



Montana's 64th Legislative Session: Water Bills Review

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BILLS PASSED

HB 36 <http://leg.mt.gov/bills/2015/billpdf/HB0036.pdf> was proposed by the DNRC to create a process for allowing a permittee who missed the completion date to perfect a permit for the amount of water put to beneficial use by the deadline or to get one additional 2-year extension to complete the project, if excusable neglect can be shown. The law became effective on April 8, 2015.

Implications: Previously, a water user could only apply for an extension of time to complete a water right permit before the project completion deadline. The completion date has not always been specified on the permit or the water right abstract. Instead, the deadline was set forth in a separate document. Therefore, a water user who had completed or partially completed a project could still miss the deadline to file the Notice of Completion and be subject to revocation.

Although the new process doesn't affect a huge number of applicants, it will help those water users who have spent thousands of dollars to build infrastructure and obtain a DNRC authorization and have completed or partially completed their projects but missed the deadline to file a Notice of Completion. The change also provides relief for water users who have gone through the time and expense to get a permit authorization and have a good reason for not completing the project.

HB 40 <http://leg.mt.gov/bills/2015/billpdf/HB0036.pdf> provides for the appointment of a Board of Adjustment only when a variance is requested. That board serves until it reaches a final decision on the petition for variance. The law became effective on April 8, 2015.

HB 168 <http://leg.mt.gov/bills/2015/billpdf/HB0168.pdf> addresses the retroactive applicability of the District Court's decision in *Clark Fork Coalition v. Tubbs*, Cause No. BDV-2010-874. It prevents the application of the Court's ruling to any project, development, or subdivision in existence and to any pending project, development, or subdivision for which the application and required fees were received by the Department of Environmental Quality or the local reviewing authority on or before October 17, 2014. The law became effective on April 10, 2015.

Implications: The Clark Fork Coalition decision reinstated the 1987 DNRC rule that defined a combined appropriation as an appropriation of water from the same source aquifer by means of two or more groundwater developments, the purpose of which, in the department's judgment, could have been accomplished by a single appropriation. The rule in effect since 1993 stated that a combined appropriation is an appropriation of water from the same source aquifer by two or more groundwater developments that are physically manifold into the same system.

The Department has determined that the use of individual exempt wells for each house in a subdivision is a purpose that could be accomplished by a single appropriation.

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The purpose of HB 168 is to exempt land developers who had invested a substantial amount of money in the plat approval process by the date of the court decision to continue to rely on individual exempt wells as the source of water for that subdivision. HB 519 and SB 203, two bills attempting to allow and regulate the use of exempt wells for use as a water supply for a subdivision, did not pass this session.

HB 180 <http://leg.mt.gov/bills/2015/billpdf/HB0180.pdf> extends the termination date of the Treasure State Endowment Regional Water System Fund to June 30, 2031. The law becomes effective on October 1, 2015.

HB 260 <http://leg.mt.gov/bills/2015/billpdf/HB0260.pdf> was sponsored by Rep. Ryan Lynch at the request of the Montana Association of the Clerks of Court. The bill was supposed to transfer the cost of the public notice for a land owner petitioning for exclusion from an irrigation district from the Clerk of Court's office to the land owner. That provision was stricken from the bill during the process. As such, the bill only clarified the language in the statute. The law became effective on March 18, 2015.

HB 590 <http://leg.mt.gov/bills/2015/billpdf/HB0590.pdf> sets up a framework for Lincoln County to receive revenue for water storage and use from Libby Dam. No revenue is expected for at least 10 years. The act becomes effective when the state receives money from any entity that benefits from the waters stored in Lincoln County through irrigation, navigation, recreation, hydropower generation, or other uses.

SB 56 <http://leg.mt.gov/bills/2015/billpdf/SB0056.pdf> sets a July 1, 2016 deadline for the Department of Natural Resources and Conservation (DNRC) to provide notice of the requirement to obtain written lease, license or easement from the DNRC for the use of a navigable river bed below the low water mark. The notice will be provided to owners of property adjacent to rivers that were navigable rivers on October 1, 2011. The deadline to apply for authorization is extended to July 15, 2021. The law became effective on March 23, 2015.

Implications: The DNRC estimates there are 26,000 parcels adjacent to the approximately 3,400 miles of navigable waterways potentially affected by a 2011 law requiring authorization for the use of a navigable river bed below the low water mark. The uses include power generation dams, railroad beds, boat docks and pumping stations. Although the statute always required the DNRC to provide notice of the requirement to owners of property adjacent to such rivers, there was no deadline for the issuance of the public notice and it was never issued. There is no notice or application information on the DNRC website, so it is probable that the majority of owners the 26,000 parcels are unaware of the requirement. A short-term employee will be needed for approximately 1 month to handle the anticipated influx of phone calls.

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SB 57 <http://leg.mt.gov/bills/2015/billpdf/SB0057.pdf> was requested by the DNRC to revise water adjudication funding and benchmarks to provide the resources to complete the next phase of adjudication. The funding is provided by transfers from the General Fund based upon the appropriations in HB 2 (the general appropriations act). The law became effective on July 1, 2015.

SB 58 <http://leg.mt.gov/bills/2015/billpdf/SB0058.pdf> was a housekeeping bill revising MCA § 85-2-307 to remove DNRC discretion to approve a change or permit application without public notice. The law became effective on February 25, 2015.

SB 82 <http://leg.mt.gov/bills/2015/billpdf/SB0082.pdf> delegates water related duties from the Environmental Quality Committee (EQC) to the Water Policy Interim Committee (WPIC) to prevent duplication between EQC and WPIC. The law became effective on March 25, 2015. The change was requested by WPIC.

SB 221 <http://leg.mt.gov/bills/2015/billpdf/SB0221.pdf> sets the date of the transfer of Willow Creek dam from the DNRC to Willow Creek Water Users Association (WCWUA). The non-binding deadline for the no-fee transfer is June 30, 2015. The water right presently owned by the State would transfer to WCWUA. The law became effective on April 23, 2015.

SB 232 <http://leg.mt.gov/bills/2015/billpdf/SB0232.pdf> revises stream access laws to reflect the 1987 decision in *Galt v. State*, 731 P.2d 912 (1987) which allows overnight camping and the placement of seasonal objects such as duck blinds or boat moorage under limited circumstances in addition to the access already allowed by law. The change became effective on April 27, 2015.

SB 262 <http://leg.mt.gov/bills/2015/billpdf/SB0262.pdf> ratifying the water compact between the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT), the State of Montana and federal government, was the most controversial bill of the session. Hundreds of people on both sides of the issue traveled to Helena in February for the Senate hearing and again in April for the hearing in the House. Individuals, representatives of water user groups, all of the state's major agricultural interests, municipalities, tribal members, business and industrial interests and power generators were among those who testified. The Chair cut off the opponents at the Senate hearing after 5 hours of testimony from both sides, while the House hearing lasted for 10 hours.

The CSKT compact ratified by SB 262 is the result of over a decade of negotiation between the parties, which resulted in the 1,000 page agreement between the Tribes, the state of Montana, and the United States to identify the CSKT water rights, which are based upon the 1855 Treaty of Hellgate. The compact affects water use on the CSKT Reservation and much of

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SB 262 cont'd: western Montana. Off reservation water management was one of the controversial aspects of the compact. Opponents contended the compact represented a federal takeover of water, and would reduce water availability on and off the reservation. Proponents contended the compact would protect water rights statewide from unnecessary litigation, would reduce uncertainty, and asserted that the agreement represents a fair settlement of the tribal water rights.

A dozen Republicans joined all 41 Democrats to pass SB 262 after 13 attempts to amend the bill failed in the House. The bill passed in the Senate by 31-19 on Feb. 26. The law became effective upon Governor Bullock's signature on April 24.

SB 330 <http://leg.mt.gov/bills/2015/billpdf/SB0330.pdf> sets July 1, 2016 as the deadline for the DNRC to review state water reservations to determine if they have been or will ever be perfected. The department must provide WPIC a summary of the reviews before September 15, 2016. The law became effective on April 23, 2015.

Implications: Water Reservations are the only way to reserve water for future use and are only available to the state and federal government, their agencies or a political subdivision of the state. Although the water must be put to beneficial use within 20 years, reservations dating back to the 1970s have never been reviewed. If a reservation has not been fully used at the time of the review, the DNRC may modify or revoke the reservation or extend the time period to complete the appropriation. The deadline to provide WPIC a summary of the reviews is September 15, 2016. The revocation or modification of unused reservations has the potential to affect conservation districts and local governments who may need water in the future.

SB 361 <http://leg.mt.gov/bills/2015/billpdf/SB0361.pdf> clarifies that "good cause shown" for filing a Water Court objection means a written statement showing that a person has an ownership, leasehold, economic, or clearly demonstrated particularized interest in an existing water right, permit, certificate, state water reservation under 85-2-316, or right to receive water through an irrigation project and that the person's interest has been affected by the decree.

SB 389 <http://leg.mt.gov/bills/2015/billpdf/SB0389.pdf> clarifies the definitions for intermittent and ephemeral streams. The definitions are used to determine whether a stock pond is exempt from permitting requirements. The law becomes effective on October 1, 2015.

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SR 11 <http://leg.mt.gov/bills/2015/billpdf/SR0011.pdf> confirmed Chief Water Judge Russ McElyea.

SR 27 <http://leg.mt.gov/bills/2015/billpdf/SR0027.pdf> confirmed Associate Water Judge Doug Ritter.

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HB 427 <http://leg.mt.gov/bills/2015/billpdf/HB0427.pdf> was a bill to provide for the defense of water rights throughout the state from competing claims to be filed if the Legislature does not pass the CSKT Compact and to expand the duties of the DNRC to include providing legal counsel to certain water rights claimants on or off the Flathead Indian Reservation. The bill also created a Water Rights Claims Defense Unit within the DNRC, created accounts and provided funds to the DNRC and the Water Court for processing water rights claims filed on or off the Flathead Indian Reservation.

HB 519 <http://leg.mt.gov/bills/2015/billpdf/HB0519.pdf> would have revised volume limits for exempt appropriations of water from 10 AF to 7.5 AF ; required certain water rights information during subdivision review and for exempt appropriations of water; provided for enforcement measures for violations of laws related to exempt appropriations of water; required water rights information during sanitation in subdivision review; required the Department of Environmental Quality to adopt rules requiring water rights documentation; required water rights information during review of subdivision application; and eliminated prohibition of metering a water well.

HB 541 <http://leg.mt.gov/bills/2015/billpdf/HB0541.pdf> would have required a majority vote of each house of the Legislature for anyone to sell surface, mineral or water rights to the United States, another state or a foreign government. The legal review note prepared by Legislative staff pointed out that the bill was probably unconstitutional.

HB 630 <http://leg.mt.gov/bills/2015/billpdf/HB0630.pdf> was intended to prohibit the state from entering into an agreement with a tribal government that infringes upon the authority of the state to own, manage, administer, or protect its water resources for the benefit of its citizens.

SB 30 <http://leg.mt.gov/bills/2015/billpdf/SB0030.pdf> would have appropriated \$600,000 to the Montana Bureau of Mines and Geology for each of fiscal years 2016 and 2017 for the ground water investigation program.

SB 37 <http://leg.mt.gov/bills/2015/billpdf/SB0037.pdf> would have required the DNRC to provide notice and mailings to the public informing them of an open filing period to file exempt claims and a February 28, 2018 deadline. It would have also required the Water Court to issue supplemental preliminary decrees in basins where a preliminary decree has been issued prior to March 1, 2018 and provide notice of that issuance. Failure to file an exempt claim does not result in forfeiture of the right, but it subordinates the existing right to all other water rights. The Governor vetoed the bill as too costly to be funded at this time. The fiscal note indicated it will cost \$214,920 in FY 2016, and approximately \$20,000 annually in subsequent years.

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SB 118 <http://leg.mt.gov/bills/2015/billpdf/SB0118.pdf> would have clarified that if the ditch or other means of conveyance is ever disrupted, impeded or otherwise blocked due to no fault of the water user, this does not represent intent to abandon the water right. The bill required the water user to notify the DNRC of the blockage. The bill was opposed by water user and agricultural groups as being unnecessary and providing a loophole in the water right abandonment law.

SB 203 <http://leg.mt.gov/bills/2015/billpdf/SB0203.pdf> would have revised the exceptions to permit requirements for ground water developments by lowering the volume limits; established criteria for exempted uses by number of users; and defined the term "project" as a contiguous or closely grouped parcels of land under the same or affiliated ownership, including but not limited to housing subdivisions or any combination of business and residential units.

SB 362 <http://leg.mt.gov/bills/2015/billpdf/SB0362.pdf> would have provided permanent duties for the Water Court as the Court of Water Appeals. The bill was opposed by water user and agricultural groups because it is premature while the adjudication was still ongoing; it creates an intermediate appellate court; and the Chief Water Judge is appointed not elected. Several of the opponents recommended that WPIC look at the issue.

SJ 4 <http://leg.mt.gov/bills/2015/billpdf/SJ0004.pdf> was a joint resolution supporting the CSKT water compact process.

SJ 5 <http://leg.mt.gov/bills/2015/billpdf/SJ0005.pdf> was a Senate and House joint resolution requested by WPIC for an interim study to examine Montana's legal processes for water and ditch rights; and requiring that the final results of the study be reported to the 65th legislature. The resolution's intent was to study what the Water Court will do when the adjudication is completed although the language of the bill described a wide area of study. The bill was supported by the Montana Water Resources Association and the Association of Gallatin Irrigators.

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