

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

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APPLICATION TO CHANGE A WATER RIGHT NO. 76F 30070218 BY BLACKFOOT VALLEY RANCH FOUNDATION	}	<b>PRELIMINARY DETERMINATION TO GRANT CHANGE</b>
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On November 13, 2014, Blackfoot Valley Ranch Foundation (Applicant or BVRF) submitted Application to Change a Water Right No. 76F 30070218 to change Statement of Claim Nos. 76F 33718, 76F 33719, 76F 33720, 76F 33721, 76F 33722, and 76F 33723 to the Helena Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Helena Regional Office transferred the change application to the Lewistown Regional Office for processing. 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 February 25, 2015. Applicant responded on May 26, 2015. The Application was determined to be correct and complete on October 19, 2015. The Department's Technical Report was sent to Applicant on December 10, 2015; a meeting with Applicant's consultant to discuss elements in the technical report was held on January 7, 2016. On February 9, 2016 the Applicant waived the statutory timelines for issuance of the Preliminary Determination. An Environmental Assessment for this Application was completed on February 2, 2016. Immediately upon issuance of the Preliminary Determination (PD) on April 6, 2016, the Applicant requested a new PD be issued based on a proposed amendment to the flow rate and period of use. Because the Department had not public noticed the application yet, it was able to accept Applicant's proposed amendment and re-issue the document. On April 11, 2016 a new Preliminary Determination was issued.

**INFORMATION**

The Department considered the following information submitted by the Applicant.

Application as filed:

- Form 606, addendums and attachments

- Copy of Water Right Lease Agreement between BVRF and Trout Unlimited

Information Received after Application Filed:

- Deficiency response on May 26, 2015
- E-mail correspondence from various dates (see file for general correspondence)
- Proposed diverted flow and volume operation discussion, via email (December 8, 2015)
- Verbal communication with Applicant on February 8, 2016 re: clarification of amount of water protected for Instream Fishery purposes
- Email from Applicant on February 9, 2016 describing its plan for stream measurement
- Email from Applicant's consultant on April 8, 2016 amending protected flow rate and period of use for the instream fishery purpose

Information within the Department's Possession/Knowledge

- Powell County Water Resources Survey, including field notes and aerial photos
- Publically available aerial photos and topographic maps
- Water right records, including files for the Statement of Claims proposed to be changed and previous Department-issued Change Authorization file
- USDA Web Soil Survey
- Pre-Application meeting
- Statute and administrative rules
- Irrigation Change Application Technical Report
- Department Policy Memorandum Return Flows, April 1, 2016
- Website for Montana Trout Unlimited

The Department has fully reviewed and considered the Environmental Assessment and evidence and argument submitted with this Application and **preliminarily determines** pursuant to the Montana Water Use Act (Title 85, chapter 2, parts 3 and 4, MCA) as follows.

**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

1. Applicant proposes to change six Statements of Claim.

**Table 1: CLAIMED WATER RIGHTS PROPOSED FOR CHANGE**

WR Number	Purpose	Source	Flow Rate	Period of Use	Point of Diversion (POD)	Place of Use	Priority Date	Acres
76F 33718	Irrigation	Warren Creek	2.5 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	Sept 15, 1882	370
76F 33719	Irrigation	Warren Creek	1.88 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	Apr 22, 1885	370
76F 33720	Irrigation	Warren Creek	0.50 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	Aug 15, 1884	370
76F 33721	Irrigation	*Warren Creek	2.5 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	May 31, 1887	370
76F 33722	Irrigation	*Warren Creek	1.25 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	Apr 22, 1885	370
76F 33723	Irrigation	Warren Creek	5.0 Cubic Feet per Second (CFS)	Apr 15 – Oct 15	Seven diversion points located in Sections 31, 32 and 33, T15N, R12W	Sections 31, 32 and 33, T15N, R12W	June 15, 1889	370

• Two water sources are claimed for 76F 33721 and 76F 33722, Warren Creek and Spring, Unnamed Tributary of Warren Creek. The source is further clarified in an information remark on the Statement of Claims that indicates the springs are located in and along Warren Creek.

**CHANGE PROPOSAL**

**FINDINGS OF FACT**

2. Applicant proposes to change a portion of six supplemental/overlapping irrigation water rights to the purpose of Instream Fishery for a temporary period of 5 years. The proposed reach of stream for Instream Fishery purposes is the lower 2.3 miles of Warren Creek located between

one of the claimed, historic seven diversion points in the NENESE Section 31, T15N, R12W, and the confluence of Warren Creek and the Blackfoot River in the SESENW Section 1, T14N, R13W. The two most downstream of the seven claimed points of diversion will be retired and no further appropriations will occur from those two diversion points. The proposed amount of water to be changed is the proportional amount associated with 137 acres out of the historic 370 irrigated acres (137 acres will be retired from irrigated production). Irrigation will continue to occur on 233 acres (see map below).

3. There are nine claimed water rights associated with the place of use in this change proceeding, including three late-filed claims that the Applicant is not proposing to change (late claims are those uses of water that were not timely filed in Montana's general stream adjudication). Of the three late claims not being changed, 76F 211875, 76F 211876 and 76F 214993, the Applicant did not provide any evidence of historic water use associated to Statement of Claim No. 76F 211875. The Applicant did assert partial season irrigation historically occurred with Statement of Claim Nos. 76F 211876 and 76F 214993, both with a claimed flow rate of 5.0 CFS. However, Applicant also asserted it will not utilize the three late claims during the change period. Applicant proposes the Department condition the change authorization to reflect that the three late claims shall not be used to irrigate the acreage being retired for Instream Fishery purposes.

4. As this is a temporary change under §85-2-408, MCA, the time period is five years upon approval with the option to renew when the period comes to an end.

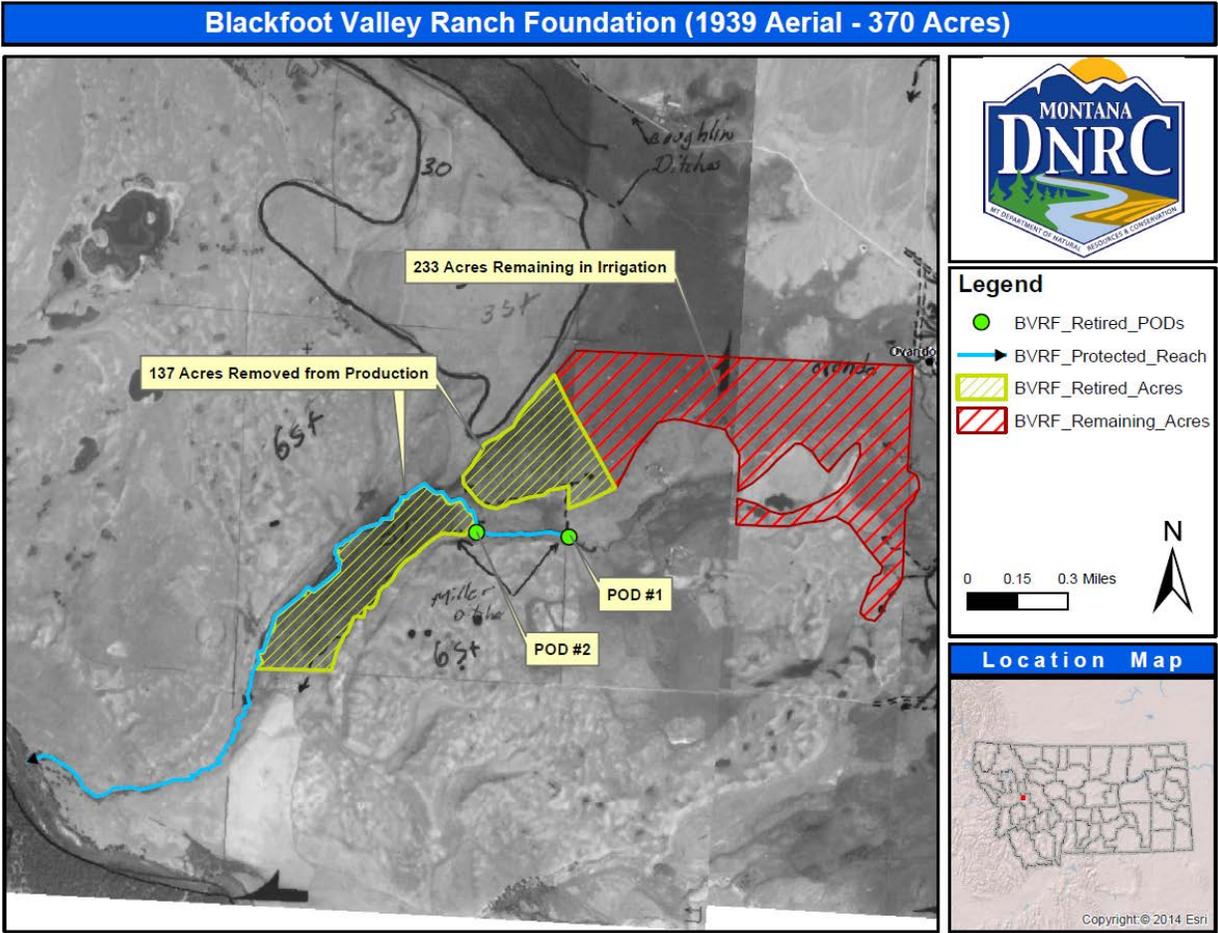


Figure 1: Map of Proposed Partial Change from Irrigation to Instream Fishery

**§85-2-402, MCA, CRITERIA**

**GENERAL CONCLUSIONS OF LAW**

5. An applicant in a change proceeding must affirmatively prove all of the criteria in §85-2-402, MCA. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in 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, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

6. The burden of proof in a change proceeding by a preponderance of evidence is “more probably than not.” Hohenlohe ¶¶ 33, 35.

7. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; ); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Hohenlohe ¶ 43; Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins,

Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Act in §85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

8. Montana’s change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

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<sup>1</sup> Although Montana has not codified the law in the detail, Wyoming has, and the two states’ requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as “diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use.” “Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant.”

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any

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When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Colorado follows a similar analysis under its requirement that a “change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.” §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

9. Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. E.g., In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, (DNRC Final Order 1991); In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, (DNRC Final Order (1992); In the Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H, Proposal for Decision and Memorandum at pgs. 8-22, adopted by Final Order (January 9,1985); see McDonald, supra (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, (2011) Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

10. The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re

[Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

[Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 43, 45](#); see also [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 9](#).

11. The extent of the historic beneficial use must be determined in a change case. *E.g.*, [McDonald](#); [Hohenlohe ¶ 43](#); [Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 \(Colo. 2002\)](#); [Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 \(Colo., 1999\)](#); [City of Bozeman \(DNRC\), supra](#) (“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors.”) As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” §85-2-234, MCA. [Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) Pg. 11](#) (proof of historic use is required even where a water right is decreed).

12. The Department is within its authority to put a volume on a change authorization even where there is no volume on the Statement of Claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. Hohenlohe ¶¶ 30-31.

13. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision adopted by Final Order (2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003) . An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (*citing Featherman v. Hennessy*, (1911) 43 Mont. 310, 316-17).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

14. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

15. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. Admin. R. Mont. (ARM) 36.12.221(4).

### **Historic Use:**

#### **FINDINGS OF FACT**

##### **Water Source, Flow Rate and Period of Appropriation**

16. The source of water for the claims to be changed is Warren Creek. Water was claimed for adjudication purposes to be diverted via seven differing points of diversion. However, the evidence indicates that only six points of diversion have historically been located on the source of supply (see file for Departments Technical Report).

17. The combined claimed flow rate for the six water rights to be changed is 13.63 CFS. The Applicant provided capacity calculations, estimations and data for the six diversions as evidence that the ditches are capable of appropriating the combined claimed flow rate. Capacities for four of the six diversions were estimated using ditch measurements and Manning's Equation. Two

diversions have been retired from use and farmed over, and are no longer available to measure. The capacities for these two diversions were estimated under a comparison scenario with one of the four remaining ditches, based on similarities of irrigated acreage. The estimations resulted in a combined capacity for the six ditches of 29.8 CFS. The Department finds the estimates to be credible. Department Technical Report.

18. The application materials suggest there is a substantial groundwater contribution (springs) to Warren Creek adjacent to and within the Applicant's property, and therefore available for appropriation, that is not present upstream of Applicant's property. This groundwater contribution results in greater water availability for irrigation purposes than water users enjoy upstream. Applicant provided stream measurements from 2008-2009 showing the maximum flow recorded at the mouth of Warren Creek was 26.0 CFS in May, 2009. The Department finds the source is capable of supplying the combined claimed flow rate of the water rights to be changed.

19. The claimed period of use for the rights to be changed is April 15 to October 15. The Applicant provided information from Kurt Brekke, ranch manager since 2007, showing that since 2007 water has been diverted from Warren Creek at various times from early May through September. The place of use is located in Climatic Area V, which has an irrigation guideline of April 25 to October 5. The Department finds the claimed April 15 to October 15 period as plausible for historic appropriations, particularly given the evidence of substantial springflow arising on Applicant's property. Application File.

20. The Department finds a historic combined flow rate diverted from Warren Creek for the claims to be changed of 13.63 CFS and the period of diversion and period of use for each of the water rights to be April 15 to October 15. DNRC Technical Report; File.

#### Place of Use

21. Several pieces of evidence were used to verify the historic place of use including: the 1959 Powell County Water Resources Survey and associated field notes, aerial photos of multiple periods, USGS Quadrangle (topographic map), Statement of Claim Files and communications with the Applicant.

22. The evidence shows the maximum number of acres historically irrigated for all six supplemental rights to be changed is 370 acres located in Sections 31, 32 and 33 T15N R12W, Powell County. USGS topographic maps indicate flood irrigation is feasible throughout the claimed places of use. The Department's Technical Report provides details in how the Department determined irrigated acreage by resource.

23. The Department finds that 370.0 acres have historically been irrigated from Warren Creek by the six water rights to be changed in this matter. Department Technical Report.

#### Consumptive Volume and Diverted Volume

24. An Historic Water Use Addendum was not submitted with the application, therefore the Department defined the historic consumptive and diverted volume using the methodology outlined in its administrative rule. ARM 36.12.1902.

25. For the six water rights to be changed, the consumptive volume for irrigation of 370 acres is 313.9 AF and the consumptive volume associated to the 137 acres being retired from production is 116.2 AF (37% of 313.9 AF). Department Technical Report; File.

26. The estimated historic diverted volume for 370 acres of irrigation for the combination of water rights to be changed is 1091.6 AF. As described in the Departments' Technical Report, the portion of the water rights proposed to be changed to instream flow in this proceeding are 37% of the total historic use. Therefore, the diverted volume associated to the instream flow portion of the rights being changed is 404.2 AF, Department Technical Report.

27. The Department finds an historic combined consumed volume for the water rights to be changed of 313.9 AF, and a diverted volume of 1091.6 AF. Department Technical Report.

#### Historic Use Summary

28. The Department's findings of historic use for the claims being changed are summarized in the table below.

W.R. NOS.	FLOW RATE (CFS)	DIVERTED VOLUME (AF)	CONSUMED VOLUME (AF)	PURPOSE	PERIOD OF USE	PLACE OF USE	PRIORITY DATE	SOURCE
76F 33718	2.5	466.0	134.0	Irrigation	Apr 15 – Oct 15	370.0 acres	Sept 15, 1882	Warren Creek
76F 33719	1.88	233.6	67.2	Irrigation	Apr 15 – Oct 15	370.0 acres	Apr 22, 1885	Warren Creek
76F 33720	0.5	93.2	26.8	Irrigation	Apr 15 – Oct 15	370.0 acres	Aug 15, 1884	Warren Creek
76F 33721	2.5	77.5	22.3	Irrigation	Apr 15 – Oct 15	370.0 acres	May 31, 1887	Warren Creek
76F 33722	1.25	128.3	36.9	Irrigation	Apr 15 – Oct 15	370.0 acres	Apr 22, 1885	Warren Creek
76F 33723	5.0	93.2	26.8	Irrigation	Apr 15 – Oct 15	370.0 acres	June 15, 1889	Warren Creek
Totals	13.63	1091.6	313.9		Apr 15 – Oct 15	370.0 acres		

### CONCLUSIONS OF LAW

29. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department’s approval.

§85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120. An applicant can change only that to which it has a perfected right. E.g., McDonald, supra; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions, *citing Featherman v. Hennessy*, (1911) 43 Mont. 310, and *Quigley v. McIntosh*, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right No. 139988-40A, 139989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

30. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right, or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13 (upholding ARM 36.12.1902, reflecting basic water law principles).

31. The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining surface and ground water conditions for their livelihood. Id. at Pg. 14.

32. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

33. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902 (16)

34. If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902 (16), the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of

water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization “duty of water”).

35. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. *E.g.*, In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC., *supra*. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

36. “Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL No. 8 (1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision ( 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, *supra*.

37. The Department has the authority to consider waste in determining a volume for change in a water right.

*The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.](#)*

Hohenlohe ¶ 71.

38. Applicants may proceed under ARM. 36.12.1902, the Department's historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has not elected to proceed under ARM 36.12.1902. FOF No.24.

39. Evidence of combined historic use for the Statement of Claim Nos. being changed has been proven by a preponderance of the evidence as set forth in these findings, and as summarized in the table in Finding of Fact No. 28.

### **Adverse Effect**

#### **FINDINGS OF FACT**

40. The Applicant proposes to change the point of diversion, place of use and purpose of use of a portion of six Statements of Claim from irrigation to Instream Fishery purposes, to increase stream flows and protect or enhance the fishery resource. The historic flow rate associated with the retired irrigated acreage is up to 5.05 CFS and a diverted volume of up to 404.2 AF, with a consumed volume of 116.2 AF. Applicant proposes to change a diverted volume of 404.2 acre feet, averaged over the period of use of July 1 through August 31 (62 days). The proposed change will not increase the amount of water historically diverted or consumed from Warren Creek. File; Department Technical Report.

41. Applicant has chosen a different plan of operation for the flow rate it protects for Instream Fishery purposes than historically occurred for irrigation purposes. The plan includes the protection of a flow rate of 3.29 CFS, based on the average flow required to achieve a diverted volume of 404.2 AF over a period of use of July 1 through August 31 ( $404.2 \text{ AF}/62 \text{ days}/1.983 = 3.29 \text{ CFS}$ ). Applicant's deficiency response; Consultant's e-mail correspondence dated April 8, 2016.

42. There are no other downstream water users on Warren Creek within the protected reach. Water right records.

43. The timing and amount of return flows will change as a result of the portional conversion from irrigation to instream flow. Given the close proximity and topography of the place of use to Warren Creek, return flows from the Applicant's historically irrigated acreage generally accrued

quickly to Warren Creek upstream of the Blackfoot River confluence. Applicant owns the only water rights on Warren Creek above the Blackfoot River confluence where return flows accrued.

44. As a normal course of protocol the Department analyzed the disposition of return flows under the proposed change and generated a Return Flow Report. File. However, on April 1, 2016 the Department issued a policy memorandum explaining how it will analyze return flows for all water right change applications from that date forward. Since the policy was issued prior to issuance of the Preliminary Determination in this matter, the Department will follow the April 1 guidance document. Finding of Fact No. 45 summarizes the Department's analysis under the April 1, 2016 policy.

45. According to Department policy, under the changed conditions return flows will only be reviewed under a limited adverse affect analysis absent a valid objection. For purposes of the Preliminary Determination, return flows will be analyzed to determine if they enter back into the source prior to or at the location of the next appropriator, or the historically-diverted water that is left instream is available during the period of diversion either below the point of diversion or where return flows returned to the source. Department Policy Memorandum on Return Flows, April 1, 2016. In this instance, both criteria will be met under the proposed change. That is, for the portion of irrigation that remains, return flows will enter back into the source at the same location as historically (upstream of the next appropriator), and for the portion converting to instream flow, the non-consumed water will be available for other appropriators during the period of diversion below the point where return flows historically accrued. This will help ensure downstream water users have similar or greater opportunity to appropriate water than they historically did. The policy directs no further detailed analysis will be undertaken by the Department prior to objections, provided there will be no enlargement of the amounts of water historically diverted or consumed. That has been determined to be the case here - there will be no enlargement of the water right. Finding of Fact No. 40.

46. On February 16, 2016 the Department received a letter from Ron Pierce, DFWP fisheries biologist with lead responsibility for management of the Blackfoot River Basin fisheries. Mr. Pierce provided his professional opinion that DFWP would be able to reasonably exercise its instream flow water right (Murphy Water Right) on the Blackfoot River in the winter, even in the event of a reduction of return flows to the river. Mr. Pierce also provided his opinion that the

proposed change would not adversely effect the fisheries values served by the DFWP's Murphy Water Right on the Blackfoot River.

47. If any other water right holder believes they will be adversely affected by a change in the timing and amount of return flows, they may file an objection to the proposed project.

48. Based on its analysis and guidance provided in policy, the Department preliminarily finds that the changes to return flows resulting from the proposal will not cause an adverse affect because more water will be left instream due to the cessation of irrigation diversions, and there are no other water users to be affected in the protected reach of Warren Creek.

49. Associated with the acreage proposed to be retired are three water rights (late claims) that are not included in this change application. Those water rights are: 76F 211875, 76F 211876 and 76F 214993. Applicant proposes that the Department apply a condition to any authorization in this matter that prohibits the late claims from being used on the acreage to be retired.

Specifically, the Applicant proposes a condition with the following language:

*The retired acreage cannot be irrigated using water allotted from claims no. 76F 211875, 76F 211876, and 76F 214993 once the retirement is enacted as outlined in this change authorization.*

The Department agrees that a condition is necessary to prevent expansion of water use and prevent adverse effects. The language of the condition is appropriate and is imposed in this decision in the Conditions section.

50. MCA 85-2-408 requires the Applicant to provide a detailed streamflow measuring plan. Applicant states it will measure streamflows at the point where the affected reach begins with an open channel flow meter, once during the months of July and August. The reason for beginning measurement in July is because it's after the spring/ high runoff period, and it is unlikely flows will be less than the protected flow rate of 3.29 CFS. Applicant will also install a staff gauge just below the lower of the two retired diversion points, rate the section and correlate it to the staff gauge, and monitor streamflows. February 9, 2016 email from Stan Bradshaw to Scott Irvin. If flows fall to a point approaching or below the protected flow rate of 3.29 CFS, Applicant will base its administration of water off of the staff gauge readings. At that time monitoring would occur on a more consistent basis. Email and verbal communication with Applicant on February 9, 2016. The Department finds the Applicant's plan for measurement of water to be reasonable

and necessary for showing the benefit to the fishery, the amount it appropriates, and the administration of water. The Department imposes a measurement condition as part of this decision. See Conditions section.

51. Under the conditions imposed in this determination, the Department finds that the proposed change would not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued.

#### CONCLUSIONS OF LAW

52. The Applicant bears the affirmative burden of proving that proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation. §85-2-402(2)(a), MCA. Royston, *supra*. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

53. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185 Mont. 409, 605 P.2d 1060, following Lokowich v. Helena (1913), 46 Mont. 575, 129 P. 1063; Thompson v. Harvey (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley (1972), 159 Mont. 72, 495 P.2d 186 (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, where the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the

gulch - such change in use was unlawful because it deprived the plaintiff of his subsequent right).

54. The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. McDonald; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.13; *City of Bozeman* (DNRC), supra; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 (1908)....

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow...

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165,

1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55-57 (Colo.,1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” Citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

... we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

55. Consumptive use of water may not increase when an existing water right is changed. E.g., Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pg.9; *In the Matter of Application to Change a Water Right No. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted Final Order (2003). Applicant

must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change No. 41H 30000806 by Montana Golf Enterprises, LLC.*, (DNRC Proposal for Decision 2003); *In the Matter of Application to Change a Water Right No. 43B 30002710 by USA (Dept. Of Agriculture – Forest Service)* (DNRC Final Order 2005); *In The Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

56. It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch & Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133; Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of a water right and an appropriator is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. see also, Doney, p. 21.

The Montana Supreme Court also recently recognized the fundamental nature of return flows to Montana’s water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell’s flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT

377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43, *citing* Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, supra.

57. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., Hohenlohe, supra; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra. The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

58. Under the conditions imposed in this determination, the Applicant has proven the proposed change in appropriation right will not adversely affect the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA.(FOFs No. 45, 48 and 51)

## **Beneficial Use**

### **FINDINGS OF FACT**

59. The Applicant proposes to change a portion of six water rights to Instream Fishery in Warren Creek. The protected flow rate for Instream Fishery purposes throughout the period July 1 through August 31 is 3.29 CFS and a diverted volume of 404.2 AF. The diverted volume will be protected at an historic point of diversion on Warren Creek located in the NENESE, Sec. 31 T15N R12W. The consumed volume of 116.2 AF will be protected below the point of diversion for approximately 2.3 miles, to the confluence of Warren Creek and the Blackfoot River.

60. According to Applicant's website, Montana Trout Unlimited (MTU) was founded in 1964 and is the only statewide grassroots organization dedicated solely to conserving and

restoring coldwater fisheries. The website states that MTU conserves, protects and restores Montana's coldwater fisheries and their watersheds. MTU has filed numerous other change applications with the Department for Instream Fishery purposes. MTU Website; Water right records.

61. The Montana Department of Fish, Wildlife and Parks administers a publically accessible database with various information on fish distribution and population surveys for Warren Creek. The data show that for the reach of interest in Warren Creek, Brook Trout, Brown Trout, the Longnose Sucker, the Redside Shiner and the Sculpin are common. Many other species are rare, but have been observed.

62. As support for the proposed change to benefit the fishery, the Applicant provided a copy of a report authored by the Montana Department of Fish, Wildlife and Parks and others (Report). The Report documented 2008 and 2009 investigations by the authors into aquatic resource conditions on Warren Creek fisheries, and also provided a basis to make informed decisions regarding future water use and fisheries conservation efforts on the property. The Report identified 1 of 5 recommendations for improving fisheries on the Applicant's place of use as: "*Maintain channel maintenance (bankfull) flows in order to remove accumulated sediment and allow for summer minimum instream flows of at least 3.0 CFS.*" File; Aquatic Resource Surveys on Lower Warren Creek on Blackfoot Valley Ranch, Ovando, MT Summer 2008 and 2009. Ron Shields, Water Legend Hydrology, Helena, MT 59602 and Craig Podner and Ron Pierce, Montana Fish, Wildlife and Parks, Missoula, MT 59804, December 2009.

63. Instream Fishery is a beneficial use of water and the amounts of water changed in this matter will benefit the fishery in Warren Creek.

64. The following table reflects the elements of the water rights after the change is authorized, in relation to both Instream Fishery and Irrigation purposes.

Table 2

Water Right No.	Flow Rate (CFS)	Irrigation Volume Div. Vol (DV) Cons. Vol (CV) (AF)	Instream Fishery Volume <sup>1</sup> (AF)	Period of Use	Place of Use <sup>1</sup>
76F 33718	2.50 CFS	DV: 293.4 CV: 84.4	DV: 172.6 CV: 49.6	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
76F 33719	1.88 CFS	DV: 147.1 CV: 42.3	DV: 86.5 CV: 24.9	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
76F 33720	0.50 CFS	DV: 58.7 CV: 16.9	DV: 34.5 CV: 9.9	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
76F 33721	2.50 CFS	DV: 48.8 CV: 14.0	DV: 28.7 CV: 8.3	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
76F 33722	1.25 CFS	DV: 80.8 CV: 23.2	DV: 47.5 CV: 13.7	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
76F 33723	5.00 CFS	DV: 58.7 CV: 16.9	DV: 34.5 CV: 9.9	4/15 – 10/15	NENESE, Sec. 31 T15N R12W to SESENW, Sec. 1 T14N R13W
<b>Totals</b>	13.63 CFS	DV: 687.4 CV: 197.7	DV: 404.2 CV: 116.2		

**Notes:**

<sup>1</sup>The full historically diverted volume (DV) is protectable to the historical POD in Sec. 31; only the historically consumed volume (CV) is protectable from the POD to the confluence of Warren Creek and the Blackfoot River. The protected reach is approximately 2.3 miles long.

CONCLUSIONS OF LAW

65. Under the change statute, §85-2-402(2)(c), 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. §§85-2-301 and 311(1)(d), MCA.

66. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. 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 (2003), *affirmed on other grounds*,

2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit No. 76H-84577 by Thomas and Janine Stellick*, DNRC Final Order (1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application No. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit No. 76LJ-115-83100 by Benjamin and Laura Weidling and No. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause No. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In The Matter of Application For Beneficial Water Use Permit 76LJ 30008762 by Vinnie J & Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); Statement of Opinion, *In the Matter of Beneficial Water Use Permit No. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In the Matter of Application for Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly*, (DNRC Final Order 2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause No. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); see also §85-2-312(1) (a), MCA.

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. §85-2-312, MCA; see also, McDonald; Toohy.

The Department can also consider waste in a change proceeding. Hohenlohe ¶ 71. Waste is defined to include the “application of water to anything but a beneficial use.” §85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. *E.g., Stellick, supra.*

67. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. *E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

68. Applicants propose to change a portion of the water rights to Instream Fishery purposes, and the balance of the water rights will remain for Irrigation purposes. Fish and Wildlife is a recognized beneficial use. §85-2-102(4), MCA, and the Department finds that the Instream Fishery purpose is also a beneficial use. Applicant has proven by a preponderance of the evidence instream flow for Instream Fishery purposes is a beneficial use and that a protected flow rate of 3.29 CFS, 404.2 AF of diverted volume, 116.2 AF of consumed volume are the amounts needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOFs No. 63 and 64)

### **Adequate Diversion**

69. The proposed temporary change of the six water rights is to protect, maintain, or enhance stream flows to benefit the fishery resource pursuant to §85-2-402(2)(b)(ii), MCA. Per statute, the Applicant is exempt from proving the adequate diversion criteria.

### **CONCLUSIONS OF LAW**

70. This application is excepted from the criteria of §85-2-402 (2)(b), MCA: “except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.” (emphasis added).

71. This application is for Instream Fishery purposes to maintain or enhance stream flows to benefit the fishery resource and is exempt from the requirement to prove the proposed means of diversion, construction, and operation of the appropriation works are adequate. §85-2-402(2)(b)(ii), MCA. (FOF 69).

### **Possessory Interest**

72. This application is for a temporary change in appropriation right for instream flow to protect, maintain, or enhance stream flows and, under §85-2-402(2)(d)(ii), MCA. Per statute, the Applicant is exempt from proving the possessory interest criteria.

### **CONCLUSIONS OF LAW**

73. This application is excepted from the criteria of §85-2-402(2)(d), MCA: “except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to §85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to §85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to §85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.” (emphasis added).

74. This application is for Instream Fishery purposes to maintain or enhance stream flows for the fishery resource and is exempt from the requirement to prove the possessory interest criteria. §85-2-402(2)(d)(ii), MCA. (FOF 72)

### **Instream Flow Change Requirements**

#### **FINDINGS OF FACT**

75. Applicant proposes to change six irrigation water rights to Instream Fishery for the benefit of the fishery resource in Warren Creek from an existing/historic point of diversion to its confluence with the Blackfoot River, using the temporary change process specific to §85-2-407

and 408, MCA. As proposed by the Applicant, this temporary change would be for a period of 5 years with an option to renew.

Protected Reach and Flow Rate

76. The stream section to be protected is the lower 2.3 miles of Warren Creek from a point in the NENESE Sec. 31, T15N, R12W to the confluence of Warren Creek and the Blackfoot River in the SESENW Sec. 1, T14N, R13W, Powell County. The flow rate to be protected is 3.29 CFS for the period of July 1 through August 31.

Protected Volume

77. The Applicant is entitled to protect the historic diverted volume associated with 137 acres that are being retired from irrigated production. That volume is 404.2 AF annually. Applicant has chosen to average the volume out over the period of July 1 through August 31, a duration of 62 days. The breakdown of volume per month is shown in the following table.

Month	Flow Rate	Days Diverted	Volume Protected
( - )	(CFS)	(#)	(AF)
Jul	3.29	31	202.1
Aug	3.29	31	202.1
SUM =			404.2

Plan for Operation and Measurement

78. Applicant’s plan for operation and measurement of the instream flows proposed for protection is as follows: Applicant will measure streamflows at the point where the affected reach begins with an open channel flow meter, once during the months of July and August. The reason for beginning measurement in July is because up until July the spring runoff or high runoff period is occurring, and it is unlikely flows will be less than the protected flow rate of 3.29 CFS. Applicant will also install a staff gauge, rate the section and correlate the rating to the staff gauge, and more closely monitor streamflows when necessary. If flows fall to a point approaching or below the protected flow rate of 3.29 CFS, Applicant will base its administration of water off of the staff gauge readings. At that time monitoring would occur on a more consistent basis. Email and verbal communication with Applicant on February 9, 2016.

## CONCLUSIONS OF LAW

79. A temporary change in appropriation right may be approved for a period not to exceed 10 years. A temporary change in appropriation right may be approved for consecutive or intermittent use. (§ 85-2-407(2), MCA).

80. If the quantity of water that is subject to a temporary change in appropriation right is made available from the development of a new water conservation or storage project, a temporary change in appropriation right may be approved for a period not to exceed 30 years unless a renewal is obtained. (§ 85-2-407(9), MCA).

81. The Department shall accept and process an application for a temporary change in appropriation rights to maintain or enhance instream flow to benefit the fishery resource under §§ 85-2-402, -407, and -408, MCA. An application for a temporary change authorization for instream flow under § 85-2-408, MCA, shall:

- (a) include specific information on the length and location of the stream reach in which the stream flow is to be maintained or enhanced; and
- (b) provide a detailed stream flow measuring plan that describes the point where and the manner in which the stream flow must be measured. (§ 85-2-408(1) (a), (b), MCA).

82. A temporary change authorization under § 85-2-408, MCA, is allowable only if the owner of the water right voluntarily agrees to:

- (a) change the purpose of a consumptive use water right to instream flow for the benefit of the fishery resource; or
- (b) lease a consumptive use water right to another person for instream flow to benefit the fishery resource. (§ 85-2-408(2) (a), (i), (ii), MCA).

83. In addition to the requirements of §§ 85-2-402, and -407, MCA, the Applicant must prove by a preponderance of the evidence that:

- (a) The temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the rights of other persons; and
- (b) The amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource. (§ 85-2-408(3) (a), (b), MCA)

84. Section 85-2-408(7), MCA provides:

The maximum quantity of water that may be changed to maintain and enhance stream flows to benefit the fishery resource is the amount historically diverted. However, only the amount historically consumed, or a smaller amount if specified by the department in the lease authorization, may be used to maintain or enhance stream flows to benefit the fishery resource below the existing point of diversion.

Pursuant to the District Court decision in *Hohenlohe v. DNRC*, Cause No. BDV-2008-750, Montana First Judicial District (June 10, 2009), *aff'd*, *Hohenlohe v. DNRC*, 2010 MT 203, an applicant in a change in appropriation right proceeding for instream flow can protect the full historic diverted flow rate and volume in certain circumstances. The full historic diverted amount (flow and volume) can be protected to the extent it does not return to the watercourse within the protected reach and it returns to those appropriators who rely on the return flow in accordance with the adverse effect criterion §85-2-402(2)(a), MCA. *Hohenlohe*, ¶¶42, 67 - 70. The determination under 85-2-408(7) as to the amount protected is within the Department's discretion. *Id.* at ¶¶37, 39. The Department has the discretion under appropriate circumstances to limit or reduce that portion suitable for instream flow from the amount historically diverted to the amount historically consumed, or a smaller amount, (§85-2-408(7), MCA) and to approve the change under such conditions as the Department considers necessary (§85-2-402(8), MCA). *Id.* at ¶¶67-69.

85. The Applicant has provided a measurement plan and specific information on the stream reach to be protected. (FOF 76 and 78)

86. The Applicant has proven by a preponderance of the evidence that the temporary change authorization will not adversely affect the rights of other persons. (FOFs 48 and 51)

87. The Applicant has proven by a preponderance of evidence that 3.29 CFS from July 1 through August 31, up to 404.2 AF in diverted volume beginning at the upstream point of the protected reach, and up to 116.2 AF in consumed volume protected in the identified stream reach are the amounts needed to maintain or enhance instream flows to benefit the fishery resource. (FOFs 63-64)

### **Salvage Water**

This Application does not involve salvage water.

## **CONDITIONS**

1. The retired acreage cannot be irrigated using water under Statement of Claim Nos. 76F 211875, 76F 211876, and 76F 214993 once the retirement is enacted as outlined in this change authorization.
2. The appropriator shall measure Warren Creek at the upgradient point of the protected reach located in the NENESE Section 31, T15N, R12W. Measuring at this location shall occur at least once per month during the months of July and August. Additionally, the appropriator shall install a Department-approved measuring device in Warren Creek at the aforementioned point in order to more closely monitor flows and administer its water rights when flows in Warren Creek drop to a level at or below 3.29 CFS. The measuring device shall be monitored, and flows recorded, at least weekly when flows are at or below 3.29 CFS. The appropriator shall keep a written record of all flows measured at the point, including the period of time.

## **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 76F 30070218 should be granted subject to the following.

The appropriator may change a portion of Statement of Claim Nos. 76F 33718, 76F 33719, 76F 33720, 76F 33721, 76F 33722, and 76F 33723 from Irrigation to Instream Fishery purposes. A flow rate of 3.29 CFS, up to 404.2 AF in volume, may be protected at a point beginning in the NENESE, Sec. 31 T15N R12W. Below that point, a volume of 116.2 AF may be protected to the confluence of Warren Creek with the Blackfoot River in the SESENW, Sec. 1 T14N R13W (a reach of approximately 2.3 miles). The appropriator shall no longer irrigate 137 of the 370 acres historically irrigated under the existing water rights. The appropriator may protect water for instream flow during the period of July 1 through August 31. This authorization is subject to the conditions outlined in the Conditions section above.

**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. E.g., §§85-2-310, -312, MCA.

DATED this 11<sup>th</sup> day of April, 2016.

/Original signed by Scott Irvin/  
Scott Irvin, Regional Manager  
Lewistown Regional Office  
Department of Natural Resources  
and Conservation