



# THE INTERIM

December 2009

A monthly newsletter of the Montana Legislative Branch

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The Interim, along with up-to-date information about interim committees, is also available on the Legislative Branch Website at [leg.mt.gov](http://leg.mt.gov).

## Countdown to the 2010 Census: Confidentiality Will Be a High Priority

Next April, the U.S. Census Bureau will count the nation's population. In a state like Montana, where citizens value their privacy and have a constitutional right to privacy, maintaining the confidentiality of census information is extremely important.

All answers to the census questionnaire are protected by federal law (Title 13, U.S.C. 9) and are confidential. It is illegal for the Census Bureau or its employees to reveal any personal information or individual responses on the census form to any other government agency, courts of law, or even the president of the United States.

Census Bureau workers must pass security and employment reference checks. They are subject to a \$250,000 fine or a five-year prison term, or both, for disclosing any information that could identify a respondent or household. In 1980, with a search warrant in hand, four FBI agents entered the Census Bureau's Colorado Springs office to seize census documents. An employee kept the agents at bay until her superiors could resolve the matter with the federal agents. No confidential information was released.

The new census form is similar to the former "short form." It asks only 10 questions about the number of people living at a residence and their sex, age, race, and whether they are of Hispanic origin. It takes about 10 minutes to fill out. The census form and other information is available at [2010.census.mt.gov](http://2010.census.mt.gov).

Information about the census is also available on the Montana Legislative Branch website under the "For Legislators" link. State and county profiles of census data can be accessed from the site through a link to the Census and Economic Information Center website ([ceic.mt.gov](http://ceic.mt.gov)).



Upcoming issues of *The Interim* will include articles about additional topics related to the census. These topics will include response rates and hard-to-count populations, the various uses of census information, the fate of the census long form, and available resources, such as news releases and public service announcements.

For more information about the 2010 census, call the state Census and Economic Information Center at 406-841-2740 or Susan Byorth Fox, executive director of the Legislative Services Division, at 406-444-3066.

## Health Committee Delves into Effects on States of Federal Reform Proposals

The Children, Families, Health, and Human Services Interim Committee learned more at its November meeting about how federal health care reforms could affect state budgets and programs.

Committee members also heard about possible changes that will occur in the future in the way health care records are shared among providers and in how some health insurance policies are sold. The presentations were part of the SJR 35 study of issues related to health care.

Joy Johnson Wilson, of the National Conference of State Legislatures, joined the meeting by phone to discuss how federal efforts may affect the states. She described likely changes to the Medicaid program, as well as the likely creation of a new health insurance marketplace for individuals and some small businesses.

Some of the key proposals that would affect the federal-state Medicaid program include:

- an expansion of the program to include childless adults, who currently aren't eligible;
- an increase in the income eligibility guidelines;
- a requirement for states to cover a portion of the expanded program; and
- a provision allowing the federal government to review a state's Medicaid reimbursement rates and withhold federal public health funds if a state's reimbursement rates are too low.

All current reform proposals would create a "health insurance exchange," where people who buy insurance

on their own could shop for and compare policies. The policies would have to meet certain criteria and would include a certain package of benefits. Under a bill drafted in the House, the federal government would run the exchange. A Senate Finance Committee bill would give states that responsibility.

Wilson noted that a nationally run exchange could affect a state's requirements for coverage of certain health care services or health conditions. These coverage "mandates" may not be included in a national benefit package.

John Mudd, of the State Auditor's Office, said the bills generally would allow only uninsured individuals to buy insurance through an exchange, at least initially. Some small businesses may be able to buy coverage for their employees, with larger businesses eventually able to opt in.

The committee also learned that the federal stimulus bill approved in February included funding to increase the use of health information technology (HIT), or the electronic sharing of patient records among health care providers. The bill provided \$2 billion to encourage states to develop the technology and set up regional assistance centers. It also contained \$17 billion for incentive payments to Medicare and Medicaid providers who use electronic records in a meaningful way.

HealthShare Montana, a nonprofit group, is applying on behalf of the state for \$5.7 million of the stimulus funds. Kris Juliar discussed the group's HIT efforts over the past four years and its plans to use the federal funds.

Gail Briese-Zimmer, of the state Department of Public Health and Human Services, told the committee how the agency is incorporating the use of health information technology into the state Medicaid plan. DPHHS also will develop the incentive program for Medicaid providers who use the technology.

In other matters, the committee heard about a number of mental health issues involving DPHHS. Agency officials provided an update on their review of recommendations made in a contracted study last interim of Montana's mental health system. They also discussed a new grant program that provides matching funds to counties that undertake crisis intervention and jail diversion efforts. The

program was created and funded by the 2009 Legislature through HB 130.

During the discussion, legal staff for the committee noted inconsistencies between the language in HB 130 and the department's proposed rules on how it will award grant funds. The committee decided to formally express its concerns about the formula in a letter to DPHHS. The letter also will ask the agency to delay adoption of the rules until it has responded to the committee and members have reviewed the issues further. The committee expects to hold a conference call meeting on the matter.

The committee will meet next on Jan. 25 in Room 137 of the Capitol. An agenda and meeting materials will be posted in mid-January to the committee webpage at [leg.mt.gov/cfhhs](http://leg.mt.gov/cfhhs).

For more information, contact Sue O'Connell, committee staff, at 406-444-3597 or [soconnell@mt.gov](mailto:soconnell@mt.gov).

## Workers' Comp Costs, Unemployment of Concern to Economic Affairs Committee

With medical costs accounting for 50% to 70% of workers' compensation costs in Montana, legislators on the Economic Affairs Interim Committee heard suggestions at their Nov. 17 meeting for ways to reduce costs and improve benefit response time in an effort to get workers back to work more quickly.

Among the suggestions from a panel of medical providers and employers for ways to contain medical costs were:

- increasing training for primary care physicians and other medical providers who may be unfamiliar with the problems facing injured workers and who may be either too quick or too slow to recommend treatment by a specialist.
- dealing with delays caused by preauthorization for treatment. One effort already under way by the state Department of Labor and Industry is to implement utilization and treatment guidelines that are expected to speed treatment by bypassing preauthorization for up to 80% of cases that currently must be preauthorized. (The remainder may be delayed by mediation, which is the current situation.) One employer suggested that a scheduling preference be

given by specialists who are treating workers injured on the job. Another employer said that his firm encouraged initial treatment by getting injured workers to walk-in clinics or emergency rooms.

- creating a state medical director of workers' compensation, suggested by staff of the Billings Clinic, to help with statewide training and possibly medical disputes.
- getting employers more involved in positive return-to-work options that might include forms of light duty.

A panel of employers discussed concerns about premium increases, the benefits of safety training, the inability to make third-party claims against those who may have caused a worker injury (because of a Montana Supreme Court ruling on "making whole" an injured worker), and the role of the employer in getting injured workers back to work.

Both panels participated in the meeting over a MetNet broadcast from Billings. Committee members and panelists endorsed the process. The MetNet option enabled the committee to avoid the costs of traveling out of Helena for meetings but still reach out to Montanans in other communities.

Ann Clayton, an outside consultant for the Department of Labor and Industry, described other states' efforts to investigate fraud, the budgets designated for that effort, and the varied perceptions that fraud ranged from less than 5% of all workers' compensation claims to nearly 25% of all claims. Jerry Keck, with DLI, noted that states that have implemented utilization and treatment guidelines have reported 40% reductions in premiums (North Dakota) and 64% reductions in medical costs (Ohio).

Roy Mulvaney, with DLI, reviewed unemployment benefits that have resulted in state payments for unemployed workers of more than \$221.4 million in fiscal year 2009 and the first three months of fiscal year 2010. In addition, federal money for extended and emergency unemployment benefits and benefits not previously paid to part-time workers, among others, amounted to nearly \$48.5 million after the implementation of the American Recovery and Reinvestment Act and HB 645, enacted in Montana last session. An additional \$32.6 million in federal funding came for emergency benefits prior to the ARRA funding.

Mulvaney also reviewed the unemployment insurance trust fund, which dropped from \$263.2 million in January to \$181.2 million in September before climbing to \$191.2 million in October. As a result, the rates that employers have to pay for unemployment insurance will climb from 1.12% (which has been the rate since 2000) under schedule 1 to 1.92% under schedule 5. Despite the recession's effect on unemployment insurance payouts, Montana is better off than most states. Montana is not among the 40 states expected to borrow from the federal government by 2012 to help shore up their unemployment trust funds.

The Economic Affairs Committee will next meet Jan. 20-21 to review how different workers' compensation insurers operate in Montana. For more information, visit the committee webpage at [leg.mt.gov/eaic](http://leg.mt.gov/eaic) or contact Pat Murdo, committee staff, at 406-444-3594 or [pmurdo@mt.gov](mailto:pmurdo@mt.gov).

## ELGIC to Discuss Historic Preservation, Review Education Shared Policy Goals

The Education and Local Government Interim Committee will meet Dec. 11 at 8 a.m. in Room 102 of the Capitol. True to its name and responsibilities, the committee will devote half the day to local government issues and half to education, with a historic preservation study that involves both disciplines included in the mix.

HJR 32 requested a study of historic preservation in Montana and the effects of and strategies for preserving heritage properties. Committee staff has been working with the Montana Preservation Alliance to research preservation programs in other states and learn how they are organized and funded.

Montana has taken steps to encourage historic preservation that other states have not, including offering a historic preservation tax credit and dedicating a portion of federal stimulus funds to preservation projects. Montana is the only state to have pledged stimulus money for that purpose. However, improvements could be made to enhance the awareness among property owners of available preservation programs and the benefits of preservation; convincing communities of the economic advantages of historical preservation; and devising ways to connect the various programs that exist in several state agencies. Staff and Sen. Bob Hawks of Bozeman will update the committee on these projects.

Interim zoning (sometimes called emergency zoning) is a contentious subject among real estate agents, developers, local governments, and "smart growth" advocates. As evidence of the ongoing disputes, the Montana Supreme Court has issued decisions in two cases dealing with interim zoning in the past two months: *Fasbender v. Lewis and Clark Co.* and *Liberty Cove, Inc. v. Missoula Co.* At the Dec. 11 committee meeting, a panel composed of representatives of the various interests will discuss their perspectives and suggestions on how (or whether) changes need to be made to the process.

Agenda items related to education will include a report from the Office of the Commissioner of Higher Education on its two-year education initiative; meetings of the HJR 6 and SJR 8 subcommittee on shared policy goals and accountability measures and member and participant expectations for the process and products (see related article below); an update on the virtual academy; and a visit with school counselors about a school counselor initiative project and the profession in general.

For more information on the December meeting, check the committee webpage at [leg.mt.gov/elgic](http://leg.mt.gov/elgic) or contact Leanne Heisel at 406-444-3593 or [lheisel@mt.gov](mailto:lheisel@mt.gov).

## Education Subcommittee Begins Work on K-20 Shared Policy Goals

On Oct. 2, the Education and Local Government Interim Committee established a subcommittee to deal with two resolutions passed during the 2009 legislative session. HJR 6 urged K-12 education agencies to develop shared policy goals and accountability measures in consultation with the ELG. SJR 8 urged K-20 education agencies to develop shared policy goals and accountability measures in consultation with ELG.



*Rep. Bob Lake*

The subcommittee met Nov. 9 and elected Rep. Bob Lake of Hamilton as its chair. The subcommittee agreed to include nonvoting participants representing the Superintendent of Public Instruction, the Board of Public Education, the Commissioner of Higher

Education, the Board of Regents, and the Governor's Office.

Madalyn Quinlan, with the Office of Public Instruction, and Steve Meloy, with the Board of Public Education, discussed several policy goals at the K-12 level.

Quinlan and Tyler Trevor, Office of the Commissioner of Higher Education, identified specific policy goals at the K-20 level.

Trevor and Lynn Hamilton, with the Board of Regents, discussed previous efforts to develop shared policy goals and accountability measures by postsecondary institutions and identified how they will work together to develop goals and accountability measures in the future.

The subcommittee will next meet Thursday, Dec. 10, at 1 p.m. in Room 102 of the Capitol. For more information, contact Casey Barrs, subcommittee staff, at 406-444-3957 or [cbarrs@mt.gov](mailto:cbarrs@mt.gov).

## Committee Asking for Public Comment on Final Issues Related to State Energy Policy

The Energy and Telecommunications Interim Committee is asking the public to weigh in on the last of nine energy issues it's examining as part of a review of state energy policy.

The 2009 Legislature, with enactment of SB 290, directed the committee to examine and possibly revise the current state energy policy. During the next several weeks, the committee will accept public comment focused on three specific issues:

- increasing energy efficiency standards for new construction;
- promoting energy efficiency incentives; and
- promoting conservation.

Committee members want to hear about specific changes in state law that the public believes are needed in these areas, as well as any other recommendations regarding them.

Comments should be submitted by Dec. 21 to [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or Legislative Services Division,

Attn. Sonja Nowakowski, P.O. Box 201704, Helena, MT 59620-1704. Email submissions should include the words "Energy Policy" in the subject line.

The committee will discuss submissions at its next meeting Jan. 14 in Helena. It will use the comments it receives in the next month, along with previous public comments on six other energy issues, to decide whether to propose changes to state energy laws.

At its meeting Nov. 9-10, the committee discussed the use of coal-fired electric generation, alternative energy systems, and electric regulation. The committee received about 60 public comments on those three topics, totaling more than 180 pages. All public comments are on the ETIC webpage at [leg.mt.gov/etic](http://leg.mt.gov/etic).

The committee also agreed to a series of draft energy policy statements on transmission lines, wind integration, and the use of state land for energy development. The committee selected about 10 potential statements to examine in more detail, as a new policy is developed.

In addition to its energy policy work, the ETIC also took a close look at possible changes to federal greenhouse gas regulation. PPL Montana, the Natural Resources Defense Council, the Montana Petroleum Association, and the Montana Environmental Information Center provided information on federal legislation and rulemaking on greenhouse gases.

The ETIC will next meet Jan. 14 in Room 102 of the Capitol. The committee will discuss recommendations and findings for a potential revision of the state's energy policy. If the committee decides to move forward with revisions, it will focus on the nine issues that the ETIC has examined over the past several months. The committee will seek additional public comments next spring on any policy revisions it decides to consider.

For more information, contact Sonja Nowakowski, committee staff, at [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or 406-444-3078.

## Law, Justice Committee to Make Study of State DUI Laws Its Top Priority

The Law and Justice Interim Committee will meet Thursday and Friday, Dec. 17-18, in Room 137 of the Capitol to continue work on the SJR 39 study of state laws related to driving under the influence.

The committee will examine DUI incarceration rates, treatment alternatives, community-based supervision options (such as electronic monitoring bracelets and ignition interlock devices), drivers' license sanctions, and special DUI courts. On the morning of Dec. 17, committee members will have the opportunity to tour the Warm Springs Addictions Treatment and Change (WATCh) program for felony DUI offenders.

The agenda also includes presentations on the following:

- the public defender system and the findings and recommendations of an American University study;
- the Montana Enhanced Registration and Licensing Information Network; and
- the implementation of committee bills enacted last session (House Bills 130, 131, and 132) to divert the mentally ill from the justice system and from involuntary commitment.

The committee will also learn about the current process and challenges related to community placement of sex offenders.

An agenda and other meeting materials for the December meeting will be posted on the committee webpage at [leg.mt.gov/ljic](http://leg.mt.gov/ljic).

At the committee's first meeting in August, members decided to make the SJR 39 study of driving under the influence its top priority. The committee also decided to limit the SJR 29 study of biological (DNA) evidence to preservation and storage issues (see below). The committee will take up the DNA study in February.

In September, the committee's examination of DUI laws covered:

- prevention and education, including server and sales training, safe and drug-free school programs, Alive at 25, and DUI prevention task forces.

- laws and enforcement, including law enforcement's perspective on weaknesses in current law, prosecutor perspectives, public defender perspectives, and compliance checks.

The committee identified several issues that it wishes to explore further. It plans to gather more information on:

- server training;
- retailer restrictions;
- curbing underage drinking;
- DUI prevention task force efforts with respect to compliance checks;
- tribal demonstration projects;
- special identification of DUI offenders to help restrict their access to alcohol and vehicles;
- field testing for impairment and penalties for refusals;
- treatment alternatives, costs, capacity, and feasibility for earlier intervention;
- increased penalties for repeat offenders and offenders with particularly high blood alcohol content; and
- strengthening laws related to counting prior DUI offenses, standards of proof, bail, driver licensing, and ignition interlock devices.

## DNA Study to Include Law Enforcement Survey

In September, the Law and Justice Committee examined, as part of the SJR 29 study, current law, practices, and challenges related to the preservation and storage of biological evidence, such as DNA. The committee decided to conduct a statewide survey of evidence rooms to gather information on storage capacity, preservation policies, training, funding, special challenges, and the handling and preservation of sexual assault kits. The web-based survey will be conducted by legislative staff, and each law enforcement agency that handles this type of evidence will be asked to participate. Survey results will be reported to the committee in February.

For more information, contact Sheri Heffelfinger, committee staff, at 406-444-3596 or [sheffelfinger@mt.gov](mailto:sheffelfinger@mt.gov). Or visit the committee webpage at [leg.mt.gov/ljic](http://leg.mt.gov/ljic).

## Legislative Audit Committee Chooses Officers from Great Falls, Hungry Horse

The Legislative Audit Committee, charged with ensuring that state agencies conform to the law, elected its officers at a recent meeting.



*Sen. Mitch Tropila*

Sen. Mitch Tropila of Great Falls will chair the committee. Rep. Dee Brown of Hungry Horse was named vice chair, and Rep. Bill Wilson of Great Falls will be committee secretary.

The audit committee is the only legislative committee specifically required by the Montana Constitution. It is made up of

six members from the Senate and six from the House of Representatives.

The audit committee appoints, consults with, and advises the legislative auditor, Tori Hunthausen. It also reviews financial, performance, and information systems audit reports submitted by the Legislative Audit Division, releases those reports to the public, and serves as a conduit between the legislative auditor and the Legislature.

The audit committee is one of three committees that oversees administration of the Legislative Branch. The others are the Legislative Council and Legislative Finance Committee.

Other members of the audit committee are Sens. Greg Barkus, Kalispell; John Brenden, Scobey; Taylor Brown, Huntley; Mike Cooney, Helena; and Cliff Larsen, Missoula; and Reps. Betsy Hands, Missoula; Scott Mendenhall, Clancy; Carolyn Pease-Lopez, Billings; and Wayne Stahl, Saco.

## Audit Division Manager Speaks to Accounting Students in Great Falls

Financial-Compliance Audit Manager Vickie Rauser spoke to accounting students at the University of Great Falls in October at the invitation of Tami Park, accounting instructor.

Rauser discussed the auditing profession in general (different avenues to pursue, such as accounting, tax, audit, personal finance); studying for and taking the CPA exam (and why the exam should be taken soon as possible, either during or after course work); the Legislative Audit Committee; the Legislative Audit Division in general, and Financial-Compliance in more detail; and Luca Pacioli, the “Father of Accounting.”

## Legislative Audit Committee Reviews Audit Reports at Nov. 18 Meeting

The Legislative Audit Committee met Nov. 18 to review a variety of audit reports. The complete audit reports are available at [leg.mt.gov/auditreports](http://leg.mt.gov/auditreports). The following reports were issued:

### Financial-Compliance Audits

**Department of Agriculture (09-21):** This report contains the results of the financial-compliance audit of the Department of Agriculture for the two fiscal years ending June 30, 2009. The report includes one recommendation to the department related to its indirect cost proposals. The previous audit report of the department did not contain any recommendations.

An unqualified opinion was issued on the department’s financial schedules for each of the two fiscal years ending June 30, 2008, and 2009, which means the reader may rely on the presented financial information and the supporting detailed information on the Statewide Accounting, Budgeting, and Human Resource System.

**Montana Arts Council (09-24):** This audit report documents the results of the financial-compliance audit of the Montana Arts Council for the two fiscal years ending June 30, 2009.

The report contains three recommendations related to noncompliance with state policy pertaining to monitoring and testing internal controls, noncompliance with state law pertaining to grantee requirements, and misclassification of current year revenue. An unqualified opinion was issued on the financial schedules contained in this report. The reader may rely on the financial information presented in the financial schedules and the supporting data on the state’s accounting system.

**Department of Commerce (09-16):** This audit report is the result of the financial-compliance audit of the Department of Commerce for the two fiscal years ending June 30, 2009. An unqualified opinion was issued on the financial schedules contained in this report, which means the reader may rely on the financial information presented in the financial schedules, as well as the supporting data on the state's accounting system.

This report contains five recommendations to the department. The previous audit report contained seven recommendations. The department implemented six recommendations and did not implement one. The latter relates to Section 8 vouchers benefit calculations and is discussed in the report.

**Office of the Commissioner of Higher Education (09-20):** This report is the financial-compliance audit of the Montana Office of the Commissioner of Higher Education for the two fiscal years ending June 30, 2009. The objectives of the audit include determining whether the office's financial schedules present fairly, in accordance with state accounting policy, the results of operations for each of the two fiscal years ending June 30, 2009, and documenting the status of six recommendations from the prior audit. The audit also tested compliance with laws related to operations of the department. An unqualified opinion was issued on the office's financial schedules.

**Department of Fish, Wildlife and Parks (09-18):** This audit report is the result of the financial-compliance audit of the Department of Fish, Wildlife, and Parks for the two fiscal years ending June 30, 2009. An unqualified opinion was issued on the financial schedules contained in this report. This means the reader may rely on the information presented in the financial schedules and the supporting data on the state's accounting system.

This report contains four recommendations directed to the department. These address internal controls over nonroutine transactions, new hires, and donated property. They also address monitoring and testing of controls.

**Department of Labor and Industry (09-15):** This financial-compliance audit report contains the results of the audit of the Department of Labor and Industry for the two fiscal years ending June 30, 2009. An unqualified

opinion was issued on the financial schedules contained in the report. This means the reader can rely on the financial information presented and the supporting detailed information on the state's accounting records.

The report contains 10 recommendations that relate to the department's internal controls and compliance with federal and state regulations. Six of the recommendations relate to areas where the department can improve its internal controls.

American Recovery and Reinvestment Act (ARRA) funds will flow through the department's control structures. This report contains six recommendations for improved controls or compliance with existing control structures where the department receives and spends ARRA funds.

A disclosure issue is contained in the report regarding services provided to other agencies for the benefit of the other agencies without compensation to the department.

**Department of Livestock (09-22):** This audit report documents the results of the financial-compliance audit of the Department of Livestock for the two fiscal years ending June 30, 2009.

The report contains two recommendations for the department to improve internal controls and enhance compliance with state laws. The department's written response to the audit recommendations begins on page B-3 of the report. An unqualified opinion was issued on the department's financial schedules contained in the report. This means the reader may rely on the financial information and supporting data on the state's accounting system.

**Department of Public Health and Human Services (09-14):** A financial-compliance audit was performed of the Department of Public Health and Human Services for the two fiscal years ending June 30, 2009. An unqualified opinion was issued on the financial schedules, which means the reader may rely on the presented financial information and the supporting data on the state's accounting system for the two fiscal years ending June 30, 2009.

This audit report contains 14 recommendations to the

department. The issues discussed in the report relate to internal controls and compliance with federal regulations and state law. Noted in the report is whether findings and recommendations also affect funding under the American Recovery and Reinvestment Act.

**Montana Department of Transportation (09-17):** This report documents the results of the financial-compliance audit of the Montana Department of Transportation for the two fiscal years ending June 30, 2009. An unqualified opinion was issued on the financial schedules presented in this report. This means the reader may rely on the presented financial information and the supporting information on the state's accounting system.

The report contains four recommendations directed to the department. The recommendations are related to internal controls at fiscal year-end, relocation expenses, fuel purchasing cards, and the Scenic-Historic Byways Advisory Council. Of the 14 recommendations from the prior audit, the department implemented 11, partially implemented two, and did not implement one, which is discussed on page 8 of the report.

## Financial-Related Audits

**Montana Guaranteed Student Loan Program (09-06):** This is the report on the fiscal year 2008-09 financial audit of the Office of the Commissioner of Higher Education's Montana Guaranteed Student Loan Program (MGSLP) Federal Special Revenue Fund. The objectives of a financial audit include determining if the program's financial statements present fairly its financial position at June 30, 2009, and the results of its operations for the fiscal year.

The audit tested compliance with state and federal laws that have a direct and material impact on the financial statements. Additional compliance testing for the program is included in a biennial financial-compliance audit of the Office of the Commissioner of Higher Education.

An unqualified opinion was issued on the financial statements and accompanying notes, which means the reader can rely on the presented information. The prior audit report contained one recommendation that was fully implemented.

## Information Systems Audits

**Automated Licensing System: Review of Select Processing Controls (09DP-09), Department of Fish, Wildlife and Parks:** The Automated Licensing System (ALS) facilitates the process for issuing hunting, fishing, and recreational licenses by the Department of Fish, Wildlife, and Parks (FWP). ALS also aides FWP in conducting license drawings, supports administrative business functions related to licensing, and provides data that assists with the enforcement of hunting and fishing regulations. Due to the reliance of FWP on ALS, audit work was conducted to address objectives related to processing controls, system change controls, and system availability.

The overall conclusion is that ALS processing controls are functioning as management intends. However, areas were identified where FWP can improve controls around ALS, including more effectively identifying deceased licensees, preventing and detecting unauthorized changes to programming code and database tables, and better preparing for the continuity of licensing operations. This report discusses the audit findings and includes four recommendations for strengthening processing and change controls and maintaining an up-to-date disaster recovery plan.

## Performance Audits

**State Building Energy Conservation Program (09P-06), Department of Environmental Quality:** The Legislative Audit Division conducted a performance audit of the State Building Energy Conservation Program (SBECP) located at the Department of Environmental Quality (DEQ). The program was designed to reduce energy costs in state facilities. The SBECP works closely with the Long Range Building Program (LRBP) at the Department of Administration on energy improvement work on state-owned buildings.

From 1993 to 2006, the SBECP issued \$14.75 million in general obligation bonds to finance energy improvement projects, using estimated energy cost savings to service bond debt. Since the inception of the SBECP, the program has reported over \$12 million in cumulative energy cost savings for state government.

Due to statutory ambiguity, the SBECF collected estimated energy cost savings beyond the retirement of the bonds utilized to finance energy improvements. And while state law directs participating agencies to transfer these additional energy cost savings to the LRBP, the SBECF has directly collected these savings from participating agencies and only transferred portions to the LRBP. Audit work indicated that the program has historically operated on an informal basis, with limited program oversight, no policies or procedures, and lack of a structured filing system. Audit work identified coordination issues between the SBECF and LRBP.

Audit recommendations address the need for the DEQ to seek legislation to clarify the retirement or continuation of the collection of estimated energy cost savings beyond the retirement of bond payments; comply with state law regarding the transfer of funds to LRBP; and develop management controls for the SBECF, including formalizing its interaction with LRBP.

### Performance Audit Follow-up Reports

- **State Grain Laboratory Operations and Future Viability (09SP-29), original report 07P-10**

### Audit Committee to Meet in March

The Legislative Audit Committee is scheduled to meet next March in Helena. For more information about the committee, visit [leg.mt.gov/audit](http://leg.mt.gov/audit). Or contact Legislative Auditor Tori Hunthausen, Legislative Audit Division, at 406-444-3122 or [thunthausen@mt.gov](mailto:thunthausen@mt.gov).

### Legislative Council Approves Expenditure for Consultant, Sets December Meeting

HB 659 requires the State Administration and Veterans' Affairs Interim Committee to examine and recommend changes to Montana's public employee retirement systems. The bill authorized a \$200,000 appropriation from the general fund to the Legislative Services Division for the purposes of the study, contingent on approval by the Legislative Council. At a teleconference meeting Nov. 16, the council approved an expenditure of up to \$125,000 for the plan design contract. The remainder of the appropriation is to be used for actuarial analysis and legal review.

The Legislative Council will meet next on Monday, Dec. 14. The Rules Subcommittee will meet at 9 a.m. in Room 102, and the Legislative Management and Succession Planning Subcommittee will meet at 10 a.m. in Room 137. The full council will meet at 1 p.m. in Room 102 of the Capitol.

The council will continue work on strategic planning initiatives, including legislative space and the Capitol Complex. Sheryl Olson, with the Department of Administration, will discuss the master planning process and some background on Capitol restoration. Additional information will be provided by Secretary of the Senate Marilyn Miller, Chief Clerk of the House Dave Hunter, and Sergeants-at-Arms Ed Tinsley and Nancy Clark.

### Rules Subcommittee Seeks Legislator Ideas

The Rules Subcommittee is considering changes to the legislative rules with the goal of making them easier to use and understand. Members are working on a searchable database, shortcuts, and reference guides to make the rules more accessible. Legislators are invited to submit ideas on content, format, or access to the subcommittee member from their respective caucus: Rep. Dennis Himmelberger, Rep. Mike Phillips, Sen. Carol Williams, or Sen. Bob Story.

For more information or to view agendas, minutes, and meeting materials, visit the Legislative Council webpage at [leg.mt.gov/legcouncil](http://leg.mt.gov/legcouncil), or contact Susan Byorth Fox, executive director of the Legislative Services Division, at 406-444-3066 or [sfox@mt.gov](mailto:sfox@mt.gov).

### Legislative Finance Committee to Consider Budget Matters, Agency Performance

The Legislative Finance Committee will meet Thursday and Friday, Dec. 3-4, in Room 102 of the Capitol. The committee will convene at 8 a.m. on both days.

An agenda and other meeting materials will be available on the committee webpage at [leg.mt.gov/lfc](http://leg.mt.gov/lfc). For more information, contact Clayton Schenck, director of the Legislative Fiscal Division, at [cschenck@mt.gov](mailto:cschenck@mt.gov), or any member of the LFD staff at 406-444-2986.

The committee is scheduled to hear the following presentations:

- a report on the status of the state general fund;
- an update on the 2009 fire season and associated costs;
- a review of a funding shortfall in the Office of the Public Defender;
- a status report on the “old fund” in the Montana State Fund;
- a budget presentation from the Montana State Fund;
- a review of a State Parks funding shortfall;
- a report on proposed new rates for leased cabins;
- an update on information technology management;
- a report on the Department of Public Health and Human Services budget reduction evaluation work plan;
- an update on DPHHS long-range information technology projects;
- a status report on federal health care reform; and
- work group reports on performance measurements.

Part of the morning of Dec. 3 has been set aside for LFC performance measurement work groups to review progress reports of several state agencies on specifically identified program goals. For more information on the performance measurement work groups, contact Kris Wilkinson at [kwilkinson@mt.gov](mailto:kwilkinson@mt.gov) or 406-444-2722.

## Panel Discussions, Property Reappraisal to Highlight Revenue Committee Meeting

The Revenue and Transportation Interim Committee will meet Thursday and Friday, Dec. 3-4, in Room 137 of the Capitol. Both sessions begin at 8 a.m.

On Thursday morning, a panel will discuss matters related to the SJR 16 study of uninsured and underinsured motorists. Mari Kindberg, with the office of the State Insurance Commissioner, will present a primer on motor vehicle liability insurance in Montana. Patrick Butler, with the National Organization of Women, will discuss state trends and options for dealing with uninsured motorists, and Jacqueline Lenmark, with the American Insurance Association, will discuss the insurance industry’s perspective.

Representatives of the Montana Society of Certified

Public Accountants will discuss the advantages, disadvantages, and obstacles to revising how married taxpayers file their individual income tax returns for the SJR 37 study.

Other items on the Thursday agenda include a staff report on property-tax circuit breakers and a staff review of administrative rules.

On Friday, the Department of Revenue will report on the implementation of property reappraisal, and staff will discuss a report on the taxation of oil and natural gas property. Other items on the agenda include reports from the DOR and the Montana Department of Transportation, and a general fund revenue update.

An agenda and meeting materials are available on the committee webpage at [leg.mt.gov/rtic](http://leg.mt.gov/rtic). For more information, contact Jeff Martin, committee staff, at 406-444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov).

## SAVA to Issue Request for Proposal for Retirement-Plan Design Consultant

At a two-day meeting in late October, the State Administration and Veterans’ Affairs Interim Committee dove headfirst into the study of redesigning Montana’s public retirement systems.

Stephen McElhane, an actuary for the Public Employees’ Retirement Board (PERB), explained the basics of public pension plans and the funding and evaluation of the state’s retirement systems.

Actuaries from both the PERB and Teachers’ Retirement System (TRS) presented the results of the retirement systems’ annual valuations and answered questions about the less-than-rosy results, as the dramatic economic downturn in 2008 took its toll on the retirement plans’ investments.

As of June 30, 2009, the date on which “snapshots” of the retirement systems were taken for the valuations, the Public Employees’ Retirement System Defined Benefit Plan, the Game Wardens’ and Peace Officers’ Retirement System, and the Sheriffs’ Retirement System do not amortize. That means the current unfunded liabilities for

those systems will never be paid off unless changes are made to the funding and possibly the benefit structures of those systems. The other five retirement systems administered by the PERB all amortize in under the 30 years required by state statute.

The TRS also did not amortize in any length of time. The valuations for the PERB systems are available at [mpera.mt.gov](http://mpera.mt.gov) and the TRS valuation is available at [trs.doa.state.mt.us](http://trs.doa.state.mt.us).

Carroll South, executive director of the Board of Investments, reported on the status of the retirement systems' assets, and Ron Snell, of the National Conference of State Legislatures, discussed the history and purpose of state retirement plans. Snell also described specific changes other states have made to deal with similar funding problems in their retirement plans. Keith Brainard, research director with the National Association of State Retirement Administrators, provided an overview of various hybrid plan designs that some states have adopted.

On the second day of the meeting, the committee reviewed responses to a request for information and decided to draft a request for proposal (RFP) to hire a plan design consultant to help the committee suggest and analyze changes – including new designs – to PERS and TRS. The committee will approve the RFP in a conference call in late November or early December, and it hopes to have a plan design consultant hired by the end of next January.

The committee will meet next on Dec. 11 in Helena. Among other things, the agenda will include time for members to examine any desired changes to the other retirement systems administered by the PERB, including firefighters, police officers, game wardens and peace officers, highway patrol officers, sheriffs, volunteer firefighters, and judges.

For more information, including reports presented at previous committee meetings, visit the committee webpage at [leg.mt.gov/sava](http://leg.mt.gov/sava), or contact Rachel Weiss, committee staff, at 406-444-5367 or [rweiss@mt.gov](mailto:rweiss@mt.gov).

## Ground Water to Bubble to Surface at Next Water Policy Committee Meeting

Ground water issues are expected to bubble to the surface at the next meeting of the Water Policy Interim Committee Jan. 13-14 in Helena.

Members will hear presentations on small water wells that are exempt from permitting. Several speakers will talk about water produced from the extraction of coal-bed methane.

For more information, contact Joe Kolman, committee staff, at 406-444-9280 or [jkolman@mt.gov](mailto:jkolman@mt.gov). Or visit the committee webpage at [leg.mt.gov/water](http://leg.mt.gov/water).

## Must a Legislator Resign to Run for Another Office?

Article XIII, section 4, of the Montana Constitution states that the Legislature is required to provide a Code of Ethics prohibiting conflict between public duty and private interest for members of the Legislature and all state and local officers and employees. The Legislature has fulfilled



this obligation by enacting Title 2, chapter 2, part 1, MCA. Section 2-2-101, MCA, provides that the purpose of Title 2, chapter 2, part 1, MCA, is to set forth a Code of

Ethics prohibiting conflict between public duty and private interest as required by the Constitution of Montana.

This Code of Ethics recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government. It prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The Code of Ethics recognizes that some actions are conflicts per se between public duty and private interest, while other actions may or may not pose a conflict depending upon the surrounding circumstances. It is important to note that the Constitution and the Code of Ethics are both couched in terms of a conflict between public duty and private interest. There are no provisions that concern conflict between competing public duties or interests.

Section 2-2-105(3), MCA, provides that a public officer or public employee may not, within 12 months following the voluntary termination of office or employment, obtain employment in which the officer or employee will take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved during a term of office or during employment. These matters are rules, other than rules of general application, that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which the officer or employee was an active participant. There is no similar restriction for legislators.

Section 2-2-111(2), MCA, provides that a legislator may

not seek other employment by the use of the legislative office. Section 2-2-201, MCA, provides that members of the Legislature may not be interested in any contract made by them in their official capacity or by any body, agency, or board of which they are members if they are directly involved with the contract. Additional restrictions apply to former public employees. A former public employee may not within 6 months following the termination of employment contract with or be employed by an employer who contracts with the state or any of its subdivisions involving matters with which the former employee was directly involved during employment.

Article V, section 9, of the Montana Constitution addresses the disqualification of a legislator. It prohibits a legislator from being appointed to a civil office during the term for which the legislator was elected. This provision does not prohibit a legislator from seeking a different elected office during the legislator's term of office. For example, John Bohlinger was elected lieutenant during his term as a state senator. Pursuant to the provisions of Article V, section 9, of the Montana Constitution, he was required to resign his legislative position prior to assuming his office in the Executive Branch. The only elected officials constitutionally required to forfeit their office upon filing for another elective public office are judges. See Article VII, section 10, of the Montana Constitution.

In *Mulholland v. Ayers*, 109 Mont. 558, 99 P.2d 234 (1940), the Supreme Court was asked to construe a statute requiring the incumbent of an office to resign the office in order to be a candidate for another office. The court found the statute, as written, invalid as a violation of equal protection. A state senator who became an unsuccessful candidate for mayor of the city of Butte did not forfeit his Senate seat by becoming a candidate for mayor. There is currently no similar statute.

In summary, there are no provisions in the Code of Ethics or any statutes that require a legislator to resign from office because of the legislator's filing as a candidate for another office.

## The Back Page

## The Murky World of Water Navigability

By Todd Everts

## Legislative Environmental Analyst

Unlike other personal or real property rights, the right to use water and the right to own and control the underlying river and lake beds are not necessarily exclusive. Water is a resource in which multiple private parties may have a right to its use. In addition, the public also has rights to use the same water resource. Throw in competing state, federal, and tribal water control laws and you are in for a wild whitewater ride through the legal morass known as “navigability.”

The various legal tests and applications of navigability are designed to sort out “who” or “what” has legal control and use of waterways and water bodies and the underlying beds.

In Montana, the multiple meanings of navigability have taken center stage recently with regard to the following issues:

- whether the State of Montana can charge dam owners rent for the use of certain river beds;
- whether the State of Montana can charge rent from other users of certain river beds;
- the determination of the State of Montana’s ownership of underlying beds of water bodies and the delineation of private property for taxation purposes;
- the scope and nature of the federal government’s regulatory power under current and pending federal legislation as it relates to dredging and filling wetlands in the State of Montana; and
- the extent to which the public has the right to access water bodies in Montana for recreational purposes.

The purpose of this article is to describe the various navigability legal tests and to illustrate how those legal tests interrelate with the issues mentioned above.

Two tests of navigability have evolved at the federal level and one at the state level. The problem is that navigability used in one legal context can have a different meaning from navigability used in another legal context.

## Federal Test of Navigability for Title

The Equal Footing Doctrine provided that, upon statehood, states admitted to the Union after the original 13 colonies were established would receive title to the beds beneath their navigable waters. Pursuant to the Equal Footing Doctrine, the U.S. Supreme Court in *Montana v. United States*<sup>1</sup> held that if a river is navigable, the state owns the bed of the river subject to the paramount powers of the federal government, but if the river is not navigable, the abutting riparian landowners may own the adjacent river bed.<sup>2</sup> Navigability determines ownership or title to the underlying beds.

In order for a court to determine whether a water body is navigable for title purposes, the court must factually recreate the conditions and uses of the water body that existed at the time the state entered the Union.<sup>3</sup> The fact that a water body was navigable for a significant portion of time is sufficient to establish navigability.<sup>4</sup> So long as the water body was capable or susceptible of being navigable (i.e., useable for floating logs), it is not necessary to show that the water body was actually used for commerce.<sup>5</sup>

If navigability for title has been established, title of the underlying beds rests with the state and the state is free, subject to federal powers and potential public trust doctrine constraints, to allocate the title to or use of those beds underlying navigable waters. Montana has judicially and legislatively adopted the federal test of navigability for title to resolve allocation and use disputes.<sup>6</sup>

During the 2009 session, the Montana Legislature passed two bills (Senate Bill 507 and Senate Bill 465) that deal with state allocation issues regarding navigability for title.

In SB 507, the Legislature clarified the treatment of

1 *Montana v. United States*, 450 U.S. 544 (1981)

2 *Id.* at 551.

3 Tarlock at section 8:12, page 8-16.

4 *Id.*

5 *The Daniel Ball*, 77 U.S. 557 (1870); *United States v. Utah*, 283 U.S. 64 (1931), *Edwards v. Severin*, 241 Mont. 168, 785 P.2d 1022 (1990), *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984).

6 See Curran, at 43 through 48 adopting the federal title definition. See Edwards, at 170 adopting the federal title definition. The Montana Legislature has also adopted the federal title test in Sections 2 and 8, Chapter 475, Laws of Montana (2009).

property consisting of the bed of navigable rivers for state land management purposes and clarified the authority of the Department of Natural Resources and Conservation (DNRC) and the State Land Board.<sup>7</sup> SB 507 defines a “navigable river” as a river that:

- (a) was determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river; or
- (b) has been adjudicated as navigable by a court of competent jurisdiction.<sup>8</sup>

In clarifying the authority of the Land Board and DNRC regarding ownership of the beds of navigable rivers, SB 507 requires that:

[t]he board or the department may only require a lease, license, or easement for the use of the bed of a river that has been adjudicated as navigable for title purposes by a court of competent jurisdiction or was meandered by official government survey at the time of statehood.<sup>9</sup>

The DNRC has produced a map and a list of Montana navigable rivers and lakes that require DNRC permitting.

SB 507 contains an internal inconsistency: the definition of “navigable river” in Section 2 of the bill does not include the requirement that the official government survey be conducted at the time of statehood, as is required in Section 8 of the bill. The question becomes: Are the governmental surveys that have been conducted at or before the time of statehood the only surveys that can be used to determine the navigability of rivers? Or could governmental surveys conducted after the time of statehood be used to indicate navigability? Federal law is the controlling authority in determining navigability for title purposes. Ultimately a court would be the final arbiter regarding this inconsistency in SB 507.<sup>10</sup> The Legislature may want to resolve this issue next session.

In SB 465, the Legislature clarified how the Department of Revenue (DOR) and the DNRC should handle claims in changes of ownership or disputes of title of

river beds and streambeds related to property taxation and regulatory jurisdiction. SB 465 also required notice and the opportunity to be heard for a claim of change in ownership of a river bed or streambed.<sup>11</sup>

The issue of navigability for title is before the Montana Supreme Court in *PPL Montana LLC v. State of Montana*.<sup>12</sup> The District Court concluded that the Missouri, Madison, and Clark Fork rivers are navigable rivers, the state owns the beds of the rivers, and those lands underlying navigable rivers are school trust lands. One of the issues on appeal to the Montana Supreme Court is whether the District Court’s navigability determination made pursuant to summary judgment was procedurally correct.

### Federal Test of Navigability in Fact

The federal government’s power to regulate the use of water has been historically based on the test of “navigability in fact.” The U.S. Supreme Court first articulated the navigability in fact test for purposes of federal regulation in the *Daniel Ball* case:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.<sup>13</sup>

The court defined navigable waters of the United States as follows:

And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.<sup>14</sup>

However, the type of commerce required to meet the

<sup>7</sup> Chapter 475, Laws of Montana (2009).

<sup>8</sup> Section 2(3), Chapter 475, Laws of Montana (2009).

<sup>9</sup> Section 8, Chapter 475, Laws of Montana (2009).

<sup>10</sup> See Curran at 43.

<sup>11</sup> Section 1(6) and (8), Chapter 472, Laws of Montana (2009).

<sup>12</sup> See footnote #1

<sup>13</sup> *The Daniel Ball*, 77 U.S. 557, at 563 (1870)

<sup>14</sup> *Id.* at 563.

navigability for title test is intrastate commerce.<sup>15</sup> As noted above, the navigability for title test is limited to the finding of navigability to the date that the state was admitted to the Union. The test for navigability of a body of water today is not limited to evidence of actual commerce, but to evidence of the susceptibility of useful commerce in its natural and ordinary condition or whether the water body could be made suitable for use in the future by reasonable improvements.<sup>16</sup>

Montana has codified, to some extent, the federal navigability in fact test within the state's water use and water resources laws. Section 85-1-111, MCA, declares that "navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation."

In addition to the Montana Constitution, the codification of the navigability in fact test is the legal foundation and authority for the state to conduct statewide water planning activities, construct water impoundments, finance water projects, generate hydroelectric energy, establish the renewable resource grant and loan program, and establish a water storage policy, among other state water-related activities.

The Daniel Ball historical test for federal regulatory jurisdiction has become limited in its application over time, mostly because the federal courts and Congress expanded the use of the commerce clause as justification of federal regulation and, in so doing, did not require that water bodies be navigable for purposes of federal regulatory jurisdiction. However, in recent years the U.S. Supreme Court has begun to limit the scope of the commerce power by setting a high standard for congressional intent to extend federal regulatory jurisdiction.<sup>17</sup>

Two recent U.S. Supreme Court cases have limited the scope of the federal government's wetland regulatory jurisdiction.<sup>18</sup> The Clean Water Act requires that any person seeking to discharge certain material into navigable

waters under federal jurisdiction must obtain a permit from the U.S. Army Corps of Engineers.<sup>19</sup> Navigable waters are defined under the Clean Water Act as "waters of the United States."<sup>20</sup> The U.S. Army Corps of Engineers has interpreted waters of the United States to include not only traditional navigable waters but other defined waters, including tributaries and wetlands adjacent to such waters and tributaries.<sup>21</sup> Adjacent wetlands include wetlands bordering, contiguous to, or neighboring waters of the United States.<sup>22</sup>

In one case, the U.S. Supreme Court has ruled that nonnavigable, isolated, intrastate waters do not fall under the Clean Water Act.<sup>23</sup> In another case, a majority of the court agreed to void a lower court ruling that affirmed the Army Corps of Engineers' interpretation of navigable waters to include not only traditional navigable waters but wetlands adjacent to navigable waters.<sup>24</sup> A plurality of the court held that the Army Corps of Engineers' regulatory jurisdiction under the Clean Water Act applies only to "relatively permanent, standing or flowing bodies of water."<sup>25</sup>

In response to these U.S. Supreme Court decisions, S. 787, the Clean Water Restoration Act, was introduced in Congress on April 2, 2009, to clarify and expand the scope of federal regulatory wetland jurisdiction. The bill is awaiting action by the full Senate.

S. 787 would amend the Clean Water Act by replacing the term "navigable waters" throughout the existing act with the term "waters of the United States," which are defined as follows:

all waters subject to the ebb and flow of the tide, the territorial seas, all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters or activities affecting these waters, are subject

15 *Utah v. United States*, 403 U.S. 9, at 10 (1971)

16 *Rochester Gas & Elec. Corp. v. FPC*, 344 F.2d 594 (2d Cir.), cert. denied, 382 U.S. 832 (1965); *City of Centralia v. FERC*, 851 F.2d 278 (9th Cir. 1988)

17 *United States v. Lopez*, 514 U.S. 549 (1995), *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), *Rapanos v. United States*, 547 U.S. 715 (2006).

18 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), *Rapanos v. United States*, 547 U.S. 715 (2006).

19 33 U.S.C. Section 1311(a) and 1342(a).

20 33 U.S.C. Section 1362(7).

21 33 CFR Section 328.3(a).

22 *Id.*

23 *Solid Waste Agency of Northern Cook county v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

24 *Rapanos v. United States*, 547 U.S. 715 (2006).

25 *Id.*

to the legislative powers of Congress under the Constitution.<sup>26</sup>

S. 787 sets forth several congressional findings and a savings clause regarding the scope and applicability of the definition of “waters of the United States.” According to S. 787, nothing in the act:

modifies or otherwise affects the amendments made by the Clean Water Act of 1977 (Public Law 95-217; 91 Stat. 1566) to the Federal Water Pollution Control Act that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements.<sup>27</sup>

Waters of the United States do not include prior converted cropland used for agriculture or manmade waste treatment systems neither created in waters of the United States nor resulting from the impoundment of waters of the United States.<sup>28</sup> S. 787 states that:

Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.<sup>29</sup>

One of the issues that has been raised during interim committee discussions on this topic has been whether S. 787 would result in more private property being potentially regulated via the dredge and fill pollution control mechanisms under the Clean Water Act. The answer is

probably “yes,” because the S. 787 definition of waters of the United States is more expansive than the current definition under existing law as interpreted by the U.S. Supreme Court. However, the current S. 787 definition with the findings and savings clause provisions does not seem to expand the federal government’s regulatory powers beyond what existed under the Clean Water Act prior the Supreme Court decisions.

### State Test of Navigability for Use of State Waters

With the enactment in 2009 of House Bill 190 (Chapter 201, Laws 2009) regarding public access at certain bridges crossing streams and rivers, the issue of recreational access and use of Montana water bodies has once again garnered statewide attention. The test for navigability for use of state waters is a state determination.

The Montana Supreme Court has held that navigability for use of a water body is a matter governed by state law and is a separate concept from the federal question of determining navigability for title purposes.<sup>30</sup> The Montana Supreme Court has determined that, under the 1972 Montana Constitution and the public trust doctrine:

The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public’s right to recreational use of the surface of the State’s waters.<sup>31</sup>

The public’s right to recreational use extends to the high-water mark. The public does not have the right to enter upon or cross over private property to reach waters for which there is a recreational use right.<sup>32</sup> However, the public may portage around barriers in water in the least intrusive way possible in order to avoid damage to the private property holder’s rights.

In response to the Montana Supreme Court decision regarding recreational use, the 1985 Legislature enacted

<sup>26</sup> S. 787, Section 4.

<sup>27</sup> S. 787, Section 3 (13).

<sup>28</sup> S. 787, Section 3(14)

<sup>29</sup> S. 787, Section 3(15)

<sup>30</sup> Montana Coalition for Stream Access v. Curran, 210 Mont. 38, at 51, 682 P.2d 163 (1984)

<sup>31</sup> Id. at 52.

<sup>32</sup> Id.

Title 23, chapter 2, part 3, MCA, providing for the scope of public recreational use of streams. Landowners claimed that the new law was an unconstitutional taking of private property without just compensation.<sup>33</sup> The Supreme Court held that the real property interests of the private landowners are as important as the public's interest in water and, if these constitutionally protected competing interests are in conflict, they must be reconciled to the extent possible.<sup>34</sup> The court reconciled these rights by striking the provisions that the public has a right to hunt big game, build duck blinds and boat moorages, and camp overnight. The court held as unconstitutional the requirement that a landowner pay the costs of constructing the portage route around artificial barriers.

Montana also recognizes that navigable waters are public waters subject to fishing rights (see 87-2-305, MCA).

**Parting Thoughts**

The multiple meanings of navigability as they are applied in different legal contexts is a very complicated area of law. As the U.S. Supreme Court has stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case."<sup>35</sup> In other words, look to who or what is invoking some type of legal control over a water body and analyze the reasons behind invoking that legal control and you will discover which concept of navigability is applicable under the circumstances.

33 Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987)

34 Id. at 916.

35 Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979).

December 2009						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2 ARRA Work Group, 2 p.m., Rm 102	3 Performance Measure Work Groups, 9 a.m., various rooms Legislative Finance Comm, 1 p.m., Rm 102 Revenue & Trans Comm, 8 a.m., Rm 137	4 Legislative Finance Comm, 8 a.m., Rm 102 Revenue & Transportation Comm, 8 a.m., Rm 137	5
6	7	8	9	10 Performance Measure Work Groups, 8 a.m., Rm 137 Education Subcomm on HJR 6 & SJR 8, 1 p.m., Rm 102	11 Education & Local Govt Comm, 8 a.m., Rm 102 State Admin & Veterans' Affairs Comm, 9 a.m., Rm 137	12
13	14 Rules Subcomm, 9 a.m., Rm 102 Succession Planning Subcomm, 10 a.m., Rm 137 Legislative Council, 1 p.m., Rm 102	15	16	17 Law & Justice Comm, 3 p.m., Rm 137	18 Law & Justice Comm, 8 a.m., Rm 137	19
20/27	21/28	22/29	23/30	24/31	25	26

All interim committee meetings are held in the Capitol in Helena unless otherwise noted.

January 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5	6	7 Environmental Quality Council, time TBA, Rm 172	8 Environmental Quality Council, time TBA, Rm 172	9
10	11	12	13 Water Policy Comm, time TBA, Rm 152	14 Water Policy Comm, time TBA, Rm 152  Energy & Telecomm Comm, 8 a.m., Rm 102	15	16
17	18	19	20 Economic Affairs Comm, time & place TBA	21 Economic Affairs Comm, time & place TBA	22 State Admin & Veterans' Affairs, time & place TBA	23
24	25 Children, Families, Health & Human Services Comm, time TBA, Rm 137	26	27	28	29	30
31						

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