



August 29, 2016

Water Policy Interim Committee
PO Box 201704
Helena, MT 59620-1704

HAND-DELIVERED

Re: Comments on draft reports and proposed legislation

Dear Water Policy Interim Committee:

Thank you for the opportunity to provide comments on two reports and associated draft legislation of the Water Policy Interim Committee (WPIC) – *Issues of Water Availability and Supply* and *Considerations for the Future of Water Rights*. I write on behalf of the Clark Fork Coalition (CFC) and our 3,000 supporters made up of individuals, businesses, volunteers, educators, and conservation and agency partners. We support forward-thinking and responsible water management that protects existing water rights, including instream water rights, and the public's interest in clean, plentiful water.

Issues of Water Availability and Supply.

Our comments are focused primarily on LCwp07 and LCwp20, both related to the definition of "combined appropriation" for purposes of determining when permit-exempt wells can be used for new groundwater developments. As you know, CFC has been advocating for years to close the loophole created by the MT Dept. of Natural Resources and Conservation's 1993 rule defining the term "combined appropriation" as two or more groundwater developments that are physically connected. Under that rule, anyone could drill and use a new groundwater well for any purpose without any analysis of whether water was physically or legally available, and without any notice to existing water users – even in basins closed to new appropriations. Our advocacy resulted in the October 2014 district court ruling that invalidated the DNRC's rule. Judge Sherlock found that the 1993 rule is illegal because it "violates not only the spirit and legislative intent behind the Water Use Act, but that it also violates the legislative intent behind the enactment of the exempt well statute." Judge Sherlock reinstated the previous DNRC rule and ordered DNRC to conduct rulemaking. There has been some discussion that the court ordered the legislature to act, which is not the case. The legislature has already acted, when it enacted the Water Use Act and the exemptions from permitting. The court recognized that DNRC is the agency charged with managing Montana's water resources and it should be working to craft a solution, with the support of the legislature.

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WATER POLICY INTERIM
COMMITTEE 2015-16

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Exhibit 16

Judge Sherlock's ruling was appealed by the MT Well Drillers Association, the MT Building Industry Association and the MT Association of Realtors. DNRC did not join in the appeal. The case was fully briefed in January 2016, oral arguments were held in May 2016 and a decision is imminent. CFC was joined by several stakeholders in defending Judge Sherlock's decision, including Mountain Water Company, the MT League of Cities and Towns, and ten other organizations who collectively represent thousands of Montana citizens who are concerned about this issue. Briefs filed with the Court can be accessed here: <https://supremecourtdocket.mt.gov/search/case?case=17513>.

CFC opposes LCwp07 because it seeks to codify essentially the same language that was declared illegal by the court – requiring a physical connection of wells in order for a new large groundwater appropriation to be deemed a “combined appropriation” requiring a permit. This bill is premature; we are waiting for guidance from the MT Supreme Court that should inform how the state moves forward. Under this bill, just like over the past 20 years, new groundwater use for large developments would go unchecked, unmonitored and unmitigated because using hundreds of individual wells is a lot easier and cheaper than going through the DNRC permitting process to obtain a permit. But the job of the legislature is to uphold the Water Use Act, which is intended to protect existing water users – not to promote easy and cheap new water development. That WPIC is once again considering going down this path is perplexing and does nothing to promote responsible water management in the state. Simply attempting to put in statute a provision that is fraught with controversy is not a compromise, and it will not settle the issue. Rather it will prevent stakeholders in Montana from thinking creatively about real solutions for providing water for our growing state and promote the continuation of the stalemate that we are all so exhausted by.

LCwp20, on the other hand, recognizes that new groundwater developments should be subject to the same scrutiny as other water uses. Of the two bills, CFC would support LCwp20. However, as Judge Sherlock noted, the issue is complex and uncertain and DNRC has valuable expertise in this area. While DNRC has not weighed in on either of these two proposed pieces of legislation, to our knowledge, we urge WPIC to give DNRC another opportunity take leadership on this issue and conduct rulemaking and decline to propose legislation that does not have a broad base of support. Finally, until we receive guidance from the MT Supreme Court, we are missing key information to inform how we move forward.

Considerations for the Future of Water Rights.

CFC routinely works with water right holders to develop voluntary water right transactions to enhance streamflow. We also manage irrigation and stock water rights on our 2,500-acre cattle ranch in the Upper Clark Fork basin– the Dry Cottonwood Ranch. As part of our work, we prepare and file several water right change applications with the DNRC each year. We are sympathetic to the significant hurdles involved in changing a water right and are often frustrated by the process. However, we are concerned about attempts to use the

water right change process to expand underlying historic water rights. There needs to be a balance between re-allocating existing water rights to new purposes and protecting existing water rights. State law currently allows for changes to stream conditions from granting a new appropriation or authorizing a change in appropriation right as long as existing appropriators can reasonably exercise their water rights under the changed conditions. This should continue to be the standard.

LCwp03. CFC opposes LCwp03. This legislation appears to do two things. First, it clarifies that a change in method of irrigation does not require approval from the DNRC. Second, it appears to allow for an increase in consumptive use over historic use by requiring DNRC to look only at current consumptive use rather than historic consumptive use when quantifying the volume of water available for change to a new purpose. The first purpose is not necessary, because it is clear from current law that the DNRC has no authority to prescribe a particular method of irrigation. DNRC has also clarified this in its recent policy memo – change in method of irrigation (Dec. 2, 2015). The second purpose of the bill is problematic. While the intent is perhaps to prevent DNRC for looking at increase in consumptive use from the change in method of irrigation to a more efficient system (e.g., from flood to pivot irrigation) – the effect will be to allow for water right holders to increase consumptive use by increasing irrigated acres. This will allow for and encourage the expansion of historic water rights through the change process.

LCwp04. CFC opposes LCwp04. This legislation appears to be aimed at reducing instream water rights and reservations held by the MT Dept. of Fish, Wildlife and Parks (DFWP) by requiring a permanent diminishment in water rights when DFWP agrees that a new permit or change in appropriation right does not adversely impact the exercise of its existing water right. DFWP's instream water rights and reservations are the primary mechanism for preserving instream flow for the benefit of all citizens of the State. Millions of dollars are generated annually from our flowing, healthy rivers and streams. This bill would prevent DFWP from making common sense decisions that its water rights not be adversely affected without agreeing to reduce its own water right. Further, to the extent that non-DFWP water users would be implicated by this bill, it is extremely unlikely that anyone would agree to a reduction in a water right – even if the new appropriation would not cause adverse effect. Would this encourage more objections to new permits or changes from water users who fear that their water right will be reduced if they don't see the need to object?

LCwp06. CFC opposes LCwp06. The Water Court is tasked with finalizing the statewide water rights adjudication. Until that work is complete, the Water Court should be singularly focused on the task for which it was created. Further, giving petitioners a choice between district court and Water Court will encourage forum shopping.

Thank you for considering our comments.

Sincerely,

/S/

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