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Water Policy Interim Committee

62nd Montana Legislature

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TO: Water Policy Interim Committee
FROM: Helen Thigpen, Staff Attorney
DATE: June 29, 2012
RE: Committee's request regarding SB 299 (2011).

At the Committee's request, legal staff provided an analysis of the Governor's veto of Senate Bill No. 299 (2011) during the March 2012 Water Policy Interim Committee (WPIC) meeting. After examining the Governor's veto message, statutory law, and relevant state and federal case law, legal staff concluded that the definition of "navigable" included in the bill, which is defined as a "river or stream adjudicated as navigable for title purposes by a court of competent jurisdiction," is consistent with state and federal law and would not result in the potential loss of state land as presented in the veto message.

Following the discussion of the veto message at the March meeting, the WPIC asked staff to redraft SB 299 for consideration by the WPIC at its July meeting. That draft, LC 8009, is attached for the WPIC's review and consideration. Staff has also attached another draft, which was not requested by the Committee, that addresses legal issues that may exist in LC 8009's present form.

SB 299 provided that if a navigable river or stream rapidly abandons its channel and forms a new river or stream channel, *i.e.*, through an avulsion, the land constituting the old channel belongs to the owner of the shores through which the old channel flowed. If the shores are owned by different owners, SB 299 provided that the new owners would own to the middle of the old river or stream channel. Subsection (3) of the bill provided that the land under the new channel would belong to the State as a channel of a navigable river or stream.

Under SB 299, the new owners are responsible for paying the property taxes on the land that constituted the old channel and must notify the Department of Natural Resources and Conservation and the Department of Revenue of the sudden change within 6 months of the sudden change. A land survey and any other information required by either agency would also have to be provided to update any applicable ownership records.

SB 299 changes current law, which provides that in the event of an avulsion, the boundary line between riparian property owners does not change; each owner continues to own to the middle of the former riverbed. *Mont. Dept. of State Lands v. Armstrong*, 251 Mont. 235, 238, 824 P.2d 255, 256 (1992). On a navigable river, the result is the same except that the riparian owner continues to own to the banks of the abandoned riverbed. An avulsion is the sudden or perceptible change in the course of a river or stream. *Armstron*

WPIC
July 13, 2012
Exhibit 6

824 P.2d at 256. A typical example of an avulsion is when a flood rapidly cuts off a bend in a river, forming a new channel.

The redraft of SB 299 (LC 8009) is nearly identical to the original version, except that it has been updated and revised to reflect current law. It also provides a definition of "avulsion." In LC 8009, an "avulsion" is defined as "a sudden and perceptible change in the course of a river or stream that results in the creation of a new river or stream channel." LC 8009 also changes a cross reference in 77-1-103, MCA, and updates the applicability date to avulsions occurring on or after October 1, 2013.

SB 299 and LC 8009 raised some questions for legal staff regarding whether title to state land could be automatically exchanged with riparian property owners in the event of an avulsion. Article X, section 11, of the Montana Constitution provides that public lands must be held in trust for the people and may not be disposed of except pursuant to general laws providing for such disposition or until full market value of the estate or interest disposed of has been ascertained. In addition, section 11 also provides that "[a]ny public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area." Article X, section 11, Mont. Const.

Because an avulsion may result in a situation where the exchange of land contemplated in LC 8009 would not result in an exchange of land that is equal in value and nearly equal in area, staff prepared an alternative draft (LC 8010) to address Article X, section 11. The alternative draft provides a process for the exchange of land in those instances where the value and size of the property in question differs. It also makes the exchange of land optional, based on a riparian owner's interest in initiating the exchange, rather than automatic.

Both drafts will be presented to the WPIC for consideration at the July meeting. Please do not hesitate to contact me if you have questions in advance of the meeting.

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