



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

August 30, 2018

Mr. Mohr,

On behalf of the Clark Fork Coalition (CFC), please accept the following comments on WPIC's draft legislation:

LCw003 -- Extend the deadline to correct an application for a permit or a change of water right

The Clark Fork Coalition supports this proposed legislation which would afford an applicant in a change proceeding additional time to respond to deficiencies in a change application. Many water right changes are, by nature, complicated, and the department requires a wealth of information from an applicant to quantify the historical elements of a water right and meet the burden to show that the change conditions are not likely to cause adverse effects to other water users.

In CFC's experience, complicated changes may lead to a situation where the applicant is left with little choice but to waive statutory timelines in order to provide the department with additional information needed to justify the change. Rather than have their application modified or rejected, an applicant may opt to waive timelines, and is then subject to a limitless review process with no incentive or requirement for the department to finalize the application. The changes proposed in LCw003 will not entirely eliminate this problem but will allow an applicant more time to address deficiencies without waiving all statutory timelines.

LCw005 -- Clarify the criteria for a water right permit relying on a waiver of adverse effect

The CFC supports this proposed legislation, which would simply eliminate duplicative language regarding the "legal availability" determination in an application for a new water right permit.

LCw006 -- Study Montana's stream gauge network

The CFC supports WPIC's proposal to study Montana's stream gauge network. Montana's stream gauges provide vital flow and temperature information for water users across the state, and CFC is concerned about the loss of any gauges. As Montanans grapple with the effects of a growing population, climate change and drought, the need for current and reliable data on water supplies will only increase. As with any shared resource, disputes over water supplies rely on a common understanding of current conditions. In order to wisely allocate resources and find creative solutions to

conflicts, all water users must have access to the same source of information. As an owner and a lessee of water rights held for both irrigation and instream flow purposes, the CFC understands the importance of continued funding for Montana's stream gauges. We encourage the committee to focus its efforts on securing continued funding for the network of stream gauges and the exploring the adequacy of the network's ability to meet current and future water information needs, which may necessarily incorporate data related to snowpack, soil moisture, water quality, and other measures.

Report on Study of Changing a Water Right

The CFC appreciates WPIC's continued interest in the change process and the inherent complexities and challenges that water users face during the process. 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 purposes. 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 other water users. Whether intentional or not, the DNRC's hyper-technical, expensive, burdensome and often 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 (making it an ideal candidate for an instream flow change), some change in the status quo (i.e. the quantity and timing of the current 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.

While CFC agrees with many of the findings and conclusions in the report, we encourage the committee to be cautious in overstating the protections afforded to other water users in the context of a change application. The report summarizes a conclusion that other water users have a general right to "conditions as they existed." This is true, but there are important caveats.

For example, the report cites the Department's position that: "junior users are entitled to have water flow in the same manner as when they located." (citing *Hohenlohe v. State*, 2010 MT 203). This blanket conclusion ignores Montana law which states that senior water users do not have the right to prevent changes by later appropriators "in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the senior can reasonably exercise the water right under the changed conditions." MCA § 85-2-401(1). This statutory language implies that the true test in determining adverse effect from water right change is not simply whether water flows in the exact same manner as when another water user made his appropriation, but whether other water users can "reasonably exercise" their rights under the changed conditions.

In addition the report cites the Department's position that "calculation of historic consumptive use is the critical math used to protect other users." (citing *Hohenlohe*) Again, the calculation of historic

consumptive use plays an important role in the change process **but only to the extent necessary to determine whether other water users are reasonably likely to be injured by the change.** In other words, calculating consumptive use and return flow may not be necessary where there is no reasonable likelihood of injury to other water users from a change.

We appreciate the opportunity to comment,

Sincerely,

/s/ Andrew Gorder

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