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Montana Legislative Services Division

Office of Research and Policy Analysis

TO: EQC Study Subcommittee members

FROM: Leanne Kurtz, Research Analyst

DATE: July 6, 2006

RE: HJR 10 Fire Study public comment

Enclosed please find the following materials submitted during the public comment period for the HJR 10 final report and draft legislation:

- Three changes to LC 2000 (shown with asterisks in an excerpt from a handout provided to the HJR 10 work group), suggested by the Department of Labor and Industry's Building Codes Bureau (BCB). The HJR 10 work group reviewed the suggestions and agreed to all of them. BCB's reason for these changes is that they further clarify that BCB is the primary authority for promulgating building regulations in the state. A representative of BCB will attend your July 17 meeting to answer any questions you may have about these suggested changes.

- Changes to LC 2002 proposed by the Department of Natural Resources and Conservation. These are intended to further clarify responsibilities for protection of classified forest land outside of the boundaries of a wildland fire protection district.

- Comments submitted by Thornton Liechty, who is not officially representing the Montana Forest Owners Association (MFOA), but who is affiliated with the organization.

- Comments submitted by Charles Umhey, also affiliated with MFOA.

- Comments submitted by Debra Foley, president of MFOA, on behalf of the organization.

Feel free to contact me if you have any questions about the enclosed materials.

Public Comment - DLI

Specific examples of vagueness or inconsistency with respect to BCB authority in existing statutes and administrative rules

a. BCB MCA's and ARM's relating to fire protection and prevention in state building code [50-60-201(1)[9], MCA, and ARM 24.301.146(6),(12->17)[10]] *(versus)* DOJ's MCA's and ARM's [50-3-103(1)[11],MCA, and ARM 23.7.102, ARM 23.7.304]

b. BCB's MCA authority to inspect buildings during construction [50-60-103(2)[12], MCA, (enter, inspect, and examine buildings) and 50-60-201(1)[13] ("fire prevention" purpose of state building code)] *versus* DOJ's delegation of authority to fire chiefs to "examine buildings in the process of erection" (7-33-2313, MCA] (included on LC2003, p.22, section 23) or FPIP's duty "to inspect" various buildings for conformance with DOJ rules (see 50-3-102 (1)(b)[14].)

2. Sample suggestions for revisions in those drafts to preclude adding more confusion to an already confusing body of law

add this

a. RE: LC2000, p33: 50-3-102(2); possibly insert the following or similar language after "laws of this state" at the end of the sole sentence:

> *, so long as those rules do not conflict with building regulations adopted by the Building Codes Bureau of the department of labor and Industry.*

b. RE: LC2000, p.33: 50-3-102(4); possibly insert the following or similar language after "portion of" and before "building" in the middle of the sole sentence:

> *an existing*

c. RE: LC2000, p.39: 50-61-102(3); possibly insert the following or similar language after "chapter" at the end of first sentence in (3):

> *, and such adoptions by these entities are subject to the same limitations set forth in 50-3-103(2) MCA, and in administrative rules promulgated in accordance with that statute.*

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[9] See Handout Tab # 7
[10] See Handout Tab # 6
[11] See Handout Tab # 5
[12] See Handout Tab # 7

[13] See Handout Tab # 7
[14] See Handout Tab # 5

Kurtz, Leanne

From: Monzie, John
Sent: Friday, June 23, 2006 11:44 AM
To: Kurtz, Leanne
Cc: Bush, Larry; Mead, Ted; Phares, Mark
Subject: FW: Assessment Amendments

Attachments: 76-13-105 and 76-13-201 Edits.doc; LC2002 (4-28-2006 e-mail).pdf

Leanne:

Larry and I have reviewed Mark's proposed changes to LC2002 and agree with them. As per Mark's email, please accept the attached document as public comment on LC2002. If you have any questions feel free to contact us.

Thanks,

John

-----Original Message-----
From: Phares, Mark
Sent: Thursday, June 22, 2006 10:27 AM
To: Bush, Larry; Monzie, John
Cc: Mead, Ted
Subject: Assessment Amendments

Hi Larry and John -

I've attached the amendments that we discussed last Friday. For reference, I've also attached LC2002, which is the draft of the amendments put together during HJR 10, and which the three of us used for discussion last Friday.

Please take a look at what I've drafted to see that it matches what we discussed and takes care of the concerns we discussed. I'll be headed to Helena later this afternoon and will be back tomorrow afternoon. If this looks OK to you, please forward it to Leanne. I spoke with her earlier this week to let her know we'd be sending it over as a public comment. Otherwise, we can discuss what further changes are necessary, can make the changes, and get it sent over to Leanne.

I'll drop off the notes we took last Friday so you can refresh your memory while you review what I've drafted.

Thanks,

Mark

76-13-105 and 76-13-201 Edits.... LC2002 (4-28-2006 e-mail).pdf ...

76-13-105. Protection of ~~nonforest~~ lands and improvements from fire. (1) Nonforest lands and improvements may be protected by the department when requested by the landowner at rates determined by the department.

(2) Land classified as forest land under 76-13-107 within a wildland fire protection district as provided in 76-13-204, or otherwise under contract for fire protection by a recognized agency, must be protected as provided in 76-13-201 and 76-13-207.

(3) Private and public land, whether classified as forest land or otherwise, that is not within a wildland fire protection district or under the protection of a recognized agency or a municipality must be protected by a county as provided in 7-33-2202. The county governing body shall either provide direct protection as provided in 7-33-2202(3) or it shall enter into an agreement with a recognized agency.

Deleted: the department, a federal agency,

76-13-201. ~~Duty of owner to protect~~ Costs for protection against fire. ~~(1) An owner of land classified as forest land by the department shall protect against the starting or existence and suppress the spread of fire on that land. This protection and suppression must be in conformity with reasonable rules and standards for adequate fire protection adopted by the department.~~

~~(2)~~ (1) ~~If the~~ An owner of land classified as forest land within a wildland fire protection district or otherwise under contract for fire protection by a recognized agency, ~~does not provide for the protection and suppression,~~ the is subject to the fees for fire protection provided in this section.

(2) The department ~~may~~ shall provide ~~it~~ fire protection to the land described in subsection (1) at a cost to the landowner of not more than $30 for each landowner in the protection district and of not more than an additional 20 cents per acre per year for each acre in excess of 20 acres owned by each landowner in each protection district, as necessary to yield the amount of money provided for in 76-13-207. ~~The owner of the land shall pay the charge approved by the department in accordance with part 1 and this part to the department of revenue. Payments to the department of revenue are due on or before November 30 of each year~~ Assessment, payment, and collection of the fire protection costs must be made in accordance with 76-13-207.

~~(3)~~ (2) Other charges may not be assessed to a

participating landowner except in cases of proven negligence on the part of the landowner or the landowner's agent or in the event of a violation of 50-63-102 or 50-63-103.

76-13-207. Determination and collection of costs of fire protection. (1) The department shall prepare an annual operation assessment plan in which fire protection costs are determined. The department shall request the legislature to appropriate the state's portion of the cost. After the appropriation is made by the legislature, the department shall cause an assessment to be made on the owners of land, as specified in 76-13-201 and 76-13-105, sufficient to bring the total amount received from the landowners to no greater than one-third of the amount specified in the appropriation.

Deleted: classified forest

(2) On or before the ~~second Tuesday in August~~ first Tuesday in September of each year, the department shall certify in writing to the department of revenue the names of these owners of forest lands in each county, together with a description of their lands and a statement of the amount found to be due and owing by each of the owners to the department for ~~forest~~ wildland fire protection.

(3) Upon receiving the certificate from the department showing the amount due, the department of revenue shall extend the amounts upon the county tax rolls covering the lands, and the sums become obligations of the owner, to be paid and collected in the same manner and at the same time and subject to the same penalties as general state and county taxes upon the same property are collected.

THORNTON A. LIECHTY
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TO: LEANNE KURTZ, LEGISLATIVE RESEARCH ASSISTANT

FROM: THORN LIECHTY

SUBJECT: COMMENTS ON HJR # 10

DATE: 6/19/2006

CC: DEBRA PARKER FOLEY, PRESIDENT, MFOA

I would like to take this opportunity to comment on the draft reports associated with HJR # 10. I recognize that a great deal of time, effort, and consultation has gone into producing these drafts, and the work group is to be commended on its persistence.

1. Introduction

In the Introduction, there should be some mention that fire is a natural aspect of Montana's history and ecology, although it may have taken different forms with different effects in various parts of the state. Wildfire is not an unnatural intruder on our lives, but a common and expected result of our climate, geography, and vegetation. And we have practiced levels of fire suppression at our peril.. For example, I have a local larch "cookie" (cut in 1999) which shows this dramatic change. The tree was a seedling in 1588, when Queen Elizabeth I defeated the Spanish Armada. For the first 300 years of its life, the tree experienced scarring fire on an average of every 25 years. It has no scars from the past 100 years, for all the years of Montana's statehood. Is this "natural"? What are the unintended consequences of this continuous suppression?

I think such a statement is important since we have many people today who, as their initial impulse, find wildfire to be "unnatural" and look for someone to blame or someone to pay. But wildfires are as natural to Montana as hurricanes are to Florida. The focus should be on preparation, initial attack, coordination, and well-defined procedures for handling the catastrophe. Laudably, that is what the work group has sought to achieve.

2. Approach to HJR 10 Study

Number 4 states "conflicts arise when fires burn on private land but may threaten public safety." This may be an accurate statement when it comes to rangeland fires in Eastern Montana or in setting back fires on private land to control a catastrophic fire. But it does lead to the impression that private lands alone are a problem. As I understand the committee discussions, several participants raised the excellent point that "fires burning on public lands threaten private lands and public safety" as well. So, Number 4 ought to be eliminated or perhaps changed to "different conflicts can arise when fires burn on lands of various ownerships but may threaten public safety" or add the statement made in the previous sentence. I mention this because, in the past, certain sensitive parts of federal lands, threatened or overrun with fire, have been treated differently from surrounding lands.

3. Wildland-Urban Interface (WUI)

If nothing else is clear, many of us agree that WUI is a slippery and imprecise term. The definition of WUI and its use in determining differential taxes and assessments have serious impacts on forest landowners.

For some citizens, WUI implies a condemnation of those who live outside the paved city streets of Missoula or Helena or Kalispell, representing a kind of class warfare between city dwellers and country dwellers. For fire professionals, the term represents a watershed aspect of geography which affects how they manage wildfire. Amazingly enough, WUI is treated as a "new" event. Historically, it can be argued that, given HJR 10's definition, most Americans used to live in what we now call the WUI. It is urbanization which has exploded and for which most of our State social and infrastructure costs are devoted. Lost in the current viewpoints are the contributions of those living in the WUI, on forest land adjacent to communities in providing a buffer of trees, green/open space, water, CO2 sequestration, wildlife riparian lands, and temperature modification for those living in towns and cities. No city dweller pays for these contributions, but all expect it - for free. However, when it comes to wildfire costs, those living in the WUI seem automatically to become culpable, requiring additional taxes and regulation.

The WUI is a constantly moving target. A home on 100 forested acres becomes five homes on 20 forested acres; these become twenty homes on no forested acreage, and the forest recedes outward from there. Each example represents a case of living in the WUI with considerably different effects on the city and on wildfire management costs. However, if the twenty homes become a larger development, then the former WUI is now a town. The quickest way to accelerate movement of the WUI from forest to town is to place inordinate cost or restrictions on those living there as long as they are surrounded by "forest." After all, the most effective way to control wildfire is to cut the forest down and cement the acreage into houses and streets. This philosophy would certainly meet the work group's goal to "minimize [the] expense [of wildfire suppression] to Montana" (LC2002, p.2).

Is this really the future scenario we want?

4. Conclusion

The conclusion would have more impact without the gratuitous reference to August and December temperatures.

5. LC2000

In assessing suppression costs, some possibility of limiting liability ought to be considered for those who, in using prescribed fire, to burn slash, for example, have followed all the permit terms but have been caught by some unforeseen event. Malice and negligence are suitably liable. Careful use of fire gone astray is different. In fact, some Southern states have limited liability under such circumstances.

6. LC2001

New Section 1, Activity Restrictions in High Fire Hazard Areas mentions only state and private lands. What about federal lands? How are practices and conditions on federal lands, which

may affect adjacent or intermingled private and state lands, coordinated with actions suggested in LC2001?

New Section 2, Wildland Closure, suggests that permits to enter a closed area "MAY" be issued to individuals living in that area. It seems to me that, ABSENT a declaration of emergency or disaster by the appropriate authorities, residents living in a "closed area" "MUST" be allowed to protect or evacuate their property, pets, and livestock. These are not circumstances under which local residents need to be diverted by running around trying to get permission from reluctant (or difficult-to-find) officials who may be miles away from residents' homes. Let's not get carried away with the parental role of the state.

7. LC2002

a. Definitions 76-13-102: Forest Land

This definition of "forest land" seems at odds with the definition of forest land used elsewhere in Montana Law. For example, the Dept of Revenue uses a definition of forest land as land growing or capable of growing trees in a given amount, and with a minimum number of contiguous acres in such condition. By redefining forest land, LC2002 has muddled, not clarified, Montana law.

b. Definitions 76-13-102: Wildland and Wildland-urban Interface

Here we come back to the crux of the problem: the imprecise and often subjective definitions of "Wildland" and "WUI." "Wildland" exempts roads, railroads, power lines, etc., but homes and structures representing "human development" are included in WUI. Areas, lines, and zones are of little consequence in wildfire. Cities, town, suburban homes, and forest residents all directly experience the consequences and costs of wildfire. A "suburban" house (Los Alamos, suburban LA) on a few acres surrounded by grades, trees, and flammable shrubs may be more at risk than a forest home (within the WUI) surrounded green space with metal sides and roof. A rural home whose owners have managed their forest well may do more to prevent the spread of catastrophic fire and its consequences to city dwellers than a prized green belt surrounding a town or city.

When it comes to managing wildfire there are two primary issues: the amount and type of contiguous fuels and the surrounding topography, and the defensible space developed around structures. Whether one lives in suburbia, small town, or "near-town" relative isolation, the protection of structures and the management of fire are subordinate to the fuels/topography and defensible space criteria. "WUI" and "Wildlands" imply mostly artificial and totally inadequate parameters by which to define wildfire risk, assign cost, and levy assessment.

c. Definitions 76-13-104 Functions of the Department ignores the responsibility that DNRC has assumed for the wildfire protection of some federal lands. Again, this situation cries out for more clarity on the relationship between private, state, and federal lands when it come to various management practices that have mutual and cumulative effects.

Thank you for the opportunity to provide comments on HJR # 10.

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Charles E. Umhey Jr., M.D.

Memo

To: Leanne Kurtz, Legislative Research Assistant

From: Charles E. Umhey Jr., MD

Date: June 25, 2006

CC: Debra Foley, President MFOA

Re: Comments to EQC Study Subcommittee – HJR 10

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1. MFOA has kept its Executive Committee informed on the discussions and actions taken by HJR 10. I am including my comments in this Memo.

2. It appears to me that the initial charge given to EQC to "develop, consolidate and update fire related statutes..... to address ***dangerous*** environmental conditions and areas of WUI, to improve wildland fire suppression and mitigation, and to recommend legislation to appropriately fund wildland fire suppression costs" is basically an attempt to increase tax revenues. I feel the use of the term "***dangerous***" is pejorative, provocative, inaccurate and inappropriate when developing a study which should be even handed and balanced. It does, however, support those who feel the need for increasing taxes.

3. The DNRC has proposed an increase in state regulation because of potential threats to citizens as well as firefighters. They argue that this preserves the concept of "*local control*" while completely ignoring that local governments already have the authority to address these issues, and in many cases have, by using zoning, subdivision regulations and fire control statutes. In fact it appears that the DNRC will let the local governing bodies define terms and regulations. In my opinion this adds another layer of bureaucracy and costs which is uncalled for. Local rural fire departments already have funding to address wildland fires. Taxpayers at the WUI are already being taxed for this.

4. The term WUI is ill defined and not well understood. Is this term going to be the same as "Wetlands" which in the 1970's had a much narrower definition than it does today but has grown like Topsy to mean a puddle on someone's front lawn? Further how can this term be fairly applied should the Legislature make the tragic error of using this to tax individuals? At best it is a capricious term.

5. The Montana Forest Stewardship Program, MFOA and Tree Farm Association have for years been educating forest land owners on the best ways to maintain a healthy forest, to develop defensible space around structures to protect them from wildland fires. It would seem to me a more intelligent approach would be to encourage these programs to have a larger outreach.

6. Government Lands and their relationship to wildland fires seem to be neglected. On one hand they are insinuating the culpability for costs and even cause of fires rests with those living in the forest lands while failing to accept their responsibility to maintain healthy forests with low fuel loads that will diminish the threat to private lands adjacent to government lands. I understand that the DNRC has already assumed

wildfire protection of some federal lands which increases their responsibilities for wildfire protection and must therefore adversely affect limited resources.

7. I would hope that the concerns about wildland fires could be addressed by simply amending existing laws as recommended by Attorney Michael S. Kakuk. This would keep the solution simple and diminish bureaucracy and costs as well as maintaining local control which is so important to Montanans.

Thank you allowing me to present my point of view.

MONTANA FOREST OWNERS ASSOCIATION

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Representing Montana's Non-Industrial Private Forest Owners

TO: LEANNE KURTZ, LEGISLATIVE RESEARCH ASSISTANT
FROM: DEBRA FOLEY, PRESIDENT, MFOA
SUBJECT: COMMENTS TO EQC STUDY SUBCOMMITTEE – HJR 10
DATE: 6/29/06

On behalf of the Montana Forest Owners Association (MFOA), I would like to express appreciation for being included (as the only landowner representative) in the working group efforts as requested by HJR 10. I would also like to thank Leanne Kurtz for her ability to assimilate into a cohesive form the information and ideas brought forth by the various members of the working group over the past 12 months.

MFOA submits the following comments:

- **Draft Report Submitted to EQC Study Subcommittee, May 3, 2006: "House Joint Resolution No. 10 Study of Wildland Fire Policy and Statutes—**

Introduction: It should be mentioned that fire is a natural aspect of Montana's ecological history, taking different forms and effects in various parts of the state. Wildfire is a common result of our climate, geography and vegetation, while humans have practiced levels of fire suppression with unintended consequences (high fuel accumulation).

Approach to HJR 10 Study, (Page 3, No. 4): "Conflicts arise when fires burn on private land but may threaten public safety." My recollection is that this statement was expressed by the fire personnel in the working group and referred mostly to range fires. The Draft Report omitted the concerns expressly stated by me and others in the working group discussions regarding ***fires burning on public lands threaten private lands and public safety.***
I hereby request that the above omitted statement be included in the Draft Report. HJR 10 specifically addresses "...high risk of wildfire posed by fuel accumulation." There is little debate that "fuel accumulation" largely refers to public lands, particularly federal forest lands.

Wildland-Urban Interface (WUI):

If nothing else is clear, many of us agree that WUI is a slippery and imprecise term. The definition of WUI and its use in determining differential taxes and assessments have serious impacts on forest landowners.

For some citizens, WUI implies a condemnation of those who live outside the paved city streets of Missoula or Helena or Kalispell, representing a kind of class warfare between city dwellers and country dwellers. For fire professionals, the term represents a watershed aspect of geography which affects how they manage wildfire. Amazingly enough, WUI is treated as a "new" event. Historically, it can be argued that, given HJR 10's definition, most Americans used to live in what we now call the WUI. It is urbanization which has exploded and for which most of our State social and infrastructure costs are devoted. Lost in the current viewpoints are the contributions of those living in the WUI, on forest land adjacent to communities in providing a buffer of trees, green/open space, water, CO_2 sequestration, wildlife riparian lands, and temperature modification for those living in towns and cities. No city dweller pays for these contributions, but all expect it–for free. However, when it comes to wildfire costs, those living in the WUI seem automatically to become culpable, requiring additional taxes and regulation.

The WUI is a constantly moving target. A home on 100 forested acres becomes five homes on 20 forested acres; these become twenty homes on no forested acreage, and the forest recedes outward from there. Each example represents a case of living in the WUI with considerably different effects on the city and on wildfire management costs. However, if the twenty homes become a larger development, then the former WUI is now a town. The quickest way to accelerate movement of the WUI from forest to town is to place inordinate cost or restrictions on those living there as long as they are surrounded by "forest." After all, the most effective way to control wildfire is to cut the forest down and cement the acreage into houses and streets. This philosophy would certainly meet the work group's goal to "minimize [the] expense [of wildfire suppression] to Montana" (LC2002, p.2).

Is this really the future scenario we want?

▪ **<u>LC2002</u>:**

Definitions 76-13-102: Forest Land—

This definition of "forest land" seems at odds with the definition of forest land used elsewhere in Montana Law. For example, the Department of Revenue uses a definition of forest land as land growing or capable of growing trees in a given amount, and with a minimum number of contiguous acres in such condition. By redefining forest land, LC2002 has muddled, not clarified, Montana law.

Definitions 76-13-102: Wildland and Wildland-Urban Interface ("WUI")—

The crux of the problem: the imprecise and often subjective definitions of "Wildland" and "WUI." "Wildland" exempts roads, railroads, power lines, etc., but homes and structures representing "human development" are included in WUI. Areas, lines, and zones are of little consequence in wildfire. Cities, town, suburban homes, and forest residents all directly experience the consequences and costs of wildfire. A "suburban" house (Los Alamos, suburban LA) on a few acres surrounded by grades, trees, and flammable shrubs may be more at risk than a forest home (within the WUI) that is surrounded by green space with metal sides and roof. A rural home whose owners have

managed their forest well may do more to prevent the spread of catastrophic fire and its consequences to city dwellers than a prized green belt surrounding a town or city.

When it comes to managing wildfire there are two primary issues: the amount and type of contiguous fuels and the surrounding topography, and the defensible space developed around structures. Whether one lives in suburbia, small town, or "near-town" relative isolation, the protection of structures and the management of fire are subordinate to the fuels/topography and defensible space criteria. "WUI" and "Wildlands" imply mostly artificial and totally inadequate parameters by which to define wildfire risk, assign cost, and levy assessment.

Definitions 76-13-104: Functions of the Department—

This ignores the responsibility that DNRC has assumed for the wildfire protection of some federal lands. Again, this situation cries out for more clarity on the relationship between private, state, and federal lands when it come to various management practices that have mutual and cumulative effects.

▪ SUGGESTED SOLUTIONS AND ACTIONS

Forest owners who manage their land provide a fire hazard reduction BUFFER between the federal-state lands and communities. Without advocating new regulations and assessments, MFOA suggests the following:

Prevention, education and incentives—

Use existing infrastructure (provide larger outreach of existing programs):

-- Community Wildfire Protection Plans where local communities plan for fuel reduction; minimizing state involvement.

-- Professional loggers and consultants for fuel reduction and wood products market—providing tax revenues to Montana

-- Cost share programs

-- Education through MSU Extension: Forest Stewardship Program, etc.

-- Tax breaks for landowners who practice good land stewardship

The Montana Forest Owners Association thanks you for your consideration and the opportunity to provide comments on this important topic.