

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

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION FOR )	
BENEFICIAL WATER USE PERMIT NUMBER 76LJ- )	FINAL
11406600 BY DAVE AND HOWARD WILKINS )	ORDER

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the September 5, 2002, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

**ORDER**

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76LJ-11406600 is **ISSUED** to Dave and Howard Wilkins to appropriate up to 1554 acre-feet of water per year from Brown Creek. The maximum flow rates in gallons per minute and associated period of appropriation and use are shown in the following table:

Power Generation	325	January
	325	February
	325	March
	769	April
	2256	May
	2529	June
	1919	July
	654	August
	497	September
	815	October
	636	November
	468	December

The water is to be diverted at a point in the NE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of

Section 7, Township 28 North, Range 19 West, Flathead County, Montana. The means of diversion is an infiltration gallery located in the NE~~NE~~~~SE~~ of Section 7, Township 28 North, Range 19 West, Flathead County, Montana. The use is power generation. The place of use is located in the SE~~NW~~~~SE~~ of Section 7, Township 28 North, Range 19 West, Flathead County, Montana.

A. Permittee may divert up to the maximum flow rates as long as a minimum flow rate of 90 gpm remains in the stream immediately below the point of diversion.

B. Permittee must return all water diverted to Brown Creek at a point in the SE~~NW~~~~SE~~ of Section 7, Township 28 North, Range 19 West, Flathead County, Montana.

C. Permittee shall place and maintain an elbow on the outlet pipe designed to consume the energy of the falling water prior to its falling to the stream, and engineered rip rap rock at the location diverted water returns to Brown Creek to dissipate the energy of the falling water to prevent channel bed erosion by the water re-entry.

D. The appropriator shall install a Department approved water use measuring device at a point approved by the department immediately below the point of diversion. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written weekly record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30<sup>th</sup> of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately. Permittee shall monitor stream flow at the measuring device year round for 3 years after the project is operational. Records shall be submitted to the Water Resources Regional Office by November 30<sup>th</sup> of each year and upon request at other times during the year.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 9<sup>th</sup> day of October, 2002.



Jack Stults, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the Final Order was served upon all parties listed below by first class United States Mail on this 10th day of October, 2002.

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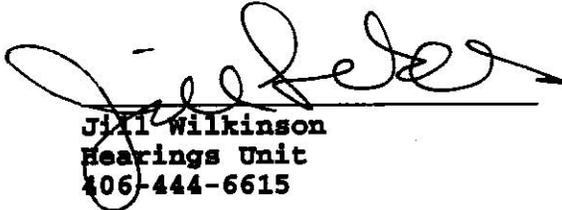
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Hearings Unit  
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### PRELIMINARY MATTERS

Prior to the hearing the Parties stipulated that the possessory interest criterion is not at issue.

The Parties requested time to discuss settlement at the time set for the hearing. All Objectors were present except for DFWP which withdrew its objection in a letter to the Applicant dated July 10, 2002. The Hearing Examiner granted the Parties request for time to discuss settlement. Settlement was reached and a list of conditions requested by the Applicant and signed by all objectors was accepted by the Hearing Examiner (hereafter Applicant's *Conditions*).

In addition, Applicant also presented the Hearing Examiner with their water quality criteria evidence which was accepted into the record. The Hearing Examiner requested clarification from the Applicant that the flow rate requested was twelve monthly rates and not one maximum rate shown in the public notice. Applicant stated the flow rate requested is the twelve monthly flow rates shown in Table 3 of Applicant's *Supplemental Information to: Criteria Addendum to Application for Beneficial Water Use, Brown Creek, SW<sup>1/4</sup>, Section 7, T28N, R19W, Flathead County, Montana.*

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

### FINDINGS OF FACT

#### General

1. Application for Beneficial Water Use Permit 76LJ-11406600 in the name of Dave and Howard Wilkins and signed by Dave and Howard Wilkins was filed with the Department on December 15, 2000. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.

3. " The Department EA (Part II. 2.) identifies a secondary impact on the physical environment. Secondary impacts will be occasional dewatering of the first 485 feet of the stream below the project. Riparian vegetation may degrade in this section. Part II, 3., of the Department EA describes mitigation/stipulation measures. Therein it states the Applicant may choose to make assurance that a minimum flow passes the diversion structure during all periods of time and that riparian habitat is not deprived of water. Applicant has requested the Department to condition any permit with a short-term measuring device to measure streamflow below the point of diversion, and to require a 90 gpm minimum stream flow below the point of diversion at all times the project is in operation. (Department file, Applicant's Conditions)

4. Applicant seeks to appropriate up to 1554 acre-feet of water per year from Brown Creek. The proposed maximum gallons per minute (gpm) flow rates and associated period of appropriation and use are shown in the following table:

Power Generation	325	January
	325	February
	325	March
	769	April
	2256	May
	2529	June
	1919	July
	654	August
	497	September
	815	October
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The water is to be diverted at a point in the NE<sup>1</sup>/<sub>4</sub>NE<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 7, Township 28 North, Range 19 West, Flathead County, Montana. The proposed means of diversion is an infiltration gallery located in a naturally occurring on-stream 0.01 acre-foot pool. The proposed use is power generation. The proposed place of use is located in the SE<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>SE<sup>1</sup>/<sub>4</sub> of Section 7, Township 28 North, Range 19 West, Flathead County, Montana. (Department file)

**Physical Availability**

5. Applicant estimated flows available using the *Basin Characteristics Method*, Parrett and Cartier, USGS Open-File Report 89-40 (1990). This method estimates a low flow of 415 gpm will be available in February and a maximum flow of 6826 gpm will be available in June. These flows exceed the flows requested by the Applicant. (Department file)

**Legal Availability**

6. Applicant compared water physically available at the point of diversion with the water rights in Department records and determined water availability varies with seasonal demand. Applicant then compared physical and legal downstream demand on a seasonal basis. Applicant owns the land adjacent to Brown Creek between the point of diversion and point of return. All water diverted will be returned to the creek at a point in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 7, Township 28 North, Range 19 West, Flathead County, Montana which is upstream of existing appropriators. Applicant's use is nonconsumptive. Water is legally available to downstream appropriators because there are no existing diversions between Applicant's point of diversion and the point of return of the water to Brown Creek, and all water diverted is returned to the creek above downstream appropriators. (Department file)

**Adverse Effect**

7. Applicant's use is nonconsumptive and all water diverted will be returned to the creek upstream of existing appropriators. (Department file)

8. Objector DFWP stated in its objection withdrawal letter that the stream and its fishery are in marginal condition. DFWP recommended diverting only half the stream flow between October 15<sup>th</sup> and November 15<sup>th</sup>, no diversion during November 15<sup>th</sup> to March 15<sup>th</sup>, and providing for some continuous surface flow downstream of the diversion at all other times.

9. Applicant requested that any permit to issue be conditioned such that a minimum stream flow below the point of diversion of ninety (90)

gpm be maintained because of concern for the riparian and fishery habitat downstream of the point of diversion. The EA clearly identifies riparian habitat concerns that could be mitigated by leaving water in the stream. (Department file, written and signed request received at hearing from Applicant, and signed by Objectors at hearing)

#### **Adequacy of Appropriation Works**

10. Applicant provided a project design by a professional consultant with experience in hydrology and engineering, and a vendor with experience in small hydropower systems. Both were involved with design of the diversion, means of conveyance, generating plant, and return to the creek. (Department file)

#### **Beneficial Use**

11. The proposed use of water is to generate up to 41.7 kilowatts (kw) of electricity at the maximum requested flow rate. The electricity will be primarily used onsite in two homes and outbuildings. Sufficient flows would allow extension to a total of seven homes. Flows in May, June, and July may generate a surplus for sale to the regional power grid. (Department file)

12. Applicant's system is designed to operate with flows ranging from 325 gpm to 2529 gpm to produce 6.4 to 41.7 kw's. These flows are the range of flows requested. (Department file)

#### **Possessory Interest**

13. Applicant has a possessory interest in the property designated in the Application as the place of use. (Department file)

#### **Water Quality Issues**

14. Valid objections relative to water quality were filed against this application concerning water turbidity below the point of return, temperature increase from the turbine, and lubricant contamination of the water run through the turbine. There were no objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

15. The return flow works consist of an upturned elbow and rip rapped shoreline. The elbow is designed to consume the energy of the falling water prior to its falling to the stream. The rip rap is to dissipate the energy of the falling water and to prevent channel bed erosion during re-entry to Brown Creek. (Applicant's Exhibit A1)

16. Applicant agreed to place rip rap rock at the point of return of the diverted water to Brown Creek. (Applicant Conditions)

17. The estimated temperature rise based on a turbine efficiency of 85% and a flow rate of 600 gpm is 0.017 degrees Fahrenheit. (Applicant's Exhibit A1)

18. The diversion works are constructed of drinking water certified materials (PVC, steel and cement). The water flows through the turbines without contact to any hydrocarbon; the bearings are sealed to prevent any hydrocarbon leakage into the water. (Applicant's Exhibit A1)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

#### CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; 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; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1) (a) (i). See Finding of Fact No. 5.

4. The Applicant has proven that water can reasonably be considered legally available. Mont. Code Ann. § 85-2-311(1) (a) (ii). See Finding of Fact No. 6.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1) (b). See Finding of Fact Nos. 7, 8, 9.

6. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(1) (c). See Finding of Fact No. 10.

7. The Applicant has proven that the quantity of water proposed to be used is the reasonable amount necessary for the proposed use of water, hydropower, and is a beneficial use of water for which Applicant can establish a water right under a permit. Montana has long recognized the use of water for hydropower as a beneficial use. See, e.g., discussion of hydropower dams in Montana Power Co. v. Carey, 211 Mont. 91, 94, 685 P.2d 336, 338 (1994). Mont. Code Ann. § 85-2-311(1) (d). See Finding of Fact Nos. 11, 12.

8. The Applicant has a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1) (e). See, Finding of Fact No. 13.

9. Objections were raised to the issue of water quality of a prior appropriator being adversely affected. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. The Applicant and Objectors have provided a condition that would satisfy the burden of establishing the water quality of a prior appropriator will not be adversely affected. Applicant will place an elbow on the outlet pipe designed to consume the energy of the falling water prior to its falling to the stream, and engineered rip rap rock where the project returns water to Brown Creek so that channel bed erosion at the point of return is prevented. Applicant has proven the water quality of a prior appropriator will not be adversely affected when rip rap rock is placed at the project outlet and channel bed erosion is prevented. Mont. Code Ann. §§ 85-2-311(1)(f), 312(1). See, Finding of Fact No. 14, 15, 16, 17, 18.

10. Applicant has requested a condition requiring a minimum flow of 90 gpm remain in the stream immediately below the point of diversion at times the hydropower unit is operational. This condition is not one usually placed on permits. Typically only conditions necessary to satisfy the criteria listed in Mont. Code Ann. § 85-2-312(1) are placed on permits. Although an agency of state government may not withhold, deny, or impose conditions on any permit based on Montana Environmental Policy Act (MEPA) documents, Mont. Code Ann. § 75-1-201 (5)(a), in this case the EA, recent amendments to MEPA specifically provide that a project sponsor and an agency may mutually develop measures that at the request of the project sponsor be incorporated into a permit. Mont. Code Ann. § 75-1-201 (5)(b); 2001 Mont. Laws ch. 268. Therefore, it is appropriate to include Applicant's requested condition on this permit. Mont. Code Ann. § 75-1-201 (5)(b). See, Finding of Fact No. 2, 3.

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76LJ-11406600 is **ISSUED** to Dave and Howard Wilkins to appropriate up to 1554 acre-feet of water per year from Brown Creek. The maximum flow rates in gallons per minute and associated period of appropriation and use are shown in the following table:

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A. Permittee may divert up to the maximum flow rates as long as a minimum flow rate of 90 gpm remains in the stream immediately below the point of diversion.

B. Permittee must return all water diverted to Brown Creek at a point in the ~~SE~~~~NW~~~~SE~~~~SE~~ of Section 7, Township 28 North, Range 19 West, Flathead County, Montana.

C. Permittee shall place and maintain an elbow on the outlet pipe designed to consume the energy of the falling water prior to its

falling to the stream, and engineered rip rap rock at the location diverted water returns to Brown Creek to dissipate the energy of the falling water to prevent channel bed erosion by the water re-entry.

D. The appropriator shall install a Department approved water use measuring device at a point approved by the department immediately below the point of diversion. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written weekly record of the flow rate and volume of all water diverted including the period of time. Records shall be submitted by November 30<sup>th</sup> of each year and upon request at other times during the year. Failure to submit reports may be cause for revocation of a permit or change. The records must be sent to the Water Resources Regional Office. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately.

E. Permittee shall monitor stream flow at the measuring device year round for 3 years after the project is operational. Records shall be submitted to the Water Resources Regional Office by November 30<sup>th</sup> of each year and upon request at other times during the year.

#### NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by September 25, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by October 15, 2002, or postmarked by the

same date, and copies must be mailed by that same date to all parties.  
No new evidence will be considered.

No final decision shall be made until after the expiration of the  
above time periods, and due consideration of timely oral argument  
requests, exceptions, responses, and briefs.

Dated this 4<sup>th</sup> day of September, 2002.



Charles F Brasen  
Hearings Officer  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below by first class United States Mail on this 5<sup>TH</sup> day of September, 2002.

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