



Jason Mohr  
Montana Legislative Environmental Policy Office  
Capitol Building, room 171  
P.O. Box 201704  
Helena, MT 59620-1704

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Mr. Mohr,

On behalf of the Clark Fork Coalition (CFC), please accept the following comments on WPIC's draft legislation LCw004, which seeks to "clarify that legal availability analysis does not determine adverse effects as criteria in a water right change application." As currently proposed, this revision would add the following language to MCA § 85-2-402(2)(a):

(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. For purposes of this section, the department may not use the legal availability analysis in subsection 85-2-311(1)(a)(ii) to determine adverse effects.

As other stakeholders have commented, it is unclear whether this addition is necessary because "legal availability" is not one of the enumerated statutory criteria analyzed by the department in a change application. For its purposes, the CFC has not experienced a change application process that included a "legal availability" determination. Instead, a determination of "legal availability" is part of the process of obtaining a *new* water appropriation as enumerated in MCA § 85-2-311. Therefore, the addition of the proposed language would not meaningfully alter the burden on the change applicant or the discretion of the department.

CFC's interest in this issue stems its position as a water right owner and an applicant in a number of change applications for instream flow. As WPIC is aware, DNRC's approach to the "adverse effect" analysis in a change proceeding serves to maintain the status quo on a given water source in order to protect all water users. Whether intentional or not, the DNRC's hyper-technical, expensive, burdensome and unpredictable approach discourages water users from making changes or encourages water users to make unauthorized changes. The department's overall approach of maintaining the status quo may work well for existing consumptive water users, but the status quo condition is unacceptable from an instream flow perspective. In other words, if a water source is over-appropriated and routinely goes completely dry, some change in the "status quo" (i.e. the quantity and timing of the hydrologic condition) is necessary in order for an instream flow applicant to achieve the desired beneficial use. This is what the instream flow statutes attempted to accomplish, but obtaining a

meaningful instream flow change from the Department has proven to be extremely difficult in practice.

It is CFC's understanding that WPIC's intent with this piece of legislation is to narrow the department's currently unlimited discretion in determining adverse effects to other water users in a change proceeding. The larger goal would be to increase predictability for water users who avail themselves of the change process and to provide clarity as to what constitutes an adverse effect to another water user.

If CFC's understanding of the desired result is correct, this result would be better accomplished by defining the term "adverse effect". The memorandum provided to WPIC by Pat Byorth of Trout Unlimited (dated May 10, 2018) offered several suggestions for revisions that would accomplish this goal, and CFC supports those suggested revisions. In particular, CFC supports defining an "adverse effect" in MCA § 85-2-101 as follows:

(2) Adverse Effect means an unreasonable interference with the legal appropriation of another appropriator through the change in use of an existing water right or a new appropriation.

With respect to MCA § 85-2-402, this provision could be amended as follows:

(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. For the purposes of this section, an adverse effect constitutes an unreasonable interference with the legal appropriation of another appropriator resulting from the proposed change of use.

Sincerely,

/s/ Andrew Gorder

Legal Director  
Clark Fork Coalition  
P.O. Box 7593  
Missoula, MT 59807  
406-542-0539 ext. 202  
[andrew@clarkfork.org](mailto:andrew@clarkfork.org)