



Water Policy Interim Committee

61st Montana Legislature

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TO: Water Policy Interim Committee
FROM: Helen Thigpen
DATE: June 28, 2010
RE: LC9999 -- Proposed Revisions to Section 85-2-125, MCA.

Following a discussion during its May meeting, the WPIC requested staff to draft a bill draft that revises section 85-2-125, MCA, regarding the recovery of costs and attorney fees by a prevailing party upon appeal of a final decision by the Department of Natural Resources and Conservation. The WPIC is scheduled to address the draft (LC9999) during its July meeting. This memorandum provides background information on section 85-2-125, MCA, and a summary of the discussion that took place during the Committee's meeting in May. It also provides a brief explanation of the factors a district court will consider in determining whether to award attorney fees.

Section 85-2-125, MCA, provides:

Recovery of costs and attorney fees by prevailing party. (1) If a final decision of the department on an application for a permit is appealed to district court, the district court shall award the prevailing party reasonable costs and attorney fees.

(2) The party obtaining injunctive relief in an action to enforce a water right must be awarded reasonable costs and attorney fees. For the purposes of this section, "enforce a water right" means an action by a party with a water right to enjoin the use of water by a person that does not have a water right.

Section 85-2-125, MCA, was enacted by section 11, Chapter 416, Laws of 1977. In 1995, the Legislature enacted a temporary subsection regarding the recovery of attorney fees in hearings and decisions involving the Upper Clark Fork basin. The amendment, which was effective April 14, 1995, and terminated June 30, 2005, provided that "the prevailing party in a hearing under 85-2-309 on an application for permit or change approval may bring an action in district court for costs and attorney fees". Section 85-2-125, MCA, was amended in 2005, to allow the recovery of costs and to allow a party who has obtained injunctive relief enforcing a water right to recover costs and attorney fees.

In 2009, Representative Cohenour introduced HB 470, which amended section 85-2-125, MCA, to apply to a permit or a change in appropriation right and to provide that the district court *may* award reasonable costs and attorney fees. HB 470 also stated that "Costs and attorney fees accrued in the administrative process are not allowed under this subsection." HB 470, which

died in standing committee, was retroactive and would have applied to pending judicial and administrative proceedings. HB 470 is attached for reference.

During its May meeting, the WPIC heard a discussion about reviving HB 470. The WPIC also heard a discussion of several different concerns related to current statutory language. There was a concern raised that section 85-2-125, MCA, does not provide the district court with discretion to award costs and attorney fees. The statute currently requires costs and attorney fees to be awarded to the prevailing party, if requested. A second concern was raised that section 85-2-125, MCA, does not allow fees to be recovered on an application for a change in appropriation right. The question posed was whether an applicant for a change in appropriation right should have the same right to recover costs and attorney fees as an applicant for a new permit under section 85-2-125, MCA. Third, a concern was raised regarding whether costs and attorney fees should be allowed to be asserted or recovered against the department. The argument was made that costs or fees should not be assessed against the department because it is acting in a "quasi-judicial"¹ capacity when it renders a decision on an application for a new permit or a change. Finally, a question was raised about whether a prevailing party should be allowed to recover costs or fees incurred from the underlying administrative proceedings.

As requested by the WPIC, staff drafted LC9999 for review at the July meeting. Specifically, LC9999 revises section 85-2-125, MCA, to:

- clarify that a district court has discretion to award reasonable costs and attorney fees;
- clarify that reasonable costs and attorney fees may be recovered on an appeal of an application for a permit or a change in appropriation;
- prohibit costs or attorney fees from being asserted or awarded against the Department of Natural Resources and Conservation; and
- limit the award of costs or attorney fees to those incurred as a result of the appeal.

LC9999 would be effective upon passage and approval and apply to an application for a permit or change in appropriation right filed with the Department after the effective date of the Act. As drafted, the bill does not affect pending proceedings, either before the DNRC or currently on review to the district court.

In determining whether to award attorney fees, the district court evaluates whether a statutory or contractual provision for the award exists. It is well established that a court cannot award attorney fees absent a contractual or statutory provision that states otherwise. If attorney fees are allowed, the district court may consider a variety of factors, including the "amount and character

¹ A quasi-judicial proceeding or action are terms that are commonly used to describe the discretion afforded to agencies or bodies that are required to investigate or determine facts and to draw conclusions in order to render a decision.

of the legal services rendered", the labor involved with the case, "the character and importance of the litigation", the amount of money or value of the property at stake, and the attorney's skill and experience.² The costs that are generally allowable are set forth in section 25-10-201, MCA. These include costs from a witness's legal fees, deposition expenses, fees paid for filing or recorded papers, and reasonable expenses for printing papers for a hearing (when required by a court's rule). The district court retains broad latitude to determine what costs and fees are reasonable under the circumstances.

The WPIC may request additional clarification of the provisions of LC9999 at its July meeting.

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² State v. American Bank of Montana, 2008 MT 362, ¶ 9, 346 Mont. 405, 195 P.3d 844.