be controlled to not create an adverse effect to existing water users on the source. Please label attachment **ST.5.B Adverse Effect**.

ST.6 SAGE GROUSE HABITAT PROJECT REVIEW

Required if the diversion and/or place of use are located within an area designated as sage grouse habitat, (<https://sagegrouse.mt.gov>).

ST.7 PROJECT COMPLETION

The Department will assign 3 years for completion of the project unless the application states otherwise. If you wish to have a different project completion period, provide an attachment that identifies the time period requested for project completion and an explanation of why this time period is necessary. Please label attachment **ST.7.A Project Completion**. If you are unable to complete the project within the time assigned, you may apply for an Extension of Time.

ST.8 AFFIDAVIT & CERTIFICATION

All undivided interest owners must sign as applicants. Read carefully before you sign and review with legal counsel if you have any questions.

I affirm the information provided for this application is to the best of my knowledge true and correct. I also affirm I have 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.

I understand that making a false statement under oath or affirmation in this application and official proceedings throughout the examination of my application may subject me to prosecution under §45-7-202, MCA, a misdemeanor punishable by a jail term not to exceed 6 months or a fine not to exceed \$500, or both. I have read this Affidavit and understand the terms and conditions.

I declare under penalty of perjury and under the laws of the state of Montana that the foregoing is true and correct.

Printed Name

Applicant Signature

Shane Schwabe
Shane Schwabe

Date: 9-27-2024

Printed Name

Applicant Signature

Vicki Schwabe
Vicki Schwabe - Partner
Shane Schwabe Partner

Date: 09-27-24

WATER RESOURCES OFFICES

Billings: 1371 RIMTOP DR., BILLINGS MT 59105-1978

PHONE: 406-247-4415

FAX: 406-247-4416

EMAIL: DNRCBillingsWater@mt.gov

SERVING: Big Horn, Carbon, Carter, Custer, Fallon, Powder River, Prairie, Rosebud, Stillwater, Sweet Grass, Treasure, and Yellowstone Counties

Helena: 1424 9TH AVE., PO BOX 201601, HELENA MT 59620-1601

PHONE: 406-444-6999

FAX: 406-444-9317

EMAIL: DNRCHelenaWater@mt.gov

SERVING: Beaverhead, Broadwater, Deer Lodge, Jefferson, Lewis and Clark, Powell, and Silver Bow Counties

Bozeman: 2273 BOOT HILL COURT, SUITE 110, BOZEMAN MT 59715

PHONE: 406-586-3136

FAX: 406-587-9726

EMAIL: DNRCBozemanWater@mt.gov

SERVING: Gallatin, Madison, and Park Counties

Kalispell: 655 TIMBERWOLF PARKWAY, SUITE 4, KALISPELL MT 59901-1215

PHONE: 406-752-2288

FAX: 406-752-2843

EMAIL: DNRCKalispellWater@mt.gov

SERVING: Flathead, Lake, Lincoln, and Sanders Counties

Glasgow: 222 6TH STREET SOUTH, PO BOX 1269, GLASGOW MT 59230-1269

PHONE: 406-228-2561

FAX: 406-228-8706

Email: DNRCGlasgowWater@mt.gov

SERVING: Daniels, Dawson, Garfield, McCone, Phillips, Richland, Roosevelt, Sheridan, Valley, and Wibaux Counties

Lewistown: 613 NORTHEAST MAIN ST., SUITE E, LEWISTOWN MT 59457-2020

PHONE: 406-538-7459

FAX: 406-538-7089

EMAIL: DNRCLeWistownWater@mt.gov

SERVING: Cascade, Fergus, Golden Valley, Judith Basin, Meagher, Musselshell, Petroleum, and Wheatland Counties

Havre: 210 6TH AVENUE, PO BOX 1828, HAVRE MT 59501-1828

PHONE: 406-265-5516

FAX: 406-265-2225

EMAIL: DNRCHavreWater@mt.gov

SERVING: Blaine, Chouteau, Glacier, Hill, Liberty, Pondera, Teton, and Toole Counties

Missoula: 2705 SPURGIN RD., BLDG. C, PO BOX 5004, MISSOULA MT 59806-5004

PHONE: 406-721-4284

FAX: 406-542-5889

EMAIL: DNRCMissoulaWater@mt.gov

SERVING: Granite, Mineral, Missoula, and Ravalli Counties

ST.1.E**Historical POU**

Quarter Sec	Section	Township	Range	County	Geocode	Landowner
SWNWSW	8	24N	24E	PHILLIPS	11-3517-08-3-01-01-0000	Thornhill Ranch Partnership
SENWSW (2 Stock Tanks)	8	24N	24E	PHILLIPS	11-3517-08-3-01-01-0000	Thornhill Ranch Partnership
SESENW	17	24N	24E	PHILLIPS	11-3517-17-4-01-01-0000	Shane Schwenke
SENENW	17	24N	24E	PHILLIPS	11-3517-17-4-01-01-0000	Shane Schwenke
NENENW	17	24N	24E	PHILLIPS	11-3517-17-4-01-01-0000	Shane Schwenke
NENWNW	17	24N	24E	PHILLIPS	11-3517-17-2-01-01-0000	Thornhill Ranch Partnership
NENWNE (2 Stock Tanks)	20	24N	24E	PHILLIPS	11-3517-20-2-01-01-0000	Shane Schwenke

Additional Stock Tanks

Quarter Sec	Section	Township	Range	County	Geocode	Landowner
NENENW	18	24N	24E	PHILLIPS	11-3517-18-2-01-01-0000	Shane Schwenke
SESWSE	18	24N	24E	PHILLIPS	11-3517-18-4-01-01-0000	Shane Schwenke
NWNWNE	20	24N	24E	PHILLIPS	11-3517-20-2-01-01-0000	Shane Schwenke
NESWNE	13	24N	23E	PHILLIPS	11-3516-13-4-01-01-0000	Shane Schwenke
SWSESW	13	24N	23E	PHILLIPS	11-3516-13-4-01-01-0000	Shane Schwenke

ST.1.F

The source (reservoir) and part of the original POU is being sold (NENWNE, Section 20, T24N, R24E). There is an easement with the new buyer. The 5 stock tanks to be added were originally supplied by groundwater certificates 40EJ 30103397 and 40EJ 30000128, are not adequately being supplied due to inadequate pressure. The 5 stock tanks POU will be removed from the

groundwater certificates and will be supplied by the reservoir instead. The reservoir is a more reliable source for the stock tanks.

ST.2.D

Pump curves are supplied in the original permit 40EJ 30103397 and has adequately diverted water historically. The permit has been verified.

ST.2.F

Water is diverted from Siparyann Creek at a single diversion point using a 2-HP FPS Series Five Submersible pump (Model 20F2S4-PE). The system will feed a total of 14 rubber, winterized stock tanks (9 historically and 5 new) via a 1.5-inch PVC pipeline that is buried 6 feet deep. There are float tank valves at each stock tanks. Each tank can be shut off via the float valves or manual shut off valves that are underground. The pump runs at a continuous rate and can be shut off if a flow rate reduction is needed.

The pump feeds water up to section 8 via the 1.5-inch PVC pipeline (see map). The new POU's are supplied via an additional pipeline that runs from section 8 through section 18, where it ends. Water is gravity fed through this additional portion (Section 8 – 18). The elevation decreases by approximately 185 feet from section 8 to 18. The pipeline branches at section 18 to section 13. A drain line runs from section 8 down to section 17. This is used when all tanks are full, before the pump is shut off, for spillover water. Water is returned to the Siparyann Creek from this drain line. The pump has to manually be shut off when tanks are full.

The stock tanks are black, rubberized, and covered with dirt. There is a 4-foot opening for the cattle to drink. There is a small valve to allow for circulation to prevent freezing. No more than 900 cattle will be ran with this stock tank system. Approximately 600 head will be run by the new owner, and 300 by the original owner.

ST.4.D

The Applicant historically diverted water from Siparyann Creek at a single diversion point using a 2 -HP FPS Series Five submersible pump (Model 20FV2S4-PE). The pump was placed into an existing reservoir but does not use stored water, only natural flow. The system feeds 9 stock tanks via a 1.5-inch pipeline. The water line travels from the source and tees into an existing line that travels under Siparyann Creek. The line travels NW about 2 miles to section 8, T24N, R24E and gains about 300 feet in elevation. The tanks in section 8 and 20 are pump fed and the remaining pumps in section 17 are gravity fed. The pump has historically been capable of delivering the requested flow rate of 20 GPM.

The stock tanks are black, rubberized and covered with dirt. There has historically been float valves at each tank, and a drain line if overflow occurs.

ST.5.A Ritchie Float Valves

ST.5.C

The pump can be shut off manually, there are float and manual valves on every tank. Each tank can be shut off via the valves. There is also a drain line if overflow occurs. If a call from a senior water right holder occurred, pumping would cease.

MONTANA SAGE GROUSE HABITAT CONSERVATION PROGRAM



GREG GIANFORTE, GOVERNOR

STATE OF MONTANA

1539 ELEVENTH AVENUE

PHONE: (406) 444-0551
FAX: (406) 444-6721

PO BOX 201601
HELENA, MONTANA 59620-1601

Project No. 6758
Governor's Executive Orders 12-2015 and 21-2015
Shane Schwenke Additional Stock Tanks Water Right Change Application

Lih-An Yang
DNRC Water Resources Regional Office
PO Box 1269
Glasgow, MT 59230

September 5, 2024

Dear Ms. Yang,

The Montana Sage Grouse Habitat Conservation Program received a request for consultation and review of your Project or proposed activity on September 4, 2024. Based on the information provided, portions of this project are located within either a Core Area or General Habitat for sage grouse. The Bureau of Land Management (BLM) classifies a portion of this area as a Priority Habitat Management Area (PHMA).

Executive Orders 12-2015 and 21-2015 set forth Montana's Sage Grouse Conservation Strategy. Montana's goal is to maintain viable sage grouse populations and conserve habitat so that Montana maintains flexibility to manage our own lands, our wildlife, and our economy and ensure that a listing under the federal Endangered Species Act is not warranted in the future. Similarly, the BLM has incorporated sage grouse conservation measures into their Resource Management Plans.

The Program has completed its review, including:

Project Description:

Project Type: Agriculture - Water

Project Disturbance: Water Rights Use Change/Clerical; No New Disturbance

Construction Timeframe: No Construction Phase

Operations Timeframe: No Operations Phase



Hosted by the Montana Department of Natural Resources and Conservation
Director's Office: (406) 444-2074



Project Location:

Legal: Township 24 North, Range 23 East, Section 13

Township 24 North, Range 24 East, Sections 7, 8, 17, 18, 19, 20, 21

County: Phillips

Ownership: Bureau of Land Management, Private

Project Description and Executive Orders 12-2015 and 21-2015 Consistency:

Shane Schwenke proposes to update the water rights for an existing livestock watering system in both a Core Area and General Habitat for sage grouse.

The purpose of the Project is to amend the water rights for an existing livestock watering system on Bureau of Land Management (BLM) and private property approximately 35 miles northeast of Winifred, Montana in Phillips County. This amendment will add an additional five stock tanks and associated buried pipeline to water right 40EJ 30103397. These upgrades have already been completed and are currently in operation. The livestock watering system will continue to function the same as its historical purpose for supplying water to livestock. There are no new construction activities associated with this Project.

This Project amends an existing water right and no new surface disturbance will occur. Based on the information you provided, your Project is 2.32 miles from the nearest active sage grouse lek in a Core Area. The Project is not within two miles of any active sage grouse lek in General Habitat. See Figure 1 (Shane Schwenke Additional Stock Tanks Water Right Change Application Project and Lek Location Map).

Discussion:

The activity described for the Project is considered a clerical change to update existing water rights for an existing livestock watering system located on BLM and private land. Amendments to the existing water rights will be intended for continued historical use as a livestock watering system. The water rights will continue to serve the same function for supplying water to livestock. Therefore, the Project is not expected to result in direct habitat loss to sage grouse and will not be assessed mitigation.

Program Recommendations:

The State of Montana appreciates and welcomes the opportunity to collaborate with BLM to implement Executive Orders 12-2015 and 21-2015 and the BLM land use plans, respectively. We have a shared goal to conserve sage grouse and the habitats upon which they depend, consistent with the “all lands, all hands, all threats” approach.

I encourage BLM to give full consideration to guidance within its own land use plans with respect to sage grouse and implement any special considerations or stipulations consistent with Montana Executive Order 12-2015 as appropriate.

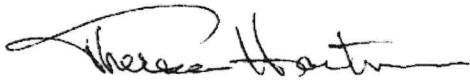


Your proposed project or activity may need to obtain additional permits or authorization from other Montana state agencies or possibly federal agencies. They are very likely to request a copy of this consultation letter, so please retain it for your records.

If the location or boundaries of your proposed project or activity change in the future, or if new activities are proposed within one of the designated sage grouse habitat areas, please visit <https://sagegrouse.mt.gov/> and submit the new information.

Thanks for your interest in sage grouse and your commitment to taking the steps necessary to ensure Montana's Sage Grouse Conservation Strategy is successful.

Sincerely,



Therese Hartman
Montana Sage Grouse Habitat Conservation Program Manager

Attachments:

1. Figure 1. Shane Schwenke Additional Stock Tanks Water Right Change Application Project and Lek Location Map

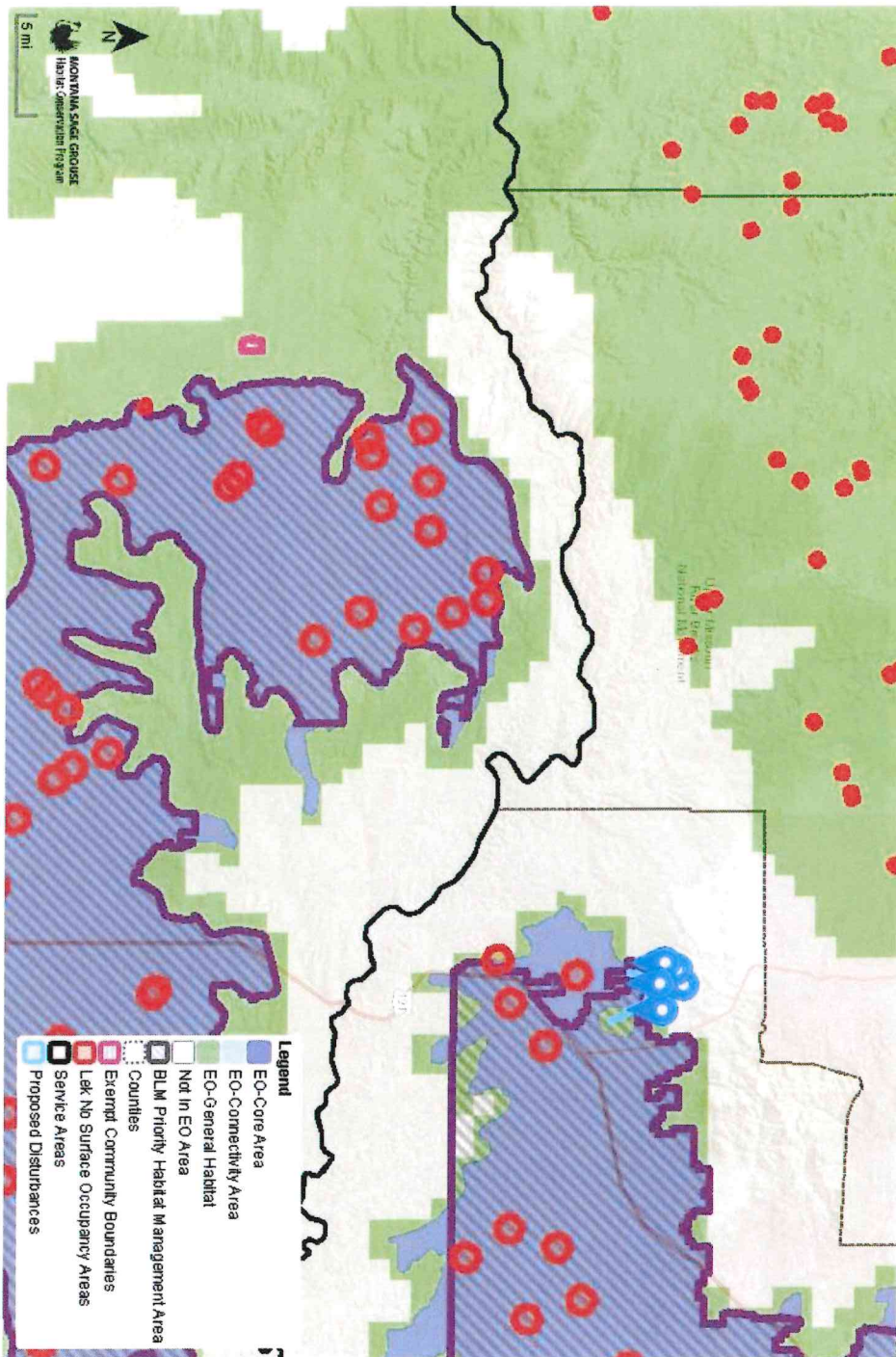
cc: David J.A. Wood, PhD
Conservation Biologist
Bureau of Land Management
Montana/Dakotas State Office
(406) 896-5246
djwood@blm.go





Figure 1

6758_Shane Schwenke Additional Stock Tanks Water Right Change Application Project and Lek Location



2, 2 = ID #2 has 2 tanks

40EJ 30103397

4

Stock tanks and pipeline

RECEIVED

APR 22 2016

DNRC WATER RESOURCES
GLASGOW UNIT OFFICE

TANK #9

Add 1
(0128)

Add 2
(BLM)
(0123)

Legend

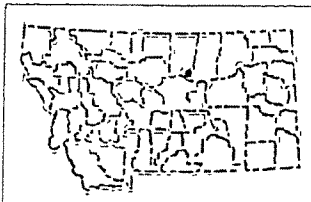
- Point of Diversion (dam)
- Stock Tanks
- Pipeline
- Section
- Township & Range
- DNRC Basins

N 1:19,192
0 0.1 0.2 0.4 Miles

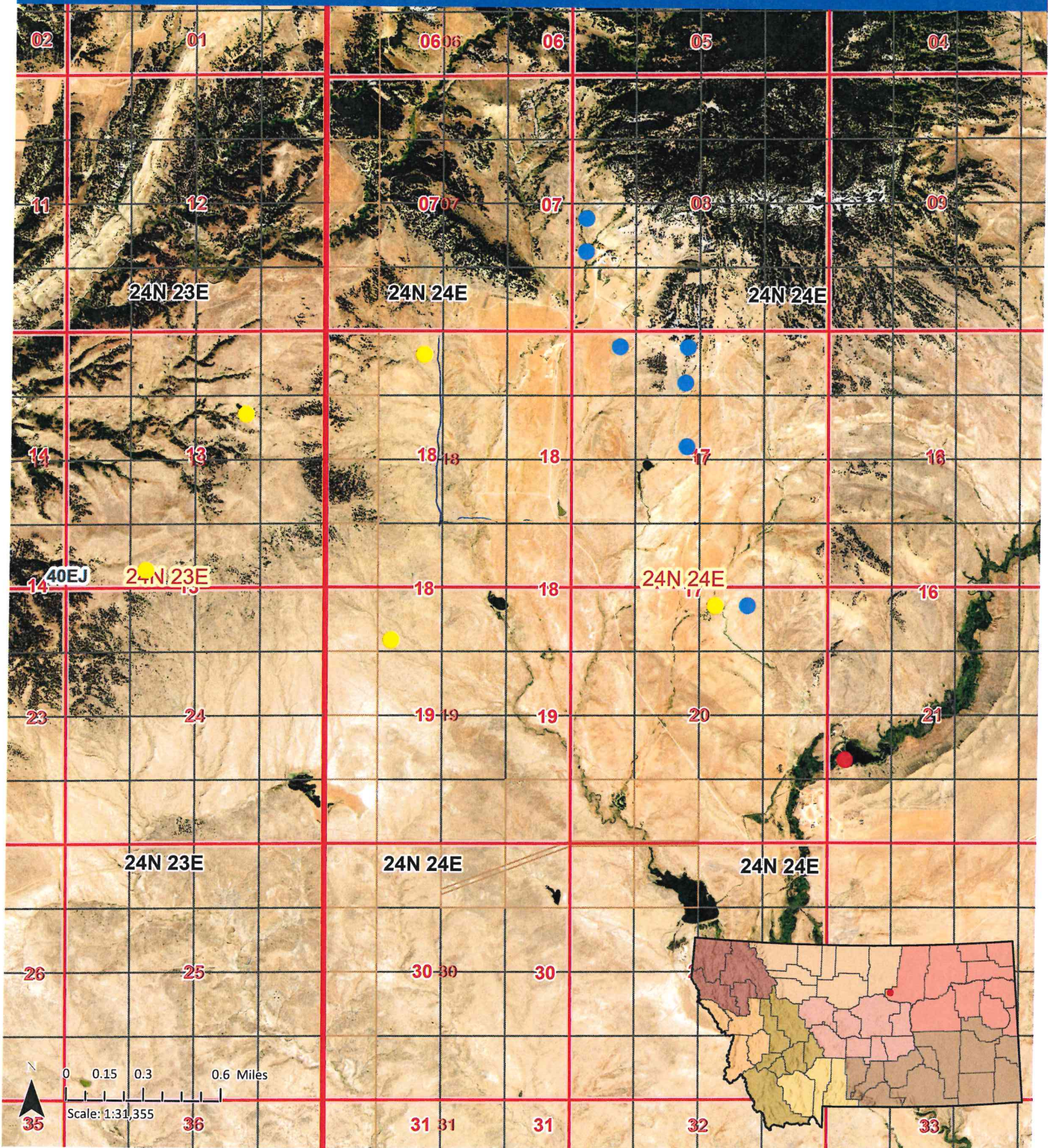
Map Created: 3/25/2016



Service Layer Credits Montana State
Library
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Society, I-cubed



40EJ 30000128



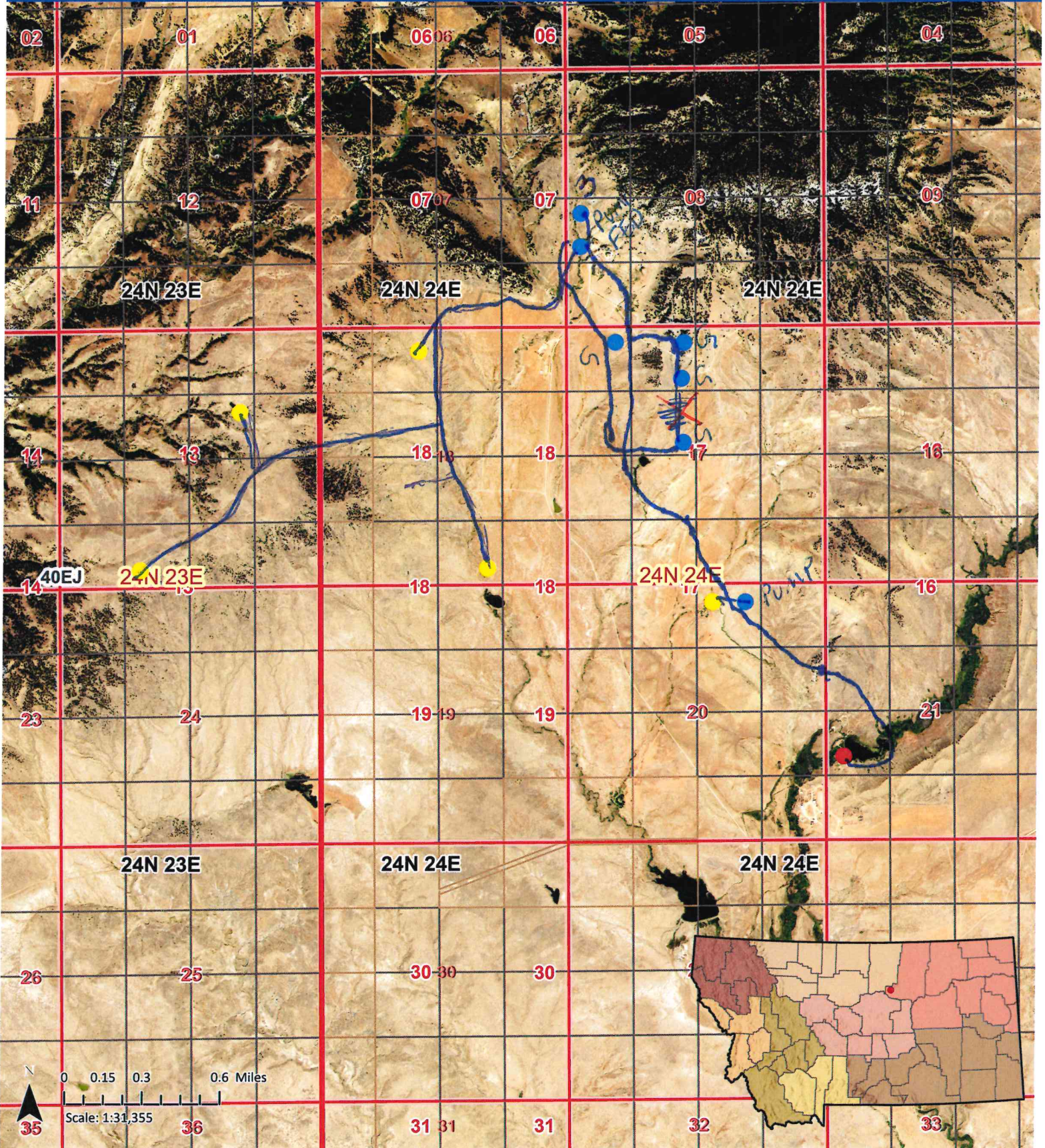
Map Created: 9/25/2024

Author: Ashley Kemmis,
Water Resource Specialist

Elements depicted on this map are for illustrative
purposes and have not been surveyed by the
Department. MSDI PLSS:
2017 Aerials



40EJ 30000128



Map Created: 9/26/2024
Author: Ashley Kemmis,
Water Resource Specialist
Elements depicted on this map are for illustrative
purposes and have not been surveyed by the
Department. MSDI PLSS:
2017 Aerink

- Section
- Township & Range
- DNRC Basins

- State Boundary
- Additional Stock Tanks
- POD
- Historical Stock Tanks

