August 7, 2025

Montana Department of Natural Resources and Conservation
Water Resources Division
ATTN: Jamie Price
1539 Eleventh Avenue
Helena, MT 59601

Submitted via email to: DNRCOAH@mt.gov

RE: Public comments submitted on behalf of Montana Conservation Society related to Montana Administrative Register (MAR) Notice No. 2025-157.1

To Whom It May Concern:

On behalf of the members of the Montana Conservation Society (MCS), please accept our written public comments regarding amendments the Administrative Rules of Montana (ARM) pertaining to water rights permitting found in Montana Administrative Register (MAR) Notice No. 2025-157.1. We are writing today in support of the rules proposed by the Department of Natural Resources and Conservation (DNRC) and seeking additional clarifications to questions that arose in our review of the proposed rule package. We look forward to working collaboratively with DNRC on the adoption and implementation of these rules.

The Montana Conservation Society is an organization dedicated to finding sustainable, long-lasting solutions to complex conservation issues. We were founded on the idea that the shared love of wildlife and open spaces can be managed with lessened conflict and more collaboration. The mission of the Montana Conservation Society is grounded in bringing diverse interests together and supporting collaborative conservation work that lifts all stakeholders while providing meaningful advancement for all Montanans.

As our membership is comprised of landowners who hold water rights, MCS supported proposed legislation related to water policy that directly affects our members' operations. SB 178, sponsored by Sen. Sue Vinton (R-Lockwood), which provides a path for water right holders to temporarily lease their water right under the Montana Water Use Act (MWUA) was one of those efforts. We believe this is a valuable tool for water right owners to manage their water use under trying conditions, temporary changes to our agricultural operations, and extreme weather events. It is our strong belief that the tools added through SB 178 can both enhance conservation and restoration efforts goals as well as add value to the production agriculture operations of many of our members. The final negotiated version of the law does all of this while protecting private property rights and accounting for changes in operation based on market forces.

We are grateful for the agency beginning rulemaking on a suite of issues that arose from the 2025 legislative session, and especially on SB 178, particularly providing for application forms, associated fees, and the general ability of the DNRC to efficiently implement temporary water leases for water right owners and lessees. We have reviewed the proposed rules associated with

the law found within MAR Notice No. 2025-157.1 (amendments to ARM 36.12.102 and 103, and NEW RULE 7), and we wish to provide our support along with the following comments:

i. **Amendments to ARM 36.12.102 (Forms) and 103 (Form and Special Fees)**
   a. We support the proposed language by the Department related to forms (ARM 36.12.102(hh)). Further, we support the proposed fees associated with new Form 650 of $400. We understand that implementation of this law will require staff time and operating costs to the agency, and as such we believe the proposed fee here to be appropriate.

ii. **NEW RULE 7 (36.12.2102) Temporary Lease of a Water Right**
   a. Overall, MCS supports the proposed rules associated with the implementation of the temporary lease program as contemplated. We appreciate the commitment to making this program as effective, efficient, and user friendly as possible to a water right owner and lessee to execute a necessary lease, and we understand the balance associated with providing adequate protection for adjacent water users from adverse effects. That tension is embodied here in the proposed rules.
   b. We support the rules as drafted in subsections (1) and (2).
   c. Subsection (3) embodies the primary reason the agency was required to promulgate rules to assist in the expedient and accurate determination of the consumptive value of the water right, which statute limits the proposed lease to fall within. Our interest in this rule is to ensure that both parties have clearly defined expectations as to how that consumptive use will be calculated prior to the application process and that it can be accomplished as efficiently as possible to not slow down a proposed lease. To that end, we support the language as drafted with the addition of further clarification in (a)(i) related to how the agency will assess the crop consumptive use under the methodology in ARM 36.12.1902(14) through (16)(f), specifically additional clarification of whether the Department proposes to use pre- or post-1973 figures (column F, G, or H). We also support the ability for a water right holder to utilize an existing consumptive use analysis in a recently complete change of use authorization, if there was a historic consumptive use analysis completed.
   d. Subsection (4) provides further clarification to the statute in what was the attempt to achieve that balancing act between promoting flexibility within the MWUA while not inflicting material harm through adverse effect to other water right holders. The statute expressly included this requirement in the application process for the applicant to catalogue adverse effects and demonstrate how they propose to mitigate those effects so that "…, *in aggregate*, demonstrate no adverse effect" (SB178 (2025), emphasis added). Since this is the basis in which potential objections to a lease may arise, we believe it is important to clarify two items related to the language in statute and these proposed rules – (1) The statute requires a water right owner to cease use of the proposed water right being leased on the original place of use to prevent someone from essentially using water twice, on the original place of use and through a lease. We support that provision. (2) Further, the statute does not require the applicant to demonstrate how it will resolve every individual adverse effect on their own, rather it requires the

applicant to demonstrate that not irrigating the historic place of use and using the leased water in a new temporary location is sufficient to mitigate "in aggregate" any possible adverse effect. We urge the Department in its implementation of the law to be pragmatic about the purpose and intent of the law and not hamstring its effectiveness by treating it with the same level of scrutiny that exists for other permitting and change processes. The legislative debate around the bill as well as the adopted statute itself were expressly intending this to not be a "lighter version" of a water right change, but instead it is intended to be a tool for expedited flexibility.

   i. To add a finer point to some of these potential areas of concern would be to use the example of impacts associated with a proposed lease's effect to other water right users using the same conveyance ditch system. To temporarily remove one water right from a ditch for the purposes of a lease may have impacts to other water users on that conveyance system. Unlike a change of use authorization, there is no conveyance loss analysis contemplated in the temporary lease statute and despite possible plans to mitigate that impact (it is questionable to what extent that effect could even be mitigated), there very may well be an objection based on that perceived, and to be honest probable, impact. Who has the burden of proof to complete the analysis, or even articulate that analysis? Would the objector have the definitive burden and then the Department do the analysis? Have we only brought ourselves into the situation where we are in the middle of a change process and muddled in analysis paralysis? Allowing objectors to go down this rabbit hole would seem to defeat the entire purpose of the statute.

e. Subsection (5) deals with the ability of an applicant to add storage temporarily with the proposed lease, which MCS believes makes this tool more effective in achieving its purpose than the prior statute. We support the requirement contemplated in this language to require the applicant to identify the capacity of the storage facility and how that capacity was calculated. We would support additional clarity about whether the Department will be asking the applicant to retire acres to account for the storage capacity and/or evaporative losses from the added storage. And if so, please provide clarity if/when DNRC will require acres to be retired for just the capacity, just the evaporative loss, or both. MCS does not have a preference as to which DNRC will require, just that there are clear expectations for applicants.
f. MCS supports the provision for written notice embodied in subsection (6).
g. To further the objective of providing clear and identifiable targets for applicants, MCS would suggest the inclusion of guidelines as to how the DNRC will identify the acceptable proposed use volumes of a lease. The statute limits the total volume of the lease to be the historic consumptive volume of the water right to be leased and requires the lease to be used for a beneficial purpose of use, but it does not speak to whether the applicant is required to use only as much water as is reasonably required to satisfy the objectives of the lease and the beneficial use. Given the DNRC's statutory obligations to prevent the waste of water, it would be expected that the applicant provides some information to justify the volume of

water proposed in the lease and how that was calculated to satisfy the objective of the proposed beneficial use. We would suggest the agency utilize existing ARM as guidance and deem proposed volumes that fall within ARM 36.12.115 and/or 36.12.1902 Table 1, Management Factor Percentage 1997-2006 (proposed use)as acceptable, and if the applicant proposes something outside of these parameters that only then are they required to provide documentation of how they identified the proposed volumes within the lease.

Given our membership's composition of water right holders, in addition to the rules associated with implementation of SB178 above, we also wish to offer our support and comments for other sections of MAR Notice No. 2025-257.1 as follows:

i. **Amendments to ARM 36.12.1305, Filing a Change Application and Form Acceptance**
   a. MCS supports the ability to use one application form when the change involves both temporary and permanent components, but the DNRC should be specific about what components of the change are required to be completed for notice of completion and/or if two different notice of completion dates will be identified.

ii. NEW RULE 2 (36.12.810) Project Completion Notice
   a. Under this proposed rule, what happens to the "unused volume" if an appropriation holder does not perfect the full volume that they originally proposed?
   b. Both subsections (3)(f) and (4)(e) list "other information deemed necessary by the department" under items that must be included in the correct and complete permit and change authorization project completion notices. That language is vague and leaves applicants uncertain what to expect the agency to determine necessary information.
   c. We have concerns about how subsection in (5) will work in practice, and if in effect, this makes the rule retroactive to all previously completed notices of completion? If one had submitted a notice of completion in compliance with the rules and customs at the time of submittal, how can DNRC just decide many years later that was insufficient and require the applicant to submit another notice of completion?
   d. Under subsection (8) we would suggest including some notice requirement provided to the landowner prior to entry. 24- or 48-hour notice seems sufficient to ensure that the applicant/landowner is available and can participate/assist in the project site inspection.
   e. Under subsection (9) what is the purpose of requiring the filing of an entirely new project completion notice? Can DNRC instead just restrict the verified parameters based on any subsequent limitations due to 85-2-313 modifications? The reason we offer this comment is that some of the notices of completion were submitted many years ago when all an applicant had to do was indicate the project was completed (with no details regarding the water use). Now twenty years and five landowners later, the applicant would need to provide a wide range of detail about the project, information that was never previously required for the notice of

completion. Again, we believe the goal of HB441 was to provide water users, existing and holders of provisional permits, with finality.

iii. NEW RULE 3 (36.12.811) Permit Verification

a. The proposed language in subsection (2) creates potential confusion and conflict between the permit holder and department. Who determines finally what water use standards apply? It would be beneficial for all parties if there was an index or catalogue of what the water use standards were through time.
b. Under subsection (3), the language should reflect that if there are corrections to legal land descriptions due to improved mapping that they will or shall be considered rather than "may" be considered.
c. Subsection (4)(f) contradicts subsection (3) and further should provide more detail as to what level of legal land description is required. Is it within the same township, section, quarter section, quarter-quarter section, etc.? If it is just within the legal land description described on the water right, then if one applicant has just the section identified, and one applicant has the quarter-quarter-quarter identified, this leads to inconsistency as to how far an applicant can vary from the permitted parameters. The applicant with the entire section described would have far more leeway to move their point of diversion/place of use around at completion compared to the applicant who has the quarter-quarter-quarter identified on their abstract. This same issue of what legal land description reference also applies to the (g) and (i)(iii).
d. Under 4(j) it refers to an "if applicable" standard for consumptive use analyses, and since many older permits do not have a consumptive use limitation in the permit application and authorization, it should be more explicit that if consumptive use was not analyzed in the permitting process, it will not be defined now as part of verification.

iv. NEW RULE 4 (36.12.812) Change Verification

a. Under subsection (2) we have the same comments here as we did above in permit verifications (Comment (ii)(a)) related to who determines the water use standards.
b. Relating to improved mapping for legal land description in subsection (3), we reiterate the above comment in permit verifications that the language should be will/shall rather than may be considered.
c. Related to subsection (4), we have the same comment as above related to the level of detail required by legal land descriptions as they apply here in sub (a), (b), and (d)(iv).
d. Second, as it relates to sub (c), the constraint associated with consumptive use limitations should clarify that those only apply when the underlying change of use authorization was issued with consumptive use limitation. The same clarification would apply to (d)(iii).
e. Lastly, we would note that because 85-2-102(7)(b), MCA exempts conversion of irrigation method from the definition of a change of use authorization that it may create some unique situations that should be acknowledged. For example, if you changed your method of irrigation independent of a previous change that was for place of use, that change of irrigation method would impact your consumptive

use, however the previous change for your place of use would have used the historic consumptive use, so because your field now has a higher consumptive use even though it is the place of use that is being verified, will the DNRC say you are exceeding your consumptive use and not in substantial accordance?

v. NEW RULE 5 (36.12.813) Verification Decision

a. Under subsection (4)(b), what happens to the water rights if the change of use authorization is revoked? Does the underlying water right revert to its original parameters within the final decree? Or does the applicant have to do another change of use authorization to change back? What will be listed in the final decree?

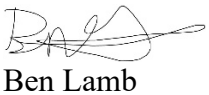
b. Generally, there is a question as to what happens in a couple of situations that relate to this process:

   i. Historic right is decreed through the court with 1,000 acres and 10 cfs. In the change process DNRC only "agrees" that 900 acres and 9 cfs were historically used and limits the applicant to only changing 900 acres, the volume associated with 900 acres and 9 cfs. What happens to your 100 acres and 1 cfs that the court decreed but that DNRC did not acknowledge was historically used? How do those acres and flow rate appear in the final decree (because DNRC does not have the authority through the change process to determine any portion of one's decreed water right is abandoned)?

   ii. After the change is authorized and one works on completing their project, one ends up only irrigating 650 acres and diverting up 6 cfs. Thus, the user identifies 650 acres and 6 cfs on the notice of completion. Does that even lower amount get verified and only that amount appears in the final decree? Again, what happens to the "balance" of the decreed water right? DNRC can't determine through a change process any of one's water right is abandoned, only the court can determine a portion (or all) of a right abandoned. So, does the balance of the right (now 350 acres and 4 cfs) show up in the final decree? If so, how designated? Or does the DNRC then plan to certify to the court a request to reduce the water right to what DNRC found historically irrigated and/or was completed in the notice of completion?

Thank you again for the opportunity to provide comments concerning these proposed rules. MCS appreciates the difficult task in front of you. If we can be of assistance or provide additional information or clarification regarding our written comments, please do not hesitate to reach out via email at b.lamb@montconservationsociety.org.

Sincerely,



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