

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

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IN THE MATTER OF APPLICATION FOR)	FINAL ORDER
BENEFICIAL WATER USE PERMIT 41K-)	PRELIMINARY
30049120 BY POWER-TETON COUNTY)	DETERMINATION DECISION
WATER AND SEWER DISTRICT)	ADOPTION

* * * * *

Having received no valid objections to the application, and subject to the terms, conditions, restrictions, and limitations described in the Preliminary Determination Decision document dated June 6, 2014, the above described water right application is GRANTED. § 85-2-310(3), MCA

DATED this 5th day of September, 2014.

/Original signed by Martin L Balukas/
Martin L. Balukas, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601

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

IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41K-30049120 BY POWER-TETON COUNTY WATER AND SEWER DISTRICT)))	PRELIMINARY DETERMINATION TO GRANT FOLLOWING HEARING ON PRELIMINARY DETERMINATION TO DENY
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Pursuant to its authority under §§2-4-601 et seq., 85-2-310(1) MCA (2013), and Mont. Admin. R. 36.12.201 et. seq, and 36.12.501 et seq., the Department of Natural Resources and Conservation (Department) conducted a show cause hearing in this matter on March 5, 2014, to allow Power-Teton County Water and Sewer District (Applicant) to show cause by a preponderance of the evidence why the Application No. 41K-30049120 should not be denied under the terms of the Preliminary Determination to Deny dated November 14, 2013. (Preliminary Determination to Deny or PDD)

APPEARANCES

Power-Teton Water and Sewer District appeared at the hearing by and through counsel John Bloomquist. The following witnesses testified on behalf of the Applicant: Ross Fitzgerald, Chairman of the Board of the Power-Teton Water and Sewer District; Matt Miles, Water Resource Specialist, DNRC Havre Regional Office; Alan Rollo, Coordinator of the Sun River Watershed Group; and Gene Walker, operator of Power-Teton Water and Sewer.

EXHIBITS

The Department considered the following information submitted by the Applicant.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments (including maps and expanded answers)
- Basin Closure Area Addendum, Form 600-BCA
- USGS Topographic Maps depicting the point of diversion, conveyance facilities, place of storage and place of use

Information Received after Application Filed

- Deficiency Letter Response received by DNRC on February 22, 2011
- Waiver of 120 Days Statutory Timeline for Preliminary Determination Decision

Information Received at Hearing

The Applicant offered a “Show Cause Hearing Notebook” at the hearing consisting of 14 numbered exhibits. They were admitted into evidence without objection and are listed individually below:

No.	DOCUMENT
1.	US DOI letter Sept. 4, 1969 to Stanley Thill & Assoc. with U.S. Dept. of Interior Water Service Contract dated August 20, 1969; Gene Walker letter dated May 6, 2010 to Mark Beatty (US DOI requesting Water Service Contract Renewal)
2.	Maps of Area and Related Features
3.	Muddy Creek Near Vaughn, MT USGS Gage Data and Estimates (Jan. 2002-Jan. 2005)
4.	Muddy Creek Followup Project Final Report (2005), prepared by J. W. Bauder and Kim Hershberger
5.	Muddy Creek Project Final Report (2006), prepared by Kim Hershberger and J.W. Bauder
6.	2007 Muddy Creek Flow and Sediment Study, prepared by Kim Hershberger and Dr. Jim Bauder
7.	2008 Muddy Creek Flow and Sediment Study, prepared by Kim Hershberger and Dr. Jim Bauder
8.	Summary Statistics on Muddy Creek, 2002-2003, 2005-2006 (Application File)
9.	Statement of Claim for Water Right 41K 188174-00
10.	General Abstract for Water Right Claim 41K 188174-00
11.	August 22, 2013 Email Correspondence Mr. Megan Estep, Colorado Water Resources, to Kraig Van Voast, Montana DNRC Deputy Regional Manager, Havre Regional Office
12.	Chart of pumped water, natural runoff, and selenium entering Benton Lake (1970-2012)
13.	Muddy Creek Pump Records (1992-2013)
14.	Benton Lake Refuge Complex - Chapter 4 Management Direction

Information Received after Hearing

Pursuant to an Order of this Hearing Examiner dated May 27, 2014, Applicant submitted a binder containing the Benton Lake National Wildlife Refuge Water Use Reports from 1992-2013. These water use reports are hereby admitted into evidence as Applicant’s Exhibit 15.

PRELIMINARY MATTERS

On August 25, 2010, Power-Teton County Water & Sewer District (Applicant), hereinafter "Power-Teton or Applicant", submitted Application for Beneficial Water Use Permit No. 41K 30049120 to the Havre Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 70 gallons per minute (GPM) up to 40 acre-feet (AF) per year for municipal use.

The Department published receipt of the Application on its website. The Department sent Applicant a deficiency letter under § 85-2-302, Montana Code Annotated (MCA)(2011), dated February 16, 2011. The Applicant responded with information dated February 22, 2011. The Application was determined to be correct and complete as of March 15, 2011. An Environmental Assessment for this Application was completed on June 28, 2011. Applicant submitted Waiver of 120 Day Statutory Timeline for Preliminary Determination Decision on June 29, 2011. The Department issued a Draft Preliminary Determination to Deny on April 9, 2013 and a Preliminary Determination to Deny on November 14, 2013.

The objective of allowing an applicant to meet with the Department after issuance of a "Draft Preliminary Determination" is to give the applicant an opportunity to provide further information or clarification of the proposal. In the instant case, after meeting with the Applicant the Department requested additional information. The Applicant did not furnish sufficient information to the Department, and the Department made its Preliminary Determination to Deny the Application as it was presented on the grounds that the Applicant failed to prove physical availability, legal availability, and absence of adverse effect. Following the Preliminary Determination to Deny, the Applicant presented additional evidence in the form of witness testimony and exhibits to the Department at the Show Cause Hearing on March 5, 2014.

This Order is structured the same as the Preliminary Determination to Deny. This document only addresses the sections on Physical Availability, Legal Availability, Adverse Effect, and the Final Determination, as these are the only sections with which the Applicant took issue. The other sections, including Findings of Fact and Conclusions of Law on the Basin Closure Exception and the individual statutory criteria are hereby incorporated by reference.

BACKGROUND

- The town of Power formed a water and sewer district in 1969 and built the present pump station and water treatment plant in 1970. Surface water is the community's only option, as groundwater from area wells is not potable. (Testimony of Ross Fitzgerald Audio Tk. #9) Until 2010, Applicant used contract water from Reclamation/Greenfields Irrigation District as the basis for diverting water from Muddy Creek.
- In 1969 all water in Muddy Creek was claimed by Bureau of Reclamation/Greenfields Irrigation District as wastewater from the Greenfields Irrigation District. The basis of this claim is unclear, but what is clear is that the Bureau of Reclamation/Greenfields Irrigation District sold Power-Teton water from Muddy Creek for 40 years. (Id.)
Bureau of Reclamation first issued a water service contract to Power-Teton for water from Muddy Creek in August 1969. (Id.)
- When Power-Teton requested renewal of this contract in 2010 the Bureau said they would not renew. (Id.)

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. Applicant proposes to divert surface water from Muddy Creek yearlong at a rate of 70 GPM up to 40 AF per year for municipal use. The system uses a variable speed pump with a maximum flow rate of 70 GPM. Typically appropriations above a flow rate of 448.8 GPM are expressed as CFS, while those below are GPM. While the proposed appropriation is for 70 GPM, later in this document it is compared with other rights expressed in CFS, and is thus expressed as .16 CFS. 70GPM and .16 CFS are one and the same flow rate. The proposed appropriation diverts water in the SE SW Section 27 T23N R1W Teton County, by means of a 5 HP pump, through a treatment facility plant and into a 30,000 gallon tank. From the tank it is pumped and distributed to the town of Power generally located in the SW Section 25 T23N R1W, Teton County and a 150,000 gallon storage tank located in the SENENE section 25 T23N

R1W, Teton County. The town of Power is located approximately 1.6 miles east of the diversion works¹.

2. The waste water system serving the town of Power disposes effluent through evaporation through a lined lagoon type system and is therefore 100% consumed from Muddy Creek.

EXISTING APPROPRIATION

3. Power-Teton currently uses, and has historically used, water withdrawn from Muddy Creek at the same point of diversion, at the same rate, with the same timing, and using the exact same facilities and plan of operations as proposed in this Application. Applicant appropriated water without a permit by contracting to purchase the Bureau's claimed wastewater from March 1970 until the present.² The Bureau of Reclamation has changed either its claim to the wastewater or its policy concerning contracts, and will no longer enter into a contract with the Applicant.

BASIN CLOSURE EXCEPTION

4. This particular application is submitted pursuant to the municipal use basin closure exception found in MCA 85-2-343 (2)(c)(iii). The findings of fact and conclusions of law on the basin closure exception from the Preliminary Determination to Deny are hereby incorporated by reference.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

5. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA. Section 85-2-311, MCA, reads in pertinent part:

1 The Applicant's initial Application for Beneficial Water Use Permit lists the means of diversion as 2-5 horsepower variable speed pump pumping 70 GPM. The same initial Application requests a flow rate of 20 cubic feet per second (CFS) (equal to 8976 GPM). Later, in Section D of the Application, Power-Teton requests 2.23 CFS, then lists the requested flow rate as 20.20CFS in the Physical and Legal Demands Comparison Table. In the Applicant's response to the Department's deficiency letter, the Applicant once again refers to a diversion of 20.20 CFS. The disparate values appear to result from confusing flow rate and volume. The Department's Preliminary Determination to Deny dated November 14, 2013 refers to Power-Teton's proposed appropriation of "70GPM and 40 AF/Year." This Order reviews the Department's Preliminary Determination to Deny, and as neither the flow rate nor volume value discrepancy was addressed by the Applicant at hearing, this hearing examiner will consider the proposed appropriation as 70GPM and 40AF

2 Whether the appropriation was legal is not a focus of this discussion. Certainly Power-Teton thought it was legally appropriating, and The Bureau of Reclamation thought it was legal.

...the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a)(i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate

(d) the proposed use of water is a beneficial use;

(e) 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[.]

(Criteria relating to water quality are not implicated by the instant Application)

6. The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

7. If the Department issues a Preliminary Determination to Deny an application, the applicant is entitled to a show cause hearing in front of a Department Hearing Examiner at which time the applicant is provided with the opportunity to show cause by a preponderance of the evidence why the permit should not be denied. §§ 85-2-307(2)(c) and - 310, MCA.

8. In the Preliminary Determination to Deny the Department found that the Applicant had satisfied the criteria of adequacy of diversion, beneficial use, and possessory interest. The

issue of water quality was not objected to. Therefore these criteria were not at issue at the hearing, and the findings and conclusions on those criteria from the Preliminary Determination are hereby adopted and incorporated into this decision by reference. The Applicant requested a hearing and presented evidence only as to the criteria of Physical Availability, Legal Availability, and Adverse Effect.

PHYSICAL AVAILABILITY

FINDINGS OF FACT

9. The Preliminary Determination to Deny found that the requested flow rate of 70 GPM and 40 AF of volume is physically available at the proposed point of diversion during the months of April through October. (PDD at ¶ 16)

10. The Preliminary Determination to Deny found that the Applicant had not shown water was physically available at the point of diversion November through March, as the Applicant furnished only estimates. (PDD at ¶14) At hearing the Applicant provided further evidence of physical availability during the period of November through March. Specifically, Ross Fitzgerald, Alan Rollo, and Gene Walker testified about personal observations of physical availability at the proposed point of diversion.

11. Ross Fitzgerald, Power-Teton Water and Sewer District President, testified that Power-Teton has used Muddy Creek water from the same point of diversion from 1970 to the present. During that period there has never been an instance where water was physically unavailable at the requested flow rate at the point of diversion. (Testimony of Ross Fitzgerald Audio Tk. #09)

12. Gene Walker has operated and maintained the Power-Teton water system since 1988. During that time the system has always had sufficient water available at the Point of Diversion. (Testimony of Gene Walker Audio Tk. #09)

13. Alan Rollo is Coordinator of the Sun River Watershed Group, a group formed to address, in part, destructively high flows in Muddy Creek. He has observed and measured flows for over twenty years in Muddy Creek. In that entire time there has never been an instance where water was not physically available at the requested flow rate at the point of diversion. (Testimony of Alan Rollo Audio Tk. #11)

14. At the Applicant's requested flow rate (70GPM) the Applicant could pump the entire requested volume of 40 AF in approximately 129 days. (40AF =13,034,040 gal., 70 gpm =

100,800 gal/day. 13,034,040 gal. total volume/100,800 gal. per day = 129.3 days). Power-Teton will use the water to serve households throughout the year, and will distribute the use of this water right throughout the year. Therefore, if the requested flow rate is physically available it follows the requested volume is physically available as well.

15. Based upon the evidence and testimony that the Applicant has pumped water from Muddy Creek at the requested flow rate and volume during the months of November through March each year since 1970, I find that water in the amount of 70 GPM is physically available at the Applicant's proposed point of diversion from November through March each year.

CONCLUSIONS OF LAW

16. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

17. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-411 by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

18. A single occurrence cannot be the basis for a finding that unappropriated water is reasonably available during the proposed period of use. *In the Matter of Application for Beneficial Water Use Permit No. 68033-76G by Robert Hollenback* (DNRC Final Order 1992).

19. The Applicant provided at the show cause hearing additional evidence of physical water availability and Applicant has proven that water is physically available at the proposed point of diversion at a flow rate of 70 GPM up to a volume of 40 AF.

LEGAL AVAILABILITY

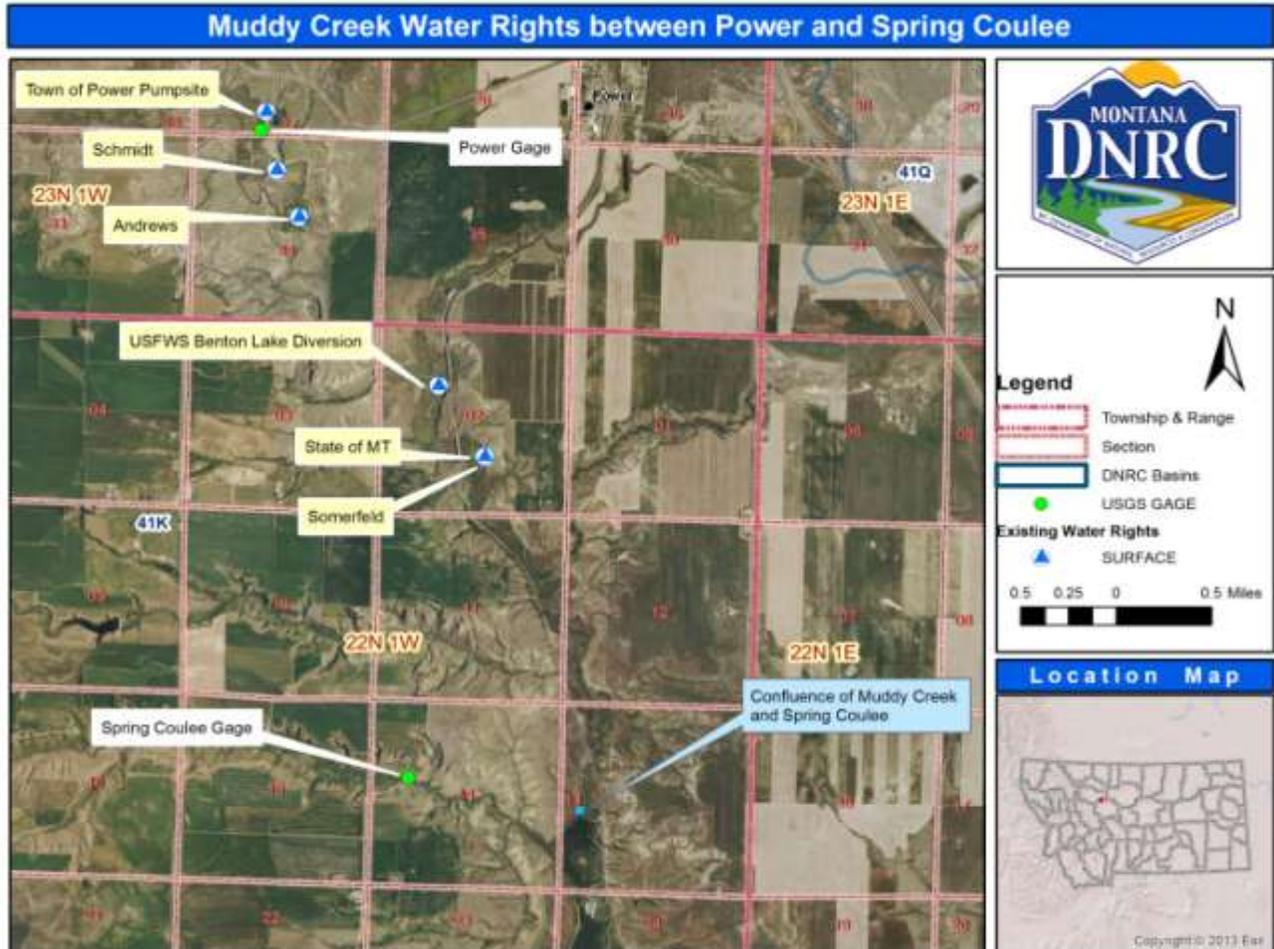
FINDINGS OF FACT

20. This Application presents two primary issues regarding legal availability. The first issue is whether water is legally available on the impacted reach of Muddy Creek which includes all of Muddy Creek from the proposed point of diversion downstream approximately six miles to

Spring Coulee. The second issue is whether water is legally available on the impacted reach of the Missouri River from the confluence of the Sun River with the Missouri River downstream to the PPL dams at Great Falls.

MUDDY CREEK

21. The Applicant provided an index of existing downstream legal demands which includes all of Muddy Creek from the proposed point of diversion downstream to Spring Coulee (approximately 6 miles) which is a major contributor of inflows to Muddy Creek from the Greenfields Irrigation District. This index was incomplete and confusing, so a map and table are included here. This map was created from information within the Department's specific and general knowledge, more particularly the DNRC GWRAT mapping system:



22. The Preliminary Determination to Deny determined the reach for which the Applicant was required to calculate legal availability as beginning at the Power-Teton Point of Diversion downstream in Muddy Creek to the confluence with Spring Coulee. (PDD at ¶ 21) There are five active water rights on Muddy Creek in the affected area, listed in order of priority. Power-Teton has applied for a right of .16 CFS with a priority date of 8/25/2010, (the date of Power-Teton’s original permit application.)³

Water Right Number - Owner	Rate of diversion	Priority Date
41K 188174 –USFWS	50 CFS	4/28/1958
41K 11928 - Somerfeld	.78 CFS	3/28/1977
41K 11979 – State of MT	.53 CFS	3/28/1977
41K 31657- Schmidt	.66 CFS	2/11/1981
41K 104362-Andrews	6.9 CFS	7/1/1985
41K 3004192 Power-Teton	.16 CFS	8/25/2010

23. The Preliminary Determination to Deny determined that the Applicant failed to prove legal availability on Muddy Creek because the Applicant failed to account for USFWS Statement of Claim No. 41K 188174 00. See PDD at ¶¶ 23-24.

24. At hearing Applicant introduced evidence that Muddy Creek acquires water very rapidly below the Power Gage. The Applicant considered legal demands only to Spring Coulee, a major source of inflows to Muddy Creek. (Testimony of Alan Rollo Audio Tk. #11)

25. The U.S. Fish and Wildlife Service Benton Lake Water Right prevented a finding of legal availability by the Department. The Department only considered legal demands within the six miles from the proposed point of diversion to Spring Coulee. (Testimony of Matt Miles, Audio Tk. #10)

26. Applicant introduced evidence of very high flows entering Spring Coulee, with measured average daily flows in 2007 ranging from approximately 20 CFS to 130 CFS in Lower Spring

³ These tables were calculated by this Hearing Examiner by identifying the water rights in the affected reach using the DNRC Water Rights Database. The flow rates and period of use of these water rights were then added together to arrive at the cumulative legal demands. The volumes in the table above were calculated by dividing the total volume listed on the face of the provisional permit by the period of use in months. Due to the piecemeal evolution of this Water Right Permit Application, the values and calculations set forth in the Preliminary Determination are confusing and sometimes contradictory. In order to correctly analyze the Permit Criteria, this Hearing Examiner will use the values set forth in the tables above in the analysis.

Coulee. All flows at Lower Spring Coulee will enter Muddy Creek after the above listed legal demands have been diverted. (Figure 2, Applicant's Exhibit 6)

27. Alan Rollo testified and introduced evidence that Muddy Creek has been the focus of a long-standing effort to reduce erosion and sediment loads by reducing the amount of water in Muddy Creek. As part of the ongoing studies, flows in Muddy Creek have been measured near the Applicant's point of diversion from 2002 through 2008. These measurements provide the basis for Applicant's physical availability analysis and median of the mean flow in Muddy Creek for the months of April through October. These flow measurements and studies also establish that flows in Muddy Creek routinely exceed the monthly median of the mean during the irrigation season due to significant amounts of waste water and return flows from the Greenfields Irrigation District Project that discharge into Muddy Creek. (Testimony of Alan Rollo Audio Tk. #11 and Exhibits 2, 4, 5, 6, 7, and 8).

28. Median of the mean monthly flows at the Applicant's point of diversion are sufficient to satisfy the legal demands of the water rights on the impacted reach of Muddy Creek if Statement of Claim No. 41K 188174 00 is not included in the analysis. Thus, with regard to legal availability on Muddy Creek, this decision focuses on Statement of Claim No. 41K 188174 00.

29. Approximately three miles below Power-Teton's POD the U.S. Fish and Wildlife Service (USFWS) has a large pump station which diverts water from Muddy Creek to the Benton Lakes National Wildlife Refuge nearly 15 miles to the east pursuant to Statement of Claim No. 41K 188174 00, (the Benton Lake Right). This right claims a flow rate of 50 CFS, a volume of 14,600 AF, and a yearlong period of use.

30. The Applicant submitted an email from Meg Estep, Chief, Division of Water Resources, U.S. Fish and Wildlife Service, to Kraig Van Voast, DNRC Havre Regional Water Resources Office Deputy Regional Manager, in which Ms. Estep states that the USFWS "does not currently use this water in the winter and does not foresee pumping it in the future." The remainder of the email indicates that the USFWS does not divert water from Muddy Creek from November 1 through April 1. (Applicant's Exhibit 11)

31. Following the show cause hearing on this matter the Applicant submitted the Benton Lake National Wildlife Refuge Water Use Reports from 1992-2013. These records include specific

information for Statement of Claim No. 41K 188174 00 regarding the amount of water diverted from Muddy Creek, including: the number of pumps used to divert water each year; the dates during which water was diverted; and, the volume of water diverted. These water use reports were admitted into evidence as Applicant's Exhibit 15.

32. Applicant also submitted a report of total annual volume diverted from Muddy Creek from 1992 through 2013 and a summary of pumping records from the USFWS for Statement of Claim No. 41K 188174 00 for the period of 1992 - 2013. (Applicant's Exhibit 12 and 13)

33. Exhibit 13 indicates that in the period from 1992 to 2012 the USFWS never pumped at a rate greater than 40 CFS and only pumped during the periods of April 6 through June 18 and from Aug 1 through November 13. This period of diversion is consistent with the email from Ms. Estep stating that the USFWS does not divert water from November 1 through April 1.

34. Review of the annual USFWS Benton Lake National Wildlife Refuge Water Use Reports for the years of 1992 – 2013 confirms that USFWS has not diverted water from Muddy Creek during the winter. (Applicant's Exhibit 15)

35. From 1992 – 2012, spring diversions began on April 6 at the earliest and concluded on June 21 at the latest. However, diversions typically occurred for a period of a month from late-April through mid-June. The Water Use Reports from 2002 through 2012 indicate that USFWS only diverted in the spring during two years – 2003 and 2006. (Applicant's Exhibit 15)

36. From 1994 – 2012, late summer diversions began on August 1 at the earliest and concluded on November 15 at the latest. However, diversions typically occurred during a two month period from mid-August through mid-October. (Applicant's Exhibit 15)

37. From 1992 – 2012, USFWS never diverted water pursuant to Statement of Claim No. 41K 188174 00 from the period of June 22 – July 31 and the period of November 15 – April 5.⁴ (Applicant's Exhibit 15)

38. The US Fish and Wildlife Service used the Benton Lake Right an average of 58 days a year during the period from 1994 -2004. (Applicant's Exhibit 13)

4 The Water Use Report for 1994 indicates that USFWS diverted water for a 24 hour period in mid-July to provide 14 AF to provide stock water for a cooperator. However, Statement of Claim No. 41K 188174 00 does not include livestock as a claimed use and therefore that isolated use is not considered part of USFWS existing right for purposes of this decision.

39. Applicant introduced the 2014 Comprehensive Conservation Plan, Benton Lake National Wildlife Refuge Complex Montana, Chapter 4–Management Direction as Applicant’s Exhibit 14. This exhibit indicates that the Refuge will be reducing its use of the Benton Lake Right and curtailing it altogether in some years. (Applicant’s Exhibit 14) In order to manage selenium levels the Refuge will not pump water from Muddy Creek at all in 4 of the next 15 years. (Applicant’s Exhibit 14, at p.130)

40. The record of pattern of use of the Benton Lake Right includes an average annual period of diversion of 58 days with a maximum range of 182 days. (Applicant’s Exhibit 13)

41. A comparison of physical and legal availability of water at the point of diversion (flow rate) excluding the Benton Lake Right shows water legal availability throughout the year.

Water Rights compared to actual flow rate from Power downstream to Spring Coulee (flow rate) in CFS

Water Right #	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
41K31657				.65	.65	.65	.65	.65	.65	.65		
4K104362				6.9	6.9	6.9	6.9	6.9	6.9	6.9 **		
41K11979					.52*	.52	.52	.52	.52			
41K11928					.77*	.77	.77	.77	.77			
Total excluding USFWS				7.55	8.84	8.84	8.84	8.84	8.84	7.55		
Flow rate at Power Gage	.16	.16	.16	10.56	29.95	31.52	54.06	13.56	17.29	20.35	.16	.16
Remaining excluding USFWS	.16	.16	.16	3.01	21.11	22.68	45.22	4.72	7.45	12.8	.16	.16

*The period of diversion for these rights begins on May 15, **The period of diversion for this right ends on October 15

42. Figure 5 in Applicant’s Exhibit 5 is a graph of average daily flows at Power in 2005. Figure 5 does not show when the US Fish and Wildlife Service was pumping the Benton Lake Right, but there are numerous periods when the gage at Power shows enough water to satisfy the all legal demands including the Benton Lake Right.

43. This case is unique in that Muddy Creek flows during the irrigation season have been subject to extensive studies over the years and there is a significant period of record with specific and detailed diversion information available regarding USFWS use of Statement of Claim No. 41K 188174 00. See PDD ¶¶ 26 – 29 and Exhibits 4 – 8, 12, and 14. The evidence

regarding historic use of Statement of Claim No. 41K 188174 00 establishes that the pattern of use for that right differs from the claimed period of use and flow rate.

44. Based upon the extensive information available regarding the USFWS historic diversions for Statement of Claim No. 41K 188174 00, I find that water in the amount of .16 CFS (70 gpm) is legally available on Muddy Creek from November 16 – April 5 and June 22 – July 31 each year. This is significant because: 1) the Preliminary Determination to Deny found that Power's greatest demand based upon its use records dating back to 1970 occurs during the month of July (a month when water is legally available); and, 2) at a diverted flow rate of .16 CFS, the Applicant can divert the full volume of 40 AF permitted in 129 days (water is legally available 183 days).

45. Evidence regarding flows in Muddy Creek also supports a finding that while water may not be legally available during the periods of April 6 – June 21 and August 1 – November 15 based upon median mean monthly flows in Muddy Creek, flows at Applicant's point of diversion routinely exceed legal demands in the impacted reach during these two periods of time due to significant amounts of wastewater and return flows discharged into Muddy Creek from the Greenfields Irrigation District. The evidence also supports a finding that during the April 6 – June 21 and August 1 – November 15 periods when water is not legally available based upon median mean flows and the flow rate for Statement of Claim No. 41K 188174 00, the USFWS is not always diverting water and when it is diverting water it is not always at the claimed flow rate of 50 CFS.

46. Based upon this evidence, I find that water may reasonably be considered legally available from April 6 – June 21 and August 1 – November 15 when flows at the Applicant's point of diversion exceed 48.84 CFS or when USFWS is not diverting water from Muddy Creek pursuant to Statement of Claim No. 41K 188174 00. See FOF 58, and the permit condition titled PERIOD OF DIVERSION/MUDDY CREEK TRIGGER FLOWS.

MISSOURI RIVER

47. In addition to the reach of Muddy Creek identified by the Applicant in the Applicant's legal demands analysis, PPL Montana has large senior water rights on the mainstem of the Missouri River which are only rarely satisfied. These rights constitute a legal demand upon the water in Muddy Creek which the Department must consider. (See *In the Matter of Application for*

Beneficial Water Use Permit No. 41K-30045713 By Nicholas D. Konen (DNRC Final Order 2011) and *In the Matter of Application for Beneficial Water Use Permit No. 41K-30043385 by Marc E. Lee* (DNRC Final Order 2011). (PDD ¶¶ 31 – 37)

48. At hearing, Applicant indicated that Power-Teton would be willing to offset the depletion to the Missouri River caused by the proposed Muddy Creek depletion by purchasing a water service contract from the Bureau of Reclamation at Canyon Ferry Dam as a condition to granting this Application. Based upon the condition that the Applicant secure a contract with BOR for 40 AF per year to mitigate the total annual volume depleted from the Missouri River as a result of the Applicant's use, I find that the Applicant has established that the amount of water requested is legally available in the Missouri River. This condition will be required and is discussed more fully in the Adverse Effect section of this document.

CONCLUSIONS OF LAW

49. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (Permit granted for only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

50. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has

instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

51. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act."); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

52. The Department may consider a mitigation plan as a means of proving that water is legally available. Rule 36.12.1704(1), ARM. The Department may also consider historic use of potentially impacted water rights where the evidence is sufficient to establish that the pattern of use differ from the legal water rights filling. Rule 36.12.1705(3), ARM.

53. Based upon the unique circumstances of this case and the extensive evidence regarding historic use of Statement of Claim No. 41K 188174 00, I conclude that Applicant has proven by

a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested based on Applicant's proposal subject to the conditions set forth in the Adverse Effect section of this document.

ADVERSE EFFECT

FINDINGS OF FACT

54. Like legal availability, this Application presents two primary issues regarding adverse effect. The first issue is whether the proposed use will cause adverse effect to prior appropriators on the affected reach of Muddy Creek. The second issue is whether the proposed use will cause adverse effect to water users on the Missouri River from the confluence of the Sun River with the Missouri River downstream to Rainbow Dam.

55. The Applicant has a plan for the exercise of the permit that demonstrates that the Applicant's use of water can be controlled so the water rights of a prior appropriator will be satisfied. The Applicant proposes to reduce or restrict the use of water for uses such as lawn and garden irrigation or cease diverting water completely upon call of water. Domestic water would then have to be hauled in from an off-site location. This proposed appropriation will divert water with an electric pump, and therefore, in the event a call is made, this appropriation can be stopped by turning off the electricity to the pump.

56. Applicant's plan, as enumerated above, is not sufficient to prevent adverse effect to prior appropriators because prior appropriators will have no ability to know whether the Applicant is diverting when water is unavailable for a downstream, though senior, appropriator.

57. Applicant's plan also ignores the social pressures which necessarily accompany a call by a senior downstream appropriator calling a relatively small municipal right which serves the community within which the senior appropriator must live and socialize.

58. Trigger flows and a measurement and reporting condition serve to protect senior downstream appropriators by providing an unbiased calculus of legally available water.

59. The historic flow rate of the Benton Lake Water Right of 40 CFS combined with the four existing permits on the impacted reach of Muddy Creek between the Power Gage and Spring Coulee have a total combined flow rate of:

- 47.55 CFS from April 1 through May 15
- 48.84 CFS from May 15 to September 30.
- 47.55 CFS from October 1 through October 15
- 40.65 CFS from October 16 through October 31

60. The earliest record of diversion by the USFWS Benton Lake Water Right is April 6, and the latest is November 15. The USFWS has not exercised the Benton Lake Water Right between the dates of June 22 to July 31 during the period of record. (Applicant's Exhibit 13)

61. Nothing in this order shall be construed to prevent the USFWS from exercising the Benton Lake Water Right subject to the terms of the Decreed Right and the historic beneficial use of the right.

62. Based upon Applicant's evidence of historic use of the Benton Lake Water Right, it is incumbent upon the Applicant to monitor actual water conditions in Muddy Creek during periods when historic evidence makes it likely that water may not be legally available.

63. At all other times the Applicant is still subject to call by any senior water right.

64. Applicant at the show cause hearing has addressed legal availability of surface water for senior hydropower rights in the Missouri River by proposing a condition on the permit to mitigate the depletions to surface water that may cause adverse effects in full. (Testimony of Ross Fitzgerald Audio Tk. # 9)

CONCLUSIONS OF LAW

65. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users). In the present case the Applicant's plan, comprised of the trigger flow conditions, the BOR water service contract, and the shut-off plan is adequate.

66. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

67. The Department has jurisdiction to approve a water use permit application subject to modifications or conditions it considers necessary to satisfy the criteria in § 85-2-311, MCA. § 85-2-312, MCA; MPC v Carey (1984), 211 Mont. 91, 685 P.2d 336, *In the matter of Application for Beneficial Water Use Permit No. 43B-30041732 by Franklin J. Rigler*. (DNRC Final Order 2010)

68. In order to prevent adverse effects to downstream appropriators, Applicant shall not divert between the dates of April 6 and November 13 when the Gage at Power shows that legal demands in Muddy Creek between the Power gage and Spring Coulee cannot be met.

69. Applicant shall communicate with Benton Lake Refuge staff and ascertain the probable pumping schedule prior to April 6 each year. Applicant shall make a record of water at the Power Gage each day between April 6 and November 13 each year.

70. On any day that Muddy Creek does not meet the trigger flow requirement the Applicant shall contact the USFWS Benton Lake Wildlife Refuge and determine whether the Refuge will be pumping that day and if the rate of the pumping, combined with the diversions of other downstream senior appropriators, allow Applicant to divert water.

71. Applicant shall purchase a Water Service Contract from the U.S. Bureau of Reclamation for the Applicant’s diverted volume in order to off-set surface water depletions and adverse effects to the mainstem of the Missouri River. In the instant case, as the Applicant’s proposed use is considered 100% consumptive, the Applicant’s diverted volume is equal to the Applicant’s net depletion. (See FOF #2)

72. The Department finds that no adverse effects will result from the proposed appropriation, provided that Applicant ceases diversions when the trigger flows are not met and the Applicant purchases a Water Service Contract from the U.S. Bureau of Reclamation for any volume diverted. In addition, Applicant’s appropriations will be measured to ensure compliance with the Permit. In the event of a call that is not satisfied by the Water Service Contract with the US

Bureau of Reclamation, the Applicant shall institute the aforementioned adverse effect plan to limit diversions or cease diverting water entirely.

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that Application for Beneficial Water Use Permit No. 41K 30049120 is **GRANTED**. Applicant may appropriate 70 GPM up to 40 AF per year for municipal use from Muddy Creek year-round subject to the following conditions, limitations, and restrictions:

WATER MEASUREMENT RECORDS

THE APPROPRIATOR SHALL INSTALL A DEPARTMENT APPROVED IN-LINE FLOW METER IN THE DELIVERY LINE OF THE DIVERSION ASSOCIATED WITH THIS WATER RIGHT. THE LOCATION OF THE FLOW METER MUST BE APPROVED BY THE DEPARTMENT. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICE IS IN PLACE AND OPERATING. THE APPROPRIATOR SHALL KEEP A WRITTEN DAILY RECORD OF THE FLOW RATE AND VOLUME OF ALL WATER DIVERTED, INCLUDING THE PERIOD OF TIME. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HAVRE WATER RESOURCES REGIONAL OFFICE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICE SO IT ALWAYS OPERATES PROPERLY AND MEASURES THE FLOW RATE AND VOLUME ACCURATELY.

PERIOD OF DIVERSION/MUDDY CREEK TRIGGER FLOWS

THE APPROPRIATOR MAY ONLY DIVERT WATER DURING THE PERIOD OF APRIL 6 – JUNE 21 AND AUGUST 1 – NOVEMBER 15 WHEN EITHER: (1) FLOWS AT THE APPROPRIATOR'S POINT OF DIVERSION EXCEED THE FOLLOWING MINIMUM FLOWS:

- 47.55 CFS APRIL 6 – MAY 15;
- 48.84 CFS MAY 15 –JUNE 21;
- 48.84 CFS AUGUST 1 – SEPTEMBER 30;
- 47.55 CFS OCTOBER 1 – OCTOBER 15;
- 40.65 CFS OCTOBER 16 – OCTOBER 31;

OR, (2) THE APPROPRIATOR OBTAINS CONFIRMATION FROM USFWS THAT IT IS NOT DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF CLAIM NO. 41K 188174 00.

THE APPROPRIATOR SHALL MEASURE FLOWS IN MUDDY CREEK AT THE APPROPRIATORS POINT OF DIVERSION USING A MEASUREMENT DEVICE

APPROVED BY THE DEPARTMENT. THE APPROPRIATOR MAY USE THE CURRENT AQUAROD STREAMFLOW RECORDER LOCATED ON MUDDY CREEK NEAR POWER (MCP) UPON CONFIRMATION BY THE DEPARTMENT IT IS CAPABLE OF MEASURING FLOWS IN EXCESS OF 49 CFS. IF THE DEPARTMENT DETERMINES THE MCP MEASUREMENT DEVICE IS INADEQUATE, THE APPROPRIATOR SHALL INSTALL A MEASUREMENT DEVICE APPROVED BY THE DEPARTMENT. THE APPROPRIATOR SHALL NOT DIVERT WATER PURSUANT TO SUBPART (1) OF THIS CONDITION UNTIL A MEASURING DEVICE HAS BEEN APPROVED BY THE DEPARTMENT.

THE APPROPRIATOR SHALL KEEP A DAILY RECORD OF FLOWS AT THE POINT OF DIVERSION AND DIVERTED FLOW RATE WHEN DIVERTING WATER PURSUANT TO SUBPART (1) OF THIS CONDITION. APPROPRIATOR SHALL KEEP A RECORD OF THE NAME OF THE INDIVIDUAL AT THE USFWS CONTACTED AND DATES FOR WHICH CONFIRMATION WAS OBTAINED THAT THE USFWS WOULD NOT BE DIVERTING WATER FROM MUDDY CREEK PURSUANT TO STATEMENT OF CLAIM NO. 41K 188174 00 WHEN THE APPROPRIATOR IS DIVERTING WATER PURSUANT TO SUBPART (2) OF THIS CONDITION. RECORDS SHALL BE SUBMITTED BY NOVEMBER 30 OF EACH YEAR AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT RECORDS MAY BE CAUSE FOR REVOCATION OF THE AUTHORIZATION. THE RECORDS MUST BE SENT TO THE HAVRE WATER RESOURCES REGIONAL OFFICE.

MISSOURI RIVER MITIGATION PLAN

PRIOR TO COMMENCING DIVERSIONS UNDER THIS PERMIT THE APPROPRIATOR SHALL MAKE PROVISION TO MITIGATE ADVERSE EFFECT TO SURFACE WATER RIGHTS BY REPLACING THE FULL VOLUME OF NET DEPLETION OF THE APPROPRIATION. THE APPROPRIATOR SHALL REPLACE AN EQUIVALENT AMOUNT OF WATER TO THE MAINSTEM OF THE MISSOURI RIVER ABOVE RAINBOW DAM IN THE FOLLOWING MANNER: THE APPROPRIATOR SHALL MITIGATE DEPLETIONS TO SURFACE WATER AND PROVIDE FOR LEGAL AVAILABILITY OF SURFACE WATER UNDER THIS PERMIT THROUGH THE PURCHASE OF A U.S. BUREAU OF RECLAMATION (BOR) WATER SERVICE CONTRACT FROM CANYON FERRY RESERVOIR. THE VOLUME OF WATER STATED ON THE CONTRACT MUST BE EQUAL TO THE VOLUME THAT POWER – TETON DIVERTS FROM MUDDY CREEK ON AN ANNUAL BASIS. DELIVERIES OF WATER UNDER SUCH CONTRACT MUST BE COMMENCED THE CALENDAR YEAR AFTER DIVERSIONS UNDER THIS PERMIT COMMENCE. APPROPRIATORS CONTRACT WITH THE BOR MAY PROVIDE THAT IN THE CALENDAR YEARS SUBSEQUENT TO THE FIRST CALENDAR YEAR IN WHICH WATER IS TO BE PUT TO BENEFICIAL USE, THE CONTRACT VOLUME DELIVERED MAY BE EQUAL TO BUT NOT LESS THAN THE VOLUME OF WATER ACTUALLY DIVERTED BY THE

APPROPRIATOR IN THE PREVIOUS CALENDAR YEAR. A DELIVERY SCHEDULE ALLOWED BY THE BOR AND WHICH RESULTS IN THE FULL REPLACEMENT OF THE PRIOR CALENDAR YEARS DIVERSION VOLUME DURING THE FOLLOWING CALENDAR YEAR SHALL BE DEEMED SUFFICIENT UNDER THIS PERMIT. APPROPRIATOR SHALL SUBMIT TO THE HAVRE REGIONAL OFFICE WITH ITS WATER MEASUREMENT RECORDS ON NOVEMBER 30 OF EACH YEAR PROOF OF THE WATER SERVICE CONTRACT WITH BOR AS DESCRIBED ABOVE. DIVERSION UNDER THIS PERMIT MUST STOP IF ANY PART OF THE REQUIRED MITIGATION CEASES.

NOTICE

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

Dated this 6th day of June 2014.

/Original signed by Martin L Balukas/

Martin L. Balukas, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-9755

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT FOLLOWING HEARING ON PRELIMINARY DETERMINATION TO DENY was served upon all parties listed below on this 6th day of June 2014 by first-class United States mail.

JOHN BLOOMQUIST - ATTORNEY
BLOOMQUIST LAW FIRM PC
PO BOX 799
HELENA, MT 59624-0799

Cc:
DNRC, HAVRE REGIONAL OFFICE
PO BOX 1828
HAVRE, MT 59501-1828

/Original signed by Jamie Price/

Jamie Price, Hearings Assistant
Hearings Unit, 406-444-6615