

EXHIBIT 9  
DATE 1/21/09  
HB 40

House Bill 40  
January 21, 2009  
Presented by Bill Schenk, Esq.  
House Natural Resources Committee

Mr. Chairman and committee members, for the record I am Bill Schenk, Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP).

H.B. 40 represents a major change in the water right permitting process. FWP supports the fundamental change being proposed.

At meetings of the Water Policy Interim Committee, water right applicants, and those who represent them repeatedly expressed frustration with the application process, not only because it takes a long time, but because it is unpredictable. Applicants can invest a lot of time and money in an application and still be told no. This bill will help because applicants will know much earlier if they will have a difficult time getting a permit.

H.B. 40 first clarifies that a correct and complete application is one that contains enough information for the DNRC to begin evaluating it, not to determine whether the application meets the water right permit or change criteria.

H.B. 40 also makes it clear that DNRC has the authority to communicate with applicants, evaluate evidence submitted at an early stage and communicate shortfalls in evidence earlier in the process. This is done by creating a new step in the process that requires a "preliminary determination" prior to the application being sent to the larger public for review. If the preliminary determination results in a recommendation to deny the permit, the applicant may appeal that decision to the department. DNRC may then affirm its preliminary determination or propose to grant the permit. Either way the Department proposes to grant a permit, whether before or after a hearing, a notice of the proposal must be published and other parties then have a chance to object.

The problem is that 90 days is not enough to conduct meaningful discovery, line up experts etc. 120 days would be more appropriate to get through the process. But more importantly, FWP feels that DNRC needs the statutory authority to extend the time limit.

Applicants want a faster permit process and predictability. That's what this bill is about, and FWP supports that. But if an applicant drags its feet leading up to hearing - by being slow to answer discovery or if there's trouble scheduling an expert for deposition, the objector may be forced into a hearing without necessary information. I don't think this is common but it certainly could happen. What is common is for parties to work toward a settlement and ask for more time to work it out. DNRC is usually accommodating if all parties agree, but it isn't clear in the statute that DNRC has the authority to do so. The statute should acknowledge that DNRC may extend the deadline.

FWP proposes that one sentence be added to 85-2-309(1) that states: "The Department may extend the 90 (120) day deadline for good cause shown or upon request of applicant and all objectors." "Good cause" would cover an extension where one party has to ask for a motion to compel discovery, or a change in attorney etc. "Request of all parties" would cover an extension for parties to continue to work toward settlement.