

Nowakowski, Sonja

From: Sexton, Mary
Sent: Tuesday, January 25, 2011 3:33 PM
To: Nowakowski, Sonja
Cc: Schultz, Tom (DNR); Holmgren, Jeanne; Lamson, Joe (DNRC)
Subject: Sen. Barrett request
Attachments: Land board ownership riverbeds 1-24-11 mmo.doc

Hi Sonja,

Attached is the response to Sen. Barrett's request regarding our authority to lease, license, and do easements on navigable waterways/rivers.

Let me know if more information is needed.

Thanks,

Mary

Mary Sexton
DNRC
Helena, MT
(406) 444-2074 office
(406) 461-6926 cell

**LEGAL AUTHORITY FOR THE LAND BOARD'S OWNERSHIP
AND CONTROL OF NAVIGABLE WATERS**

The State Land Board's ownership and authority over navigable waters is derived from various provisions of State and Federal law. Navigable waters within each State belong to that State. The U.S. Supreme Court held that the principle of state ownership of the submerged beds of navigable waters was extended to non-tidal waters via the "Equal-footing Doctrine" in Barney v. Keokuk, 94 U.S. 324 (1877). In that case, the Supreme Court held that:

By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. That right was not granted by the Constitution to the United States, but was reserved to the States respectively. And new States have the same right of sovereignty and jurisdiction over the navigable waters within their limits as the original ones.

..... [citations]

The State, having the complete and absolute right of property from high-water mark to the middle of the channel of the river, holds it for public uses, subject only to the power of Congress to regulate commerce among the several States and with foreign nations.

Barney v. City of Keokuk, 94 U.S. 324, 333 (U.S., 1876)

The Federal Submerged Lands Act of 1953 also vested in the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. Section 1311(a)

70-1-202, MCA, defines the property of the State of Montana. It provides that:

The state is the owner of:

- (1) all land below the water of a navigable lake or stream;
- (2) all property lawfully appropriated by it to its own use;
- (3) all property dedicated or granted to the state; and
- (4) all property of which there is no other owner.

(emphasis added.)

Article X, Section 4 of the 1972 Montana Constitution, grants the Land Board sole control over the ownership and administration of State lands. It directs that:

The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.

The Montana legislature has acknowledged this authority by enacting Section 77-1-202, MCA, which reflects the Constitutional directive in Article X, Section 4 by providing that:

(1) The board shall exercise general authority, direction, and control over the care, management, and disposition of state lands and, subject to the investment authority of the board of investments, the funds arising from the leasing, use, sale, and disposition of those lands or otherwise coming under its administration. In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:

- (a) secure the largest measure of legitimate and reasonable advantage to the state; and
- (b) provide for the long-term financial support of education.

(2) It is consistent with the powers and duties provided in subsection (1) that the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation.

(3) When acquiring land for the state, the board shall determine the value of the land after an appraisal by a qualified land appraiser.

(emphasis added.)

Accordingly, the Land Board's ownership of land extends to other features of navigable streams, as well. Section 77-1-102, MCA, provides that:

All lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake in this state and lying between the meandered lines of such stream or lake as the same are shown by the United States survey thereof and all islands existing in the navigable streams or lakes in this state which have not been surveyed by the government of the United States and all lands which at any time in the past comprised such an island or any part thereof, except such lands as are occupied by and belong to the adjacent landowners as accretions, belong to the state of Montana to be held in trust for the benefit of the public schools of the state.

According to 77-3-102, MCA, the board can lease these lands for mineral development:

(1) The board may, in its discretion and subject to the other provisions of this part, lease state lands, including the beds of navigable streams and the beds of navigable bodies of water and the reserved mineral rights of the state in lands sold or leased by the state, to any person, association, or corporation for the purpose of prospecting for or mining metalliferous minerals or gems.

According to 77-4-201 – 208, MCA, the state is authorized to lease or license power sites on state-owned river beds. “It is unlawful to sell or advertise for sale state lands constituting power sites or part of power sites capable of developing hydroelectric energy in commercial quantities. However, the board may issue a lease or license to any person, corporation, or municipality for the development of power sites and the distribution, use, and disposition of the electrical energy generated on the sites as specifically provided in this chapter.”

Finally, the boundary between State and private ownership is the low-water mark.

Section 70-16-201, MCA, directs that:

Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.