As requested by Chief Judge McElyea, the DNRC provides the following comments on the potential future of the Montana Water Court (per Water Policy Interim Committee study) and the Study *Resolving Water Rights Issues in Montana* (UM 2014)(Study).

Preliminary Comment

Many of the issues discussed in the Study about the adjudication, the permit and change process, enforcement and administration of water, and the post-final decree world were thoroughly discussed during the State Water Planning process. This process involved 80 diverse members of four Basin Advisory Councils (BACs), many technical advisory committee members, dozens of public meetings, and hundreds of public comments. The recommendations arising from those discussions can be found under the *Water Use Administration* section in the State Water Plan. http://dnrc.mt.gov/divisions/water/management/state-water-plan. This public-based planning product is bedrock to the Department's comments below.

Future of the Water Court

- *Complete the Adjudication*: It is critical that the State of Montana and the Water Court stay focused on completing the adjudication. The current timeline for completion is 2028. The BACs consistently cited the completion of the adjudication as a top priority. Deciding the future or changing the focus of the Water Court before final decrees is premature and distracts the Court from the sole purpose for which it was created. However, it is important to begin planning for how the final decrees will be implemented after the conclusion of the adjudication.
- *Improve Administration and Enforcement*: Of immediate concern for both current water use and in anticipation of final decrees is improving consistency, predictability and availability of administration (distribution) and enforcement of water rights. This could involve exploration of the use of new technologies as well as expanding the use of metering and measurement reporting to improve water right administration before and after final decrees. Additional water use data would improve both the change process and water availability for new permitting.
- *Living Decrees:* A statutory process should be developed to provide for updating final decrees with new ownership and incorporating changes and permits.
- *Maintain the current roles of the Executive and Judicial Branches*: Current due process protections in the permit and change processes need to be maintained or strengthened in the future. The current permit and change processes involve the Executive and Judicial branches as well as public notice. DNRC provides a scientific and legal review of permit and change applications and public notice of decisions. Applicants or other water right holders have the ability to participate and appeal a final DNRC decision to a local district court. This process continues to work and should be maintained in order to maximize the

due process protections involving both branches of government. It should be noted that a final DNRC decision on the merits of a change authorization has not been appealed since 2008.

General Study Concerns

- The Study would need additional context and detail for its purpose. Water rights are by their very nature both legal and science-based. The lack of legal and scientific context makes it impossible for a "lay" reader or anyone else to evaluate critically what changes should or should not be made to our current system. The Study is too general for one to make an informed decision.
- The discussion of authority from other states lacks sufficient context to form a basis for a critical evaluation for Montana. Each state has a complex scheme of checks and balances. Any one legal provision of a neighboring state is acceptable and effective only because it works in conjunction with other provisions. Individual provisions cannot be viewed in isolation. For example, the generous *prima facie* status of water right claims in Montana works only because the check on the accuracy of water rights comes in the change process; the change process purposefully puts the burden of proof of relevant criteria on the person seeking that change and involves a scientific review of potential adverse effects of the proposed change on the source and potentially affected water right holders.
- The Study seems to focus too heavily on the "look back" period. The use of the term "look back" period is really a misnomer. The Constitution and the Montana Water Use Act protect existing rights as they existed in 1973, with some, limited perfection exceptions. In 1973, the Legislature, based on the Constitution struck a balance between those existing rights and post-1973 new rights and changes in existing rights. The Legislature consciously chose to change the burden of proof moving forward and included a prospective scientific review. Changing the "look back" period has burden-shifting and constitutional implications; changing the look-back period would also arguably reward those who chose not to follow the law by seeking timely change approval from the DNRC. Since 1973, water holders old and new have relied on the Water Use Act process to protect their interests. Other states such as Colorado can have a much longer "look-back" period.
- The issues raised in the Study would need to be part of a broader open, public review and comment process to ensure transparency and that all perspectives are heard. A comparison can be made to the extensive public participation in *The Evaluation of Montana's Water Rights Adjudication Process* ("Ross Report,"1988), prepared for the Water Policy Interim Committee.