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 Trout Unlimited and Trout Unlimited in response to Montana Adminisrative Register (MAR) Notice No. 2025-157.1

To Whom It May Concern:

Thank you for the opportunity to provide written public comment on proposed rules made by the Department of Natural Resources and Conservation (DNRC) regarding water rights permitting found in the MAR Notice No. 2025-157.1. Please accept these written comments on behalf of both Montana Trout Unlimited (MTU) and Trout Unlimited (TU) in support of the proposed rules offered in this notice.

Founded in 1964, Montana Trout Unlimited is the only statewide grassroots organization dedicated solely to the mission of conserving, protecting, and restoring Montana's coldwater fisheries and their watersheds. As the voice for healthy rivers and wild trout, MTU represents more than 5,000 members and supports in Montana, including local chapters across the state that prize our rivers, streams, their coldwater fisheries and recreation opportunities. In our both advocacy and restoration work, we partner closer with our national partners at Trout Unlimited.

Both of our organizations have been outspoken supporters of changes to Montana water law that help our organizations achieve their missions, which has included directly advocating for legislative and administrative measures. To that end, MTU and TU have been members of DNRC's Comprehensive Water Review Stakeholder Workgroup (SWG) for the last four years, which was the genesis of many of the legislative changes that necessitated this rulemaking endevor. Further, we worked alongside the agency and other water user partners during the most recent legislative session to support these pieces of legislation. We are pleased to continue that advocacy with our support for this package of rule changes.

The following comments are organized to correspond with the respective rule amendments and new rules being proposed in MAR Notice No. 2025-1517:

I. *Amendments to ARM 36.12.101, Definitions*
Our organizatons support the changes provided in this rule package for definitions that provide additional clarity to existing issues within permitting as well as are necessary for implementation of legislative changes. In regard to the former issue, the new defintions for aquifer and aquifer system increase clarity and reduce misguided interpretations of language in statute referring to “same source aquifer” and provide a scientifically credible definition ot aquifer in the ARM. The additional new definitions provided in the rule notice are necessary due to passage of statute changes in 85-2-313, MCA, as amended in HB441.

II. *Amendments to ARM 36.12.102, Forms*
MTU and TU support the changes to ARM 36.12.102 to include the new forms required for implementation to legislation from the 2025 legislative session (HB432, 441, 681, SB 178, and 190).

III. *Amendments to ARM 36.12.103, Forms and Special Fees*
MTU and TU strongly support the DNRC’s proposed fee schedule included in the rule proposal, including new fees for forms established in ARM 36.12.101 as a result of legislation in the 2025 legislative session and revisions to existing fees for consistency. These fee increases are necessary to generate adequate state special revenue to implement these legislative changes, including staffing and operational expenses associated with implementation. These increases to fee were included in discussions at both the Comprehensive Water Review Stakeholder Work Group and during appropriations committee discussions in both the House and Senate. It was widely supported in all of these venues that increases to fees would be required to generate state special revenue to pay for implementation. As such, we strongly support these changes to fees outlined in these ARM amendments.

One additional clarification that we request is related to fees associated with ownership updates to clarify that the filing of an ownership update for notice of intent to appropriate is treated the same as for a water right. The language change to (m) that we suggest is as follows:

> “(m) $100, plus $20 for each water right or authorized notive of intent to appropriate transferred after the first water right, for a Water Right Ownership Update, Form No. 608. The total amount shall not exceed $600. No fee is required for removing a deceased person from a record of ownership”

IV. *Amendments to ARM 36.12.115, Water Use Standards*

Our organizations support the change to utilize the Montana Department of Environmental Quality (DEQ) design flow rate standards for domestic single household water use. This is a common sense change to the ARM.

V. *Amendments to ARM 36.12.117, Objection to Application*
MTU and TU support changes to the administrative rule here concerning filing objections to applications. The current process of using a postmark date to assess the timeliness of filing an objection has become obsolete, and the utilization of digital filing brings the process into the modern era for all water users. We also support the changes to correct and complete determination that supports more defensible valid objections by requiring an objector to include both a set of "probable and believable facts" as well as requiring that those facts "support a reasonable legal theory." Given the level of misconceptions in the legislative process about frivolous versus valid objections, this change will help strengthen the integrity of the objection process that our organizations believe is a central tenant to the prior appropriation doctrine.

Lastly, both HB432 and SB178 contained new permitting processes, in which our organizations supported adequate opportunities for notice and objection to other parties that are materially harmed. These were critical elements to both pieces of legislation garnering the support needed to pass, and we strongly support utilizing the existing objection rules to support consistency.

VI. *Amendments to ARM 36.12.1305, Filing a Change Application and Form Acceptance*
Given the fact that our organizations regularly submit change applications that include both temporary and permenant elements of a change (i.e. instream flow transactions), we support this codification of Department policy that allows applicants to submit both elements on a single application form.

VII. *NEW RULE I, Public Comment on a Draft Preliminary Determination*
Our organizations were involved in the 2023 legislation that changed the permit and change application process, commonly known as HB 114 (2023). Part of that expediated process was to front load the review of application materials with a public comment opportunity to raise issues prior to the objection period. We supported that change, and we support this NEW RULE I to provide clarity of expectations in the public comment process for commenters and applicants alike. These rules will help promote consistency and completeness of comment to most effectively enhance the robustness of public comments.

One concern raised in the review of this rule was related to the requirements in subsection (2) and (3) related to the differences between submitting separate public comments on individual applications or water rights. It has been clarified in conversation that a separate public comment is required for

each individual application, not water right, even when an application may include multiple water rights.

VIII. *NEW RULE II, Project Completion Notice*
We support the proposed rule regarding project completion notices for permit and change authorizations generally as drafted. Other stakeholders have brought forward questions related to needing clearer expectations under some of the language, and we would make ourselves available to work with the Department if there is additional clarification needed.

IX. *NEW RULE III, Permit Verification*
We support the proposed rule regarding permit verification, a new requirement under HB441, generally as drafted. Again, we have spoken with other stakeholders that are seeking additional clarification around expectations, notably around level of detail required in the legal description as well as whether corrections may or shall be considered, and we make ourselves available to assist the Department in working through any changes that may be needed to increase clarity and define expectations.

X. *NEW RULE IV, Change Verification*
Again, we support the proposed rule regarding change verification, similarly a requirement under HB441, generally as drafted. Similar to NEW RULE III, we have heard similar concerns and make ourselves available to work through those areas of additional clarification needed.

In addition, part of the intention of HB441 was to ensure the congruence of change authorizations with a final decree. To that end, we understand that the holders of the change authorization, as well as other water right owners generally, do not want to re-open or re-litigate the change authorization after the fact, which is why the intention is to limit the verification to only the elements within the change. However, it is the goal to have one decree with identical information in it with water right abstracts, meaning that there may be changes imposed via final decree or petition process. As such, we would suggest the following language:

(1) The department will only evaluate:
    a. Elements of the water right authorized for change;
    b. Terms and conditions of the authorization;
    c. Elements of the right issued in a final decree pursuant to 85-2-402(9);
    d. Elements of the authorization to change a permit that have been reduced, modified, or revoked pursuant to 85-2-313, 85-2-314, and 85-2-315, MCA.

XI. *NEW RULE V, Verification Decision*
We support the proposed rule regarding the verification decision, as part of the requirements under HB441, generally as written.

XII. *NEW RULE VI, Hearing and Final Action*
This rule is congruent with the intent of HB441 to ensure due process for a water right user involved in a verification dispute. We support it generally as drafted.

XIII. *NEW RULE VII, Temporary Lease of a Water Right*
MTU and TU strongly supported SB 178 during the recent legislative session. We believe that it is an innovative tool to provides flexability for water users and enhances our organization's ability to achieve its mission to restore and conserve coldwater fisheries and their habitats. This tool is not new, and the policy that was adopted previously by the legislature in HB 37 (2013) first initiated the concept of a temporary lease in the Montana Water Use Act. Those provisions included a sunset that expired in 2019. In renewing the provision in 2025, we worked diligently with the diverse water stakeholder community to help develop a more workable, usable framework for this tool that contained adequate protections for senior water right holders.

One protection embedded in the new statute is a limitation to only the consumptive portion of a water right being available for lease (Sec. 1., (2)). One of the primary reasons rulemaking was required under the law is for DNRC to promulgate its methods for quickly, efficiently, and accurately determining the consumptive portion of a right, which is found in proposed NEW RULE VIII, subsection (3). We support the proposed rules for calculating the consumptive volume of the water right proposed, including the ability of the applicant to utilize a consumptive volume analysis from a recent change authorization. We support some of the discusssions from partners around additional clarity of expectations in (3)(a)(i).

Additionally, there is a requirement that the owner of the water right proposing to be leased must submit a statement of potential adverse effect and include measures being proposed to mitigate, *in aggregate*, those adverse effects. We supported the inclusion of this provision in the statute because it increases the transparency for other water users. In our mind though, it is important to clarify the bounds of that adverse effect disclosure and adequaqucy of mitigation efforts. The very nature of the law is to provide short term and temporary flexibility outside of the full change authorization process, so we think it would be helpful to clarify that the obligation is for the applicant to identify and disclose potential adverse effects and provide a good faith effort at mitigating those adverse effects, in aggregate, as the statute references. Further, there remain questions of who would have the burden of proof or responsibility of analysis in proving an adverse effect in an objection situation. We hope that the DNRC will work with partners to resolve those issues in implementation.

We support the ability to temporarily add storage to the leased water, which was a departure from the statute that previously expired. It is appropriate to require an applicant to identify the capacity of the proposed storage facility

and how that capacity was calculated, under subsection (5), if the applicant proposes to utilize this option. It help improve clarity if the applicant was also expected to identify if it is a consumptive or non-consumptive storage capacity in the application.

Finally, while the debate around SB 178 during the legislative session did thoroughly explore acceptable upper limits to the volume of water available for lease and the statement that the water leased must be used for beneficial purposes, it did not explore how an applicant would justify the volume that is being proposed to be leased. To the former issue, the legislature in SB 178 took a different approach than the previously expired statute and did not include an artificial cap to the volume of a lease, rather it said the volume of water to be leased was limited by the volume constraints of the underlying lease. To the latter point, it would be imaginable that given the Department's obligation to prevent the unnecessary waste of water, that even when the volume of water proposed to be leased is within the bounds of the underlying water right and it is for a beneficial use, that the Department would want some justification that the proposed volume of water to be leased is reasonable and not wasteful. To that end, we would suggest some inclusion of language that establishes the criteria by which the Department would evaluate the reasonableness of the proposed volume of a lease. One suggestion to that end is to consider any proposed lease that fits within the water use standards as deemed acceptable on its face. If the proposed volume falls outside of those standards, it would be reasonable to assume that the applicant would be expected to provide justification of the volume.

Thank you again for the opportunity to share our comments in regard to the proposed rule amendments and new rules pertaining to water rights permitting. If you have any questions or need additional information, please do not hesitate to reach out to us (clayton@montanatu.org or 406-543-0054).

Sincerely,

Clayton Elliott
Conservation Director
Montana Trout Unlimited