

Applicant has agreed to abide by the terms of the settlement agreement, and the terms of the agreement that relate directly to the criteria that must be proved by the Applicant are incorporated as conditions included in the PD (see discussion *infra* at 23 – 24). Those conditions are:

1. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON FOR THE INSTALLATION OF A STAGE MEASURING DEVICE (STAFF GAGE OR OTHER SUITABLE DEVICE) AND THE DEVELOPMENT OF A STAGE-DISCHARGE RELATIONSHIP USED TO DETERMINE THE FLOW OF WILLOW CREEK NEAR THE POINT OF DIVERSION AND DEEP CREEK BELOW HWY 287. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON TO MAINTAIN SAID STAGE-DISCHARGE RELATIONSHIP. THE STAGE-DISCHARGE RELATIONSHIP SHALL BE SUBMITTED ANNUALLY TO THE HAVRE WATER RESOURCES REGIONAL OFFICE FOR APPROVAL.

2. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING AT THE SMITH DITCH NEAR THE POINT OF DIVERSION, AT THE POINT WHERE WATER IS DIVERTED INTO THE RESERVOIR FROM THE SMITH DITCH, AND RELEASES FROM THE RESERVOIR OUTLET. ON A FORM PROVIDED BY THE DEPARTMENT, 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 MONTHLY AND A SUMMARY PROVIDED BY NOVEMBER 30 OF EACH YEAR TO THE HAVRE WATER RESOURCES REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPERLY FUNCTIONING CONDITION SO THAT FLOW RATE AND VOLUME ARE ACCURATELY MEASURED.

3. DIVERSIONS ARE ALLOWED UNDER THIS PERMIT IF THE FLOW OF WILLOW CREEK IS GREATER THAN THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED

BELOW **AND** THE FLOW IN DEEP CREEK IS GREATER THAN 23.0 CFS. DIVERSIONS MUST BE CEASED OR REDUCED AT ANY TIME THE FLOW OF WILLOW CREEK BELOW THE POINT OF DIVERSION IS LESS THAN OR EQUAL TO THE AMOUNT OF WATER BEING DIVERTED BY THE APPROPRIATOR PLUS THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED BELOW **OR** IF THE FLOW IN DEEP CREEK FALLS BELOW 23.0 CFS.

WILLOW CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	6.0	39.3	46.8	46.8

DEEP CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	23.0	23.0	23.0	23.0

APPEARANCES

Applicant Teton Prairie, LLC, appeared at the hearing by and through counsel David Markette. Testifying on behalf of the Applicant were: Karl Uhlig, Senior Water Resource specialist from WGM Group; Dan Hoffman, Hydrologist/Geomorphologist with Atkins North America Inc.; and Gary Andres, Senior Hydrogeologist with Atkins North America Inc.

Objectors Reichelt Land and Cattle, William E. Reichelt Gift Trust, Monte Giese, Kalanick Ranch, Inc., Conley Kelly, Danreuther Ranches, Rubens Ranch Corp., James and Diane Walker, and Steve Kelly (collectively “LTWU Objectors”) appeared by and through counsel Stephen R. Brown. Monte Giese and Steve Kelley testified for LTWU Objectors. Matt Miles, Water Resource Specialist, DNRC Havre Water Resources Regional Office and Mike Roberts, Hydrologist, DNRC Water Resources Division were called by counsel for LTWU Objectors and testified regarding the processing the application and the staff expert report prepared by Mr. Roberts (Roberts 3/16/12).

LTWU Objectors pre-filed expert testimony from Michael E. Nicklin, Ph.D., P.E., from Nicklin Earth & Water, however, Dr. Nicklin did not attend the hearing and was thus unavailable

for examination. A motion to strike Dr. Nicklin's prefiled testimony was therefore made by Mr. Markette and granted.

EXHIBITS

Applicant did not offer any Exhibits at the hearing. LTWU Objectors offered ten exhibits at the hearing all of which were admitted:

Exhibit O-1 is a 1 page graph titled "10 year Average Flows – Teton River at the Dutton Gaging Station."

Exhibit O-2 is a 1 page table titled "Teton River – Dutton Gaging Station Median of Average Monthly Flow."

Exhibit O-3 is a 1 page table titled "Lower Deep Creek and Willow Creek Flow Measurements Median of Average Monthly Flow."

Exhibit O-4 is a 1 page table titled "Number of Months Average Flow is Below 15 CFS Dutton Gaging Station."

Exhibit O-5 is a 1 page table titled "Contribution of Deep Creek to Teton River Flows (as measured at Dutton Gaging Station) For the proposed period of diversion by Teton Prairie."

Exhibit O-6 is a 1 page graph titled "Flows at Dutton Gaging Station."

Exhibit O-7 is a 1 page graph titled "Flows in Willow Creek."

Exhibit O-8 is a 1 page table titled "Deep Creek versus Willow Creek Flows."

Exhibit O-9 is a 1 page table titled "Legal Availability."

Exhibit O-10 consists of a 3 page table titled "Existing Water Rights."

FINDINGS OF FACT/CONCLUSIONS OF LAW

General Findings of Fact

1. Application for Beneficial Water Use Permit No. 41O-30049563 in the name of Teton Prairie, LLC, and signed by David Hirschfeld was filed with the Department on October 1, 2010. (Department File)
2. The Environmental Assessment (EA) prepared by the Department for this application was reviewed and is included in the record of this proceeding. (Department File)
3. Applicant proposes to divert 15 cubic feet per second (CFS) for the storage of up to 279.2 acre-feet (AF) from Willow Creek in an off stream reservoir for irrigation use on 387 acres. The point of diversion is located NENWSE Section 31, T24N, R6W, Teton County. The place of

storage is located in the W2SE Section 10, T23N, R6W and the 387 acre place of use is generally located in Sections 10, 11, 14 and 15 all in T23N, R6W Teton County. The period of diversion is proposed to be from March 1 to June 30 and the period of use is proposed to be July 1 to September 30, inclusive, of each year. The means of diversion is a diversion dam and head gate from Willow Creek leading to the storage reservoir. Water stored in the reservoir will be released from the reservoir, conducted down Willow Creek to Applicant's secondary point of diversion, where it will be picked up by a pump to run two pivots. Use of the stored water will occur when Applicant's existing Water Right Claim Nos. 41O-152412, 41O-152414, 41O-152418 and 41O-152427 cannot be used because they are out of priority and calls have been made by senior appropriators for curtailment of those rights. (Department File, PD)

4. Notice of the Application and PD was published on September 21, 2011 in the *Choteau Acantha* and provided notice to interested individuals on September 20, 2011 as required by § 85-2-307, MCA. (Department File)

5. This Application is within the legislatively closed Teton River Basin. The Teton River Basin is closed to new surface water appropriations with limited exceptions. One exception to the closure is for "an application to store water during high spring flows." Applicant has filed this Application under the high spring flow exception. (Department File, 85-2-330, MCA, PD.)

General Conclusions of Law

6. 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, and in this case that the application qualifies as "high spring flow" under the § 85-2-330, MCA, exception. (Findings of Fact 1-5, PD ¶ 9 – 13)

High Spring Flow Findings of Fact

7. Flows at the Dutton Gaging Station on the Teton River have progressively dropped during the period of record (1964 to 2010). Both the average monthly mean and the median of average monthly flow show that flows have dropped on the order of 18% to as much as 49% between the full period of record (1955 to 2010) and the last half of the period of record (1983 to 2010). Median of average monthly flows for the last half of the period of record are 89.7 CFS for March, 79.8 CFS for April, 81.9 CFS for May, and 111.5 CFS for June. (Exhibit O-1, O-2)

8. Department Hydrologist Mike Roberts conducted an analysis of flows in Willow Creek and Deep Creek at the request of the Hearing Examiner (Roberts 3/16/12). Under that analysis the Hydrologist concluded that the most accurate method to estimate the median of the average monthly flows is to use the actual measurement records available instead of using a regional regression equation approach, which was used by the Applicant. For Willow Creek, using the actual measurement data, the analysis shows a median of the average monthly flow of 14 CFS in March, 27 CFS in April, 40 CFS in May and 23 CFS in June. Miscellaneous instantaneous flows in Willow Creek ranged from 0.1 CFS to 99.8 CFS during the proposed period of diversion. On Deep Creek the figures show a median of the average monthly flow of 35 CFS in March, 53 CFS in April, 150 CFS in May and 133 CFS in June with miscellaneous instantaneous flows ranging from 11 CFS to 334 CFS during the proposed period of diversion. (PD, Roberts 3/16/12)

9. LTWU Objectors argue that high spring flows should be measured from the time when the basin closure was put in effect (1993) because flows in the Teton River basin have been declining steadily throughout the period of record. However, in the case *sub judice*, the Applicant was informed by Havre Water Resource Office Acting Manager Matt Miles by letter dated August 30, 2010, that they must show “that the flow found in the source of supply is commonly above the average annual flow during the period of diversion.” In this case, the average annual flow for Willow Creek is 30 CFS, and Deep Creek is 71 CFS. Comparing those figures with the calculated figures in Finding of Fact 8, along with the instantaneous measurements taken, reveals that the average annual flow is commonly exceeded during the period of diversion. (PD, Roberts 3/16/12)

High Spring Flow Conclusions of Law

10. Neither the Legislature nor the Department have defined what constitutes high spring flows. The Department has, however, issued previous permits for high spring flows in the past: In the Matter of the Application for Beneficial Water Use Permit 41QJ-111525 by Robert Durocher, 2001 (Permit issued for diversion from March 1 through June 30 - water may not be diverted when stream gage data fall below trigger level. High spring flow defined as “seasonal, sustained, moderately high flows characteristic of a basin or region affected by runoff from winter snowpack.” This Applicant’s own previously issued permit, Teton Prairie’s existing permit In the Matter of Application for Beneficial Water Use Permit 41O-11211400 and 41O-11211500

by Teton Prairie, LLC, Statement of Opinion and Reasons for Opinion (2002), *pending revocation on other grounds*, which was issued for a smaller scale version of this very same project, only mentions that “this application is for high spring flows that fall within January, February, March and April of each year.”

The data show that flows are commonly in excess of the average annual flow on both Willow Creek and Deep Creek during the proposed period of diversion. This application qualifies as an exception from the closure for the purpose of storage of water during high spring flows. (85-2-330, MCA, Findings of Fact 7 – 9)

Physical Availability Findings of Fact

11. Flow rates are physically available during the proposed period of diversion. In addition, using the figures from the Roberts memo the volume of water passing the proposed point of diversion during the period of diversion is found to be 860 AF in March, 1,607 AF in April, 2,459 AF in May and 1,369 AF in June (1.98 AF per CFS per day * number of days). (Memo of Mike Roberts 3/16/12, Finding of Fact 8, calculation by Hearing Examiner).

12. In all of those months the quantity of water passing the point of diversion is in excess of the 279.2 AF of water requested. Whether Applicant can divert a total of 279.2 AF during the proposed period of diversion will depend largely on the daily flow rates being in excess of those agreed to in the conditions. (Finding of Fact 8, PD)

Physical Availability Conclusions of Law

13. 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.”

14. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate, and that at least in some years no legitimate calls for water will be made by a senior appropriator. *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC 1992).

15. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Findings of Fact 11, 12, PD)

Legal Availability Findings of Fact

16. The Department conducted an independent analysis of the existing water rights in Willow Creek and Deep Creek which showed a sum of all existing rights in Willow Creek of 6.0 CFS in March, 39.3 CFS in April, 46.8 CFS in May and 49.8 CFS in June. For Deep Creek the figure is 23 CFS for all months between March and June. (PD)

17. Using the revised (Roberts 3/16/12) figures for physical availability and conducting the same analysis that was used in the PD the following tables show the legal availability for both Willow Creek and Deep Creek:

Willow Creek	Mar	Apr	May	Jun
Flow Physically Available at Point of Diversion (cfs)	14.0	27.0	40.0	23.0
Other prior users (cfs)	6.00	39.30	46.80	46.80
Legal Availability at point of diversion (cfs)	8.0	-12.30	-6.8	-23.80

Willow Creek	Mar	Apr	May	Jun
Volume Available at Point of Diversion (AF)	860.77	1,606.50	2,459.34	1,368.50
Other prior users (AF)	52.6	134	1,353	2,109
Legal Availability (AF)	808.17	1,472.50	1,106.34	-740.50

Deep Creek	Mar	Apr	May	Jun
Flow Physically Available at the Confluence of Willow and Deep Creek (cfs)	35.0	53.0	150.0	133.0
Other prior users (cfs)	24.00	39.50	145.20	145.20
Legal Availability the Confluence of Willow and Deep Creek (cfs)	11.00	13.50	4.80	-12.20

Deep Creek	Mar	Apr	May	Jun
Volume Available at the Confluence of Willow and Deep Creek (AF)	2,151.92	3,153.50	9,222.51	7,913.51
Other prior users (AF)	1085.90	115.30	2092.50	2654.10
Legal Availability at the Confluence of Willow and Deep Creek (AF)	1,066.02	3,038.20	7,130.01	5,259.41

(Department File, PD, memo of Mike Roberts 3/16/12, calculation by Hearing Examiner)

18. As can be seen from the tables, the median of the mean monthly flow in Willow Creek is exceeded by existing demands in April, May and June but the total volume passing the point of diversion during the proposed period of diversion (March, April, May, June) is far in excess of the 279.2 AF requested. In Deep Creek the median of the mean monthly flow is exceeded by existing demands only in April and again the total available volume is in excess of the requested volume. This is not to say that flows in excess of the median of the average monthly flows never occur or that flows in excess of the existing demand never occur. It must be remembered that the median of the average monthly flow is developed through averaging and that there will be times when the flow is below that median and times when flow is above that median. Despite the acknowledged decline in flows in the Teton River Basin, it is not uncommon when the flow of Willow Creek and Deep Creek exceed the annual average flow and exceed the existing legal demands. The record shows that flows as high as 99.8 CFS have been measured in Willow Creek and as high as 172.8 CFS have been measured in Deep Creek. (Department File, Roberts 3/16/12)

19. The Applicant included information explaining why water may be legally available during these lower flow periods. This information concludes that based on the recent physical flow measurements taken, the amount of water requested may be available at times during each of the low flow months because of the “flashy” nature of both the Willow Creek and the Deep Creek drainages. This is due to variables in snow pack, snow melt events, as well as precipitation frequency and amounts. (PD)

20. The Department's Hydrologist conducted a review of the Department's own flow measurements in addition to the flow data the Applicant provided and concluded that there were times during each of the months applied for that there were days that exceeded the median of the average monthly flows and that flows in each of the drainages analyzed do fluctuate on a day-to-day basis meaning that on some days, the requested 15 CFS would be available after all downstream demands have been met.

Legal Availability Conclusions of Law

21. Section 85-2-311(1)(a)(ii) requires an applicant prove by a preponderance of the evidence that:

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.

22. Legal availability was determined using the analysis required by law and, with the conditions on the permit as further described in this Final Order, the Applicant has proven by a preponderance of the evidence that the requested flow rate of 15 CFS and a volume of up to 279.2 AF 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. § 85-2-311(1)(a)(ii), MCA, § 85-2-312, MCA ("The department may issue a permit subject to terms, conditions, restrictions, and limitations . . ."). (Findings of Fact 16 – 20)

Adverse Effect Findings of Fact

23. Applicant has a plan for the exercise of the permit, if granted, which is found in the

conditions agreed to *infra*. This plan is essentially the substantive provisions of the settlement agreement entered into with Objectors DFWP, Stephens and Miller sans the provision of requiring a court appointed water commissioner. Through measurement and limiting diversions to periods of time when existing water rights are satisfied, there will be no adverse effect on existing water users. Applicant's plan, however, requires some refinement. Modifying the conditions as follows will prevent adverse effect: (PD)

1. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON FOR THE INSTALLATION OF A STAGE MEASURING DEVICE (STAFF GAGE OR OTHER SUITABLE DEVICE) AND THE DEVELOPMENT OF A STAGE-DISCHARGE RELATIONSHIP USED TO DETERMINE THE FLOW OF WILLOW CREEK NEAR IMMEDIATELY BELOW THE POINT OF DIVERSION AND DEEP CREEK BELOW HWY 287. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON TO MAINTAIN SAID STAGE-DISCHARGE RELATIONSHIP. THE STAGE-DISCHARGE RELATIONSHIP SHALL BE SUBMITTED ANNUALLY TO THE HAVRE WATER RESOURCES REGIONAL OFFICE FOR APPROVAL.

2. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING AT THE SMITH DITCH ~~NEAR~~IMMEDIATELY BELOW THE POINT OF DIVERSION, AT THE POINT WHERE WATER IS DIVERTED INTO THE RESERVOIR FROM THE SMITH DITCH, ~~RELEASES FROM THE~~ AT THE RESERVOIR OUTLET AND AT THE SECONDARY POINT OF DIVERSION PUMP SITE. NO WATER MAY BE DIVERTED INTO THE RESERVOIR AFTER 279.2 ACRE-FEET HAVE BEEN DIVERTED INTO THE SMITH DITCH UNDER THIS PERMIT. THE MEASURING DEVICE AT THE SECONDARY POINT OF DIVERSION MUST HAVE A TOTALIZING METER AND DIVERSION FROM THE SECONDARY POINT OF DIVERSION MUST CEASE WHEN 279.2 ACRE-FEET HAVE BEEN DIVERTED. THE RATE OF DIVERSION FROM THE SECONDARY POINT OF DIVERSION MUST NOT EXCEED THE OUTFLOW FROM THE RESERVOIR. ON A FORM PROVIDED BY THE DEPARTMENT, 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 MONTHLY AND A SUMMARY

PROVIDED BY NOVEMBER 30 OF EACH YEAR TO THE HAVRE WATER RESOURCES REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPERLY FUNCTIONING CONDITION SO THAT FLOW RATE AND VOLUME ARE ACCURATELY MEASURED.

3. DIVERSIONS ARE ALLOWED UNDER THIS PERMIT IF THE FLOW OF WILLOW CREEK IS GREATER THAN THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED BELOW **AND** THE FLOW IN DEEP CREEK IS GREATER THAN 23.0 CFS. DIVERSIONS MUST BE CEASED OR REDUCED AT ANY TIME THE FLOW OF WILLOW CREEK BELOW THE POINT OF DIVERSION IS LESS THAN OR EQUAL TO THE AMOUNT OF WATER BEING DIVERTED BY THE APPROPRIATOR PLUS THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED BELOW **OR** IF THE FLOW IN DEEP CREEK FALLS BELOW 23.0 CFS.

WILLOW CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	6.0	39.3	46.8	46.8

DEEP CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	23.0	23.0	23.0	23.0

24. LTWU Objectors assert that portions of the settlement agreement entered into by the Applicant and Objectors DFWP, Stephens, and Miller are not lawful. Specifically, LTWU Objectors assert that there is nothing in the statutes that authorizes a district court to a water commissioner to enforce the provisions in the settlement agreement which state, *inter alia*, “[d]iversion under this permit may only occur under the supervision of a court appointed water commissioner” and [t]he parties further agree to jointly petition the District Court to permanently appoint a water commissioner . . . under Permit No. 41O-30049563.” (PD, LTWU Post-Hearing Brief)

Adverse Effect Conclusions of Law

25. It is well established that agencies only have the power granted to them by the legislature. There is nothing in DNRC's statutory authority to determine the extent of the District Court's jurisdiction or its authority. The conditions placed on this permit are not dependent on the provisions enumerated in the settlement agreement, but are designed to establish that the criteria in § 85-2-311 have been met. Should the District Court decline to appoint a water commissioner as anticipated in the settlement agreement, and the parties thereto cannot resolve the issue between themselves, it is an action that would lie in contract – also beyond the realm of the DNRC's authority.

26. 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).

27. It is the applicant's burden to produce the required evidence. E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶21. E.g., In the Matter of Application for Beneficial Water Use Permit Nos. 56782-76H and 5830-76H by Bobby D. Cutler (DNRC 1987) (constant call is adverse effect); In the Matter of Application for Beneficial Water Use Permit No. 80175-s76H by Tintzmen (DNRC 1993) (constant call is adverse effect); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (DNRC 1992)(applicant must show that at least in some years no legitimate call will be made); In the Matter of Application for Beneficial Water Use Permit No. 76N 30010429 by Thompson River Lumber Company (DNRC 2006).

28. No adverse effect if permit is conditioned to provide flow adequate to meet prior legal demands below point of diversion. The Department can and routinely does, condition a new permit's use on applicant's plan to prevent adverse effect. See Mont. Code Ann. § 85-2-312; et

seq., MCA; see, e.g., *In the Matter of Beneficial Water Use Permit No. 107-411 by Diehl Development* (DNRC Final Order 1974).

29. The Applicant has proven 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. § 85-2-311(1)(b), MCA. (Findings of Fact 23 - 24)

Adequacy of Means of Diversion Findings of Fact

30. The adequacy of the means of diversion was not at issue in the hearing held on May 30, 2012 and I find the PD's analysis to be sufficient. (PD ¶ 44 – 49)

Adequacy of Means of Diversion Conclusions of Law

31. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

32. 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. (Finding of Fact 30)

Beneficial Use Findings of Fact

33. Beneficial Use was not at issue in the hearing held on May 30, 2012 and I find the PD's analysis to be sufficient. (PD ¶ 52 – 55)

Beneficial Use Conclusions of Law

34. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§ 85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

35. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43c 30007297 By Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451

36. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(4), MCA. The Applicant has proven by a preponderance of the evidence that irrigation is a beneficial use and that 279.2 AF of diverted volume and 15 cfs of water requested is the amount needed to sustain the beneficial use. (Finding of Fact 33)

Possessory Interest Findings of Fact

37. Possessory Interest was not an issue in the hearing held on May 30, 2012 and I find the PD's analysis to be sufficient. (PD ¶ 59)

Possessory Interest Conclusions of Law

38. Pursuant to § 85-2-311(1)(e), MCA, an 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, or if the proposed use has 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 under the permit.

39. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory

interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

40. 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. § 85-2-311(1)(e), MCA. (Findings of Fact 37)

FINAL ORDER

Subject to the terms, analysis, and conditions in this Order, the Department determines that this Application for Beneficial Water Use Permit No. 41O-30049563 is **GRANTED**.

The applicant proposes to irrigate crops on 387 acres. The place of use is generally located in Sections 10, 11, 14 and 15, all in T23N, R6W, Teton County. The place of storage is a 279.2 AF off stream reservoir located in the W2SE of Section 10, T23N, R6W, Teton County. The Department determines the Applicant may divert water from Willow Creek, by means of a diversion dam and head gate, from March 1 to June 30 at 15 CFS up to 279.2 AF, from a point in the NENWSE of Section 31, T24N, R6W, Teton County for irrigation use from July 1 to September 30 inclusive of each year subject to the following conditions, limitations and restrictions:

1. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON FOR THE INSTALLATION OF A STAGE MEASURING DEVICE (STAFF GAGE OR OTHER SUITABLE DEVICE) AND THE DEVELOPMENT OF A STAGE-DISCHARGE RELATIONSHIP USED TO DETERMINE THE FLOW OF WILLOW CREEK IMMEDIATELY BELOW THE POINT OF DIVERSION AND DEEP CREEK BELOW HWY 287. THE APPROPRIATOR SHALL OBTAIN THE SERVICES OF A PROFESSIONAL ENGINEER, HYDROLOGIST OR OTHER QUALIFIED PERSON TO MAINTAIN SAID STAGE-DISCHARGE RELATIONSHIP. THE STAGE-DISCHARGE RELATIONSHIP SHALL BE SUBMITTED ANNUALLY TO THE HAVRE WATER RESOURCES

REGIONAL OFFICE FOR APPROVAL.

2. WATER MUST NOT BE DIVERTED UNTIL THE REQUIRED MEASURING DEVICES ARE IN PLACE AND OPERATING AT THE SMITH DITCH IMMEDIATELY BELOW THE POINT OF DIVERSION, AT THE POINT WHERE WATER IS DIVERTED INTO THE RESERVOIR FROM THE SMITH DITCH, AT THE RESERVOIR OUTLET AND AT THE SECONDARY POINT OF DIVERSION PUMP SITE. NO WATER MAY BE DIVERTED INTO THE RESERVOIR AFTER 279.2 ACRE-FEET HAVE BEEN DIVERTED INTO THE SMITH DITCH UNDER THIS PERMIT. THE MEASURING DEVICE AT THE SECONDARY POINT OF DIVERSION MUST HAVE A TOTALIZING METER AND DIVERSION FROM THE SECONDARY POINT OF DIVERSION MUST CEASE WHEN 279.2 ACRE-FEET HAVE BEEN DIVERTED. THE RATE OF DIVERSION FROM THE SECONDARY POINT OF DIVERSION MUST NOT EXCEED THE OUTFLOW FROM THE RESERVOIR. ON A FORM PROVIDED BY THE DEPARTMENT, 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 MONTHLY AND A SUMMARY PROVIDED BY NOVEMBER 30 OF EACH YEAR TO THE HAVRE WATER RESOURCES REGIONAL OFFICE AND UPON REQUEST AT OTHER TIMES DURING THE YEAR. FAILURE TO SUBMIT REPORTS MAY BE CAUSE FOR REVOCATION OF A PERMIT OR CHANGE. THE APPROPRIATOR SHALL MAINTAIN THE MEASURING DEVICES IN PROPERLY FUNCTIONING CONDITION SO THAT FLOW RATE AND VOLUME ARE ACCURATELY MEASURED.

3. DIVERSIONS ARE ALLOWED UNDER THIS PERMIT IF THE FLOW OF WILLOW CREEK IS GREATER THAN THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED BELOW **AND** THE FLOW IN DEEP CREEK IS GREATER THAN 23.0 CFS. DIVERSIONS MUST BE CEASED OR REDUCED AT ANY TIME THE FLOW OF WILLOW CREEK BELOW THE POINT OF DIVERSION IS LESS THAN OR EQUAL TO THE AMOUNT OF WATER BEING DIVERTED BY THE APPROPRIATOR PLUS THE FLOW RATE OF PRIOR APPROPRIATIONS IDENTIFIED BELOW **OR** IF THE FLOW IN DEEP CREEK FALLS BELOW 23.0 CFS.

WILLOW CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	6.0	39.3	46.8	46.8

DEEP CREEK

	MAR	APR	MAY	JUN
OTHER PRIOR USERS DOWNSTREAM (CFS)	23.0	23.0	23.0	23.0

NOTICE

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

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation and payment of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 17th day of August, 2012.

/Original signed by David A. Vogler/

David A. Vogler, Hearing Examiner
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and Conservation
Water Resources Division
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 17th day of August, 2012 by first class United States mail.

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