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Chairman Zach Brown
Water Policy Interim Committee

Re: Comments on HJ 14: Study of the future of the Water Court

Dear Chairman Brown and Members of the Water Policy Interim Committee:

The Montana Department of Natural Resources & Conservation (the "Department") appreciates the opportunity to provide comments to the Water Policy Interim Committee ("WPIC") on the scope of HJ 14 (2019). While HJ 14 is technically a study of the future of the Water Court, outcomes of such an effort could affect all of water policy, the institutions responsible for its implementation, and stakeholders with interests in water rights and water management.

The 1972 Montana Constitution requires the legislature to "provide for the administration, control, and regulation of water rights and [to] establish a system of centralized records . . ." Mont. Const. Art. IX., sec. 3(4). There are essentially two stages to creating a constitutionally defensible water right administration and regulation system. The first stage is the required filing, adjudication, and recording of all existing water rights. The second stage is to put in place a system of administration, including mandatory measurement, reporting, and recording of water use to manage water rights post-adjudication.

At this juncture, the first stage of creating a system that comports with the constitutional requirements must be completed, and WPIC's focus on the future of the Water Court should be on what resources are needed to complete the adjudication as quickly as possible. Many of the issues being raised with WPIC stem from the fact that the Water Court is in the 40th year of the adjudication, and there is no clear end in sight. At this late stage in the adjudication process, the expertise possessed by the Water Court should be utilized to maintain laser focus on the completion of the adjudication.

Further, any comprehensive water policy study needs to be conducted with purpose and funding. A study of the future of the Water Court cannot occur without considering many other facets of current water policy. Prior to embarking on such an endeavor, WPIC should engage stakeholders, the executive, and the judiciary in formal

scoping to define the priorities and scope of a study. If Montana is at a crossroads of water policy, it should proceed with a comparable level of study, expertise, and stakeholder engagement as the legislature has done in the past when evaluating the adjudication, which resulted in the Ross Report (Sept. 30, 1988), or other major water policy matters, such as the comprehensive water marketing study conducted in the early 1980s. *See*, Montana Select Committee on Water Marketing, Report to the 49th Montana Legislature (Dec. 1984).

The 2015 Montana State Water Plan [1] reveals that stakeholders consider completion of the adjudication, water measurement, and data-driven administration and enforcement, major water policy priorities for Montana. *See*, pp. 70-74. In that vein, the Department believes the following water policy topics are worthy and ripe for the legislature's consideration:

- Requiring mandatory water measurement, recording, and reporting;
- Standardizing administrative record keeping on administered streams;
- Developing a pilot project to test water administration options in a specific basin;
- Establishing water commissioners as employees of the Department;
- Creating a framework for the administrative resolution of distribution disputes, including mediation options, right to hearing, and judicial review; and
- Bolstering administrative enforcement of unauthorized water use.

If it is true that water is Montana's most valuable resource, it is imperative that time, resources, and funding be allocated to study the future of Montana water policy. While it is critical for the adjudication to conclude with the utmost speed, now is the time for the State to chart a path toward comprehensive water right administration post-adjudication. The Department is committed to working with stakeholders, WPIC, and the Water Court on this effort.

Thank you for considering our comments.

Sincerely,

John E. Tubbs, Director

[1] The State Water Plan and related documents are available at this link: http://dnrc.mt.gov/divisions/water/management/state-water-plan.