

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

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 41H 30159301) BY HOME 40 HOMEOWNERS) ASSOCIATION)	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On January 20, 2023, Home 40 Homeowners Association (Applicant) submitted Application for Beneficial Water Use Permit No. 41H 30159301 to the Bozeman Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 2.24 cubic feet per second (CFS) flow rate and 192.43 acre-feet (AF) volume for fisheries 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), dated May 4, 2023. The Applicant responded with information dated June 8, 2023. The Application was determined to be correct and complete as of September 1, 2023.

The Department met with the Applicant (Pat Eller and Faith Doty, Consultants) on January 9, 2023, for a preapplication meeting. An Environmental Assessment for this Application was completed on December 28, 2023.

INFORMATION

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

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Attachments
- Basin Closure Area Addendum, Form 600-BCA
- Maps:

REVISED 04-2021

- Vicinity Map depicting entire proposed project area
- Subject Property Map depicting proposed place of use

Information Received after Application Filed

- Deficiency Letter response from Applicant to DNRC dated June 8, 2023

Information within the Department's Possession/Knowledge

- Change Authorization 41H 30143744 file
- Statements of Claim 41H 15358-00 & 41H 15849-00 files
- DNRC Surface Water Permit Application Technical Report, dated September 1, 2023.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Bozeman Regional Office at 406-586-3136 to request copies of the following documents.
 - Upper Missouri Water Availability Analysis, State of Montana Department of Natural Resources and Conservation, December 1997

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from Hyalite Creek, by means of the Hoy Ditch headgate, from May 1st to November 1st inclusive of each year at 2.24 CFS up to 192.43 AF, from a point in the SENWNW Section 14, T3S, R5E, Gallatin County, for fisheries use from January 1st to December 31st inclusive of each year. The place of use is generally located in the SW Section 2, T3S, R5E, Gallatin County. This proposed appropriation is associated with Statements of Claim (SOCs) 41H 15358-00 and 41H 15849-00 owned by the Home 40 LLC. SOC 41H 15358-00 and 41H 15849-00 were part of Change Authorization 41H 30143744,

issued on November 11, 2021. The common elements between the proposed appropriation and existing appropriation are a shared point of diversion (POD), means of conveyance (Hoy Ditch), and places of storage. The operation of the proposed appropriation, under Permit Application 41H 30159301, is entirely dependent on the diversion schedule and operation of Change Authorization 41H 30143744 for SOC's 41H 15358-00 and 41H 15849-00 as a condition of issuance of a beneficial water use permit by the Department as a result of this Application.

2. The proposed fishery use is completely non-consumptive. The proposed fishery ponds are located completely within places of storage appropriated by 41H 15358-00 and 41H 15849-00 through Change Authorization 41H 30143744. Therefore, the proposed beneficial use is non-consumptive as identified by the Upper Missouri River Basin Closure pursuant to §85-2-342(2), MCA and further defined by §85-2-102(19), MCA. Any consumption (e.g., evaporation) that occurs is accounted for under the Applicant's existing water rights and change authorization. As a result, the proposed fisheries use will result in no additional water consumption, nor will it be an additional legal demand. The proposed fisheries use will be subject to the following conditions:

IMPORTANT INFORMATION

THE FLOW RATE, VOLUME, AND TIMING OF WATER USED FOR FISHERIES PURSUANT TO THIS PERMIT IS SECONDARY AND ENTIRELY DEPENDENT ON THE HOME 40 LLC DIVERSION AND STORAGE OF WATER FOR IRRIGATION IN ACCORDANCE WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00. THE VOLUME AND FLOW RATE FOR THIS PERMIT ARE SHALL NOT EXCEED THE AUTHORIZED FLOW RATE AND VOLUME ASSOCIATED WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00.

IMPORTANT INFORMATION

BASIN CLOSURE INFORMATION: THIS PERMIT IS SUBJECT TO THE CONDITION THAT THE TIMING AND QUANTITY OF WATER AVAILABLE WILL BE AT THE SOLE DISCRETION OF THE HOME 40 LLC IN ACCORDANCE

WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00. FISHERIES USE MAY ONLY OCCUR AS A RESULT OF THE APPROPRIATION OF WATER ASSOCIATED WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00 FOR THIS USE TO BE CONSIDERED NON-CONSUMPTIVE PURSUANT TO §85-2-343 (2)(B), MCA.

IMPORTANT INFORMATION

FISH WILDLIFE AND PARKS FISHPOND LICENSE REQUIREMENT: THE APPROPRIATOR SHALL ENSURE THAT THE POND IS PLANTED WITH LEGALLY OBTAINED FISH AND THAT A PRIVATE FISHPOND LICENSE IS OBTAINED AND SUBMITTED AT PROJECT COMPETITION, AFTER WHICH THIS CONDITION WILL BE REMOVED.

BASIN CLOSURE

FINDINGS OF FACT

3. This Application is for fisheries use and is non-consumptive. This Application is located within the Upper Missouri River Basin Legislative Closure, §§ 85-2-342 and 85-2-343, MCA.

CONCLUSIONS OF LAW

4. DNRC cannot grant an application for a permit to appropriate water within the Upper Missouri River Basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the Upper Missouri River Basin. § 85-2-343(1), MCA. The upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA).

5. This Application is for fisheries use, which is a non-consumptive use. The Application falls under the exceptions for the basin closure, 85-2-343, MCA. 85-2-343 (2)(b), MCA, allows for a permit application for a non-consumptive use. Pursuant to §85-2-363, MCA, a combined application for new appropriations of ground water in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application

for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. §85-2-363, MCA.

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

GENERAL CONCLUSIONS OF LAW

6. The Montana Constitution and Montana Water Use Act recognize the protection of senior appropriations while at the same time providing for the development and use of the waters of the state by the public. Mont. Const. Art. IX, §3; Mont. Code Ann. § 85-2-102; Montana Power Co. v. Carey, 211 Mont. 91, 96, 685 P.2d 336, 339 (1984) (the MWUA provides for the regulated development of water use in Montana through allowing for the new appropriation of water and protecting senior water rights from encroachment by junior appropriators).

7. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA.

8. Under this Preliminary Determination, the relevant permit criteria in Mont. Code Ann § 85-2-311 are:

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

9. 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.

10. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnes (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an Applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an Applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, *Wesmont Developers v. DNRC*, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

11. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other

restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

12. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

13. The Department utilized United States Geologic Survey stream gauge at Hyalite Creek¹ at Hyalite Road South near Bozeman, MT, gauge number 06050000, to conduct a physical availability analysis. The gauge has a period of record from 1895-present. Seven years of data are available 1895-1904, and the site has been monitored continuously from 1934 to present. This gauge is located on the proposed project's source above all points of diversion on Hyalite Creek. This stream gauge data includes storage water released from Hyalite Dam, which is carried through Hyalite Creek. For simplicity of calculations and due to lack of detailed storage water information, storage water was not removed from the gauge data. Table 1 below shows the analysis of physical water availability at the proposed point of diversion based on the median of the mean monthly flow.

¹ Hyalite Creek is also known as Middle Creek. Both names were used to query water rights in the DNRC Water Right Query System.

Table 1. Hyalite Creek Physical Water Availability

USGS 06050000 Hyalite C at Hyalite R S nr Bozeman, MT Stream Gauge Period of record: 8/1/1895 - 5/17/2023			Water Rights Use Between Gauge and POD		Physical Availability at POD	
Month	Median monthly mean flow rate (CFS)	VOLUME (AF) ¹	FLOW RATE (CFS)	VOLUME (AF)	FLOW RATE (CFS)	VOLUME (AF)
MAY	124.65	7651.02	167.56	6099.63	-42.91	1551.39
JUNE	211.00	12533.40	180.13	6422.77	30.87	6110.63
JULY	125.00	7672.50	140.10	3985.69	-15.10	3686.81
AUG	79.45	4876.64	140.10	3577.86	-60.65	1298.78
SEPT	46.20	2744.28	130.03	3085.61	-83.83	-341.33
OCT	35.60	2185.13	114.33	1707.34	-78.73	477.79
NOV	27.05	1606.77	13.44	46.08	13.61	1560.69
TOTAL		39269.74			24924.98	14344.76

¹Volume calculated by converting the median monthly flow rate to monthly volume

CFS = cubic feet per second AF = acre-feet

14. Water is physically available in the amount requested because the proposed appropriation is completely dependent on the flow rate and volume diverted under SOC's 41H 15358-00 and 41H 15849-00 through Change Authorization 41H 30143744 owned by Home 40 LLC. The storage facilities needed for the proposed fisheries use are listed as storage elements for 192.43 AF for irrigation use of Change Authorization 41H 30143744. Water is diverted at up to 2.24 CFS into the storage ponds from May 1st to November 1st each year to provide irrigation water.

15. The Department finds that in this case, the amount of water is physically available for the proposed fisheries use.

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. 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. *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).

18. 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. (FOF 13-15)

Legal Availability

FINDINGS OF FACT

19. Legal demands on the source for the area of potential impact were indexed in the Department's Water Rights Query System. The area of potential impact was determined to be from the POD at Hoy Ditch on Hyalite Creek to the intersection of the Farmer's Canal on Hyalite Creek. The flow rate and volume found to be physically available at the POD and the downstream legal demands were compared pursuant to ARM 36.12.1705 in the Department's September 1, 2023, Technical Report.

20. The Department finds that the proposed use of water is completely non-consumptive, and this new use of water only uses water already appropriated under Statements of Claim 41H 15358-00 and 41H 15849-00 through Change Authorization 41H 30143744 owned by Home 40 LLC. The Department finds that the proposed permit does not add a new legal demand on the source.

21. The proposed fisheries use will not alter the amount or timing of water diverted at the proposed POD, and since the new use is non-consumptive, the proposed project would leave the same amount of water legally available to prior water users after permit issuance. The

Department finds water can be considered legally available for the proposed non-consumptive fisheries use.

CONCLUSIONS OF LAW

22. Pursuant to §85-2-31, MCA, an Applicant must prove by clear and convincing 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.

23. It is the Applicant's burden to present evidence to prove water can be reasonably considered legally available. *E.g., 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.)

24. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. *E.g., In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *see also* Robert and Marlene Takle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102

P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillion Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the ground water source proposed for appropriation, and since diversion by Applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the Applicant bears the burden of proof as to legal availability, the Applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to ground water. §85-2-311(a)(ii), MCA. Absent such proof, the Applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009).

25. Where a proposed ground water appropriation depletes surface water, Applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on and availability of water in the surface water source. *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-

602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30026244 By Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion). Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under §85-2-360(5), MCA.

26. The Applicant has proven 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. § 85-2-311(1)(a)(ii), MCA. (FOF 19-21)

Adverse Effect

FINDINGS OF FACT

27. The Applicant’s plan to prevent adverse effect to water rights of a prior appropriation under an existing water right, certificate, permit, or state water reservation is to only exercise proposed Permit 41H 30159301 simultaneously and secondary to SOC’s 41H 15358-00 and 41H 15849-00 under Change Authorization 41H 30143744 owned by Home 40 LLC. The proposed fisheries use will only divert water when these existing rights are being diverted. Storage water necessary for fisheries use will only be available under water diverted by existing rights.

28. Under the proposed use, flows diverted from Hyalite Creek will be conveyed by Hoy Ditch for approximately 8,500 feet to the southeast property boundary. Water is diverted from Hoy Ditch at a secondary POD and conveyed to two storage ponds by a 12-inch pipe and lined ditch. The project will not alter historic operations and will be entirely dependent on the operations of Change Authorization 41H 30143744.

29. The storage ponds required for the proposed use are already created and were filled using a share of Hyalite Creek purchased by Home 40 LLC. The volume needed for annual evaporative losses and one capacity fill is authorized under Change Authorization 41H 30143744. Diversions to the storage ponds will only occur May 1st to November 1st. Additional water will not need to be diverted under the proposed project, as the authorized ponds were designed to include fish habitat and continue to support fish in the event of a call (Application SW.7.C). Therefore, the fisheries use will not in any way increase the burden on the source.

30. Hyalite Creek was part of a recent enforcement project with a court-appointed Water Commissioner. The Hoy Ditch headgate and conveyance system is also operated by the Hoy Ditch Company. This will ensure the proposed project does not divert additional water than what is authorized under Change Authorization 41H 30143744, upon which this permit will be entirely dependent.

31. The Department finds that water can only be used for fisheries use when SOC's 41H 15358-00 and 41H 15849-00, upon which this permit will be entirely dependent, are in priority and can be operated in a manner consistent with priority administration on the source.

32. The Department further finds that the proposed appropriation will not cause an adverse effect because the proposed use is non-consumptive and is only utilizing water already appropriated under SOC's 41H 15358-00 and 41H 15849-00 through Change Authorization 41H 30143744.

CONCLUSIONS OF LAW

33. 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); Bostwick Properties, Inc., ¶ 21.

34. An Applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an Applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

35. As described above, the Applicant's proposal is not an additional legal demand on the source. The Applicant demonstrated that to the extent necessitated, additional water will not need to be diverted to support the proposed use in low water years. 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. (FOF 27-32)

Adequate Diversion

FINDINGS OF FACT

36. Water is diverted from Hyalite Creek and conveyed by Hoy Ditch for approximately 8,500 feet to the southeast corner of the Applicant's property boundary. The headgate that diverts water from Hyalite Creek to Hoy Ditch is a 36-inch galvanized corrugated steel culvert that is set in a concrete weir structure and operated by a wheel type gate. The water travels north through Hoy Ditch for approximately 4,000 feet where it crosses under South 19th Avenue in two, 30-inch by 48-inch squashed reinforced concrete pipe culverts. These culverts were found during the HY-8 analysis in Change Authorization 41H 30143744 to not limit capacity. Once water crosses South 19th Ave, water is split in two directions by a concrete weir structure, which is operated by two, wheel gates. The water conveyed by the east channel goes under Fowler Lane through a 30-inch by 43-inch squashed galvanized corrugated steel culvert, which has a capacity of approximately

51 CFS, calculated during the HY-8 analysis. The water then travels for 4,200 feet northeast until it reaches the Home 40 LLC property. Water is diverted from Hoy Ditch by a 12-inch slide gate with trash rack and then travels from the southeast corner of the property by a 12-inch pipe and lined ditch into the first storage pond in SESESW Section 2, T3S, R5E. Water continues through the pond through the pipeline and ditch system to the second pond in NESESW and N2SW Section 2, T3S, R5E. Once water passes through the second pond, it continues northeast through the pipeline and ditch system to the northeast corner of the property where the unconsumed water returns to Hoy Ditch.

37. The Applicant has stated there will be infrastructure in place to prevent fish passage. Fish screens will be installed at the inflow and outflow of the ponds to prevent fish passage to and from the ponds.

38. The Department finds that the design of the diversion works and means of operation are adequate for the proposed fisheries use.

CONCLUSIONS OF LAW

39. 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.

40. 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.

41. The Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the proposed appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 36-38).

Beneficial Use

FINDINGS OF FACT

42. The Applicant is requesting a flow rate of 2.24 CFS up to a volume of 192.43 AF for the purpose of fisheries. The ponds required for the proposed project have been constructed and authorized by Change Authorization 41H 30143744, which changed SOCs 41H 15358-00 and 41H 15849-00 to create two places of storage for irrigation use. The ponds were built to were built to 14- and 8-foot maximum depths and are designed to include fish habitat, as well as support existing irrigation rights (41H 15358-00 and 41H 15849-00). The 14-foot maximum depth pond provides enough depth over approximately 40% of the pond bottom to prevent winter kill and regulate temperatures for fish habitat (Application SW.9.). The Applicant proposes to work with local fish and wildlife agencies to stock the fisheries with native species and install additional bubblers or aquatic vegetation as needed to ensure healthy fish habitat. The Applicant stated that fish screens will be placed in upstream and downstream structures, as well as in the irrigation pumping station, to prevent unplanned fish mortality.

43. The Applicant will be required to obtain a fishpond license as a condition of granting this proposed permit.

44. Change Authorization 41H 30143744 authorizes 192.43 AF to be diverted into the two ponds, equivalent to one fill, annual evaporation, and irrigation use requirements. The proposed new use would utilize water currently diverted and appropriated for pond fills and annual evaporation.

45. The Department finds the proposed non-consumptive fisheries use to be a beneficial use of water.

CONCLUSIONS OF LAW

46. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

47. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 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. 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; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

48. The Applicant proposes to use water for fisheries which is a recognized beneficial use. § 85-2-102(5), MCA. The Applicant has proven by a preponderance of the evidence fisheries is a beneficial use and that 192.43 AF of diverted volume and 2.24 CFS of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 42-44)

Possessory Interest

FINDINGS OF FACT

49. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

50. 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.

51. 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.

52. 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. (FOF 48)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 41H 30159301 should be GRANTED.

The Department determines the Applicant may divert water from Hyalite Creek, by means of Hoy Ditch, from May 1st to November 1st at 2.24 CFS up to 192.43 AF, from a point in the

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SENWNW Section 14, T3S, R5E, Gallatin County, for fisheries use from January 1st to December 31st. The place of use is located in the SW Section 2, T3S, R5E, Gallatin County.

The application will be subject to the following conditions:

IMPORTANT INFORMATION

THE FLOW RATE, VOLUME, AND TIMING OF WATER USED FOR FISHERIES PURSUANT TO THIS PERMIT IS SECONDARY AND ENTIRELY DEPENDENT ON THE HOME 40 LLC DIVERSION AND STORAGE OF WATER FOR IRRIGATION IN ACCORDANCE WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00. THE VOLUME AND FLOW RATE FOR THIS PERMIT ARE SHALL NOT EXCEED THE AUTHORIZED FLOW RATE AND VOLUME ASSOCIATED WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00.

IMPORTANT INFORMATION

BASIN CLOSURE INFORMATION: THIS PERMIT IS SUBJECT TO THE CONDITION THAT THE TIMING AND QUANTITY OF WATER AVAILABLE WILL BE AT THE SOLE DISCRETION OF THE HOME 40 LLC IN ACCORDANCE WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00. FISHERIES USE MAY ONLY OCCUR AS A RESULT OF THE APPROPRIATION OF WATER ASSOCIATED WITH CHANGE AUTHORIZATION 41H 30143744 FOR CLAIMS 41H 15358-00 AND 41H 15849-00 FOR THIS USE TO BE CONSIDERED NON-CONSUMPTIVE PURSUANT TO §85-2-343 (2)(B), MCA.

IMPORTANT INFORMATION

FISH WILDLIFE AND PARKS FISHPOND LICENSE REQUIREMENT: THE APPROPRIATOR SHALL ENSURE THAT THE POND IS PLANTED WITH LEGALLY OBTAINED FISH AND THAT A PRIVATE FISHPOND LICENSE IS OBTAINED AND SUBMITTED AT PROJECT COMPETITION, AFTER WHICH THIS CONDITION WILL BE REMOVED.

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 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, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 29th day of December 2023.

/Original signed by Kerri Strasheim/
Kerri Strasheim, Manager
Bozeman Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 29th day of December 2023, by first class United States mail.

HOME 40 HOMEOWNERS ASSOCIATION
1668 BUCKRAKE AVE
BOZEMAN, MT 59718

AND BY EMAIL:

MORRISON AND MAIERLE INC
% PAT ELLER
2880 TECHNOLOGY BLVD W
PO BOX 1113
BOZEMAN, MT 59771

Regional Office, (406) 586-3136