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Memorandum

To: Environmental Quality Council

From: Krista Lee Evans
Research Analyst

RE: Water Right Ownership Updates

Date: May 1, 2006

One of the side effects of the water adjudication fee billing is the chance for Department of Natural Resources and Conservation (DNRC) to update the addresses in the water rights database. The state is required, by the constitution, to keep a centralized record system.

Purpose of the Water Rights Database

Article IX, section 3 of the Montana Constitution provides:

Section 3. Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

DNRC is the agency responsible for maintaining the "water rights database". Part of that maintenance includes updating ownership information. The water right ownership update statutes were initially passed in 1983 when it became apparent that "use" water

rights were not being filed with the department. Since that time, the statutes have evolved in an effort to ensure that DNRC is made aware of ownership changes so that the database can be updated. A copy of the legislative history for sections 85-2-421, MCA through 85-2-431, MCA are attached.

Ownership Update Form -- What it Does and Does Not Do

The water right ownership update form DOES NOT transfer the title of the water right. A water right is a property right just like the property to which it is attached. However, water rights automatically transfer with a piece of property if the deed is silent in the transaction. If a seller wants to keep a portion or all of the water right, the seller must state this and provide for this in the deed. It is critical that entities selling property understand this. They cannot retain a water right through the ownership update form -- it MUST be done through the deed process.

The water right ownership update form DOES update the owner information in water rights database managed by DNRC. If a seller does not file the form as required by 85-2-424, MCA there is no way for DNRC to know that the database needs to be updated. The sole purpose of the form is for purposes of updating the database. There are multiple reasons for ensuring that the water rights database is current. A few of those reasons are outlined below.

Ownership Update Form Location

The ownership update form (the name was updated in the 2005 session to more accurately reflect its purpose) is part of the Realty Transfer Certificate (RTC) that is filed at closing. Part 6 of the first page of the RTC is a water right disclosure section that must be filled out by the seller. The actual update form is located on the second page of the RTC. The form should be completed during closing in a real estate transaction. However, even if the form is completed the requirement for filing the form lies solely with the seller. Some real estate companies and title companies take care of filing the update form or ensuring that it gets filed. However, that is not required and is voluntary by those entities. A copy of an RTC is attached.

Section 85-2-431, MCA provides for a civil penalty of not more than \$50 if the seller does not file the ownership update form. However, if the form is not filed, there is no way for DNRC to know that a property transaction occurred and to move forward with assessing a penalty.

Importance of Updating Database

Why it is important to have accurate ownership information in the water rights database? The most recent public example of why accurate mailing addresses are needed was for the purpose of sending out water adjudication fee bills. However, the

uses of the database and the implications associated with inaccurate ownership records far exceed the need for sending out fee bills.

New Appropriations

The information contained in the water rights database is used by DNRC (both adjudication and new appropriations) and the Montana Water Court. When there is an application for a new water right other water users with existing water rights are allowed by law to challenge the new water right permit application if their water right will be adversely impacted by the new right and its use. DNRC determines the entities that need to be noticed based on the records in the database. The water right ownership information is acquired through the database by stream reach, by basin or sub-basin, or by location for specific sites. In the event an address or name is wrong because the ownership update was not submitted to DNRC there is a good chance that an existing water user will not receive proper notice as required by 85-2-307, MCA.

Water Right Controversies

Water right controversies occur throughout Montana in various venues. When or if a water right controversy is elevated to an administrative or judicial level it is critical that the database be able to provide indexes by owner, basin or sub-basin, stream reach, or priority date and sometimes combinations of all or some of those listed. This type of request is commonly made against the water rights database during enforcement projects where a stream or stream reach is part of a decree and the water users have petitioned the district court for enforcement. Enforcement is not possible without the indexes discussed in this section.

Highway and Road Construction Projects

When the Montana Department of Transportation, counties, or cities are designing, building, or repairing roads that cross waterways they often request information from the water rights database. The water rights information that they request helps the entity to estimate culvert size needed and to determine a ditch's location and use.

Real Estate Transactions

Depending on the type and use of the property being bought and sold, water rights information can be critical to the decision of a buyer to purchase a parcel of property. Property with out a water right, whether it be for domestic, stock, lawn and garden, commercial or any other use, is generally less valuable than property with a water right. Sellers and buyers often contact DNRC to determine the validity of the water rights associated with the parcel they are interested in and to ensure that a portion of the water right has not been retained by a seller in a previous transaction.

Water Leasing

Montana law allows entities to lease water for specific periods of time and for specific purposes. The water rights database is used to identify who the owner of a water right is, what the flow rate or volume of the right is, and where the place of use is located. If the ownership information is not accurate in the database it is much more difficult for the parties to determine if there would be an opportunity for a lease. An example of a water lease would be the lease that exists between International Malting Company and Montana Fish, Wildlife, and Parks. The malting company leases water from FWP for use in its plant for a nonconsumptive purpose. Without the water made available by this lease it would be impossible for the malting company to operate.

Adjudication

A critical part of the adjudication process is providing notice to other water users in the basin subject to a decree. Montana's statutes rely heavily on other water right holders and claimants to object to claims if they feel they are inaccurate or adversely affect their water rights. In fact, some claimants object to their own claims so that their claim can be looked at more closely by a water master and the Water Court. If the database does not have accurate ownership records and a claimant is not notified then there could be significant problems with the resulting decree. A claimant is guaranteed in statute that they will receive notification - since the seller is responsible for submitting the ownership update form, the claimant could be excluded from the process out of no fault of their own. The Water Court makes every effort to ensure that the claimants get notification but if the ownership update form isn't filed there is really no way that the Water Court could know that the claimant is not receiving notice unless the mail is returned as undeliverable or the Water Court is notified some other way. However, if the person who receives the notice no longer owns the property and simply throws away the notice rather than returning it to the Water Court, how will the Water Court or the DNRC know that the ownership records are not accurate?

Summary

Prior to the bills being sent out for the water adjudication fee, it was estimated that the ownership records in the water rights database were only 60% accurate. DNRC has cleaned up these ownership records as the result of return mail in the billing process and the issuance of decrees. In essence, the state has been given a second chance to "start from scratch" with a reasonably accurate database. The question is how does the state make sure that the ownership update forms are filed? Is there a problem with the current process? Is there a way to make the process better? Without accurate records there are serious concerns regarding due process and the rights of existing water right holders or claims holders to be notified of new permit applications, decree issuances, and enforcement actions. If this notification is not received out of no fault of their own the property buyer might have standing to challenge the whole process - whether it be the adjudication or a new appropriation.