To: **Water Policy Interim Committee**

From: **Millie Heffner, Water Rights Bureau Chief, DNRC**

Date: **August 29, 2018**

Re: **DNRC Comments on WPIC Reports**

Following are comments from the Department of Natural Resources and Conservation (DNRC) on two reports from the Water Policy Interim Committee (WPIC): *A Right to Stream Conditions as They Existed* and *The Exemption at 45*. Thank you for the opportunity to comment.

A Right to Stream Conditions as They Existed

Page 2 "Conclusions" – Generally, the three conclusions oversimplify and somewhat mischaracterize the testimony and deliberations that occurred among WPIC members and stakeholders during the interim.

Additionally, the discussions and recommendations of the Basin Advisory Councils (BACs) for the Montana State Water Plan does not appear to have been considered in this interim's discussion or this report. During the 18-month State Water Plan planning process, DNRC worked with four regional BACs representing the Clark Fork/Kootenai, Upper Missouri, Lower Missouri and the Yellowstone river basins. The 80 members of the four BACs represented the most diverse group of water users and interests brought together by the State of Montana. (Montana State Water Plan Executive Summary, 2015). Of the many issues discussed by the BACs, water rights and the processes involved were among them. For example, the Lower Missouri River Basin Advisory Council Recommendation Development Report (2014) states, in part, "The principle of beneficial use is a cornerstone of the Prior Appropriation Doctrine. Beneficial use is the basis and measure of a water right. The accuracy of water right processes is paramount to the protection, administration and enforcement of valid water rights…Analysis of historic water use in DNRC's change application process is important for the protection of existing water rights…DNRC must maintain the integrity of its change process and continue to analyze water right claims for actual, historic beneficial use…"

The third conclusion suggests the change process is responsible for incentivizing unauthorized changes which creates difficulties for water commissioners to distribute water. However, the distribution of water in Montana is complicated due – in part – to all types of unauthorized/illegal water use, not only unauthorized changes to a water right. Further, the lack of required measurement, monitoring, and enforcement significantly contributes to water distribution problems. Unauthorized changes, in and of themselves, should not complicate the duties of a water commissioner any more than any other illegal water use would. A water commissioner is required to distribute water only to a diversion that is in compliance with the law and operating pursuant to a valid water right.

Page 3 – The definition of "water right" referenced at § 85-2-422, MCA, is not simply a "right to use water," as indicated in the report. It is "the right to use water *as documented by a claim to an existing right, a permit, a certificate of water right, a state water reservation, or a compact*." The additional language is significant because a true definition of a "water right" must include an understanding of each of those types of rights.

Page 4 first full paragraph – The use of the word "claimed" is not technically accurate in this paragraph. Water rights existing before the 1973 Water Use Act was passed are defined as "existing rights" and a statement of claim was required to be filed for those existing rights. See § 85-2-221, MCA. A "claim" is a term of art in Montana and a water right put to use after July 1, 1973 cannot be claimed. A person seeking to appropriate water pursuant to a new water right after July 1, 1973 must file an application for a new beneficial water use permit with the DNRC.

The phrase "adjudicated by the act" in last sentence in that paragraph should read "adjudicated by the Water Court."

Finally, rather than characterizing the change process as a "major technical and administrative hurdle," the DNRC suggests that the report – throughout – should refrain from characterizing the change process as a "hurdle" or "onerous" but rather as a process set in place by the legislature to protect existing water users from adverse effect due to subsequent changes in water use by other appropriators.

Page 4 last paragraph – A change goes through the DNRC's *change* process, not *permitting* process.

Page 6 line1 – The law does not require a "promise" not to adversely affect other water users. The law requires that the applicant prove by a preponderance of the evidence that a proposed change will not adversely affect existing water users. The Getches excerpt appears to state that the "possibility of harm . . . must be proved." The required proof is actually the opposite in Montana. The legislature has placed the burden squarely on the applicant to prove that a proposed change will not cause adverse effect/harm – by a preponderance of the evidence. There is no requirement that the harm – or the possibility of it – must be proved.

Page 7 fourth paragraph – The description of the historic information needed to prove historic use for the application differs depending on the type of water right being changed. ARM 36.12.1902(1). Also, there are more aerial photo resources than the three years listed. It may be more correct to simply say, "…Water Resources Surveys…or aerial photos."

Page 7 last two paragraphs – In response to the "haircut" allegation, it may be more objective to include the DNRC's position as well: The DNRC may authorize for change an amount that is less than what is on the face of the water right in order to prevent adverse effect from the change. The change application process is designed to quantify the volume of water that was actually put to beneficial use through operation of the water right to be changed to ensure that the appropriation will not be enlarged as a result of the change. If that amount beneficially used is less than what is on the face of the water right, then the DNRC will authorize only that amount. The report could also include a paragraph on the difference between a "paper" water right and a "wet" water right.

Page 8 first paragraph – Rather than "*believing* it is necessary to protect other rights," the DNRC is required by the Montana Water Use Act to ensure that a change in appropriation right will not adversely affect existing water users.

Page 8 second paragraph – Court cases "dictate" or "inform" the DNRC's approach; they do not "bolster."

Table 1 – Transfer of appropriation right – the correct statutory refence is § 85-2-403, not -402. It would be better to simply quote the statute. As written it does not indicate that a transfer of a water right automatically passes with the conveyance of land, unless specifically excluded by deed. It is also important to highlight that any change in use of the transferred water right must be authorized by the DNRC.

Page 17 first sentence – It may be helpful to cite to Tim Hall's memo cited in footnotes 12, 13, and 19 of the report.

Page 17 second to last paragraph – The change application referred to here has not been in the DNRC's possession for 3 years. DNRC believes the change application being referred to is actually 2 applications (40A 30072562 and 40A 30117289). Application 40A 30072562 was submitted to DNRC February 2015. The applicant was requesting a change of more acres than was reflected on the Statement of Claim. DNRC was not able to process the change for the additional acres. Therefore, the applicant waived the decision timelines and submitted an amendment to the Water Court for the claimed place of use in July 2016. DNRC was notified in February 2017 the Water Court process was complete, and it proceeded with processing the application. The application was subsequently withdrawn June 2017. The applicant resubmitted the application (40A 30117289) April 2018. It was issued August 2018.

The Exemption at 45

Introduction – The second paragraph quotes outdated language from the Water Use Act regarding the permit exemption for groundwater appropriations of less than 100 gallons per minute (gpm). The introduction should clarify that the Water Use Act has been amended to lower the exemption.

Page 5 second paragraph - This paragraph should be revised because it is not an accurate statement of the law. See 85-2-306(1)(b) and (c).

Page 5 third paragraph under "Rules for the exemption" – It would be helpful to cite/link to the DNRC's Declaratory Ruling (Aug. 17, 2010), which clearly lays out the history of the exemption. Also, see footnote 15 in the Declaratory Ruling which provides the DNRC's rationale for the 1993 amendment to the definition of "combined appropriation":

> In response to a comment from the Legislative Rules Committee, the Department responded "Rule 36.12.101 was amended to more concisely define what is considered a combined appropriation. The past definition was too ambiguous and therefore difficult to administer 85-2-306(1) fairly and consistently throughout the state. It required the department to make assumptions when determining whether developments were considered combined appropriations. The amended rule clearly defines what is a combined appropriation without any supposition." Montana Administrative Register, June 24, 1993.

Page 16 first paragraph – The Montana Supreme Court reinstated the 1987 administrative rule defining combined appropriation. As the DNRC communicated to WPIC, it initiated the rulemaking process to reinstate the 1987 rule (not the 1989 rule as stated in this paragraph) based on the Court's order. It is important that the Secretary of State's record of current administrative rules reflects the rule that is in effect and not the invalidated 1993 rule.