



Montana Legislative Services Division
Legal Services Office

TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: February, 2012
RE: Senate Bill No. 299 (2011) and property ownership in the event of an avulsion

The Water Policy Interim Committee (WPIC) requested an analysis of the Governor's veto of Senate Bill No. 299 (2011). Pursuant to the WPIC's request, this memorandum briefly summarizes SB 299 and provides an analysis of the veto message issued by the Governor after the session adjourned.

SB 299 was introduced during the 2011 session and provided that if a navigable river or stream rapidly abandoned its channel and formed a new channel as a result of an avulsion, the bed of the former channel would become the adjacent landowner's property and the new channel would become the State's property. An avulsion is a sudden change in the course of a river and is usually caused by a flood.

SB 299 also amended § 77-1-102, MCA, which addresses the ownership of certain islands and abandoned riverbeds (*i.e.*, riverbeds without any water). The amendments to this section primarily updated outdated language, but also provided an exception to the State's ownership of the beds of navigable rivers that have been changed as a result of an avulsion. Under both new section 1 and the amendments to § 77-1-102, MCA, "navigable" was defined to mean "a river or stream adjudicated as navigable for title purposes by a court of competent jurisdiction".

SB 299 passed the House by a vote of 98-0 on April 8, and passed the Senate by a vote 50-0 on April 18. The Governor vetoed SB 299 on May 6, 2011, and the Legislature did not obtain a sufficient number of votes to override the veto. In the veto message, the Governor stated that SB 299 "may be the singular piece of legislation passed by the 62nd Legislature to have slipped by with the gravest unintentional consequences." He recognized that the primary purpose of the bill was to define the ownership of the channel of navigable waters that have been altered through an avulsion, but stated that "SB 299 divests the State of its ownership of a large portion of the beds of navigable rivers -- authority held by the State of Montana since passage of the Enabling Act by Congress in 1889 -- contrary to well-settled federal and state constitutional law."

The Governor's primary concern with SB 299, as expressed in the veto message, was the definition of "navigable" that was included in the bill. In two sections "navigable" was defined as rivers that are adjudicated as navigable **by a court**. The Governor stated that "[b]y defining navigable rivers in this narrow way, SB 299 could be construed to divest the Land Board of its power to fulfill its constitutional duty to administer all the public trust lands granted to the State of Montana at the time of statehood, regardless of whether a river has been adjudicated."

However, upon reviewing SB 299 and the Governor's veto message, it appears that the definition of "navigable" included in the bill would not divest the State of abandoned definition codifies the general rule that only a court can determine whether

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Exhibit 7

for purposes of establishing title. As a brief refresher, the State of Montana took title to the beds beneath navigable rivers when it was admitted to the Union as a state pursuant to the Equal Footing Doctrine, which provides that a state admitted to the Union after 1789, entered the Union with the same rights of sovereignty and jurisdiction as the original 13 colonies. Thus, if a river is "navigable", the State owns the riverbed subject to the power of the federal government to ensure that the river remains navigable for commerce. For purposes of establishing the ownership of riverbeds, navigability is determined by whether the river at issue was susceptible to being used for commercial navigation at the time the State was admitted to the Union. As such, navigability for title in Montana is determined by the condition of the river as it existed in 1889.

If a river is determined to be navigable for title purposes, it is undisputed that the State owns the beds of the river and may administer those lands consistent with state law and the federal government's power to regulate for commerce. The question of who decides whether a river is navigable for purposes of determining ownership is equally clear. As the Supreme Court indicated in *U.S v. Appalachian Electric Power Co.*, 61 S.Ct. 291 (1940), questions of navigability involve judicial standards and questions of law, which are necessarily reserved for courts. This rule is demonstrated by the numerous cases in which courts have been called upon to determine whether a river is navigable for title purposes, including the case between PPL and the State of Montana, which is now before the United States Supreme Court.

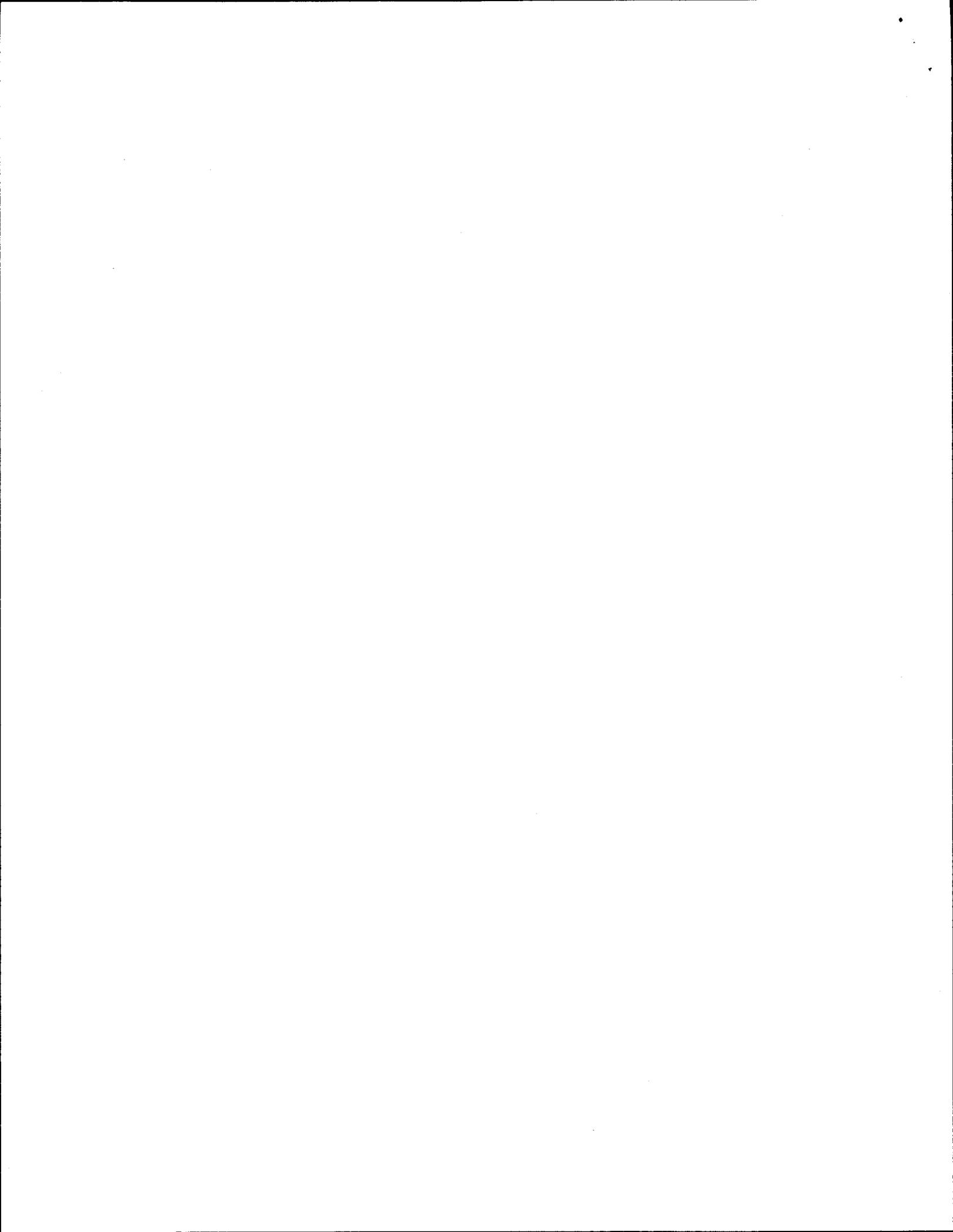
Although not specifically expressed in the veto message, the Governor may have been concerned that the bill allowed adjacent landowners to take title to the beds of navigable rivers, albeit in limited circumstances. As noted above, if a navigable river or stream rapidly abandoned its channel and formed a new channel as a result of an avulsion, the bed of the former channel would become the adjacent landowner's property and the new channel would become the State's property. SB 299 would have changed current law, which provides that the State retains ownership of both the former channel and the new channel when an avulsion occurs. In this sense, SB 299 would have divested the State of its ownership of certain stretches of an abandoned riverbed in the event of an avulsion.

However, in the veto message the Governor stated that he "would not have objected to codifying the matter of the ownership interests, and therefore the tax consequences, of beds of streams and rivers whose channels have changed through avulsion . . ." As such, it appears that the Governor did not object to providing adjacent landowners with title to the beds of abandoned navigable rivers in the event of an avulsion, even though under current case law, the State retains ownership to both the beds of the former channel and the new channel in the event of a sudden change in the course of the river.

Nevertheless, because SB 299 provides for an automatic transfer of riverbeds that may be owned by the State, the WPIC may wish to consider how SB 299 and similar legislation proposed in the future may affect the State's duty to manage and dispose of state land in accordance with the Enabling Act and the Montana Constitution. Article X, section 11 of the Montana Constitution provides that state lands must be held in trust for the people of Montana. As such, state land may

not be "disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state." Any legislation that may dispose of state land must be considered within this constitutional framework.

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AN ACT PROVIDING FOR THE OWNERSHIP OF THE CHANNEL AND FORMER CHANNEL OF A NAVIGABLE RIVER OR STREAM; PROVIDING THAT A FORMER CHANNEL IS OWNED BY THE ADJACENT LANDOWNER AND THE LAND UNDER THE NEW CHANNEL IS OWNED BY THE STATE; DEFINING THE TERM "NAVIGABLE"; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 77-1-102, MCA; REPEALING SECTION 70-18-202, MCA; AND PROVIDING AN APPLICABILITY DATE.

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

Section 1. Sudden change in bed of navigable river or stream. (1) (a) If a navigable river or stream rapidly abandons its channel and forms a new river or stream channel, the land that constituted the old channel belongs to the owner of the shores through which the old channel flowed or, if the shores are owned by different owners, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the old river or stream channel. The land that constituted the old channel is subject to property taxation payable by the new owners.

(b) Within 6 months of the sudden change, the affected owners shall provide the department of natural resources and conservation and the department of revenue with a land survey and any other information required by either agency to verify the sudden change and update the applicable ownership records.

(c) The department of natural resources and conservation and the department of revenue may adopt rules to implement the provisions of this section.

(2) Ownership remains unchanged for land that constituted an island before the avulsion occurred in the channel and that is not wholly surrounded by water after the river has abandoned the old channel.

(3) As a channel of a navigable river or stream, the land under the water of the new channel belongs to the state pursuant to 70-1-202.

(4) For the purposes of this section, "navigable" means a river or stream adjudicated as navigable for title purposes by a court of competent jurisdiction.

Section 2. Section 77-1-102, MCA, is amended to read:

"77-1-102. Ownership of certain islands and abandoned riverbeds. (1) All Except as provided in [section 1] and subsection (2) of this section and subject to Title 70, chapter 18, part 2, the following lands belong to the state of Montana to be held in trust for the benefit of the public schools of the state:

(a) 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 ~~the~~ stream or lake as ~~the same are~~ shown by the United States survey ~~thereof and of the stream or lake;~~ and

(b) all islands existing in the navigable streams or lakes in this state ~~which that~~ have not been surveyed by the government of the United States and all lands ~~which that~~ at any time in the past ~~comprised such constituted~~ an island or any part ~~thereof, of an island.~~

(2) This section does not apply to ~~except such~~ lands as ~~that~~ are occupied by and belong to the adjacent landowners ~~as that were formed by accretions, belong to the state of Montana to be held in trust for the benefit of the public schools of the state.~~

(3) For the purposes of this section:

(a) "abandoned bed" means a river bed or stream bed with no water over it; and

(b) "navigable" means a river or stream adjudicated as navigable for title purposes by a court of competent jurisdiction."

Section 3. Repealer. The following section of the Montana Code Annotated is repealed:

70-18-202. Sudden removal of bank -- right of owner to reclaim.

Section 4. Codification instruction. [Section 1] is intended to be codified as an integral part of Title 70, chapter 18, part 2, and the provisions of Title 70, chapter 18, part 2, apply to [section 1].

Section 5. Applicability. [This act] applies to a sudden change in the bed of a navigable river or stream that occurs on or after October 1, 2011.

- END -

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR



JOHN BOHLINGER
LT. GOVERNOR

May 6, 2009

The Honorable Linda McCulloch
Secretary of State
State Capitol
Helena, MT 59620

Dear Secretary McCulloch:

In accordance with the power vested in me as Governor by the Constitution and the laws of the State of Montana, I hereby veto Senate Bill No. 299 (SB 299), **"AN ACT AN ACT PROVIDING FOR THE OWNERSHIP OF THE CHANNEL AND FORMER CHANNEL OF A NAVIGABLE RIVER OR STREAM; PROVIDING THAT A FORMER CHANNEL IS OWNED BY THE ADJACENT LANDOWNER AND THE LAND UNDER THE NEW CHANNEL IS OWNED BY THE STATE; DEFINING THE TERM "NAVIGABLE"; PROVIDING RULEMAKING AUTHORITY; AMENDING SECTION 77-1-102, MCA; REPEALING SECTION 70-18-202, MCA; AND PROVIDING AN APPLICABILITY DATE."**

Senate Bill 299 may be the singular piece of legislation passed by the 62nd Legislature to have slipped by with the gravest unintentional consequences. The bill primarily was intended to define the ownership of the channel of navigable waters altered through avulsion (see section 1 of SB 299). However, in the process of dealing with the subject of avulsion, SB 299 divests the State of its ownership of a large portion of the beds of navigable rivers – authority held by the State of Montana since passage of the Enabling Act by Congress in 1889 – contrary to well-settled federal and state constitutional law. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984).

Specifically, SB 299 amends § 77-1-102, MCA – a statute addressing the administration of state lands that has remained unchanged since its enactment in 1937 – to define navigable rivers as only those that have been "adjudicated" navigable. By defining navigable rivers in this narrow way, SB 299 could be construed to divest the Land Board of its power to fulfill its constitutional duty to administer all the public trust lands granted to the State of Montana at the time of statehood, regardless of whether a river has been adjudicated. Under this scenario, SB 299 would unintentionally divest the State of its ownership of over approximately 1,500 miles of riverbed granted to the state at statehood.

I understand the 62nd Legislature used a similar narrow definition of "navigable" rivers in SB 35, which establishes a regulatory process for leasing beds of navigable rivers. Senate Bill 35 contained nine new sections of law, to be codified presumably as a new part in Title 77, chapter 1, MCA, for the *exclusive* purpose of establishing the regulatory

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scheme for leasing riverbeds. Senate Bill 35 also contains an express proviso that nothing in the bill "diminishes the state's ownership of the beds of navigable rivers, streams, or lakes under any other law." See section 1(3) of SB 35. This limiting provision in SB 36 is markedly absent from SB 299, a bill which amends Montana's bedrock law regarding the administration of state lands and limits state ownership of those lands.

While I would not have objected to codifying the matter of the ownership interests, and therefore the tax consequences, of beds of streams and rivers whose channels have changed through *avulsion*, given the consequences of SB 299, I have no choice but to veto it. The amendments to the 1937 statute contained in SB 299 would affect the ability of the Land Board to fulfill its constitutional duty to administer all the public trust lands granted to the State at the time of statehood.

I strongly urge legislators to sustain my veto of SB 299.

Sincerely,



BRIAN SCHWEITZER
GOVERNOR

cc: Legislative Services Division