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April 4, 2022

I write on behalf of Big Sky County Water & Sewer District No. 363 (the “District”). The District requests the Water Policy Interim Committee recommend *non-support* of the proposed Initiative 191. The District opposes Initiative 191 because it would cause material harm to the District and the Big Sky business community, as well as adverse consequences to the environment.

The District supports environmental protection efforts—we are part of the Big Sky community and take our responsibility to protect water resources seriously. Initiative 191, however, seeks an outcome that many well-known environmental advocacy organizations do not support. The proponents of Initiative 191 seek to override the rigorous decision-making and technical analyses by experts at the Department of Environmental Quality (“DEQ”) and to circumvent the legislative process all with the singular goal of preventing further development in Big Sky as well as West Yellowstone and the Town of Ennis. In sum, the District believes that Initiative 191 does not serve the public interests of these communities.

By way of background, the District is a county water and sewer district organized under Montana law to operate wastewater and sewer systems in Big Sky. We serve our customers over a 6,000-acre area in Madison and Gallatin Counties. Our service area includes single-family residences, condominiums and townhouses, hotels, restaurants, medical services, fire protection and commercial centers, comprising approximately 6,338 single-family equivalents, and close to 3,000 billable accounts.

The District operates a Water Resource Recovery Facility (“WRRF”) in Big Sky, along with treated effluent storage and pumping facilities that support complete reuse of our treated effluent in the watershed. The plant operates under DEQ oversight and treats wastewater to produce an effluent that meets Montana’s standards for irrigation of golf courses. After treatment, the District stores the effluent in lined ponds and later delivers the effluent to irrigate golf courses and other nearby areas. This kind of water recycling and reuse is environmentally beneficial. Most wastewater treatment facilities discharge treated wastewater to surface water or groundwater. Since the mid-1970s, the practice of reusing 100% of the treated effluent in Big Sky for irrigation has allowed it to avoid such discharges. Moreover, in order to ensure the District continues to meet the needs of the growing Big Sky community in a responsible manner, the District is currently constructing a \$43-million state-of-the-art WRRF upgrade and expansion project to improve treatment

of wastewater and protect local water resources.

Cottonwood Environmental Law Center (“Cottonwood”) believes the District’s efforts to manage Big Sky’s wastewater are inadequate. Cottonwood markets Initiative 191 as a necessary measure to protect the Gallatin River and Madison River. In reality, the proposed initiative is a ploy to halt development in the Big Sky community as well as West Yellowstone and Ennis. Cottonwood’s previous conduct informs these concerns.

Initiative 191 is not the first attempt to designate the Gallatin River as an Outstanding Resource Water (“ORW”). The ORW designation is intended for surface waters located in national parks, wilderness areas, and similarly unpopulated areas—not for surface waters that flow through a community. A.R.M. 17.30.617(1). Previous attempts to obtain an ORW designation for the Gallatin River utilized the proper statutory procedure, including a petition to the Board of Environmental Review (“BER”) to institute rulemaking and environmental analysis by DEQ.¹ American Wildlands filed such a petition in 2001. Cottonwood filed another in 2018. Both petitions failed. Ultimately, prominent environmental organizations like the Greater Yellowstone Coalition and American Rivers expressed concern about the ORW designation and chose to pursue more collaborative approaches to protecting the Gallatin—approaches that do not jeopardize the livelihood of Big Sky or risk unintended environmental consequences. In February of 2020, Cottonwood sued DEQ over its rejected petition, but that lawsuit failed.

Initiative 191 In its effort to halt development in Big Sky at all costs, Cottonwood has seriously underestimated the consequences Initiative 191 would have on the Big Sky community and the local environment. Initiative 191 would cause material harm to the District and members of the public in its service area. It could force the District to curtail drastically its sewer and wastewater treatment services, depriving the community of an essential government function. For some property owners, this outcome could rise to the level of a regulatory taking. Development is ongoing in Big Sky, and wastewater collection, treatment and disposal/reuse is essential for both residential and commercial uses of property. The District has committed to accept wastewater from projects currently under construction. Other projects undoubtedly are in the permitting and financing stage, with reasonable expectations for access to essential government services.

Big Sky is at approximately 60% buildout. The District encompasses dozens of subdivisions that have been approved by the State. Those approvals specify that wastewater and water will be provided by the Big Sky County Water & Sewer District which create legal obligations that we must meet. Initiative 191 could force property owners to abandon use of their properties—necessitating just compensation by the State. The District is not interested in the multiple litigations which will drain resources away

¹ With the enactment of Senate Bill 233 in April of 2021, the Legislature eliminated BER. DEQ now oversees ORW petitions.

from environmental protections to pay attorneys over such lawsuits.

Alternatively, property owners may attempt to find other methods of waste disposal. Property owners would simply find other ways to develop their existing land investments—and dispose of their waste—likely by constructing large septic systems and community (Level 2) treatment systems. The development community has shown that it can build in this fashion by distributing wastewater across multiple sub-5,000-gallon Level 2 systems. Developers can also choose to build their own treatment facilities. But having additional treatment facilities in Big Sky for DEQ to monitor may be problematic for DEQ.

The wastewater must go somewhere, and property owners likely will opt to install septic systems or other onsite treatment facilities. And in most cases the lot sizes of approved subdivisions in our service area are not large enough to support individual septic drain fields.

If the District cannot connect new development to our wastewater collection system and treatment facility, then we will not be able to pay the principal on our loan for the \$43M WRRF expansion and upgrade. And rather than realizing the benefits of the District's new state-of-the-art WRRF, Big Sky instead would experience an increase in private discharges of wastewater to groundwater.

This perverse outcome illustrates the folly of Cottonwood's proposed ballot issue—and the reason an ORW designation is not supported by reputable environmental groups or DEQ. A recent study concluded that individual septic systems in Big Sky contribute massive amounts of nitrogen to the Gallatin.² The study recommended onsite systems be connected to centralized treatment systems where possible. Cottonwood has framed BI-24 as an environmental protection measure. In reality, the ballot issue would cause a proliferation of private waste systems in Big Sky, resulting in waste disposal with less oversight by wastewater treatment experts and fewer safeguards against adverse water quality impacts.

Equally concerning, Cottonwood seeks to abuse Montana's initiative process to achieve a result already evaluated and rejected by BER and DEQ—twice. Article III, Section 4 of our State's constitution prohibits public initiatives that create local or special laws. Similarly, Article V, Section 12 prohibits the legislature from enacting "a special or local act when a general act is, or can be made, applicable." But that is precisely Cottonwood's objective here. Montana already permits members of the public to seek ORW designations under a generally applicable act, section 75-5-316 of the Montana

² Allen, C. & Howell, S., "Technical Memorandum: Preliminary Estimate of Nutrient Loading and Potential Mitigation Projects," *WGM Group* (2020), available at https://gallatinrivertaskforce.org/wp-content/uploads/2020/11/WGM-Gallatin-Nutrient-Assessment-Final_Draft2_reduced.pdf

Code. That section establishes a rigorous and transparent process through which Montana has decided to evaluate ORW designations. With Initiative 191, Cottonwood is attempting to circumvent this carefully tailored statutory process and dodge consideration of the severe social and environmental impacts of Initiative 191.

Big Sky provides world-class opportunities for tourism and recreation, attracting visitors from across the globe and generating substantial tax revenue for the State. Development in Big Sky is ongoing and will continue in the future. Thus, we must strive to implement conscientious environmental protections that protect both our economy and our rivers. The District supports this mission with major investments in innovative wastewater treatment facilities that promote responsible development. In contrast, Initiative 191 would cause significant material harm to the property owners, residents, and businesses of Big Sky with unintended adverse environmental impacts.

The District respectfully this Committee *not support* this proposed initiative as contrary to the public interest and will push owners to less protect the environment, contrary to its stated purposes.

Respectfully submitted,

BIG SKY COUNTY WATER & SEWER DISTRICT



Ron Edwards
General Manager

April 4, 2022

Water Policy Interim Committee ("WPIC")

RE: Ballot Measure 24 regarding Outstanding Resource Waters ("ORW") Opposition to I-191

Chair and Committee Members,

On behalf of the Bozeman Area Chamber of Commerce we send this Letter to Support the Attorney General's finding of legal deficiency for Ballot Measure 24 and in Opposition to I-191

We feel that the Department of Environmental Quality (DEQ) already has in place the regulatory processes and protections in place and this initiative bypasses this process.

During these economic times, the ballot initiative will hurt job creation, workforce housing that will be developed and adversely impact all the businesses operations and growth in key communities like Ennis, West Yellowstone, Big Sky, and other surrounding communities that serve the 4.2 million visitors to Yellowstone National Park each year.

Ballot Measure 24 would create a precedent by which other groups can replicate this process for all waterway throughout Montana, ceasing all future Montana Development and Tourism Development.

Thank you in advance for your support of the Attorney Generals decision and for the continued work all of you do to make Montana a better place to live work and play.

Sincerely,



Dary W. Schliem
CEO

dschliem@bozemanchamber.com

406-922-0448

From: [Mohr, Jason](#)
To: [Spencer, Nadine](#)
Subject: FW: [EXTERNAL]
Date: Monday, April 4, 2022 11:42:08 AM

From: carole <C._lee@mail.com>
Sent: Monday, April 4, 2022 10:19 AM
To: Mohr, Jason <JasonMohr@mt.gov>
Subject: [EXTERNAL]

Who: Water Policy Interim Committee review of ballot initiative 191
When: 9 a.m. April 5
Where: virtual Zoom meeting
Comments provided by: Carole Mackin, Helena, Montana
C._lee@mail.com

The notice of meeting states: "Signature-gathering for I-191 may begin after the WPIC vote." This statement in the Meeting Notice implies that signature gathering can begin when the meeting adjourns. However, signatures can not be gathered until the Secretary of State provides the final form of the Initiative.

13-27-202 (e) MCA requires the Secretary of State to immediately incorporate the vote of the legislative committee into the form of the petition and send it to the sponsor.

For years I have wondered just how long a time the term "immediately" indicates when used in Montana law. I am now about to find out.

Sent from [Mail \[go.microsoft.com\]](mailto:Mail[go.microsoft.com]) for Windows

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 8:27:00 AM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 08:26

First Name:

Rich

Last Name:

Chandler

Email Address:

rhandler@lonemountainland.com

Subject:

Lone Mountain Land Company

Comment:

Lone Mountain Land Company (“LMLC”) has serious concerns about I-191. I-191 seeks to designate certain stretches of the Gallatin and Madison Rivers as Outstanding Resource Waters (“ORW”) and changes statute to prevent DEQ from issuing any point source discharge permits in an ORW if the permit would cause a temporary or permanent change in water quality. This initiative has far-reaching implications that should be fully vetted through the process outlined in current statute (MCA § 75-5-316) for designating ORWs. LMLC strongly believes that both the Gallatin and Madison Rivers are precious resources that should be protected. We do not believe I-191 is a thoughtful approach to this goal, nor do we believe it accomplishes this goal. A local watershed stakeholder group has been working within our community to address meaningful protections for the Gallatin River, such as a Wild and Scenic River designation, that would also respect property rights of individual landowners and job creators in our community. I-191 Bypasses the Statutory Analysis for ORW. The proponents of the ballot issue were unsuccessful in reviving an ORW designation petition for the Gallatin River through the regulatory process which requires substantial environmental and societal analysis and public comment to the Department of Environmental Quality (“DEQ”). After failing at the regulatory level, the proponents then sued DEQ to try to force the designation and were again unsuccessful. See *Montana Rivers v. Montana Department of Environmental Quality*, Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-20-200A (Sept. 20, 2021) (granting summary judgment in favor of DEQ and finding there is no proposed state action obligating DEQ to prepare an EIS or supplement the 2007 EIS and grant an ORW designation.). Having failed at both the regulatory level and in the court system, proponents now seek to bypass the thorough vetting process provided for in law and bypass the Legislature by forcing an ORW designation through I-191. In our view, this is an inappropriate use of the citizen’s initiative process. Fiscal Note Doesn’t Account for True

Cost of I-191. Statement of Fiscal Impact fails to account for lost revenue to the state and local governments if property owners and job creators are prevented from developing their property if I-191 passes. The Fiscal Note acknowledges that DEQ permits will be denied which would prevent construction, maintenance, restoration activities, improvements, and other activities, but does not account for the cost of lost projects. As the Montana Supreme Court noted in its opinion allowing the initiative to continue forward, if a court finds that private property is taken due to the passage of I-191, the remedy is for the state to compensate the landowner. The cost to the state to compensate private property owners for takings should be calculated and included in a revised Fiscal Note. ORW is not the Answer for the Gallatin and Madison Rivers. ORW provides the highest protections for a water body, while also creating the most restrictions, especially considering I-191 prevents the DEQ from approving any activity that would cause a temporary change in water quality. For rivers as accessible as the Madison and Gallatin this protection is far-reaching. To date, ORW protections have only been used for water bodies within national parks or adjacent wilderness. See Admin. R. Mont. 17.30.617. The intent of ORW designation is not for waterbodies like the Madison or Gallatin. Existing ORW statutory language focuses on eliminating new and increased point source pollution that would result in a permanent change in water quality (see Mont. Code Ann. § 75-5-316), but this ballot issue goes well beyond standard discharge permits issued by the DEQ and adds a prohibition for any activities that cause a temporary change to water quality. DEQ already has non-degradation standards in place to protect the Gallatin therefore making the ORW designation redundant and unnecessary, especially considering the designation does nothing to address current water health issues. In recent Clean Water Act cases, litigated at the highest courts, challenges to the term “Point Source” have created ambiguity in the law which allow the term to be used beyond its original intent. See e.g., County of Maui v. Hawaii Wildlife Fund, 140 S.Ct. 1462, 206 L.Ed.2d 640 (2020) (The Court ruled that non-point discharges require a permit when they are the “functional equivalent of a direct discharge,” thereby creating a new test under the Clean Water Act.). This case law combined with this initiative, if successful, will essentially weaponize the ORW, using it to prevent growth, recreation, and tourism in the areas around these water bodies. Furthermore, the ORW designation would not address current water quality and quantity issues, it only addresses future potential impacts. Data collected on the Gallatin suggests climate change, water usage, wastewater disposal and recreation are the four primary threats to the health of the Gallatin River. The last three are collaboratively being addressed by local watershed groups. Through upgraded infrastructure (ex. BSWSD \$50M water treatment plant upgrade and effluent snowmaking projects) and the creation of the Big Sky Sustainable Water Solutions Forum, stakeholders have been and continue to work to address and mitigate these threats. ORW Harms the Tourism Industry. We all care deeply for both the Madison and Gallatin Rivers, but an ORW designation is the wrong protection for these rivers and will adversely impact nearly every business and property owner within the Madison, Big Sky and upper Gallatin watersheds from accommodations (70% employment) to construction (7.5% employment) to real estate (3.5% employment). In 2018 tourism accounted for \$660 million spent in Gallatin County, including Big Sky and West Yellowstone. The Big Sky Resort Area District currently has 720 registered businesses within its district which remit resort tax funds, generating nearly \$8 million per year, that get awarded back to the community for critical operational and infrastructure needs. This is in addition to the lodging taxes paid by accommodations in Ennis, Big Sky and West Yellowstone that generate millions of dollars of revenue for the state coffers, as well as all the property, corporate and payroll taxes paid by businesses in these communities (in 2017, Big Sky accommodations remitted \$2,636,226 in the 4% Facility Use Tax and \$1,977,169 in the 3% Accommodation Sales Tax; in 2017, West Yellowstone accommodations remitted \$2,506,922 in the 4% Facility Use Tax and \$1,882,441 in the 3% Accommodation Sales Tax.

These numbers continue to grow annually). Ennis, Big Sky, West Yellowstone, and the surrounding areas are a major economic driver for the State of Montana with local businesses attracting tourists from around the world to visit our state. These tourists travel not only to Ennis, Big Sky and West Yellowstone, but up the canyon to Bozeman and beyond (the University of Montana Institute for Travel and Tourism Research estimates visitors to Big Sky in 2018 estimated to be nearly 850,000 and visitors to West Yellowstone estimated to be approximately 4,000,000; the State of Montana sees approximately 12,500,000 non-resident visitors each year). Inhibiting maintenance and future development in these areas will limit economic growth to surrounding areas of the state as well. All the businesses that support and service the tourism industry will likewise suffer. Restricting the opportunity for growth by instilling unnecessary protections on the river will result in billions of dollars of lost revenue in all sectors. We strongly believe in appropriate protections for the Gallatin and Madison Rivers as these amazing resources are what help attract visitors, and we work to ensure the rivers remain healthy. This ballot issue's ORW designation and the denial of permits for activities that temporarily change water quality are not the answer. Instead, we should all support practical statutory protections such as the Wild and Scenic designation proposed for the Gallatin, a federal act that maintains the remarkable values of the waterbody through perpetuity without compromising individual landowner freedoms. Please vote no, you do not believe I-191 should be placed on the ballot. The WPIC vote will be placed on all signature petitions so electors are aware your review found that the initiative should not move forward.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

January 27, 2022

VIA EMAIL

Attorney General Austin Knudsen
Montana Department of Justice
215 N. Sanders St.
Helena, MT 59601
brent.mead2@mt.gov

RE: Proposed 2022 Ballot Initiative #24

Introduction

The Attorney General should reject Ballot Initiative 24 for several reasons. The Initiative as drafted seeks the benefits of a designation without any of the protections in place to ensure that such a designation makes sense. The Initiative is impermissibly vague, confusing, and misleading. The initiative does not satisfy the requirements of the statute as required by MCA § 13-27-312. And the adverse impacts of the designation would be far reaching and extreme and those impacts are not adequately conveyed.

These comments are submitted on behalf of the following organizations:

Treasure State Resources Association
The Montana Mining Association
The Montana Association of REALTORS
The Montana Wood Products Association
The Montana Contractors Association
Citizens for Balanced Use
The Montana Petroleum Association
The Montana Building Industry Association
Association of Gallatin Valley Irrigators

The Initiative improperly avoids the process for ORW designation.

Ballot Initiative 24 improperly avoids the statutorily required process for designating any river as an “Outstanding Resource Water” or ORW. The Clean Water Act embodies the concept of cooperative federalism in which states like Montana are granted the ability to manage their own water resources, as Montana has done for decades. States like Montana are empowered to attain federal standards as they find most appropriate. In Montana, the regulatory process falls to the Montana Department of Environmental Quality (DEQ). The Legislature has vested the DEQ with the discretion to issue discharge permits to balance potential impacts to the environment with the economic and social benefits permitted discharges may provide. In addition, the DEQ has been granted, by statute, the discretion to designate certain rivers as ORW’s under the provisions of MCA § 75-5-315. The statute provides:

Outstanding resource waters — statement of purpose. (1) The legislature, understanding the requirements of applicable federal law and the uniqueness of Montana's water resource, recognizes that certain state waters are of such environmental, ecological, or economic value that the state should, upon a showing of **necessity**, prohibit, to the **greatest extent practicable**, changes to the existing water quality of those waters. Outstanding resource waters must be afforded the greatest protection feasible under state law, **after thorough examination**.

(2) The purpose of 75-5-316 and this section is to provide this protection, **when necessary**, and to provide guidance to the department in establishing rules to accomplish that level of protection.

MCA § 75-5-315. Critically, the ORW designation comes only after a showing of “**necessity**” and only “**after thorough examination**.” The designation is only appropriate “**when necessary**.” Impacts to water quality must be balanced with what is “**practicable**.” The Legislature recognized the potentially serious impact an ORW designation might have on the State as well as local communities and industries and accordingly articulated a specific legislative intent for the statute.

It is the further intent of the legislature that surface and ground water in Montana be designated as outstanding resource waters **only if there is no other reasonable means of protecting the water**. The legislature intends that because this designation may severely limit future use of the designated water, the designation should be accomplished **only after a very thorough examination of the environmental, social, and economic impacts**.

MCA § 75-5-315 statement of intent. The process for such a designation is clearly spelled out in MCA § 75-5-316. Ballot Initiative 24 would completely circumvent and short circuit that process in derogation of the Legislature’s directive and contrary to law. The statutory

prerequisites for any designation—a showing that “there is no other reasonable means of protecting the water” and a designation “only after a very thorough examination” of the impacts—are entirely missing from Ballot Initiative 24.

Pursuant to MCA § 75-5-316, before any ORW designation, there must be extensive consultation with various state agencies. Section 6 requires preparation of an environmental impact statement to be paid for by the proponent of the designation. With Ballot Initiative 24, no environmental impact statement will have been conducted and no interagency consultation will take place. There must be notice and comment and a hearing. The financial impact of the designation must be thoroughly considered, and the designation should be rejected if there are significant economic impacts. None of those safeguards are available with this Initiative. The statute provides:

(3) (a) A person may petition the department for rulemaking to classify state waters as outstanding resource waters. The department shall initially review a petition against the criteria identified in subsection (3)(c) to determine whether the petition contains sufficient credible information for the department to accept the petition.

(b) The department may reject a petition without further review if it determines that the petition does not contain the sufficient credible information required by subsection (3)(a). If the department rejects a petition under this subsection (3)(b), it shall specify in writing the reasons for the rejection and the petition's deficiencies.

(c) The department may not adopt a rule classifying state waters as outstanding resource waters until it accepts a petition and makes a written finding containing the provisions enumerated in subsection (3)(d) that, based on a preponderance of the evidence:

(i) the waters identified in the petition constitute an outstanding resource based on the criteria provided in subsection (4);

(ii) the increased protection under the classification is necessary to protect the outstanding resource identified under subsection (3)(a) because of a finding that the outstanding resource is at risk of having one or more of the criteria provided in subsection (4) compromised as a result of pollution; and

(iii) classification as an outstanding resource water is necessary because of a finding that there is no other effective process available that will achieve the necessary protection.

(d) The written finding provided for in subsection (3)(c) must:

- (i) identify the criteria provided in subsection (4) that serve as justification for the determination that the water is an outstanding resource;
- (ii) specifically identify the criteria that are at risk and explain why those criteria are at risk; and
- (iii) specifically explain why other available processes, including the requirements of 75-5-303, will not achieve the necessary protection.

MCA § 75-5-316. All of these procedural steps and required findings are skipped with Ballot Initiative 24. There is a process for achieving the goals of Ballot Initiative 24 and that process carries with it procedural and substantive safeguards entirely missing from the Ballot Initiative approach.

The statute sets forth numerous opportunities for extensive public involvement.

(5) Before accepting a petition, the department shall:

- (a) publish a notice and brief description of the petition in a daily newspaper of general circulation in the area affected and make copies of the proposal available to the public. The cost of publication must be paid by the petitioner.
- (b) provide for a 30-day written public comment period regarding whether the petition contains sufficient credible information, as provided in subsection (3)(b), prior to the hearing required in subsection (5)(c);
- (c) hold a public hearing regarding the petition and its contents and allow further written and oral testimony at the hearing;
- (d) issue a proposed decision, including:
 - (i) the written finding provided for in subsection (3)(c); and
 - (ii) the department's acceptance or rejection of the petition;
- (e) provide for a 30-day public comment period regarding the department's proposed decision; and
- (f) issue a final decision on acceptance or rejection of the petition, which must include a response to comments received by the department, and make copies of this decision available to the public.

None of these procedural safeguards are available with the Ballot Initiative.

Finally, even if the criteria for designation are met, the DEQ may still deny the request for designation based on the potential economic and social impacts such a designation might have.

(8) (a) After completion of an environmental impact statement and consultation with state agencies and local governments, the department may deny an accepted outstanding resource water classification petition if it finds that:

(i) the requirements of subsection (3)(c) have not been met; or

(ii) based on information available to the department from the environmental impact statement or otherwise, **approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts.**

All of these carefully created steps for public, private, and agency input, discussion, consideration, and decision making would be lost with Ballot Initiative 24. Ballot Initiative 24 seeks to gain the perceived advantages of designating a river as an ORW but without any of the regulatory protections in place to make sure such a designation makes good sense.

Ballot Initiative 24's Statement of Purpose is Misleading and Confusing

Montana Code Annotated § 13-27-312(4) requires that a Ballot Initiative “express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue.” Ballot Initiative 24 fails this test. More accurately stated, Ballot Initiative 24 Statement of Purpose would be:

To prohibit the DEQ from approving a permit for **any** new or increased point source discharge on the Gallatin River from Yellowstone National Park to the confluence of Spanish Creek, and on the Madison River from Hebgen Lake to Ennis Lake if the permit would result in **any** change in water quality and prohibiting the Department from permitting even a **temporary** change in the water quality of these rivers, all without the statutorily required investigation, notice, comment, hearing, consultation, and findings and leading to material adverse impacts on Montana business interests.

This reality is not at all clear from the proposed Initiative language.

Ballot Initiative 24 purports to acknowledge the statutory requirement for a “thorough investigation” before designating any stretch of river as an ORW. It notes that the designation is to be made only “after thorough examination,” suggesting that such an examination has occurred for these two stretches of river. In fact, there has been no such examination other than the one decades ago of the Gallatin River discussed below in which the ORW designation was rejected.

Ballot Initiative 24 would forbid **any** new or increased point source discharge that would result in a permanent or temporary change in the water quality of either of these rivers, regardless of how miniscule that change might be or how otherwise beneficial to society at large. The Clean Water Act is predicated on the balancing of interests and the issuance of permits when appropriate. By prohibiting the DEQ from allowing a new or increased point source discharge that would result in even a **temporary** change in water quality, the status quo would be permanently frozen and the smallest, fleeting change in water quality would be forbidden. The practical impacts of such a restriction are massive. Construction projects, including road improvement work required for public health and safety, that might result in even a temporary discharge, could be stopped. A trail improvement project that might result in a temporary discharge could never be allowed. Desperately needed workforce housing in the Gallatin Valley could be severely impacted since housing construction projects might have “temporary” impacts. Issuance of even a stormwater permit could be prohibited. The impact of the restriction on related federal permits is not even mentioned. By making even temporary impacts to water quality illegal, the Initiative would effectively freeze activity in those portions of Gallatin and Madison Counties through which these rivers flow. The Initiative as drafted hides this impact and is therefore unconstitutionally and impermissibly vague.

The Initiative is also impermissibly confusing in that it purports to discuss only the Gallatin and Madison Rivers, but the language would apply to **all** ORW’s in the State. The prohibition on even temporary changes in water quality applies statewide, not just to the two rivers specifically identified.

Inclusion of the defined term “temporary” further confuses the Initiative. Temporary water quality standards are addressed in MCA § 75-3-312. The DEQ is empowered to, “on its own accord or upon a petition for rulemaking, as provided in § 2-4-315, by a person, including a permit applicant or permittee, temporarily modify a water quality standard for a specific water body or segment on a parameter-by-parameter basis in those instances in which substantive information indicates that the water body or segment is not supporting its designated uses. When the department adopts temporary standards, the goal is to improve water quality to the point at which all the beneficial uses designated for that water body or segment are supported.” The DEQ’s ability to temporarily address water quality issues in the appropriate exercise of agency discretion should not be disturbed.

Finally, the Initiative purports to be limited to “point sources” as defined in MCA § 75-5-103. The “point source” definition, however, is subject to interpretation and expansion as evidenced by the Supreme Court’s recent decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462, 206 L.Ed. 2d 640 (2020). Potential impacts beyond point sources must be considered and yet they are not addressed in the Initiative.

The Statutory Process was followed in the past and it must be followed now.

There has been discussion of designating the Gallatin River as an ORW for several years. The parties involved in those discussions considered the facts, the practical impacts of such a designation, and the availability of other means to address any environmental concerns and ultimately concluded that such a designation would not be appropriate. A statutory prerequisite to any ORW classification is a finding that the designation is necessary because “there is no other effective process available that will achieve the necessary protection.” 75-5-316(3)(c)(iii). Various parties have been engaged in constructive management of the Gallatin River for over 20 years under the auspices of the Gallatin River Task Force. When DEQ considered the previous request to designate the Gallatin River as an ORW, and actually conducted the “thorough examination” called for by the statute, it ultimately decided against the designation.

In 2020, the proponent of Ballot Initiative 24 filed suit to contest the historic decision not to designate the Gallatin as an ORW and lost on summary judgment. See *Montana Rivers, Gallatin Wildlife Association, and Cottonwood Environmental Law Center v. Montana Department of Environmental Quality*, Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-20-200A. Judge Peter Ohman initially noted that the original petition to designate the Gallatin River as an ORW was filed in 2001. After years of comment, public meetings, and completion of an EIS, the DEQ and the Board of Environmental Review concluded that such a designation was not justified. Cottonwood Environmental Law Center filed a petition to designate the identical reach of the Gallatin River as an ORW on January 31, 2018 and sought to enjoin the DEQ from issuing any permit to discharge treated wastewater into the Gallatin River. Judge Ohman ultimately concluded that Cottonwood’s petition came too late and granted summary judgment to the DEQ.

It is hereby ordered that Plaintiffs’ motion for Summary Judgment is denied and Plaintiffs’ requested relief, requiring DEQ to supplement the 2007 EIS and enjoining DEQ from issuing discharge permits or authorizations that may adversely impact water quality in the petitioned segment of the Gallatin River is denied. Defendant DEQ’s cross motion for summary judgment is granted.

Order re: Cross Motions for Summary Judgment at 14. That decision is currently on appeal to the Montana Supreme Court. Apparently disappointed with the outcome in court, Cottonwood has proposed Ballot Initiative 24. The administrative and judicial review process should be allowed to move forward before leaping to the Ballot Initiative approach.

In addition, as noted, the DEQ manages the permit process required by the Clean Water Act. The proponent of Ballot Initiative 24 disagrees with the approach DEQ has taken to permitted discharges to the Gallatin and Madison Rivers and so has filed various citizen lawsuits seeking to enforce the Clean Water Act. See, for example, *Cottonwood Environmental Law Center v. Ron Edwards and Big Sky Water and Sewer District*, United States District Court for the District of Montana, Butte Division, Cause No. 2:20-cv-00028-BMM. The existence of that litigation is

further evidence that the designation of these rivers as ORW's is not "necessary" because there are other processes available to achieve some of the same goals the Ballot Initiative seeks.

The Ballot Initiative "will likely cause significant material harm to one or more business interests in Montana."

Pursuant to Montana Code Annotated § 13-27-312(9) (as amended by HB 651), the Attorney General must consider whether the Ballot Initiative will likely cause significant material harm to one or more business interests in Montana or result in a regulatory taking. The agricultural, recreation, construction and tourism industries in Gallatin and Madison counties employ thousands of people, generate billions of dollars of economic activity, and lead to millions of dollars in tax revenues for these counties and for the State. Industries impacted by Ballot Initiative 24 include agriculture, forestry, downhill and cross-country skiing, snowmobiling, construction, real estate, automobile sales and service, restaurant, airport, rental car, and innumerable retail establishments, to name only a few. By effectively freezing all new activity that might have any impact on water quality in these rivers, even if the impact is only temporary, Ballot Initiative 24 will have a dramatic and material adverse impact on numerous Montana business interests and could also constitute an impermissible regulatory taking. In addition, the watershed targeted by Ballot Initiative 24 is at the center of a long-standing housing shortage that has contributed to a shallow labor pool and skyrocketing property prices. The near moratorium on construction that Ballot Initiative 24 would create would exacerbate this housing shortage with severe adverse impacts well beyond market tolerance.

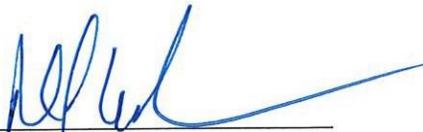
Development in Montana is currently regulated by a myriad of state and federal agencies. The scientific checks-and-balances permitting programs are strictly adhered to. Agencies like the DEQ, the Montana Transportation Department, the Fish and Wildlife Service, and the Corps of Engineers all observe and thoroughly regulate construction. Ballot Initiative 24 would upset this regulatory scheme without the benefit of the statutory process designed to assess whether any change is actually needed.

Finally, MCA § 13-27-312(3) provides, "If the proposed ballot issue has an effect on the revenue, expenditures, or fiscal liability of the state, the attorney general shall order a fiscal note incorporating an estimate of the effect, the substance of which must substantially comply with the provisions of 5-4-205." The fiscal note provided with Ballot Initiative 24 suggests that "denial of DEQ permits" could inhibit construction, but the actual consequences are not even estimated. Those consequences would be massive and must be appropriately assessed before the Ballot Initiative moves forward. The Statement of Fiscal Impact set forth in the proposal is inaccurate. Denial of future permits **will** result in local and statewide fiscal impacts. There is no "may" about it. Consultation with the Department of Revenue to quantify these impacts should be undertaken.

Conclusion

Ballot Initiative 24 attempts to circumvent a careful process the Legislature created to obtain the perceived benefits of an ORW designation without complying with the procedural and substantive safeguards for obtaining such a designation. The economic and societal impacts of this short circuit approach would be significant and unjustified. The Initiative is impermissibly vague, unclear, and confusing. Ballot Initiative 24 as drafted should be rejected as legally insufficient.

CROWLEY FLECK PLLP

By 
Neil G. Westesen

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 1:29:28 PM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 13:29

First Name:

Ron

Last Name:

Edwards

Email Address:

ron@wsd363.com

Subject:

Opposition to Initiative 191

Comment:

I write on behalf of Big Sky County Water & Sewer District No. 363 (the “District”). The District requests the Water Policy Interim Committee recommend non-support of the proposed Initiative 191. The District opposes Initiative 191 because it would cause material harm to the District and the Big Sky business community, as well as adverse consequences to the environment. The District supports environmental protection efforts—we are part of the Big Sky community and take our responsibility to protect water resources seriously. Initiative 191, however, seeks an outcome that many well-known environmental advocacy organizations do not support. The proponents of Initiative 191 seek to override the rigorous decision-making and technical analyses by experts at the Department of Environmental Quality (“DEQ”) and to circumvent the legislative process all with the singular goal of preventing further development in Big Sky as well as West Yellowstone and the Town of Ennis. In sum, the District believes that Initiative 191 does not serve the public interests of these communities. By way of background, the District is a county water and sewer district organized under Montana law to operate wastewater and sewer systems in Big Sky. We serve our customers over a 6,000-acre area in Madison and Gallatin Counties. Our service area includes single-family residences, condominiums and townhouses, hotels, restaurants, medical services, fire protection and commercial centers, comprising approximately 6,338 single-family equivalents, and close to 3,000 billable accounts. The District operates a Water Resource Recovery Facility (“WRRF”) in Big Sky, along with treated effluent storage and pumping facilities that support complete reuse of our treated effluent in the watershed. The plant operates under DEQ oversight and treats wastewater to produce an effluent that meets Montana’s standards for irrigation of golf courses. After treatment, the District stores the effluent in lined ponds and later delivers the effluent to irrigate golf courses and other nearby areas. This kind of water recycling and reuse is environmentally beneficial. Most wastewater treatment facilities discharge treated

wastewater to surface water or groundwater. Since the mid-1970s, the practice of reusing 100% of the treated effluent in Big Sky for irrigation has allowed it to avoid such discharges. Moreover, in order to ensure the District continues to meet the needs of the growing Big Sky community in a responsible manner, the District is currently constructing a \$43-million state-of-the-art WRRF upgrade and expansion project to improve treatment of wastewater and protect local water resources. Cottonwood Environmental Law Center (“Cottonwood”) believes the District’s efforts to manage Big Sky’s wastewater are inadequate. Cottonwood markets Initiative 191 as a necessary measure to protect the Gallatin River and Madison River. In reality, the proposed initiative is a ploy to halt development in the Big Sky community as well as West Yellowstone and Ennis. Cottonwood’s previous conduct informs these concerns. Initiative 191 is not the first attempt to designate the Gallatin River as an Outstanding Resource Water (“ORW”). The ORW designation is intended for surface waters located in national parks, wilderness areas, and similarly unpopulated areas—not for surface waters that flow through a community. A.R.M. 17.30.617(1). Previous attempts to obtain an ORW designation for the Gallatin River utilized the proper statutory procedure, including a petition to the Board of Environmental Review (“BER”) to institute rulemaking and environmental analysis by DEQ. 1 American Wildlands filed such a petition in 2001. Cottonwood filed another in 2018. Both petitions failed. Ultimately, prominent environmental organizations like the Greater Yellowstone Coalition and American Rivers expressed concern about the ORW designation and chose to pursue more collaborative approaches to protecting the Gallatin—approaches that do not jeopardize the livelihood of Big Sky or risk unintended environmental consequences. In February of 2020, Cottonwood sued DEQ over its rejected petition, but that lawsuit failed. Initiative 191 In its effort to halt development in Big Sky at all costs, Cottonwood has seriously underestimated the consequences Initiative 191 would have on the Big Sky community and the local environment. Initiative 191 would cause material harm to the District and members of the public in its service area. It could force the District to curtail drastically its sewer and wastewater treatment services, depriving the community of an essential government function. For some property owners, this outcome could rise to the level of a regulatory taking. Development is ongoing in Big Sky, and wastewater collection, treatment and disposal/reuse is essential for both residential and commercial uses of property. The District has committed to accept wastewater from projects currently under construction. Other projects undoubtedly are in the permitting and financing stage, with reasonable expectations for access to essential government services. Big Sky is at approximately 60% buildout. The District encompasses dozens of subdivisions that have been approved by the State. Those approvals specify that wastewater and water will be provided by the Big Sky County Water & Sewer District which create legal obligations that we must meet. Initiative 191 could force property owners to abandon use of their properties—necessitating just compensation by the State. The District is not interested in the multiple litigations which will drain resources away from environmental protections to pay attorneys over such lawsuits. Alternatively, property owners may attempt to find other methods of waste disposal. Property owners would simply find other ways to develop their existing land investments—and dispose of their waste—likely by constructing large septic systems and community (Level 2) treatment systems. The development community has shown that it can build in this fashion by distributing wastewater across multiple sub-5,000-gallon Level 2 systems. Developers can also choose to build their own treatment facilities. But having additional treatment facilities in Big Sky for DEQ to monitor may be problematic for DEQ. The wastewater must go somewhere, and property owners likely will opt to install septic systems or other onsite treatment facilities. And in most cases the lot sizes of approved subdivisions in our service area are not large enough to support individual septic drain fields. If the District cannot connect new development to our wastewater collection system and treatment facility, then we will not be

able to pay the principal on our loan for the \$43M WRRF expansion and upgrade. And rather than realizing the benefits of the District's new state-of-the-art WRRF, Big Sky instead would experience an increase in private discharges of wastewater to groundwater. This perverse outcome illustrates the folly of Cottonwood's proposed ballot issue— and the reason an ORW designation is not supported by reputable environmental groups or DEQ. A recent study concluded that individual septic systems in Big Sky contribute massive amounts of nitrogen to the Gallatin. The study recommended onsite systems be connected to centralized treatment systems where possible. Cottonwood has framed BI-24 as an environmental protection measure. In reality, the ballot issue would cause a proliferation of private waste systems in Big Sky, resulting in waste disposal with less oversight by wastewater treatment experts and fewer safeguards against adverse water quality impacts. Equally concerning, Cottonwood seeks to abuse Montana's initiative process to achieve a result already evaluated and rejected by BER and DEQ—twice. Article III, Section 4 of our State's constitution prohibits public initiatives that create local or special laws. Similarly, Article V, Section 12 prohibits the legislature from enacting "a special or local act when a general act is, or can be made, applicable." But that is precisely Cottonwood's objective here. Montana already permits members of the public to seek ORW designations under a generally applicable act, section 75-5-316 of the Montana Code. That section establishes a rigorous and transparent process through which Montana has decided to evaluate ORW designations. With Initiative 191, Cottonwood is attempting to circumvent this carefully tailored statutory process and dodge consideration of the severe social and environmental impacts of Initiative 191. Big Sky provides world-class opportunities for tourism and recreation, attracting visitors from across the globe and generating substantial tax revenue for the State. Development in Big Sky is ongoing and will continue in the future. Thus, we must strive to implement conscientious environmental protections that protect both our economy and our rivers. The District supports this mission with major investments in innovative wastewater treatment facilities that promote responsible development. In contrast, Initiative 191 would cause significant material harm to the property owners, residents, and businesses of Big Sky with unintended adverse environmental impacts. The District respectfully requests this Committee not support this proposed initiative as contrary to the public interest and will push owners to less protect the environment, contrary to its stated purposes. Respectfully submitted, BIG SKY COUNTY WATER & SEWER DISTRICT Ron Edwards, General Manager

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 8:04:40 AM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 08:04

First Name:

thomas

Last Name:

elfmont

Email Address:

thomas.elfmont@tdaltd.net

Subject:

I 191

Comment:

Sirs/Madams Please ensure this initiative is included on the November ballot. The Gallatin must be protected for many reasons including the economic impact fly fishing has on Montana. It is one of our most valuable resources both to locals and non residents alike. We must fully protect this Montana state treasure.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 10:30:55 AM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 10:30

First Name:
Krista Lee

Last Name:
Evans

Email Address:
blakecrk@gmail.com

Subject:
Opposition to I-191

Comment:

The Senior Water Rights Coalition is composed of senior water right holders across Montana including irrigated agriculture and hydropower generation facilities. We are writing to express our concerns with I-191. The language in the Ballot is at best misleading due to the fact it does not accurately reflect or even discuss the impact of amending existing statute. The amendment of existing statute to include the term “temporary” has significant unknown and unintended consequences. The language that outlines the details of the initiative does not include any discussion of the impact to existing outstanding resource waters and the continued use of those waters. The term “temporary” will severely limit or eliminate the ability of irrigators that divert out of the Madison River in the stretch identified as an ORW to conduct maintenance on their diversion and headgate structures. The ability to exercise these water rights is critical to the continued financial stability of those agriculture operations. In addition, it will limit the ability to conduct road maintenance and improvements on Hwy 191. This will lead to a significant public safety concern as the road and bridges deteriorate over time. Last, the addition of two new segments of rivers without using the rigorous process that is currently in statutes is a disservice to Montana’s citizens. The existing process includes environmental and economic analysis that are crucial to understanding the impacts to local communities, businesses, and visitors of designating river segments as Outstanding Resource Waters. Thank you for your consideration.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Sunday, April 3, 2022 7:53:03 AM

Public Comments for the Water Policy Interim Committee

Date: 3rd April 2022 07:52

First Name:
Senator Carl

Last Name:
Glimm

Email Address:
carl.glimm@mtleg.gov

Subject:
I-191 - Citizen's Initiative

Comment:

Members of the Water Policy Interim Committee, I write to you as you will look at I-191. I want to point out to you the following: I-191 is unconstitutional, in review of this initiative one only need look at the constitution Article IX, Section 3. Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed. (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use. (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law. (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records. Of particular importance here is 3 and 4, ALL... water is subject to appropriation for beneficial use and it is the LEGISLATURE's role to provide for administration, control and regulation of water rights. As such, you should oppose I-191, as it is unconstitutional, it allows a citizens initiative to determine that specific rivers shall have no further diversions. Furthermore, it is poorly worded, confusing and if passed, has strong implications for regulatory takings of private property rights. The sound bite in favor of the initiative is don't pollute this particular river, well, here in Montana we don't pollute our rivers, we have processes in place to prevent that. And they work. Thank you, Senator Carl Glimm Former member of WPIC, former Vice-Chair

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Wednesday, March 30, 2022 3:43:04 PM

Public Comments for the Water Policy Interim Committee

Date: 30th March 2022 15:42

First Name:

Mike

Last Name:

Hope

Email Address:

mkwnhope@aol.com

Subject:

Oppose I-191

Comment:

Please accept these comments on behalf of the Hospitality and Development Association of Montana (“HDAM”) expressing serious concerns regarding Proposed Ballot Measure #24 which is now known as I-191. HDAM is a non-partisan, unincorporated association whose members are private sector businesses in the hospitality industry in Montana. Our members include restaurants, resorts, private clubs, national park service concessioners, dude ranches, hotels and other entities that cater to Montana’s robust tourism industry. HDAM works to advance the interests of our members in improving the hospitality offered by our state to our many non-resident visitors as well as resident travelers. In 2019, over 12.6 million non-residents visited our great state where they spent \$3.76 billion. This economic input supported 53,120 jobs statewide and generated \$265 million in state and local taxes. See <http://www.voicesoftourism.com/research/>. Tourism is an important industry in Montana and supports our members who offer these visitors a truly great experience. I-191 is expected to significantly harm Montana businesses that offer hospitality services in connection with Montana’s tourism industry. These hospitality businesses are members of HDAM and operate in the affected communities of West Yellowstone, Ennis, Big Sky, and Bozeman. If the Ballot Measure were to pass, it would essentially cap development in and around those communities, severely impacting the growth and sustainability of these businesses. The change proposed to MCA § 75-5-316(2)(b) would prevent DEQ from issuing any new or increased water discharge permits that would temporarily change water quality. This impacts stormwater construction permits required for any construction site to point source water discharge permits for treated effluent of a water and sewer district. DEQ would be required to deny any new or increased permit applications and without these permits, projects to build new accommodations, including workforce housing, or improve the safety of highway 191 would be prohibited. Forcing DEQ to deny all new or increased permit applications would effectively

halt development and improvements of all kinds in these communities which would likely prevent the tourism industry in these areas from continuing to grow. It would also severely impede development of crucial workforce housing needed to address existing deficiencies and future growth of the businesses in all these communities. Workforce housing is a critical issue already facing these communities and if this Ballot Measure were to pass it would effectively kill several planned developments that are in process to try to mitigate the workforce housing issue. The tourism economy is the economic backbone of these communities and an economic driver for the State. The harm to business would extend from the border of Yellowstone National Park west to the Madison and north down the Gallatin River Canyon to Bozeman and beyond, as many visitors travel to other areas of Montana after visiting Yellowstone. We also believe that the current fiscal note is insufficient to portray the real losses to state and local governments in unrealized revenue if development is halted. The fiscal statement also fails to acknowledge the significant costs and revenue lost to businesses, individuals, and property owners who are prevented from implementing their development plans in these areas. Further, as the Montana Supreme Court noted in its opinion allowing the initiative to move forward, the appropriate remedy for regulatory takings of private property is compensation. If this initiative results in regulatory takings, which the Attorney General determined it was likely to do, the State is on the hook to compensate landowners for the loss of their property—a cost to the State that was not included in the original fiscal note and could be substantial. HDAM requests the Water Policy Interim Committee vote that I-191 should not appear on the November ballot.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 9:20:38 AM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 09:20

First Name:
craig

Last Name:
mathews

Email Address:
candj@3rivers.net

Subject:
1-191

Comment:

The Gallatin River is a primary economic driver of Southwestern Montana. I have been in the fishing business for over 40 years and have operated a hunting and fishing outfitter business during that time. My customers come from all over this state, around the country and the world to fish the Gallatin and Madison Rivers. These valuable natural resources are the reason anglers, hunters, birders, hikers and thousands of others come to the area to experience in their pristine-natural state. They must be protected at the highest standards with ORV designation. Too, this protection would prevent permits that would degrade the river by discharges into it. Millions of dollars could be lost if we allow the fouling of our river with these discharges. We cannot allow this to happen so please vote in favor of putting 1-191 onto the ballot. It would protect the state's outstanding fishery and improve environmental, recreational and economic factors for all Montana's into the future. Thanking you in advance for considering my comments, I remain; Respectfully, Craig Mathews, Cameron, Mt 59720

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/



COTTONWOOD

ENVIRONMENTAL LAW CENTER

4/4/2022

Dear Water Policy Interim Committee:

Please accept these comments on behalf of Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association regarding the Committee's April 5, 2020, review of I-191.

Cottonwood Environmental Law Center petitioned the Montana Board of Environmental Review in 2018 to make a rule designating the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek as an Outstanding Resource Water (ORW). An attorney for the Montana DEQ stated during a public hearing on the petition before the Board of Environmental Review (BER) that "[t]he petitioned stretch of the Gallatin River does meet the Outstanding Resource Water criteria as an outstanding fishery, and it meets the criteria with regard to other important environmental and economic factors, including recreational use of the river." Exhibit 1 at 45-46: 20-3.

Cottonwood's 2018 petition is similar to a 2006 petition from another conservation organization. According to the DEQ attorney that provided

Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771

Cottonwoodlaw.org
Info@cottonwoodlaw.org
Phone | 406.546.0149



COTTONWOOD

ENVIRONMENTAL LAW CENTER

testimony on the 2018 petition, “the difference between the 2006 petition to the Board from American Wildlands and this current petition is that DEQ has numeric nutrient standards which would be incorporated in an MPDES permit for a point source. Those standards are designed to protect the beneficial uses including the fishery, and recreational use of the water.” *Id.* at 46.

The Montana legislature has removed the numeric criteria that were previously available to protect beneficial uses. 75-5-321, Mont. Code Ann. As such, the DEQ’s rationale for proposing a rule that protects the Gallatin River as an ORW similarly supports the WPIC voting to place the initiative on the 2022 ballot.

Ultimately, the Montana BER accepted the 2006 petition and directed the DEQ to complete MEPA analysis regarding the impacts of making a rule designating the Gallatin River as an Outstanding Resource Water. The DEQ prepared a draft and final EIS that proposed the BER make a rule designating the Gallatin River an ORW. Cottonwood is now asking the Montana Supreme Court to require the DEQ to prepare a supplemental Environmental Impact



COTTONWOOD

ENVIRONMENTAL LAW CENTER

Statement because the agency did not issue a Record of Decision. *Cottonwood*

Environmental Law Center, et al. v. MT DEQ, DA-21-0613.

As currently written, the ORW statute prohibits the Montana DEQ from issuing a permit for a point source discharge that would permanently degrade the water quality of the designated section. 75-5-316. Permanent means forever. The agency can now issue a permit that allows pollutants to bio-accumulate for years or decades, but that still does not cross the threshold permanent limit. This is a concern regarding pharmaceutical pollutants, for which no effluent limitation standards or treatment technology is available. To address the issue, Ballot Initiative I-191 adds statutory language that prohibits the DEQ from issuing a permit that would temporarily degrade the section of the designated river.

People come from all over the world to fish and boat the Madison and Gallatin Rivers. I-191 will ensure these rivers are clean for them to enjoy.

I-191 will not change irrigation rights. If anything, I-191 ensures irrigators have clean water available for irrigation.



COTTONWOOD

ENVIRONMENTAL LAW CENTER

Neither the state of Montana nor the U.S. EPA treat septic systems as point sources. *See generally, Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020). Moreover, regularly pumping and maintaining septic systems will ensure our rivers stay clean.

I-191 is the only permanent protection available for these outstanding resource waters. The Water Policy Interim Committee should vote in favor of placing I-191 on the ballot.

Respectfully submitted,

/s/ John Meyer
JOHN MEYER

Attorney for Petitioners

Exhibit 1

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
October 5, 2018)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
October 5, 2018
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
DEXTER BUSBY, HILLARY HANSON, JOHN FELTON;
and CHRIS TWEETEN (by telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

1 you for sure. Board members, questions of Sarah
2 in regards to her memo, or questions of Mr. Meyer?

3 MR. DEARMENT: I have one, Madam Chair.
4 Question for Ms. Clerget.

5 So if I understand correctly, we have
6 something of a precedent here, which a previous
7 Board moved forward with this, 2002 or whenever it
8 was. It seems to me that the situation now is
9 largely the same as it was then, as the river is
10 not listed as wild and scenic, there is no
11 endangered species, and so on.

12 The difference perhaps between now and
13 then is that the Circular 12A has come out, and we
14 have the numeric nutrient standards that we didn't
15 have then, and that's sort of the major difference
16 between now and the previous effort; is that a
17 reasonable summary?

18 MS. CLERGET: I think probably the
19 specific words that the Board used previously were
20 that they were concerned about nutrient loads,
21 which I think that not only the Circular 12A and
22 12B, but also the changes to the MPDES permitting
23 process that have occurred in the intervening time
24 would be an additional difference.

25 MR. DEARMENT: Okay. I guess what I'm

1 getting at is I appreciate your memo and generally
2 agree with it. I'm wondering, just procedurally,
3 given Cottonwood's concerns about pharmaceuticals
4 and the growing awareness of pharmaceuticals, our
5 options right now are we could just end this
6 essentially, or we can give notice of our intent
7 to accept, and have a public comment period.

8 I'm wondering, just as discussion for
9 the Board, if we think there is any value in
10 allowing that public process to proceed for
11 another month or so, and seeing if there is
12 anybody else out there who supports this idea, and
13 doing a more thorough job of vetting concerns from
14 other members of the community in the Big Sky
15 area.

16 I'm not necessarily advocating that we
17 do so, just more trying to -- I'm curious what my
18 other Board members think about continuing that
19 process for another month or so during this
20 comment period.

21 CHAIR DEVENY: I was kind of thinking
22 along those same lines, too. And to me the
23 significant difference between what the previous
24 Board approved, as Sarah described, was the
25 nutrient loading that at that time was numerical,

1 as was brought up, but now is a specific number.
2 And so that's probably not the big concern at this
3 point, at least from a point source type of
4 pollutant.

5 The concept of emerging chemicals,
6 emerging pharmaceuticals as an emerging pollutant,
7 pharmaceuticals and other personal care products,
8 is something that is kind of cutting edge right
9 now, and is becoming more and more -- we're
10 becoming more and more aware of the potential that
11 that could possibly have an aquatic life.

12 And while the science isn't really solid
13 on that yet, the memo from EPA makes it pretty
14 clear that there is a real need for more research
15 and work on that, and even in the RFQ that the
16 water and sewer district put out, they directed
17 their engineering firm to look at potential
18 treatment for that in the future, knowing that the
19 technology doesn't exist these days, but that
20 someday it may need to.

21 And so there is a recognition out there.
22 And I think if you look at the purpose of the
23 Outstanding Resource Water designation by the
24 Legislature, it is one of the few pieces of
25 legislation that is there to sort of preempt

1 anything from happening.

2 Most of the other legislation that's out
3 there is really sort of preventative in a way, but
4 if something happens, then there is ways to
5 correct. But this is sort of a preventative
6 precautionary measure.

7 And I think that the issue of
8 pharmaceuticals to me is enough to maybe move
9 along to that next step, to get some more input
10 from the public, to see where other people in the
11 Big Sky area in particular, what their thoughts
12 are on this. We really haven't heard much except
13 from the Petitioner. There hasn't been a lot of
14 public comment on our deliberations here.

15 So that's kind of where I was leaning,
16 too, John. And I don't know if other members have
17 thoughts.

18 MR. BUSBY: I would like to hear if DEQ
19 has any comments before we go any further.

20 MS. BOWERS: Madam Chair, members of the
21 Board, I'm Kirsten Bowers, DEQ attorney. And in
22 general, DEQ agrees with the Board attorney's
23 recommendation. The petitioned stretch of the
24 Gallatin River does meet the Outstanding Resource
25 Water criteria as an outstanding fishery, and it

1 meets the criteria with regard to other important
2 environmental and economic factors, including
3 recreational use of the river.

4 And I do think the difference between
5 the 2006 petition to the Board from American
6 Wildlands and this current petition is that DEQ
7 has numeric nutrient standards which would be
8 incorporated in an MPDES permit for a point
9 source. Those standards are designed to protect
10 the beneficial uses including the fishery, and
11 recreational use of the water.

12 And it would be unlikely that a new
13 point source discharger would be granted a
14 variance from those standards, because the
15 discharge is to high quality water, and existing
16 beneficial uses have to be protected.

17 So DEQ is also concerned about
18 pharmaceutical pollution, as those are emerging
19 issues of concern with regard to pharmaceuticals,
20 and also certain personal care products. And
21 you're correct there are no water quality
22 standards designed to protect beneficial uses from
23 those types of pollutants, and so there are no
24 standards that can be incorporated in a permit.

25 Most permits do have a reopener

1 provisions if in the future there are water
2 quality standards, and there is a reasonable
3 potential that a discharger could violate those
4 standards.

5 So I guess the bottom line for DEQ is
6 the petitioned section is an Outstanding Resource
7 Water. It is of high economic and environmental
8 value to the State of Montana. But there isn't
9 the required showing of necessity to protect the
10 waters beyond the available processes, which are
11 MPDES permitting and application of the State's
12 nondegradation policy.

13 CHAIR DEVENY: Does that answer your
14 question?

15 MR. DEXTER: It pretty much does
16 personalize. Can I make a couple of comments on
17 this myself?

18 CHAIR DEVENY: Sure.

19 MR. DEXTER: I tend to agree with DEQ on
20 this thing, that pharmaceuticals is going to be a
21 problem in the future. While it is there today,
22 we have no way of addressing it through regulation
23 until such criteria and methods of treatment have
24 been proven.

25 So I'm not sure we can address

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Friday, April 1, 2022 8:51:31 AM

Public Comments for the Water Policy Interim Committee

Date: 1st April 2022 08:51

First Name:

Mac

Last Name:

Minard

Email Address:

moga@mt.net

Subject:

Opposition to I-191

Comment:

Montana Outfitters & Guides Association ("MOGA") has serious concerns about I-191 from a legal perspective as it has significant adverse impact on business interests in the communities surrounding the bodies of water it seeks to designate as Outstanding Resource Waters ("ORW"). Furthermore, this type of issue has far-reaching implications that should be fully vetted through the process outlined in current statute. As we understand the situation, the Ballot Issue sponsors were unsuccessful in achieving an ORW designation petition for the Gallatin River through the regulatory process, which requires substantial environmental and societal analysis and public comment to the Department of Environmental Quality ("DEQ"). Instead, they are now trying to force the ORW designation and prevent DEQ from issuing any discharge permits on these water bodies if an activity would temporarily or permanently change water quality. While the Ballot Issue is currently targeting "point source" pollution, recreational activity in the Gallatin and Madison Rivers create "temporary" changes water quality, if nothing else by creating turbidity. As noted by the Attorney General in finding I-191 legally deficient, I-191 has significant regulatory takings implications and is in conflict with Article II, Section 3 of the Montana Constitution regarding fundamental rights to acquire, possess and property. I-191 also needs to be reviewed in the context of interfering with the sporting public's constitutional right to engage in water-based recreation activities. I-191 sponsors have failed to have the proposed stretches of rivers designated ORW at the regulatory level and in the court system. They are now trying to shove the designation through a ballot initiative process, bypassing the extensive environmental and societal reviews, as well as multiple opportunities for public comment that are required under existing statutory review prior to the designation of an ORW. I-191 is an inappropriate use of the citizen's initiative process. The Gallatin and Madison Rivers are world class watersheds. Millions of people travel to Southwest Montana each year to enjoy outdoor recreation activities, including fishing

with the members of MOGA. The unintended consequences of what I-191 could mean for the larger economic interests of Southwest Montana could be staggering, not to mention the precedential impacts to Montana as a whole. There are multiple business and conservation groups who are better positioned to work collaboratively on the overall health and welfare of the Gallatin and Madison Rivers than the Ballot Issue sponsors who have one goal, which is to shut down all commercial activities along the corridors of those water bodies. We request you vote not to support placing I-191 on the ballot. The WPIC vote will appear on all signature petitions to inform potential signers that, after review, the Committee did not believe I-191 should appear on the ballot.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Sunday, April 3, 2022 5:08:59 PM

Public Comments for the Water Policy Interim Committee

Date: 3rd April 2022 17:08

First Name:

Joan

Last Name:

Montagne

Email Address:

joan.montagne@gmail.com

Subject:

Citizen Initiative 191

Comment:

I have been a full time resident of Montana since 1969 - more than 1/2 a century. The clean water of our Gallatin and Madison Rivers brings millions of dollars to our state and is known world wide for its fisheries. People with no sense of place or pride in their home over money are destroying these resources. It is not right by our state constitution!

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/



4 April 2022

Water Policy Interim Committee
67th Montana Legislature
PO Box 201706
Helena, MT 59620-1706

RE: Proposed 2022 Ballot Initiative 191

Dear Chair Welborn and Members of the Water Policy Interim Committee,

On behalf of the business entities that drive economic growth and development in our state, I am writing with concerns about proposed Ballot Initiative 191 (I-191). The Montana Chamber of Commerce recognizes the need for water quality standards, but leveraging the ballot initiative process for a specific "outstanding resource water" (ORW) designation would create an unnecessary statutory carveout that poses a threat to doing business in the Gallatin and Madison areas and circumvents existing due process.

I-191 will likely harm Montana businesses. Consider what an ORW designation would mean for economic drivers like Gallatin and Madison County - tourism and its associated tax revenue would stall when communities such as Big Sky, West Yellowstone, and Ennis are unable to develop new infrastructure in adherence to the designation. Area businesses, and the jobs they sustain, depend on this region's ability to grow to meet visitor demand. One of the top workforce issues in our state is housing availability, and this proposal would only exacerbate that challenge. Simply put, I-191 places economic development of this area in jeopardy.

The Montana Chamber also questions whether I-191 is an appropriate use of the citizen's initiative process. The Department of Environmental Quality (DEQ) already houses a sound regulatory process for ORW designation, and proponents who had previously applied for the Gallatin-area designation were rejected upon the agency's review. It is also our understanding that this matter was taken up in the courts, and the matter was decided supporting DEQ's decision. With proponents now appearing to sidestep this outcome via ballot initiative, we are concerned about the precedent this could set for other parties who lose their case in court. Is this what we want for our legal system?

The Montana Chamber therefore urges this committee to exercise its authority pursuant to MCA 13-27-202(5)(c) and vote to oppose placement of I-191 on the ballot.

Maintaining water quality is important, and there are existing avenues in statute for petitioners' use in their pursuit of that worthy goal. This proposal, however, appears to be a solution in search of a problem. Please oppose I-191.

Thank you for your consideration.

Sincerely,

Bridger Mahlum
Government Relations Director

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Friday, April 1, 2022 4:54:10 PM

Public Comments for the Water Policy Interim Committee

Date: 1st April 2022 16:54

First Name:

Brad

Last Name:

Niva

Email Address:

brad@bigskychamber.com

Subject:

Opposition to Ballot Initiative I-191

Comment:

Water Policy Interim Committee Montana State Legislature RE: Written Comment in Opposition to Ballot Measure I-191 Dear Chairman Welborn and esteemed committee members, Please accept this letter on behalf of the 460 members of the Big Sky Chamber of Commerce. Since 1985, our organization has been focused on supporting businesses in our community and advocating for their benefit. Big Sky hosts almost 300,000 visitors annually and is a major contributor to the economy of Montana through tourism as well as construction. We as residents of this community value our environment and have a deep respect of our natural resources. It's the reason why people come and vacation in Big Sky and those of us lucky enough to live here. Ballot Measure I-191 is expected to significantly harm Big Sky businesses that are key to our visitor economy. The change proposed to MCA § 75-5-316(2) (b) would prevent DEQ from issuing any new or increased water discharge permit that would temporarily change water quality. This impacts stormwater construction permits required for any construction site to point source water discharge permits for treated effluent of a water and sewer district. DEQ would then be required to deny any new or increased permit applications and without these permits, projects to build new accommodations or improve the safety of highway 191 would be prohibited. Forcing DEQ to deny all new or increased permit applications would effectively halt development or improvements of any kind in Big Sky. It would also severely impede development of crucial workforce housing needed to address existing deficiencies and future growth of the businesses in Big Sky. Besides the impact to construction and new housing facilities we know this initiative will harm important river preservation and mitigation to erosion work for years to come. There is no doubt that the Gallatin is a major destination and if this ballot initiative was to pass, it would limit many of the activities that locals and visitors love about this place. We appreciate your committee reviewing this initiative and seeing how this will limit access and put unnecessary restrictions

on Montanans using their natural resources. With Warm Regards, Brad Niva- CEO Big Sky Chamber of Commerce Brad@BigSkyChamber.com

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Thursday, March 31, 2022 5:22:24 PM

Public Comments for the Water Policy Interim Committee

Date: 31st March 2022 17:22

First Name:

Nancy

Last Name:

Ostlie

Email Address:

nancyostlie@gmail.com

Subject:

Support for I-191 Outstanding Resource Water petition

Comment:

I have a strong interest in Montana's constitutionally protected rights to a clean and healthful environment. I am not confident in existing public processes managed by the State to protect our lands and rivers from the intense pressures that degrade it. In particular, I believe the DEQ has permitted pollution in the Madison and Gallatin River waterways that have contributed to the terrible algal blooms we see in the rivers in recent years. With lower streamflows due to climate change, the rivers need more protection, not less. There are absolute limits to the amount of pollution the rivers can tolerate, and with increasing development pressures, we have to respect those limits and stop further development from degrading the rivers. In contrast, there are no limits to the amount of development and accompanying pollution that will continue to be pressed upon us by future population growth. As ecosystems are pressured negatively worldwide due to overpopulation and degradation of resources, climate 'refugees' will be streaming into Montana and other perceived havens. And many of these climate refugees may be well-heeled, wealthy occupants with no real ties to the current or future health and well-being of existing residents. In fact, many in Big Sky and the Madison Valley are second or third-home occupants, who may visit for only days or weeks, but then sublet their properties to visitors with even less regard for the long-term health of our rivers and ecosystem. The state of Montana has no obligation to accommodate these pressures, and even less incentive to provide space for these interests, since the current State Administration is bent on ensuring that the wealthiest Montana residents pay zero taxes. More specifically, the following points are true: - The Montana DEQ has stated during public testimony before the Montana Board of Environmental Review that the stretch of the Gallatin River at issue satisfies the Outstanding Resource Water criteria. - The initiative adds statutory language that prohibits the Montana DEQ from issuing permits to temporarily degrade the water quality of the Gallatin River. The additional language is important because the DEQ has begun issuing

permits which allow a polluter to temporarily degrade Montana water bodies. - The DEQ has not provided any evidence that it has previously issued temporary permits to degrade water bodies for "restoration" projects. For these reasons, and those I described in my opening, I believe this petition is in the best interest of the State of Montana, and I plan to vigorously work to obtain support throughout the state. I anticipate that the fly fishing industry will be supportive, and I plan to work to bring their support to bear. Sincerely, Nancy Ostlie Leader, Great Old Broads for Wilderness Bozeman Broadband

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 12:19:36 PM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 12:19

First Name:

Daryl

Last Name:

Schliem

Email Address:

dschliem@bozemanchamber.com

Subject:

Opposition to I-191

Comment:

Water Policy Interim Committee (“WPIC”) RE: Ballot Measure 24 regarding Outstanding Resource Waters (“ORW”) Opposition to I-191 Chair and Committee Members, On behalf of the Bozeman Area Chamber of Commerce we send this Letter to Support the Attorney General's finding of legal deficiency for Ballot Measure 24 and in Opposition to I-191 We feel that the Department of Environmental Quality (DEQ) already has in place the regulatory processes and protections in place and this initiative bypasses this process. During these economic times, the ballot initiative will hurt job creation, workforce housing that will be developed and adversely impact all the businesses operations and growth in key communities like Ennis, West Yellowstone, Big Sky, and other surrounding communities that serve the 4.2 million visitors to Yellowstone National Park each year. Ballot Measure 24 would create a precedent by which other groups can replicate this process for all waterway throughout Montana, ceasing all future Montana Development and Tourism Development. Thank you in advance for your support of the Attorney Generals decision and for the continued work all of you do to make Montana a better place to live work and play.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Saturday, April 2, 2022 12:06:12 PM

Public Comments for the Water Policy Interim Committee

Date: 2nd April 2022 12:06

First Name:

Patricia

Last Name:

Simmons

Email Address:

psimmons100@gmail.com

Subject:

Initiative 191

Comment:

Please approve this initiative 191. All Montanans deserve better quality rivers and streams for our human health, the fish and aquatic life's health, wildlife who drink the water. We'll see if the public supports this without your weighing in, in advance. Montana law and constitution allow the public to directly support or no support an issue brought before them. Thank you.

Sent via www.leg.mt.gov/committees/interim/wpic/public-comments-wpic/

From: donotreply@mt.gov
To: [LEG Cmte-WPIC Comment](#)
Subject: Public Comment for WPIC
Date: Monday, April 4, 2022 3:14:59 PM

Public Comments for the Water Policy Interim Committee

Date: 4th April 2022 15:14

First Name:
Abigail

Last Name:
St. Lawrence

Email Address:
abigail@stlawrencelawfirm.com

Subject:
Ballot Initiative 191--comments in opposition on behalf of MBIA

Comment:

As per the expressed preference for written comments in the announcement of the April 5, 2022 meeting, I offer the following brief comments in opposition to Ballot Initiative 191 on behalf of the over 1,500 members of the Montana Building Industry Association (MBIA) and nine local associations throughout Montana, who are the builders and affiliated small businesses constructing nearly 75 percent of new residential buildings in Montana. I further respectfully request the Water Policy Interim Committee exercise its authority under MCA 13-27-202(5)(c) and not support the placement of the proposed initiative text on the ballot. MBIA joins numerous other Montana-based membership associations in opposing Ballot Initiative 191 for a broad number of reasons. However, as the leading voice for residential construction in Montana, MBIA's opposition focuses particularly on the drastic impact Ballot Initiative 191 would have on much needed housing in the Gallatin Valley. As this committee is well aware, the Gallatin Valley is at the apex of a housing shortage and resulting rising prices that has been building for years, thanks in no small part to NIMBY (not in my backyard) opposition to any new housing development, no matter how environmentally responsible and compliant with community planning. Ballot Initiative 191 is the epitome of NIMBY policy and would undoubtedly drastically slow if not fully halt much needed new housing construction in the Gallatin Valley. Although Montanans are rightfully shocked by the lack of housing in Southwest Montana now to meet demand and the resulting rise in prices for the limited existing supply, such lack of supply and rise in cost would be dwarfed by the resulting impacts on the housing market should Ballot Initiative 191 become law. MBIA urges this committee to take into consideration the broad opposition to Ballot Initiative 191 and vote to not support the placement of the proposed initiative text on the ballot. Thank you for this opportunity to provide written public comment. I will be available online at the April 5th committee meeting to answer any questions.

Sent via leg.mt.gov/committees/interim/wpic/public-comments-wpic/

DATE: April 4, 2022

TO: Senator Jeff Welborn, Presiding Officer
Representative Willis Curdy, Vice Presiding Officer
Members of the Water Policy Interim Committee

FROM: Ken Walsh, Representative
HD 71 (Madison, and parts of Jefferson, and Silver Bow Counties)

RE: I-191 Outstanding Resource Waters (ORW)

I write today in OPPOSITION to this Initiative – 191, for several reasons. This initiative circumvents normal and traditional way that public policy should be made. Public policy of this significance needs to be vetted in a public forum, either in the Legislative and/or through the appropriate State Agencies. The public needs to have a clear impact on the consequences, intended and unintended, of that this referendum. There needs to public hearings and input from all stakeholders. A ballot issue should NOT be the method. Any changes should be done through the legislative process.

There appears to be a small but vocal group of conservations that have been previously unsuccessful to move their cause in the traditional manner. This initiative process seeks to bypass the extensive environmental and societal reviews, as well as multiple opportunities for public comment that are required under the existing statutory review prior to the designation of an ORW.

A significant part of the Initiative language is the inclusion of **temporary** change in water quality. This could affect all types of commerce and prevent improvements and development of property. Road construction and improvements for roadways along the rivers would likely be prevented as discharges along the rivers would likely be prevented. The hospitality industry would be allowed to expand, and the communities will suffer economically. The agriculture operations located near the rivers and /or their tributaries could be restricted from repairs to irrigation headgates, fences, and bridges; movement of cattle, stream restoration, timber harvest, to name just a few.

For the above reasons and those of the attached talking points, I would ask that your committee includes a strong Statement of Opposition to Initiative – 191.

Thank you for your consideration.

TALKING POINTS

Background re: the Gallatin River

- Initial ORW designation sought for the Gallatin River in 2001 through the process established by DEQ and outlined in statute.

- DEQ kept the issue open until 2012, collecting public comments and input on the designation. DEQ never moved forward with the rulemaking to designate this portion of the Gallatin River as an ORW.
- Ultimately, the stakeholder groups decided to create a forum within which to collaborate and work to protect the water quality while also allowing for responsible development along or near the river to occur.
- Cottonwood tried to revive the ORW in 2018 at the DEQ level but was ultimately unsuccessful since they failed to put up the required \$250,000 for the EIS.
- Cottonwood sued DEQ trying to avoid completing a new EIS and instead directing DEQ to update the 2007 EIS. DEQ prevailed in court in Sept. 2021.
- Cottonwood submitted this Ballot Issue in December 2021 to try to force ORW designation and prevent DEQ from issuing any discharge permits on these water bodies if an activity would *temporarily* or permanently change water quality.

Existing Law

- Despite failing at having these stretches of rivers designated ORW at the regulatory level and in the court system, Cottonwood is now trying to shove the designation through a ballot initiative process.
- Cottonwood seeks to bypass the extensive environmental and societal reviews, as well as multiple opportunities for public comment that are required under existing statutory review prior to the designation of an ORW.
- This is an inappropriate use of the citizen's initiative process.
- Everyone fully supports ensuring the health of this water resources and does not want to see them degraded, but an ORW is not the way to go. As it relates to the Gallatin River, stakeholder groups are already working on a federal Wild and Scenic River designation.
- Under existing Montana law, ORWs are governed by [MCA § 75-5-316](#) which provides the extensive review process.
- Currently, all existing ORWs are wholly within National Parks or adjacent wilderness areas ([ARM 17.30.617](#)) – truly undeveloped areas, nothing like the West Yellowstone, Big Sky and Ennis communities.
- DEQ is prohibited from approving point source discharges into ORW water bodies if the discharge would result in a permanent change in water quality.

Ballot Issue #24

- Bypasses all of the review in statute and designates a portion of the Gallatin River and portion of the Madison River as ORWs.
- Prohibits DEQ from approving a point source discharge into an ORW if the discharge would result in a permanent or temporary change in water quality.
- A temporary change in water quality will occur from the turbidity when a fly fisherman walks downstream or a cow walks across the river. We understand these are not point source discharges requiring a permit, but use these examples to highlight how low of a threshold it is to cause a temporary change in water quality.

- Using the ballot initiative process to try to make wholesale changes to water quality law in Montana sets a terrible precedent and limits true thoughtful and collaborative efforts.

Ballot Language

The ballot language provides: **Statement of Purpose and Implication: (129 words)**

“Outstanding resource water” is a designation that affords a body of water the greatest protection feasible under state law, after thorough examination. The Department of Environmental Quality (DEQ) may not allow a new or increased point source discharge that would result in a permanent change in the water quality of an outstanding resource water. “Point source” is defined in 75- 5-103, MCA. Passing this initiative would make outstanding resource waters on the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek, and on the Madison River from Hebgen Lake to Ennis Lake. Passage would also amend 75-5-316(2), MCA, to prohibit the DEQ from allowing a new or increased point source discharge that would result in any temporary or permanent change in water quality.

YES on [statutory initiative number]

NO on [statutory initiative number]

Statement of Fiscal Impact (46 words)

[Initiative number] will result in increased costs to the state of approximately \$60,000 per year and require additional state employees. Denial of DEQ permits under [initiative number] may result in local fiscal impacts from inhibited or stopped construction, maintenance, improvements, or other activities requiring a DEQ permit.

- Law requires the ballot language to express the true, unbiased meaning the initiative and requires it to be written in plain, easily understood language.
- The statement of purpose references statutes for definitions etc.—this is not plain, easily understand language for the average voter. Most voters don’t know what statutes provide off the top of their heads.
- Fiscal statement should note that the denial of DEQ permits would cause unknown, but likely significant fiscal impacts to businesses as well as local governments.

Regulatory Takings/Significant Material Harm to Business Interests

- The Ballot Issue could prevent many uses of property as it relates to improvements and developments because these activities would likely require a permit that will be denied by DEQ. Denial of these permits and ability to use property as anticipated could result in regulatory takings.
- For example, new housing or accommodation units would be prohibited because DEQ would not be able to issue a permit for increased effluent discharge. A landowner would be prevented from building a home with a septic system on their property that abuts or is adjacent to the rivers. Road construction and improvements for roadways along the rivers would likely be prevented as discharge permits are generally required and would be denied under this Ballot Issue.
- If Ennis, Big Sky and West Yellowstone are not allowed to make improvements to further develop hospitality in their communities to attract tourists or keep up with the demands from the growing tourism industry, the visitors will find other locations to

travel to that can offer the amenities they are looking for. Most of the tourism supported businesses will suffer while some may be put out of business.