Oct. 8, 2020
Water Policy Interim Committee
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LEPO

PD0009 (AMENDING WATER RIGHT OWNERSHIP UPDATE PROCESS)

OPTIONS FOR DRAFT LEGISLATION

This memo serves to provide options for the WPIC to consider further amendments to PD0009. Members of the Geocodes Working Group offered a modified PD0009 at the Sept. 15 WPIC meeting. The committee directed staff to further amend that modified bill by:

- Removing subsection (9) of section 1 (85-2-424) as redundant
- Adding "except as provided" language in subsection (8) of section 1 (85-2-424)
- Increasing the penalty in subsection (1) of section 2 (85-2-431) to $300
- Replacing "must" with "may" in subsection (2) of section 2 (85-2-431)

After a subsequent meeting of the Geocodes Working Group Sept. 30, WPIC members asked for additional options. The options span two areas: the penalty for not paying the ownership update fee (subsection 1 of 85-2-431) and the mechanism for recovery of penalties (subsection 2).

PENALTY

The committee requested two options for the penalty: a penalty that would be double a transferee's fee, and a graduated scheme. Both are described in more detail below.

A penalty twice the amount the update fee. Under 36.12.103 ARM, the transferee (new owner) of the water right must file form 608 and pay a fee of $50 "plus $10 for each water right transferred after the first water right...The total amount shall not exceed $300." Under this option, subsection (1) may be drafted as:

> A person who fails to comply with the requirements of 85-2-424 is liable for a civil penalty of not more than twice the amount of the required fee.

A graduated penalty similar to 15-1-216, MCA. The Department of Revenue uses this statute for unpaid income taxes and contains a variety of graduated penalties. For example, if a tax return is not filed by the due date, "the penalty is the greater of $50 or 5% of the tax due for each month during which there is a failure to file...not to exceed an amount up to 25% of the tax due." Failure to pay a tax when due "must be assessed a late payment penalty of 0.5% a month on the unpaid tax. The penalty may not exceed 12% of the tax due."

This section thus penalizes a person for not filing a return *and* for not paying their tax. The section continues with different penalty schemes for those who make a substantial understatement of a tax, knowingly fail to file a return, or files fraudulent or frivolous returns.

For a graduated penalty for PD0009 mirroring 15-1-216, MCA, subsection (1) may be drafted as:

> A person who fails to comply with the requirements of 85-2-424 must be assessed a late filing penalty. The penalty is 5% of the required fee due for each month during which there is a failure to file the return or report, not to exceed an amount up to 25% of the fee due. A person who fails to pay the required fee must be assessed a late payment penalty of 0.5% a month on the unpaid fee. The penalty may not exceed 12% of the fee due.[1]

What would the practical effects be of this graduated scheme? For example, a transferee with two water rights would be responsible for an ownership update fee of $60. Under the graduated scheme, the transferee would be subject to a $3 a month penalty (up to $15 a month) for not filing form 608, and a penalty of 30 cents a month up to $6.60 a month for failure to pay that required fee. A transferee responsible for the maximum ownership update fee of $300 could face a $15 a month penalty (up to $75 a month) for not filing form 608, and a penalty of $1.50 a month up to $36 a month for failure to pay the required fee.

MECHANISM

Once the committee has settled on a penalty, the committee must choose a mechanism for gathering that penalty. The WPIC asked for the following options at the GWG meeting Sept. 30:

The current mechanism in subsection (2) of 85-2-431, which required the DNRC to file an action in Helena district court.

Private collections, which would require an administrative decision by the DNRC to pursue collections through a private agency. This approach is not common in Montana state government, according to staff research.

Collections through the Department of Revenue and Title 17, chapter 4, part 1, MCA. This approach is more commonly used by state agencies, using Revenue as the collections agency. The DNRC would need to give the water right owner notice of the penalty and an opportunity to argue that they were not in violation, and the DNRC would need to make a determination that the money owed was "uncollectible" before turning it over to Revenue's debt collection service.

A lien against the transferee. A lien is defined as "a charge or security or encumbrance upon property."[2] This option appears to have two approaches:

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[1] Please note this draft language does not include "the greater of $50 or 5%" language included in 15-1-216, MCA, because the math does not work.
[2] *Black's Law Dictionary*, West Publishing Co. (1979).

- a lien enforced through the Department of Revenue's existing system for collecting delinquent taxes in Title 15, chapter 1, part 7, MCA, or
- a lien on property created under Title 71, chapter 3, MCA.

The Department of Revenue approach relies on the creation of a "warrant of distraint" upon the transferee's property. The transferee would have to pay the fee, and perhaps penalties and interest, it is unclear if the required fee, penalties and interest would end up with the Department of Revenue or back in the DNRC's water rights filing fee fund. This approach would require additional staff research during the formal drafting of the bill.

State law also allows for the creation of liens by "contract by parties" or the "operation of law."[3] The question for the committee under this approach is what leverage would the DNRC have—perhaps an interest in the water right? For example, hotel owners have a lien on a guest's "baggage or other property" until all charges are paid. After six months, the hotelkeeper may "sell or dispose" that baggage or property to pay those charges. This approach, if chosen by the committee, would also require additional staff research during the drafting of the bill.

[3] Title 71, chapter 3, MCA.