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MEMORANDUM

Date: September 3, 2015
To: Water Policy Interim Committee
From: Abigail J. St. Lawrence
Subject: Suggested statutory revisions: application timelines, enforceability and administration of decrees

During discussion of the draft work plan for the Water Policy Interim Committee ("WPIC") on September 2, 2015, I suggested three areas of statutory revision that WPIC may want to include in their work plan:

1. Revisions to the timeline for applications for new beneficial water use permits and change applications;
2. Revisions/new statutes regarding enforceability and timing of final decrees; and
3. Administration of decrees at the district court level.

I bring the suggestion regarding application timelines on behalf of the Montana Association of REALTORS®. All other suggestions are mine as a private practice water rights attorney. Sen. Fielder asked that I present these suggestions in writing to WPIC. I do so now.

1. Timelines of application processing

Under Mont. Code Ann. § 85-2-302(5) after an application for a new beneficial water use permit or a change application is submitted to the Montana Department of Natural Resources and Conservation ("DNRC"), DNRC has 180 days to provide notice of any deficiencies. The application then has 30-90 days, depending on requests for extensions, to submit information to correct any deficiencies. *See*, Mont. Code Ann. § 85-2-302(6). Once the application is determined to be correct and complete, DNRC has 120 days to issue a written preliminary determination. *See*, Mont. Code Ann. § 85-2-307(2).

WATER POLICY INTERIM
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Exhibit ¹⁹~~20~~

In this timeline, as DNRC Water Resources Division Administration Tim Davis stated to WPIC on September 2nd when questioned, there is an indefinite gap between when the applicant submits information to address deficiencies and when DNRC determines the application is correct and complete. This indefinite gap can cause serious delays in the application process, which, in turn, can cause problems for an applicant trying to develop residentially or even an agricultural development trying to modify irrigation practices in time for the next season. For example, in one situation in the Beaverhead, DNRC well took over two years to make a determination as to whether the application for irrigation modification was correct and complete, and then unceremoniously terminated the application. In another example, also in Southwestern Montana on irrigation changes, DNRC has flatly refused to act on the application at all. MAR asks that WPIC examine this gap and consider legislation to address this indefinite timeline.

2. Enforceability of final decrees

As the Chief Water Judge stated to WPIC on September 2nd in response to questioning by Rep. Williams, the enforcement of final decrees is a significant topic, with the immediacy of it growing as the Water Court moves forward with its work. Mr. Davis concurred with this assessment. Consequently, the enforceability of decrees is a topic that bears looking at.

As an example of the issues created around the uncertainty of when final decrees are enforceable, in the Teton Basin, as master's reports are being issued, actions are being initiated in the district court to enforce the master's report, but without a full final decree being issued. The question before the district court is if the master's reports should be considered partial final decrees or if the enforceability of master's decisions should be postponed until the full final decree for the entire basin is issued, with a full picture of water use in the basin. The uncertainty of when a decision on particular water rights is considered final is not a question fully answered by Mont. Code Ann. § 85-2-234, but should be addressed for the sake of both water users and the district courts, which will be responsible for enforcing final decrees.

3. Administration of decrees by the district court

Finally, in those situations where there are existing decrees—either old decrees determined by the district court or final decrees issued by the Water Court—there needs to be consistency in how those decrees are administered. In particular, standardized instructions for both the district court and the water commissioners would be helpful. As Chief Water Judge McElyea also stated to WPIC on September 2nd, there are structural issues with statutes providing instructions to the district courts, which administrative statutes are “antiquated.”

In an example of how the district courts and water commissioners could benefit from some standardized statutory guidance, there is a situation in the Eureka area where the district court judge is dealing with a petition for a water commissioner for what may be the first time, and the water commissioner himself has never served as such before. In this case, standardized statutory instructions to both the district court and the water commissioner would be helpful. Of course, each water body is unique, and there would need to be room within the instructions for tailoring to each individual situation, but a basic body of instructions from which to start would provide predictability and “ease of use” for water users, water commissioners, and district court judges.