

**FACT SHEET
HB178**

SENATE NATURAL RESOURCES
PERMIT NO. 2
DATE 3/2/05
BILL NO. HB178

Department of Natural Resources and Conservation
Water Resources Division
01/03/2005

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO WATER USE; CHANGING THE NAME OF THE WATER RIGHT TRANSFER CERTIFICATE TO THE WATER RIGHT OWNERSHIP UPDATE FORM; CLARIFYING THAT THE DEFINITION OF "APPROPRIATE" MEANS THE USE OF WATER FOR A BENEFICIAL USE; PROVIDING THAT TEMPORARY CHANGES OR LEASES FOR INSTREAM FLOW TO MAINTAIN OR ENHANCE INSTREAM FLOW TO BENEFIT THE FISHERY RESOURCE IS AN APPROPRIATION; CLARIFYING THAT CERTAIN ACTIONS ON AN APPLICATION FOR A CHANGE IN APPROPRIATION RIGHT ARE THE SAME AS ACTIONS ON AN APPLICATION FOR A PERMIT; CLARIFYING THAT REVOCATION OR MODIFICATION APPLIES TO CHANGES IN APPROPRIATION RIGHTS; ELIMINATING THE REQUIREMENT THAT THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION NOTIFY THE COUNTY CLERK AND RECORDER OF EACH TRANSFER FILED; ELIMINATING THE REQUIREMENT THAT THE DEPARTMENT PROVIDE AN ADEQUATE SUPPLY OF WATER RIGHT TRANSFER CERTIFICATE FORMS TO EACH COUNTY CLERK AND RECORDER IN THE STATE; ELIMINATING THE REQUIREMENT THAT UPON REQUEST OF THE DEPARTMENT THE COUNTY CLERK AND RECORDER SHALL SEND TO THE DEPARTMENT A COPY OF ANY REALTY TRANSFER CERTIFICATES THAT DISCLOSE A TRANSFER OF WATER RIGHTS; ELIMINATING THE ADJUSTMENT OF FEES TO COVER THE COSTS INCURRED BY THE COUNTY CLERK AND RECORDERS IN PROCESSING WATER RIGHT OWNERSHIP UPDATE FORMS; AMENDING SECTIONS 15-7-305, 15-7-308, 85-2-102, 85-2-117, 85-2-307, 85-2-308, 85-2-310, 85-2-314, 85-2-316, 85-2-421, 85-2-423, 85-2-424, 85-2-426, AND 85-2-431, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

The Issue

- 1) Current law states the name of a form for updating the water right records after a water right changes ownership, such as in a simple real estate transaction. The form name in statute implies that filing the form legally transfers water rights. Only a deed legally transfers a water right; the department form is filed only to maintain an accurate central water rights system.
- 2) Current law specifically states that "Appropriate" and "Beneficial use" mean in the Upper Clark Fork River basin, to maintain and enhance streamflows to benefit the fishery resource in accordance with 85-2-439. However, the current definitions do not include references to another statute that authorizes temporary changes or leases for instream flow throughout the rest of Montana.
- 3) Current law specifies that a permit application must be published, that an objection to a permit application must contain certain information, and what action must be taken on a permit application and the consequences of not completing a project or following the conditions of a permit. However, the law does not specify that an application to change a

water right must be published, an objection to a change application must contain certain information, what action must be taken on a change application and the consequences of not completing a project or following the conditions of a change authorization.

4) Current law requires that the department notify the County Clerk and Recorder of each ownership update form filed, supply the ownership update forms to the County Clerk and Recorder, and that the County Clerk and Recorder send copies of realty transfer certificates that disclose a water right transfer. The Clerk and Records no longer have any responsibilities in this record keeping function, so this activity is unnecessary.

The Solution

1) This legislation changes the name of the form from Water Right Transfer Certificate to Water Right Ownership Update.

2) This legislation clarifies that the definitions of "appropriate" and "beneficial use" include temporary changes and leases allowed under 85-2-408, which allows for changes and leases across all of Montana.

3) This legislation clarifies that change applications have always required the same type of actions required on permit applications, including that a change application must be published, that objections to change applications must include certain information, and what action must be taken on a change application and the consequences of not completing a project or following the conditions of a change authorization.

4) This legislation removes the requirements of both the County Clerk and Recorder and the department.

Benefits to Montana

1) The form name change will help lessen the confusion by the public.

2) The definition clarifications of "appropriate" and "beneficial use" assure that all types temporary changes or leases throughout the State are consistently defined under Montana statute.

3) Water right change applicants and objectors to change applications will be able to clearly know what information is required on applications and objections and what actions will be taken on their application or change authorization.

4) The costs to Clerks and Recorders resulting from sending and receiving information that is no longer needed or used by them will be saved, including needing to be current on the appropriate use of the forms. Further, water right forms which used to be available only at department offices or from County Clerk and Recorder offices are available online. The costs of sending forms to the County Clerk and Recorder offices and of keeping current forms supplied will be saved.

TESTIMONY BEFORE THE SENATE NATURAL
RESOURCES COMMITTEE

HOUSE BILL NO. 178

Jack Stults, Administrator
Department of Natural Resources and Conservation
Water Resources Division

March 2, 2005

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO WATER USE; CHANGING THE NAME OF THE WATER RIGHT TRANSFER CERTIFICATE TO THE WATER RIGHT OWNERSHIP UPDATE FORM; CLARIFYING THAT THE DEFINITION OF "APPROPRIATE" MEANS THE USE OF WATER FOR A BENEFICIAL USE; ... AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Introduction

Representative Taylor agreed to sponsor this bill at the request of DNRC. I thank her for doing so, and thank the committee for its consideration.

Background

This bill is a general clean up of various Montana water laws. In addition to a few clerical corrections, the bill changes a form name; clarifies two definitions; adds language to clarify actions that occur on applications to change a water right; and removes requirements that are no longer needed.

Form Name Change: Let's talk about the form name change first. Current statute requires water right owners to update water right records stored in the centralized water right system. By having updated names and addresses, the DNRC and the Montana Water Court is able to notify the proper individuals about information pertaining to their water right and about new water right applications that may impact their water right.

Current statute requires that the form name used to update these records be called a Water Right Transfer Certificate. The form name has caused confusion for the public because they think that by filing the form, their water right has been legally transferred when in fact the form simply updates the DNRC centralized records. The deed legally transfers a water right. This bill changes the name from Water Right Transfer Certificate to Water Right Ownership Update. The DNRC talked with various water users and the Water Court staff about changing the name and everyone hopes that the new form name will clarify that the form only updates the water rights centralized records.

Definition Change: The next change included in this clean up bill is to add to the definitions of "Appropriate" and "Beneficial use". Let's start with the definition of "Appropriate". First, 85- 2-301 states that, "A person may appropriate water only for a beneficial use." However, the definition of "appropriate" does not include the reference to beneficial use. Many folks looking through statute to find out requirements start by looking at the definitions. Because the definition of "appropriate" does not include the reference to beneficial use, some folks have been unsure about whether their project requires a water right. For example, a person who digs a drain ditch to remove water and doesn't use it for any other purpose does not need a water right. By adding to this definition there may be less confusion among the public about what types of projects should be protected by a water right.

The second item this bill clears up in the definitions pertains to temporary changes or leases to enhance instream flow. Both "appropriate" and "beneficial use" include a section about benefiting fishery resources in the Upper Clark Fork River basin as provided for in 85-2-439, however, the definitions do not make it known that temporary changes or leases to benefit fisheries throughout the

State as allowed for in 85-2-408. This bill clarifies that the definitions of "appropriate" and "beneficial use" apply to all the temporary change and lease statutes.

Change Application Processing: A permit application is used to apply for new uses of surface water and large uses of ground water and a change application is used to change a water right's point of diversion, place of use, purpose of use or storage. Both applications require similar information, for example, applicants for a permit or a change must provide information pertaining to the source of water, the purpose, location of the diversion, the place of use, and so on. Applicants must also provide information to meet similar criteria required in statute. Since the passage of the Water Use Act in 1973, the DNRC has applied the actions set forth in statute to both permit and change applications. Those requirements include publishing the details of an application; providing individual notices to water users who may be affected by the application; how and when the DNRC must grant, deny modify, or cease action on an application; and what requirements must be followed to revoke a right granted by the DNRC. This is all basic process and this bill clarifies that both permit and changes are subject to the same actions.

Ownership Update Forms: When the Water Use Act was passed in 1973, there was a lot of concern about the historical reliance upon local county courthouses as water right information centers, and people continuing to depend upon courthouses for that purpose. At the time, the courthouses had been the only repositories for water rights information and it was where people were used to going to obtain water right information and file notices for new water rights. Over the years people have learned that the DNRC is now responsible for providing information about water rights.

This bill eliminates the requirement that the DNRC notify counties of each ownership update form filed and supply ownership update forms to the counties, and the requirement that the counties send a copy of any ownership update forms to the DNRC. At the request of the counties, the DNRC and Department of Revenue worked together to ease the burden on the counties pertaining to water right ownership updates. The DNRC and DOR developed a form that combined the Realty Transfer Certificate and the Water Right Ownership Update Form. This is the last statute clean up that is needed to eliminate the counties' responsibilities related to water rights. The counties no longer have to provide forms to the public, maintain a water right ownership file, or send reports to the DNRC. However, the access to water right information by the public has been enhanced by technology, which now allows forms and water right information to be provided via the Internet, by electronic mail, or by fax.

Conclusion

The DNRC urges the Committee to adopt these amendments to the existing water law. While I am certain that you will have to deal with far weightier questions of policy, these modest clarifications of the law will avoid future confusion. Please give HB178 a "do pass" recommendation from the committee.