


# *Water Right Permitting*

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*2009 AWSE Fall Conference*





# 2009 LEGISLATION OVERVIEW

- HB40 – Major change in permitting process [MCA 85-2-102, 307, 309, 310]
- SB396 – Exemption for replacement point of diversion changes on surface water sources [MCA, 85-2-402(18)]



# What led to the legislation?

- 2006 - Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.2d 224
- Interim Water Policy Committee
- 2007 - HB831 Groundwater Permitting in Closed Basins [MCA, 85-2-360-369]

# Interim Water Policy Committee

- Many other concerns from water users and interest groups
  - Length of time to get a decision
  - Don't have any idea of the Dept. position until very end of process
  - Objectors continually have to expend resources to protect their water rights
- Developed and enacted HB40

# HB40 – What were some of the changes made?

## 85-2-307 Notice of application for permit or change

- *Post notice on website*
- *Meet informally with applicant*
- *Meet with other appropriators*
- *Issue Preliminary Determination (PD)*
- *If PD to grant , application proceeds to notice*
- *If PD to deny, applicant may request a hearing*

# HB40 Permit Process

## 85-2-309 Hearing on objections

- *Hearing within 90 days of objection deadline*
- *90-day extension for good cause or upon request of applicant and objectors*

# HB40 Permit Process

## 85-2-310 Action on application for permit or change

- *If PD proposes to deny, hearing held to show cause why the permit or change should not be denied*
- *Substitution of hearing examiner who did not participate in the PD (limited to 1 request)*
- *PD to grant after hearing on PD to deny, proceed to public notice*

# HB40 Permit Process

## 85-2-310 Action on application for permit or change

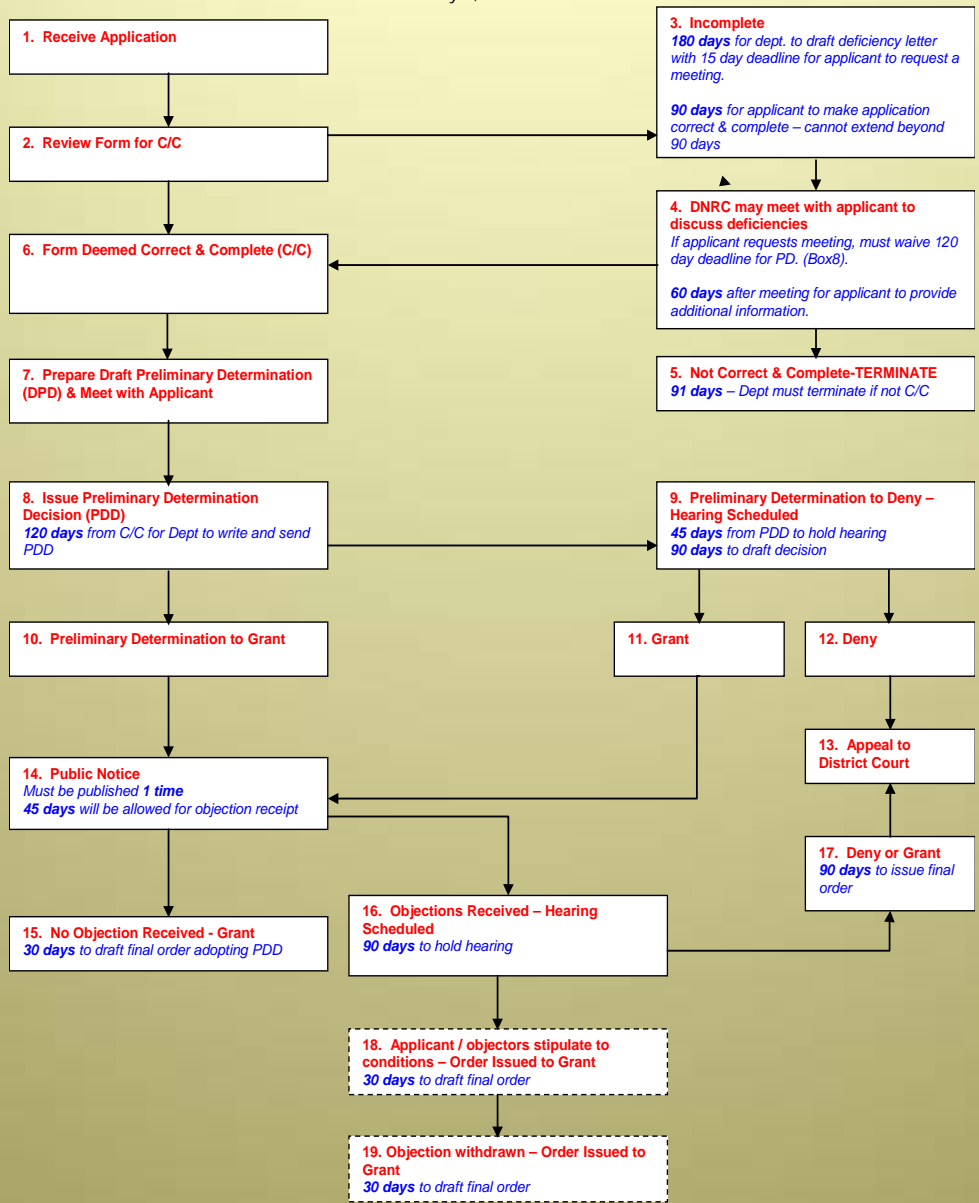
- *Objections not received or unconditionally withdrawn*
  - *Dept. shall grant*
- *Objections conditionally withdrawn*
  - *Dept. shall grant with conditions as necessary*
- *Grant or deny within 90 days of close of administrative record.*

# How does the Application Process work



# HB 40 PROCESS FLOW CHART

For Permit and Change Applications  
July 1, 2009



# SB396

## Replacement PODs





# SB 396 Replacement POD

## 85-2-402(18) Purpose

- Reduce the requirements for replacement point of diversion (POD) changes
- Previously a simple maintenance change in POD required an applicant to file a 606 form and prove criteria under 85-2-402(2), MCA
- Replacement PODs allowed without prior approval from the Department
- Effective October 1, 2009.



# When does a POD change qualify?

- Existing POD is inoperable due to natural causes or deteriorated infrastructure
- No other changes to water right
- Capacity of the diversion is not increased
- No intervening points of diversion or water rights OR the appropriator obtains waivers
- Same surface water source; located as close as reasonably practicable to the existing POD



# When does a change of POD qualify?

- Existing POD will no longer be used
- Existing POD has been used within past 10 years
- Will not increase access to water availability, change the method of irrigation, increase the amount of water diverted, used or consumed
- Notice of Replacement POD is filed 60 days after completion



# What's Next

## The Process

- Department will review the Notice to determine if it is correct and complete and has met all the criteria in 85-2-402(18)(a), MCA
  - May inspect the diversion to confirm
  - May send a deficiency letter
- If above are met, Department shall issue the change authorization



# The Process

- If a notice is not filed within the time allowed or the criteria under 85-2-402(18)(a) not all met
  - The appropriator shall cease appropriation from the replacement POD
  - Submit an application to change form 606 under MCA, 85-2-402(1)



# The Process

- If issued, authorization published and notice sent [ 85-2-307, MCA]
- Appropriator may file objection that change in POD will create adverse effect
- Contested case hearing
  - Department may revoke or condition the Authorization
  - Burden of proof for lack of adverse effect is on the appropriator changing the point of diversion

### NOTICE OF REPLACEMENT POINT OF DIVERSION

Use this form to inform the DNRC of a surface water point of diversion (POD) that has been replaced. This form must be filed within 60 days of the completion of the replacement POD.

Attach additional sheets if needed to explain information.

**FILING FEE: \$400.00**

#### FOR DEPARTMENT USE ONLY

Notice No. \_\_\_\_\_ Basin \_\_\_\_\_  
 Date Received \_\_\_\_\_ Time \_\_\_\_\_ AM / PM  
 Rec'd By \_\_\_\_\_  
 Fee Rec'd \$ \_\_\_\_\_ Check # \_\_\_\_\_  
 Deposit Receipt # \_\_\_\_\_  
 Payor \_\_\_\_\_  
 Refund \$ \_\_\_\_\_ Date \_\_\_\_\_

1. **WATER RIGHT OWNER(S)** \_\_\_\_\_  
 Mailing Address \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
 Work Phone \_\_\_\_\_ Home Phone \_\_\_\_\_ Cell Phone \_\_\_\_\_
  
2. **DATE REPLACEMENT OF POD COMPLETED** \_\_\_\_\_ If the date completed is longer than 60 days from the date post marked, this form cannot be filed. An Application for Change Form 606 must be filed.
  
3. **WATER RIGHT NUMBER (for the old POD being replaced)** \_\_\_\_\_
  - a.  Attach a water right abstract of the existing water right.
  - b.  What type of change is being made to this water right? If more than the Point of Diversion is checked, this form cannot be used.  Point of Diversion  Place of Use  Purpose of Use  
 Place of storage
  - c.  Yes  No  NA Is the method of irrigation changing? If yes, this form cannot be used.
  
4. **DIVERSION INFORMATION**
  - a.  Yes  No Has the old POD been used within 10 years prior to this notice? If no, this form cannot be used. If yes, attach supporting documentation such as dated pictures, affidavits, power records, or water commissioner records.
  - b.  Yes  No Are the new and old means of diversion the same? If no, explain.  
 \_\_\_\_\_  
 \_\_\_\_\_
  - c.  Yes  No Are the old and new (replacement) POD on the same surface water source?  
 If no, this form cannot be used.
  - d.  Yes  No Is the new POD located as close as reasonably practicable to the old diversion?  
 Explain.  
 \_\_\_\_\_  
 \_\_\_\_\_
  - e.  Yes  No Is the old POD rendered inoperable due to natural causes or structure deterioration.  
 Explain why it cannot be used. If the old POD can still be used, this form cannot be filed.  
 \_\_\_\_\_  
 \_\_\_\_\_
  - f.  Yes  No Is the old POD able to be used by you or other water right users? If yes, this form cannot be used.
  - g. Old diversion capacity: \_\_\_\_\_ gpm/cfs (circle one)  
 New diversion capacity: \_\_\_\_\_ gpm/cfs (circle one)

- f.  Yes  No Is the old POD able to be used by you or other water right users? If yes, this form cannot be used.
- g. Old diversion capacity: \_\_\_\_\_ gpm/cfs (circle one)  
 New diversion capacity: \_\_\_\_\_ gpm/cfs (circle one)
- h. The new POD is located approximately \_\_\_\_\_ feet upstream/downstream from the old POD.  
 (Circle one)
- i. Identify the new POD location.  
 \_\_\_\_\_ 1/4 \_\_\_\_\_ 1/4 \_\_\_\_\_ 1/4 Section \_\_\_\_\_ Twp \_\_\_\_\_ N / S Rge \_\_\_\_\_ E / W County \_\_\_\_\_
- j. Explain why the change in point of diversion will not increase access to the amount of water that was historically available and not increase the amount of water diverted, used or consumed.
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

**5. INTERVENING WATER RIGHT HOLDERS AND WAIVERS**

- a.  Yes  No Are there any intervening points of diversion between the old POD and the replacement POD other than one you own? You need to also include instream flow diversions for water reservations, fisheries or mitigation If yes, list the intervening water rights and owners. If no, go to section 6.
- \_\_\_\_\_
- \_\_\_\_\_

- b.  Provide a notarized waiver from all intervening water right holders listed above. Obtain waiver form from the DNRC website.

**6. MAP – IDENTIFY THE FOLLOWING ON A MAP**

- Map standards pursuant to ARM 36.12.111(1) through (3) must be followed.
- a.  The new and old POD locations.
- b.  The points of diversion of intervening water rights.

**7. AFFIDAVIT**

I affirm that statements appearing here are to the best of my knowledge true and correct. I also affirm I have possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use.

Appropriator's Signature \_\_\_\_\_ Date \_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_

For contact information for your local DNRC Water Resources office go to <http://www.dnrc.mt.gov/field%5Foperations/regionaloffices/>. Mail the form to your local regional office.

**BILLINGS:** AIRPORT BUSINESS PARK, 1371 RIMTOP DR., BILLINGS MT 59105-1978  
**BOZEMAN:** 2273 BOOTHILL COURT, SUITE 110, BOZEMAN MT 59715-7249  
**GLASGOW:** 222 SIXTH ST SOUTH, GLASGOW MT 59230-1269  
**HAVRE:** 210 SIXTH AVE, HAVRE MT 59501-1828  
**HELENA:** 1424 NINTH AVE; PO BOX 201601, HELENA MT 59820-1601  
**KALISPELL:** 655 TIMBERWOLF PKWY, SUITE 4, KALISPELL MT 59901-1215  
**LEWISTOWN:** 813 NE MAIN, SUITE E, LEWISTOWN MT 59457-2020  
**MISSOULA:** 1610 SOUTH THIRD STREET WEST, SUITE 103, MISSOULA MT 59806-5004



**WAIVER**

For Replacement Points of Diversion (§85-2-402(18), MCA)

As a water right holder with an intervening point of diversion, I,

\_\_\_\_\_ hereby provide the waiver to

\_\_\_\_\_ (*applicant*) for a change in the point of diversion from (old POD description)

\_\_\_ 1/4 \_\_\_ 1/4 \_\_\_ 1/4 Section \_\_\_ Twp \_\_\_ N / S Rge \_\_\_ E / W County \_\_\_\_\_  
to (*new pod legal description* )

\_\_\_ 1/4 \_\_\_ 1/4 \_\_\_ 1/4 Section \_\_\_ Twp \_\_\_ N / S Rge \_\_\_ E / W County \_\_\_\_\_

required by §85-2-402(18), MCA(2009), including but not limited to a waiver of the right to file an objection under §85-2-402(18)(e), MCA.

\_\_\_\_\_  
Signature Date

\_\_\_\_\_  
Signature Date

Subscribed and sworn before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Signature

\_\_\_\_\_  
Printed Name

Residing at \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

Notary Seal

# RESOURCES

[http://www.dnrc.mt.gov/wrd/water\\_rts/appro\\_info/default.asp](http://www.dnrc.mt.gov/wrd/water_rts/appro_info/default.asp)

- Pending Applications
- Forms
- Rules-ARM, Title 36 Chapter 12
- MCAs Title 85 Chapter 2
- Closed Basins & Controlled Groundwater Areas
- Regional Office Contacts
- Find a Water Right

<http://nris.mt.gov/dnrc/waterrights/default.aspx>

