

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

EXHIBIT 3
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HB 3



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**TESTIMONY OF TIM DAVIS, ADMINISTRATOR WATER RESOURCES DIVISION
DNRC
BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE
IN SUPPORT OF HB37 (January 16, 2013)**

Chairman Bennett and Members of the House Natural Resources Committee:

Please consider this written testimony in addition to my verbal testimony before the Committee on January 16, 2013.

The Water Use Act was passed in 1973. The Water Use Act reflects the important protections and considerations of Article IX Section 3 of the 1972 Montana Constitution. Specifically, these are the recognition and protection of existing water rights (pre-1973) while allowing for the appropriation of water for the beneficial use of the people of Montana. Since passage of the Water Use Act, one cannot obtain a water right (permit) or change an existing water right in Montana without completing the process set forth in the Act. One of the key features of the Act is that the new applicant must prove to DNRC that the new appropriation or change will not cause an adverse effect to other appropriators before a permit or change authorization will be granted.

HB 37 creates a new process, as a very limited exception to the change process, to allow water right holders to be able to temporarily lease their water rights for other purposes. This new process is faster than the normal change process, but it will also contain specific limits to help ensure that other appropriators will not be adversely affected by the lease.

HB 37 will help bring people into compliance with the Water Use Act who may have otherwise used or leased water illegally without HB 37. The purpose of this Bill is to address temporary uses which the Department knows are occurring outside the protections of the Water Use Act.

If an applicant does not want to comply with the limitations under HB 37 or wants more than HB37 offers, he or she can go through the normal change process under 85-2-402,

MCA. In fact, under HB 37, an applicant could seek to temporarily lease their water right while going through the normal change process to permanently or temporarily change their water right under 85-2-407, -408 or 436, MCA (generally 10-year terms).

A temporary lease under HB 37 may only be used 2 years out of ten consecutive years. This limitation is necessary to minimize adverse effect to other appropriators and keep this process from becoming an end-run around the much more rigorous adverse effect analysis in the normal change process under 85-2-402, MCA. The 2 years need not be consecutive. However, the lessee must provide the Department with a copy of the executed lease agreement prior to putting temporarily leased water to use.

In order to use the temporary lease process under HB 37, an applicant must provide the Department with affirmative proof that the water right to be leased has been used within the 10 years prior to the application date. This requirement is essential to limit people from leasing a water right that they have not used for more than 10 years and whose resumption of that use could harm other water rights that have been developed during that period of non-use.

In order for the HB 37 process to be faster than the change process, an applicant may only lease the consumptive volume of an appropriation right. For example, the consumptive volume of an irrigation water right would generally be than amount consumed by the crop, which did not return to the stream. The Department, not the applicant, will determine the consumptive volume using rules adopted pursuant to HB 37. The total consumptive volume that may be leased under HB 37 may not exceed 180 acre feet per year.

HB 37 is also designed for the Department to easily enforce any potential abuse of the bill if it becomes law by requiring that the lessor cease the use of all water rights associated with place of use of the leased appropriation rights during the entire period of the lease. This includes any supplemental rights or other rights associated with the place of use even if those other rights are not being leased. In other words, if for example an irrigator uses the HB 37 process to temporarily lease 180 acre feet per year from a pivot then they must not irrigate the place of use covered by that pivot during the entire irrigation season or seasons.

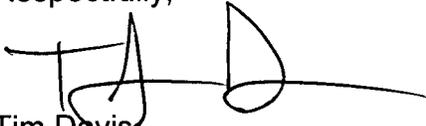
The Department believes that it is important that HB 37 not be limited to specific beneficial uses or users, but instead is available to be used for any beneficial use.

The Department would like to see two amendments to the bill. One is simply a technical amendment to correct a missed reference to ensure that all beneficial uses are covered by HB 37 and the other is to ensure that if a temporary lease application is objected to and goes to hearing that the applicant then has the burden of proving that other water rights will not be adversely affected.

Under HB 37, if a temporary lease application is denied or cancelled then the underlying water right is not changed and may continue to be used according to the provisions of that water right.

And finally, a temporary lease under HB 37 is still in priority and may be called if a senior water right holder is not receiving their water.

Respectfully,

A handwritten signature in black ink, appearing to read 'TD', with a long horizontal line extending to the right.

Tim Davis

Water Resources Division Administrator

Montana Department of Natural Resources and Conservation