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Montana Legislative Services Division

Legislative Environmental Policy Office

July 7, 2010

To: EQC
From: Joe Kolman, research analyst
Re: Redraft of SB507 - use stream beds

At the May 2010 meeting, the EQC requested that Senate Bill No. 507 passed by the 2009 Legislature be redrafted for discussion at the July EQC meeting. The draft is attached. Also attached is an updated legal opinion from EQC attorney Todd Everts explaining how the PPL Montana Supreme Court decision affects the navigability for title test.

In LC8001 the bolded areas are those that need addressing by the EQC. Other parts also may be discussed. In general, the draft provides a process for those who use the beds of navigable rivers to obtain an easement, license, or lease, from the state for that use. What follows is a section by section breakdown of discussion issues.

Section 2 - Definition of navigable river. In the original, the language in this section pertaining to surveys conflicts with the survey language in Section 8. The other issue is whether the legislature should define navigability beyond saying that the determination of navigability is the responsibility of a court of competent jurisdiction. (See Everts legal opinion section, "Parting Thoughts").

Section 3, subsection (1) - The July 15, 2015 date in SB507 gave streambed users six years to apply after the bill became effective. The EQC can determine a date.

Section 3, subsection (2) - This new language is for consideration. If one assumes that a river is only navigable as determined by a court, then on the effective date of this act, there will be rivers in Montana that are navigable - and there will be rivers where the state may assert ownership based on a variety of evidence, but have not yet been deemed navigable by a court. Subsection (1) deals with the already navigable rivers. Subsection (2) deals with those that may adjudicated as navigable in the future. Subsection (2) provides streambed users the same opportunity for a lease, license, or easement - without MEPA review - for a five-year period after the date of the adjudication. (The timeframe is open to debate).

The proposed draft does not prohibit the DNRC from granting easements, licenses, or leases on streambeds not adjudicated as navigable. As written, such an action may undergo MEPA review and the provision of this bill would not apply. (The EQC may wish to change this). If this type of permissive language is placed in the bill draft, it would need to say something along the lines streambed users may apply, and the DNRC may grant, licenses, leases, and easements on land where the state asserts ownership, but that ownership has not been confirmed by a court.

Section 8 - This section can be deleted. A navigable river is defined in Section 2.

**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act generally revising and clarifying laws related to the treatment of property consisting of the bed of navigable rivers; requiring authorization from the board of land commissioners for uses on the beds of navigable rivers; requiring the board of land commissioners to adopt rules for providing easements, leases, or licenses for uses on the beds of navigable rivers; clarifying the authority of the board of land commissioners to grant easements; and amending section 77-2-101, MCA."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Legislative findings -- purpose.**

(1) The legislature finds that:

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

(b) a person who has historically used the bed of a navigable river in conjunction with a legal use of water or for

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

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

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

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

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

(2) The purpose of [sections 1 through 8] is to clarify the historic and future use of the beds of navigable rivers and how the state should be compensated for that use.

NEW SECTION. **Section 2. Definitions.** For the purposes of [sections 1 through 8], the following definitions apply:

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

(2) "Full market value" means an amount calculated based

upon the area of a footprint and the fair market value as determined by rule or statute. The annual payment for a license issued under [sections 1 through 8] is $150.

(3) "Navigable river" means 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.

NEW SECTION. **Section 3. Historic use of navigable riverbeds -- authorization required -- exemptions.** (1) A person using the bed of a navigable river below the low-water mark without written authorization from the department prior to [the effective date of this act] who wants to continue use of the bed of a navigable river after [the effective date of this act] shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement by **July 15, 2015.**

(2) A person using the bed of a river below the low-water mark without written authorization from the department who wants to continue use of the bed after the date the river is adjudicated as navigable by a court of competent jurisdiction shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement within five years of the date the river is adjudicated as navigable.

(3) The application must include:

(a) an application fee of $50;

(b) a notarized affidavit:

(i) demonstrating that the applicant or the applicant's predecessor in interest used the bed of a river that has been **determined navigable pursuant to [section 8]** and that the use continues;

(ii) describing the acreage covered by the footprint prior to [the effective date of this act]; and

(iii) demonstrating that the use applied for under this section is the use shown in the evidence provided in subsection (3)(c); and

(c) (i) aerial photographs demonstrating the use to which the application for authorization applies; or

(ii) other evidence of the use to which the application for authorization applies.

(4) The department shall issue the authorization for a lease, license, or easement if:

(a) the applicant provides evidence to satisfy the requirements of subsection (3);

(b) the applicant pays the application fee and the full market value of the footprint acreage;

(c) the department has, if necessary, made a site inspection of the use to which the application for authorization applies;

(d) the authorization is only for the acreage of the footprint historically used by the applicant or the applicant's predecessor in interest; and

(e) the authorization is approved by the board. The authorization must be approved if the requirements of this section are met.

(5) Proceeds from the application fee must be deposited in the account in [section 4] and must be used by the department to administer the provisions of this section.

(6) The full market value collected pursuant to subsection (4)(b) must be deposited in the appropriate trust fund established for receipt of income from the land over which an authorized use is granted.

(7) Issuance of an authorization pursuant to this section is exempt from the requirements of Title 22, chapter 3, part 4, and Title 75, chapter 1, parts 1 and 2.

(8) The department shall waive the survey requirements of 77-2-102 if the department determines that there is sufficient information available to define the boundaries of the proposed use for the purposes of recording the easement or issuing a license or lease.

(9) The requirements of this section do not apply to footprints:

(a) related to hunting, fishing, or trapping;

(b) that existed prior to November 8, 1889;

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

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

NEW SECTION. **Section 4. Historic riverbed use account.** (1) There is an account in the state special revenue fund into which the fees collected pursuant to [section 3] must be deposited.

(2) The funds in the account may be used only for administering the provisions of [section 3].

NEW SECTION. **Section 5. Navigable riverbed uses -- lease, license, or easement required -- challenges.** (1) (a) After [the effective date of this act], the department shall require a person who proposes to use the bed of a navigable river up to the low-water mark to obtain a lease, license, or easement pursuant to the provisions of this title.

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

(2) An applicant for authorization to use the bed of a navigable river pursuant to [section 3] or for a lease, license, or easement under this section may challenge the requirement of the authorization based on the navigability of the river, the location of footprint related to the low-water mark, or other factors. There is no presumption of navigability because an entity has applied for or received a lease, license, or easement.

NEW SECTION. **Section 6. Easement transferable -- relocation of structure -- increased footprint.** (1) An easement granted pursuant to [section 3 or 5] runs with the benefited land and may be transferred or assigned.

(2) (a) Pursuant to rules adopted under [section 7], the holder of a lease, license, or easement under [section 3 or 5] may relocate a footprint and associated facilities due to the natural relocation of a navigable river or other factors.

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

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

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

NEW SECTION. **Section 7. Board to adopt rules.** To fulfill the requirement of [sections 1 through 8], the board shall adopt rules to:

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

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

(3) allow the holder of a lease, license, or easement for water diversion structures associated with a water right to relocate a footprint based on certain circumstances, including but not limited to natural relocation of a navigable river.

NEW SECTION. **Section 8. Ownership of beds of navigable rivers. The 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.**

Section 9. Section 77-2-101, MCA, is amended to read:

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

(a) schoolhouse sites and grounds;

(b) public parks;

(c) community buildings;

(d) cemeteries;

(e) conservation purposes:

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

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

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

(f) for other public uses.

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

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

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

~~(c) the use of the bed of a navigable river pursuant to 77-1-1103 or 77-1-1105. (Subsection (2)(c) void on occurrence of contingency--sec. 12, Ch. 475, L. 2009.)~~

(c) the use of a bed of a navigable river pursuant to [section 3 or 5]."

{*Internal References to 77-2-101:*
77-2-105x *77-2-318**}

NEW SECTION. **Section 10. Codification instruction.** [Sections 1 through 8] are intended to be codified as an integral part of Title 77, chapter 1, and the provisions of Title 77, chapter 1, apply to [sections 1 through 8].

NEW SECTION. **Section 11. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the

invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

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