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MEMORANDUM

DATE: August 30, 2018

TO: Chairman Sen Pat Connell, Vice Chair Rep Zach Brown, Members of the 2017-2018 Water Policy Interim Committee and Jason Mohr, Legislative Lead Staff member

FROM: Julie Merritt & Kyle Mace, Water Resources Specialists WGM Group, Inc.

CC: Brent Campbell, CEO WGM Group, Inc.

RE: Comments for WPIC on Committee Reports and Proposed Legislation

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WGM Group, Inc. would like to thank the Water Policy Interim Committee (WPIC) for its hard work over this interim. We appreciate the opportunity to provide public comment on the reports the Committee has prepared and the bill drafts that the Committee is considering. Following are our comments on each of the reports and bill drafts.

A Right to Stream Conditions as They Existed: A Study of the Process for Changing a Water Right

The Committee made great use of its time investigating the topic of water right changes in general during this interim. As Representative Brown suggested during comments at the July meeting, there are some long-term considerations that could be worthy of further discussion. Based on our experiences, one of those items is the topic of mitigation changes. One possible future line of inquiry could be to examine mitigation changes, especially regarding mitigation for new public water supplies for residential developments and municipalities.

As you all know, water rights mitigation is a critical aspect of providing water for our growing communities. These types of applications often prove to be some of the most complex. We believe it would be worthwhile, perhaps during a future interim, to look closely at the mitigation process and determine if there could be improvements to the process.

Some specific comments we have on the report are as follows:

- On page 2 of the report under “Conclusions”
    - One conclusion we had hoped the committee had reached is the relationship between population growth in closed basins and the need for water right changes to provide mitigation water for that new

development. The need for mitigation changes is going to steadily increase over the next years and decades. These types of applications are complex and we believe there are steps that could be considered to reduce the uncertainty in the change process for applicants.

- On page 5 in Figure 1
    - Box 4 states "DNRC may meet with applicant to discuss deficiencies". Under the current statute, this is not an accurate description of this step in the process. Currently, this step allows for the DNRC to issue one deficiency letter and the applicant may have up to 90 days to respond.
- In the discussion of harm to a water right, we would like to call attention to an idea that Mr. Byorth of Trout Unlimited spoke to during his testimony at the May WPIC meeting in Bozeman. Specifically, the concept that it is not the applicant's responsibility to prove no adverse effect will ever occur. Rather, it is the applicant's responsibility to provide a preponderance of evidence that adverse effect is unlikely to occur. I
    - In particular, we are concerned about the use of the quote from David Getches *Water Law in a Nutshell* at the top of page 6 that appears to be inconsistent with our understanding of the change application requirements.
    - In addition, the last sentence at the top of page 7 reads, "It is up to the department to ultimately determine if a water right as adversely affected by a change." We believe it would be more accurately stated as, "It is up to the department to ultimately rule if the applicant has provided adequate evidence that there will be no adverse effect." While we recognize this may seem nit-picky, we believe this distinction is important to the overall understanding of the responsibilities of the parties, applicants and the department, in a change proceeding.
    - Similarly, at the top of page 6 there is discussion about how adverse effect was treated under pre-1973 law and a reference to how the "…burden of proof was switched." under the Water Use Act. A "switch" in this instance could be interpreted as the inverse, i.e. if under pre-73 law an effected appropriator had to prove that adverse effect was in fact occurring due to a change then under the Water Use Act an applicant is required to prove that in fact no adverse effect will occur. We believe it would be more accurate to say that the burden shifted. The applicant is required to provide a preponderance of evidence not to absolutely rule out every possibility of adverse effect.
- Our final comment on the report is regarding the statement from the department on page 17 about average change application processing times. It is our belief that this "average" includes a number of applications that do not require a much lower level of effort to process. Specifically, we contend the average reported by the department includes applications for additions of stock tanks only. The department acknowledges that these types of applications are far less time-consuming to process by the fact that the filing fee for such applications is only $200 compared to the $900 filing fee charged for other types of changes. In addition, it appears that applications involving Conservation District water reservations may also have been included in the

calculation of the average processing time. A closer look at these application files reveals that they have often spent many months in processing at the Conservation District office before they are stamped as received at a DNRC Water Resources Division office. From the point of view of an applicant, it hardly matters which office has been working on an application. These discrepancies should be noted by the Committee and the public.

The Exemption at 45: A study of Groundwater Wells Exempt from Permitting
We have very few comments on this report. One item of note in our opinion is a corollary to the final bullet point under "Conclusion". In addition to the 2016 Supreme Court decision potentially altering development patterns, it is also likely to increase the need for new water right permits for new development and consequently, more change applications in closed basins to supply mitigation.

LCw002
We are supportive of the proposed modifications to 85-2-235 regarding 'Appeals' with the correction to the deadline that was discussed during the July meeting. We are however, concerned about the proposed language under 85-2-233(e). This appears to eliminate the possibility of filing post-decree amendments to water rights.

While we understand that the existence of a process to file post-decree amendments could lead to the possibility of an ever-shifting landscape, it is also a tool that occasionally really needs to be made available to water right owners. It appears from the proposed language that if this modification were passed, the practice would be terminated without an opportunity for potentially affected water right owners to consider if this process is something they need to employ. Perhaps a timeframe could be developed as is proposed for the appeals.

LCw003
As I believe Mr. Mohr indicated during discussion of this item at the July meeting, this proposed language does not address concerns with the "black hole" (actually, I think we've referred to it as the "gray area" which is much less daunting than a black hole). That said, we really don't have any opposition to the proposed modification of the deadline. We would be very interested in continuing the discussion about the gray area/black hole issue. The response we received from the department when we have raised concerns is that if we tighten up the timelines to eliminate the gray area, the department will be forced to terminate more applications. We are hopeful that some middle ground could be found that could both provide the applicant more certainty on the timeframe of processing and not unduly burden the department.

LCw004
We have the same confusion about the language in this proposed bill. After speaking with Mr. Byorth at TU, we believe we generally understand the issues this bill draft was attempting to address. However, as others noted during public comment at the July meeting, it is unclear if the proposed language speaks directly to the issue. We

are hopeful that more clarity can be reached if this bill draft progresses through the process.

LCw005
We agree with others who made public comment during the July meeting that the reference to legal availability analysis in the section proposed for modification is redundant. Our concern is perhaps an aside. While we assumed at first that the ability of an applicant to obtain a waiver from a neighboring water user applied to both permit and change applications, the existence of this language within 85-2-311 (Criteria for Issuance of a Permit) and NOT within 85-2-402 (Changes in Appropriation Rights) leaves us questioning if the waiver can be used in the instance of a change application. Would it be possible to clarify this point?