

SENATE BILL NO. 35

INTRODUCED BY B. HAMLETT

BY REQUEST OF THE ENVIRONMENTAL QUALITY COUNCIL AND THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING AND CLARIFYING LAWS RELATED TO THE TREATMENT OF PROPERTY CONSISTING OF THE BEDS OF NAVIGABLE RIVERS; DEFINING A "NAVIGABLE RIVER"; REQUIRING AUTHORIZATION FROM THE BOARD OF LAND COMMISSIONERS FOR USES ON THE BEDS OF NAVIGABLE RIVERS; REQUIRING THE BOARD OF LAND COMMISSIONERS TO ADOPT RULES FOR PROVIDING LEASES, LICENSES, OR EASEMENTS FOR USES ON THE BEDS OF NAVIGABLE RIVERS; CLARIFYING THE AUTHORITY OF THE BOARD OF LAND COMMISSIONERS TO GRANT EASEMENTS; AND AMENDING SECTIONS 77-1-121, 77-1-134, AND 77-2-101, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Legislative findings -- purpose. (1) The legislature finds that:

(a) Article IX, section 3, of the Montana constitution provides that the use of all water that is or may be appropriated for sale, rent, distribution, or other beneficial use, the right-of-way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection with the beneficial use, and the sites for reservoirs necessary for collecting and storing water are a public use;

(b) a person who has historically used the bed of a navigable river in conjunction with a legal use of water or for other uses or a person who desires to use the bed of a navigable river in conjunction with a legal use of water or for other uses must be able to do so provided that statutory provisions are met;

(c) owners of property adjacent to navigable rivers in Montana have historically been assessed property taxes on the beds of navigable rivers on the premise that the riverbeds are the property of the adjacent property owners;

(d) the historic payment of property taxes on the bed of a navigable river constitutes adequate compensation for any past use of the riverbed and relieves the owner of adjacent property of the duty to compensate the state for past use of the riverbed;

(e) any person who uses the bed of a navigable river after [the effective date of this act] shall apply to the state for a lease, license, or easement and pay full market value for the use of the riverbed; and

1 (f) the department has not consistently required payment for riverbed uses over time.

2 (2) The purpose of [sections 1 through 9] is to clarify the historic and future use of the beds of navigable
3 rivers and how the state should be compensated for that use.

4
5 **NEW SECTION. Section 2. Definitions.** For the purposes of [sections 1 through 9], the following
6 definitions apply:

7 (1) "Footprint" means a structure or other constructed interruption or modification to the bed of a
8 navigable river below the low-water mark as provided in 70-16-201.

9 (2) "Full market value" means an amount calculated based upon the area of a footprint and the fair
10 market value as determined by rule or statute. The annual payment for a license issued under [sections 1 through
11 9] is \$150.

12 (3) "Navigable river" means a river adjudicated as navigable for title purposes by a court of competent
13 jurisdiction.

14
15 **NEW SECTION. Section 3. Use of beds of navigable rivers -- authorization requirement restricted.**
16 The board or the department may require a lease, license, or easement under [sections 1 through 9] only for a
17 footprint on the bed of a navigable river.

18
19 **NEW SECTION. Section 4. Historic use of navigable riverbeds -- authorization required --**
20 **exemptions.** (1) A person using the bed of a navigable river below the low-water mark without written
21 authorization from the department prior to [the effective date of this act] who wants to continue use of the bed of
22 a navigable river after [the effective date of this act] shall file for authorization of the use on a form prescribed by
23 the department for a lease, license, or easement by July 15, 2017.

24 (2) A person using the bed of a river below the low-water mark without written authorization from the
25 department who wants to continue use of the bed after the date the river is deemed a navigable river shall file
26 for authorization of the use on a form prescribed by the department for a lease, license, or easement within 5
27 years after the date that notice is issued by the department as provided in [section 6].

28 (3) The application must include:

29 (a) an application fee of \$50;

30 (b) a notarized affidavit:

- 1 (i) demonstrating that the applicant or the applicant's predecessor in interest used the bed of a navigable
2 river and that the use continues;
- 3 (ii) describing the acreage covered by the footprint prior to [the effective date of this act] or, for
4 applications under subsection (2), the acreage covered by the footprint prior to the date the river was deemed
5 navigable; and
- 6 (iii) demonstrating that the use applied for under this section is the use shown in the evidence provided
7 in subsection (3)(c); and
- 8 (c) (i) aerial photographs demonstrating the use to which the application for authorization applies; or
9 (ii) other evidence of the use to which the application for authorization applies.
- 10 (4) The department shall issue the authorization for a lease, license, or easement if:
- 11 (a) the applicant provides evidence to satisfy the requirements of subsection (3);
12 (b) the applicant pays the application fee and the full market value of the footprint acreage;
13 (c) the department has, if necessary, made a site inspection of the use to which the application for
14 authorization applies;
- 15 (d) the authorization is for only the acreage of the footprint historically used by the applicant or the
16 applicant's predecessor in interest; and
- 17 (e) the authorization is approved by the board. The authorization must be approved if the requirements
18 of this section are met.
- 19 (5) Proceeds from the application fee must be deposited in the account in [section 5] and must be used
20 by the department to administer the provisions of this section.
- 21 (6) The full market value collected pursuant to subsection (4)(b) must be deposited in the appropriate
22 trust fund established for receipt of income from the land over which an authorized use is granted.
- 23 (7) Issuance of an authorization pursuant to this section is exempt from the requirements of Title 22,
24 chapter 3, part 4, and Title 75, chapter 1, parts 1 and 2.
- 25 (8) The department shall waive the survey requirements of 77-2-102 if the department determines that
26 there is sufficient information available to define the boundaries of the proposed use for the purposes of recording
27 the easement or issuing a license or lease.
- 28 (9) The requirements of this section do not apply to footprints:
- 29 (a) related to hunting, fishing, or trapping;
30 (b) that existed prior to November 8, 1889;

1 (c) for which the applicant can show an easement obtained from a state agency prior to [the effective
2 date of this act] or prior to the date the river was deemed a navigable river; or

3 (d) associated with a power site regulated pursuant to Title 77, chapter 4, part 2.

4 (10) A person using the bed of a navigable river who is subject to this section may continue to use the
5 bed of the navigable river for that purpose while applying for a lease, license, or easement or until the applicable
6 timeframe for obtaining a lease, license, or easement expires. The state may not impede access to a footprint
7 or use of a footprint during the applicable timeframe or after a lease, license, or easement is obtained.

8
9 **NEW SECTION. Section 5. Historic riverbed use account.** (1) There is an account in the state special
10 revenue fund into which the application fees collected pursuant to [section 4] must be deposited.

11 (2) The funds in the account may be used only for administering the provisions of [section 4].
12

13 **NEW SECTION. Section 6. Notice required.** (1) The department shall provide notice of the
14 requirements of [sections 1 through 9] to owners of property adjacent to rivers that are navigable rivers on [the
15 effective date of this act] and provide notice pursuant to subsection (3).

16 (2) For a river deemed a navigable river after [the effective date of this act], the department shall provide
17 notice of the requirements of [sections 1 through 9] to owners of property adjacent to the navigable river. The
18 5-year period pursuant to [section 4] begins when the department issues this notice and publishes the notice
19 required in subsection (3) of this section.

20 (3) The department shall publish notice of navigable rivers and the requirements of [sections 1 through
21 9] twice in a newspaper of general circulation in the area of the navigable river.
22

23 **NEW SECTION. Section 7. Navigable riverbed uses -- lease, license, or easement required --**
24 **challenges.** (1) (a) After [the effective date of this act], the department shall require a person who proposes to
25 use the bed of a navigable river up to the low-water mark to obtain a lease, license, or easement pursuant to the
26 provisions of this title.

27 (b) The requirements of subsection (1)(a) do not apply to footprints related to hunting, fishing, or trapping.

28 (2) An applicant for authorization to use the bed of a navigable river pursuant to [section 4] or for a lease,
29 license, or easement under this section may challenge the requirement of the authorization based on the
30 navigability of the river, the location of the footprint related to the low-water mark, or other factors. There is no

1 presumption of navigability because an entity has applied for or received a lease, license, or easement.

2

3 **NEW SECTION. Section 8. Easement transferable -- relocation of structure -- increased footprint.**

4 (1) An easement granted pursuant to [section 4 or 7] runs with the benefited land and may be transferred or
5 assigned.

6 (2) (a) Pursuant to rules adopted under [section 9], the holder of a lease, license, or easement under
7 [section 4 or 7] may relocate a footprint and associated facilities due to the natural relocation of a navigable river
8 or other factors.

9 (b) (i) The holder of a lease, license, or easement shall provide written notice to the department when
10 a footprint or associated facilities are proposed to be relocated.

11 (ii) The holder of a lease, license, or easement for water diversion structures associated with a water right
12 may increase the size of the footprint if the increase is necessary to accomplish the purpose for which the lease,
13 license, or easement was granted and if the holder pays full market value for the portion of the footprint that is
14 greater than the original footprint and has the appropriate state or federal permits.

15 (3) Section 77-1-805 applies to the use of navigable rivers for which leases, licenses, or easements for
16 the use of the bed have been granted.

17

18 **NEW SECTION. Section 9. Board to adopt rules.** To fulfill the requirement of [sections 1 through 9],
19 the board shall adopt rules to:

20 (1) determine the full market value for the use of the bed of a navigable river and establish a minimum
21 payment for leases and easements;

22 (2) allow an applicant to choose to apply for a lease, license, or easement depending on the type of
23 proposed use and the duration of the use; and

24 (3) allow the holder of a lease, license, or easement for water diversion structures associated with a
25 water right to relocate a footprint based on natural relocation of a navigable river or other factors.

26

27 **Section 10.** Section 77-1-121, MCA, is amended to read:

28 **"77-1-121. Environmental review compliance -- exemptions.** (1) Except as provided in 77-1-122,
29 [section 4], and subsection (2) of this section, the department and board are required to comply with the
30 provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title only if the

1 department is actively proposing a sale or exchange or to issue a right-of-way, easement, placement of
 2 improvement, lease, license, or permit or is acting in response to an application for an authorization for a
 3 proposal.

4 (2) The department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when
 5 issuing any lease or license that expressly states that the lease or license is subject to further permitting under
 6 any of the provisions of Title 75 or 82.

7 (3) Except for rulemaking and as provided in subsection (1), the department and board are otherwise
 8 exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title,
 9 including but not limited to the issuance of lease renewals. The department and board do not have an obligation
 10 to comply with the provisions of Title 75, chapter 1, parts 1 and 2, when implementing provisions within this title
 11 if the department or board chooses not to take any action, even though either may have the authority to take an
 12 action.

13 (4) The department and board are exempt from the provisions of Title 75, chapter 1, parts 1 and 2, when
 14 taking actions, including preparing plans or proposals, in relation to and in compliance with the following local
 15 government actions:

- 16 (a) development or adoption of a growth policy or a neighborhood plan pursuant to Title 76, chapter 1;
- 17 (b) development or adoption of zoning regulations;
- 18 (c) review of a proposed subdivision pursuant to Title 76, chapter 3;
- 19 (d) actions related to annexation;
- 20 (e) development or adoption of plans or reports on extension of services; and
- 21 (f) other actions that are related to local planning."

22
 23 **Section 11.** Section 77-1-134, MCA, is amended to read:

24 **"77-1-134. Irrigation structures, utility structures, and bridges of formerly taxable land -- water**
 25 **rights.** (1) If an irrigation structure, a utility structure, or a bridge was placed on land that consists of the bed of
 26 a navigable river or stream, the irrigation structure, utility structure, or bridge remains the property of the original
 27 owner or the original owner's successors in interest or assignees. ~~Access~~ Subject to [section 4(10)], access to
 28 the irrigation structures, utility structures, and bridges described in this section for the purposes of operation,
 29 maintenance, repair, enhancement, or improvement may not be impeded by the state.

30 (2) ~~The~~ Subject to [section 4(10)], the change of designation of the bed of a navigable river or stream

1 from a taxable to a nontaxable status may not interfere with or impede the exercise of a water right, including a
 2 livestock watering right for which a claim was not required to be filed pursuant to 85-2-212 and 85-2-222."

3

4 **Section 12.** Section 77-2-101, MCA, is amended to read:

5 **"77-2-101. Easements for specific uses.** (1) Upon proper application as provided in 77-2-102, the
 6 board may grant easements on state lands for the following purposes:

7 (a) schoolhouse sites and grounds;

8 (b) public parks;

9 (c) community buildings;

10 (d) cemeteries;

11 (e) conservation purposes:

12 (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land
 13 owned by the department of fish, wildlife, and parks as of January 1, 2001;

14 (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same
 15 nonprofit corporation as of January 1, 2001; and

16 (iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township
 17 28 north, range 21 west, in Flathead County; and

18 (f) for other public uses.

19 (2) The board may grant easements on state lands for the following purposes:

20 (a) right-of-way across or upon any portion of state lands for any public highway or street, any ditch,
 21 reservoir, railroad, private road, or telegraph or telephone line, or any other public use as defined in 70-30-102;

22 or

23 (b) any private building or private sewage system that encroaches on state lands; or

24 (c) the use of the bed of a navigable river pursuant to [section 4 or 7]."

25

26 **NEW SECTION. Section 13. Notification to tribal governments.** The secretary of state shall send
 27 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
 28 Chippewa tribe.

29

30 **NEW SECTION. Section 14. Codification instruction.** [Sections 1 through 9] are intended to be

1 codified as an integral part of Title 77, chapter 1, and the provisions of Title 77, chapter 1, apply to [sections 1
2 through 9].

3
4 NEW SECTION. **Section 15. Severability.** If a part of [this act] is invalid, all valid parts that are
5 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
6 the part remains in effect in all valid applications that are severable from the invalid applications.

7 - END -