Unofficial Draft Copy
As of: July 28, 2010 (11:37am)

LC8002

**** 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; defining a navigable river; requiring authorization from the board of land commissioners for uses on the beds of navigable rivers; requiring the board of land commissioners to adopt rules for providing 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

WATER POLICY INTERIM COMMITTEE
SEPTEMBER 8, 2010
EXHIBIT 15

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 9] 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 9], 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 9] is $150.

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

NEW SECTION. **Section 3. Use of beds of navigable rivers -- authorization requirement restricted.** The board or the department may only require a lease, license, or easement for a footprint on the bed of a navigable river.

NEW SECTION. **Section 4. 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, 2017.

(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 deemed a navigable river 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 after notice is issued by the department as provided in [section 6].

(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 navigable river 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 5] 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 deemed a navigable river; or

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

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

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

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

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

(2) For a river deemed a navigable river after [the effective date of this act] the department shall provide notice of the requirements of [this act] to owners of property adjacent to the navigable river. The five-year period pursuant to [section 4] begins when the department issues this notice and publishes the notice required in subsection (3).

(3) The department shall publish notice of navigable rivers

and the requirements of [this act] twice in a newspaper of general circulation in the area of the navigable river.

NEW SECTION. **Section 7. 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 4] 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 8. Easement transferable -- relocation of structure -- increased footprint.** (1) An easement granted pursuant to [section 4 or 7] runs with the benefited land and may be transferred or assigned.

(2) (a) Pursuant to rules adopted under [section 9], the holder of a lease, license, or easement under [section 4 or 7] 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 9. Board to adopt rules.** To fulfill the requirement of [sections 1 through 9], 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.

Section 10. 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 4 or 7]."

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

NEW SECTION. **Section 11. Codification instruction.** [Sections 1 through 9] 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 9].

NEW SECTION. **Section 12. 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.

- END -

{Name : Joe P. Kolman
Title : Research Analyst
Agency: LSD
Phone : 444-9280
E-Mail: jkolman@mt.gov}