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House Bill 39: New system for updating water right ownership records will bring changes for real estate transactions

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HELENA, Mont. – The long, rigorous effort to adjudicate water rights in Montana has a new ally – House Bill 39 – and title companies, attorneys, and anyone else closing a property transaction in Montana will want to become familiar with it.

The Water Resources Division of the Montana Department of Natural Resources and Conservation (DNRC) has been working since 1982 to adjudicate some 215,000 claims in the state. The project would be daunting enough with accurate ownership records, but in 2005, after sending out adjudication fee invoices to 108,000 supposed water right owners, DNRC found that more than one-third of them were returned as undeliverable.

“People simply weren’t filing ownership updates on their water rights when property changed hands,” said Terri McLaughlin, Chief of DNRC’s Water Rights Bureau. “We had water rights owned by people who had passed away or who had transferred the water right in a sale years ago.”

McLaughlin estimated there were some 72,000 water rights in the DNRC database for which the ownership information was obsolete.

Since 1983, Montana water law has required the parties to a property transfer to file a water right ownership update form with the DNRC. Staff would enter the new owners into the water right database. The purpose of the statute was to facilitate the maintenance of a reliable record of water right ownership.

In an effort to accelerate ownership updating to assist the adjudication of water rights, Montana lawmakers in 2007 turned to the state Department of Revenue (DOR) and its geocode tracking system. Every piece of property in the state is assigned a geocode by the county for tax purposes; if a property is subdivided, each new parcel gets its own

geocode. The DNRC and DOR put their heads together to come up with a system for matching water rights with property geocodes in order to find a way to automate updating water right ownership.

House Bill 39 authorized the funding to facilitate DOR sharing its property database with DNRC. The agency will link geocodes to water right parcels. Then DOR will forward on a periodic basis to DNRC the new property owners and addresses with the property geocode. DNRC can then upload the data file, match the geocodes and update the new owners' names in their water right records. Beginning July 1, 2008, future transfers of water rights with property will have the new owners updated automatically through the linking of the two agency databases.

McLaughlin said using the geocode system will update 80 to 90 percent of the water right ownership records electronically. DNRC will still have to update some 5,000-10,000 records by hand. Once that task is complete, McLaughlin estimates that 90 percent of all future records will be updated automatically.

HB 39 will go into effect on July 1 of 2008. What does it mean for title companies, attorneys and other parties closing a property transaction?

By law a water right automatically transfers with a piece of property when it is sold unless specific provisions are made by the seller at the time of the sale. When filling out the Realty Transfer Certificate (RTC) which is filed with the deed at the county, the seller must disclose his plans for the water right. A revised RTC form will identify the possible scenarios, which include the following:

- An outright transfer of the water right to the new owner
- A division of the water right among two or more owners (this may occur when a parcel of land is subdivided)
- An exemption or reservation of the water right from the sale of the property. This means the water right remains with the seller even though the property changes hands.

A water right can also be "severed" from a parcel of land. In this scenario, the water right is removed from the property and the owner sells the water right but keeps the property. These transactions require the owner to file a paper ownership update form with DNRC. McLaughlin said this scenario accounts for fewer than 5% of all water transactions.

The completed RTC form is then filed by the closing party or closing company at the county clerk and recorders office, along with the deed. If the water right was divided or reserved, the RTC form and deed must be accompanied by a certification that the water right ownership update form and fee is in escrow or will be filed with the DNRC within 5

days of filing the deed. The DNRC will provide the form to the sellers or closing companies.

The closing company will collect the DNRC update filing fee whether the water right transfers, is divided, or reserved. If the property has been divided, the county clerk will then assign the property a new geo-code, which will go into the Department of Revenue's database. Each month, DOR will send DNRC the latest batch of new owners with geocodes, enabling DNRC to update its records.

Until the new legislation goes into effect, McLaughlin said, it's important that title companies and others handling property transactions file the Water Right Ownership Update Form 608 (available on the web at: www.dnrc.mt.gov/wrd/) with DNRC if there's a water right connected to the land. Most of the time, she added, that duty falls to the buyer. "About 80 percent of the time it ends up being the buyer's responsibility," McLaughlin said. "The seller has already left the area."

Why is it so important to have the correct owner of every water right in Montana? In a word: Adjudication. The process of adjudicating water rights in every Montana basin is accelerating due to the 2005 Legislature passing HB22. If the Montana Water Court sends out notices of a decree to water right holders on a particular river or stream and the notice goes to the wrong party, the rightful owner could lose out on the chance to contest the court's ruling – and could ultimately lose the water right.

There's another, equally important reason, McLaughlin said. "DNRC gets new water right applications every day. Part of the application process involves notifying potentially affected water right owners. If we don't have the right owner, that person could miss out on the chance to file an objection or participate in a hearing."

For more information, or if you have questions or comments, contact DNRC Public Information Officer John Grassy at (406) 444-0465 or by email at jgrass@mt.gov