

## 1 HOUSE BILL NO. 653

2 INTRODUCED BY R. FITZGERALD

3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING UTILITIES TO CROSS A RAILROAD RIGHT-OF-WAY;  
5 ESTABLISHING REQUIREMENTS AND FEES RELATED TO THE RIGHT OF UTILITIES TO CROSS A  
6 RAILROAD RIGHT-OF-WAY; REQUIRING APPLICATIONS FOR CROSSINGS; ESTABLISHING CROSSING  
7 FEES AND INSURANCE COVERAGE; ALLOWING FOR OBJECTIONS; PROVIDING FOR THE  
8 ASSIGNMENT OF CROSSING RIGHTS; PROHIBITING MECHANIC'S LIENS; PROVIDING DEFINITIONS;  
9 AMENDING SECTION 69-4-527, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN  
10 APPLICABILITY DATE."  
11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
13

14 NEW SECTION. **Section 1. Short title.** [Sections 1 through 15] may be cited as the "Montana  
15 Railroad Crossing Fairness Act".  
16

17 NEW SECTION. **Section 2. Definitions.** For the purposes of [sections 1 through 15], the following  
18 definitions apply:

19 (1) (a) "Annual fee" means an exact and specific price established in an annual fee agreement that  
20 the utility agrees to pay annually to the railroad as consideration for a crossing.

21 (b) The term does not include:

22 (i) any increases to the exact and specific price established in the annual fee agreement, unless the  
23 exact and specific amount or percentage of increase is established in the annual fee agreement; or

24 (ii) increases that are at the railroad's discretion.

25 (2) "Annual fee agreement" is a signed, written agreement that establishes an annual fee.

26 (3) (a) "Crossing" means the construction, operation, repair, or maintenance of a facility over, under,  
27 or across a railroad right-of-way.

28 (b) The term includes the construction, operation, repair, or maintenance of a facility that runs

1 adjacent to and alongside the lines of a railroad within a railroad right-of-way without disturbing railroad lines or  
2 operations, after which the facility crosses the railroad lines, terminates, or exits the railroad right-of-way.

3 (4) "Crossing fee" is a one-time payment from a utility to a railroad, not to exceed the greater of  
4 \$1,250 or 25 cents for each linear foot for the length of the railroad right-of-way occupied by the crossing.

5 (5) "Disused rail crossing" means the railroad line of the crossing:

6 (a) is classified as "inactive" by a state or federal agency, including the department of transportation  
7 or the federal surface transportation board;

8 (b) is not capable of operation due to the long-term removal of ties or track; or

9 (c) is abandoned.

10 (6) "Facility" includes but is not limited to pipes, sewers, conduits, cables, valves, lines, wires,  
11 manholes, attachments, or any item of personal property placed over, across, or underground for use in  
12 connection with the storage or conveyance of:

13 (a) water;

14 (b) sewage;

15 (c) electronic, telephone, or telegraphic communications;

16 (d) fiber optics;

17 (e) cable television;

18 (f) electric energy;

19 (g) oil;

20 (h) natural gas; or

21 (i) hazardous liquids.

22 (7) "Prescriptive easement" means a right to cross a railroad if the property of another is acquired by  
23 open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years.

24 (8) "Public right-of-way" means the area adjacent to, along, and on any public roads, streets, or  
25 highways in accordance with 69-4-101.

26 (9) "Railroad" means any association, corporation, or other entity engaged in operating a common  
27 carrier by rail, or its agents or assigns, including any entity responsible for the management of crossings or  
28 collection of crossing fees.

1 (10) "Railroad land" means land adjacent to railroad lines and owned or controlled, in whole or in part,  
2 by a railroad, its subsidiaries, affiliated businesses, lessees, agents, or other entity controlled in whole or in part  
3 by the railroad or the railroad's parent company.

4 (11) (a) "Utility" means a public utility, rural telephone cooperative, rural electric cooperative,  
5 transmission company, gas utility, municipal utility, municipal power utility, municipality, pipeline company, rural  
6 water system, or telephone, telegraph, telecommunications, cable, or fiber optic provider.

7 (b) The term includes contractors and agents hired by a utility.  
8

9 **NEW SECTION. Section 3. Existing agreements.** (1) Nothing in [sections 1 through 15] impairs the  
10 existing authority of a utility to secure crossing rights by easement through the power of eminent domain in  
11 accordance with Title 70, chapter 30.

12 (2) A utility is not required to undertake a crossing in accordance with [sections 1 through 15].  
13

14 **NEW SECTION. Section 4. Rights of utilities -- crossings.** When the placement of a facility is  
15 outside the public right-of-way, a utility may place a crossing subject to [sections 1 through 15].  
16

17 **NEW SECTION. Section 5. Notice and application for placement of facilities.** (1) A utility that  
18 intends to place a crossing shall provide notice of the placement to the railroad at least 30 calendar days prior  
19 to placement.

20 (2) The notice must be in the form of a completed crossing application, including a drawing showing  
21 the location of the proposed crossing and the railroad's property, tracks, and wires in relation to where the utility  
22 will cross.

23 (3) The utility shall submit the crossing application on a form provided or approved by the railroad, if  
24 available, or provided by the railroad and made available to utilities within 30 calendar days of submission of an  
25 application.

26 (4) The crossing application must be sent to the railroad by registered or certified mail or by means of  
27 mutually agreed electronic confirmation of receipt.

28 (5) The crossing application must be accompanied by a certificate of insurance and the crossing fee,

1 if the crossing fee is required in accordance with [section 7].

2 (6) (a) If a railroad terminates an annual fee agreement or other crossing agreement or otherwise  
3 orders removal of a crossing without good cause, the utility may notify the railroad, in accordance with this  
4 section, that the utility will maintain the crossing and continue to use the crossing, with the following exceptions:

5 (i) the crossing fee to maintain an existing crossing is set at \$100; and

6 (ii) a certificate of insurance is not required.

7 (b) Good cause exists if a facility damages or is likely to damage the railroad or its structures or any  
8 other property on the premises of the railroad, or if a facility endangers the safety of the railroad's operation or  
9 is likely to cause injury or death to a person.

10

11 **NEW SECTION. Section 6. Right-of-way crossing -- construction.** (1) Except as provided in  
12 subsection (2), a utility may commence the construction of the crossing 30 calendar days after the railroad  
13 receives a completed crossing application, certificate of insurance, and crossing fee, if a crossing fee is  
14 permitted in accordance with [section 7].

15 (2) (a) If a railroad objects to a utility's proposed crossing because the proposal is a serious threat to  
16 the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad shall notify the  
17 utility of the objection and the specific basis for the objection within 15 days of receipt of the utility's application  
18 by registered or certified mail or by means of mutually agreed electronic confirmation of receipt.

19 (b) If the parties are unable to agree on a resolution to a railroad's objection under subsection (2)(a),  
20 the dispute must be resolved in accordance with [section 10] prior to construction.

21

22 **NEW SECTION. Section 7. Permissible fees -- crossing fees and annual fees.** (1) Unless  
23 otherwise agreed to by the parties and subject to subsections (2) through (7) and [section 9(2)], a utility that  
24 places a crossing shall pay the railroad a crossing fee for each crossing.

25 (2) The crossing fee is in lieu of any license, permit, application, or processing fee, or any other fees  
26 or charges to reimburse the railroad for the direct expenses or diminution of railroad land value incurred by the  
27 railroad as a result of the crossing. Except as provided in subsections (3) through (7), any additional fee or  
28 financial charge may not be assessed by the railroad or by any railroad agent, contractor, or assignee to the

1 utility or to any agent or contractor of the utility.

2 (3) (a) A crossing fee may not be imposed if the crossing is located within a public right-of-way, a  
3 prescriptive easement, or the utility's right-of-way.

4 (b) A crossing fee may not be imposed for:

5 (i) the replacement or upgrading of existing utility facilities in a railroad right-of-way;

6 (ii) disused rail crossings;

7 (iii) facilities located outside of an active railroad right-of-way;

8 (iv) an extension of utility service to buildings or other facilities owned or operated by the railroad or its  
9 lessees;

10 (v) an extension of utility service at the request of the railroad, its agents or lessees, or other  
11 occupants of railroad land; or

12 (vi) any crossing where the railroad or its predecessor in the affected right-of-way has agreed, in  
13 writing, to provide, at no cost to the utility, easements, licenses, or other authorization to place crossings or  
14 facilities or related improvements or systems.

15 (c) The crossing fee may not be charged for a facility that is not located on the railroad right-of-way.

16 (d) The crossing fee is a lifetime fee and does not expire for the duration of the crossing.

17 (4) (a) A utility may request a copy of an annual fee agreement from a railroad, if the railroad seeks  
18 to collect an annual fee. If the railroad cannot produce a copy of the original signed annual fee agreement, the  
19 railroad may not charge, assess, or collect an annual fee.

20 (b) If an annual fee agreement was executed prior to December 31, 2018, and remains in effect, the  
21 railroad may only assess and collect a fee equal to the amount collected in 2018 for an annual fee, but only for  
22 the timeframe that the annual fee agreement remains in effect.

23 (c) If an annual fee agreement was executed after December 31, 2018, and prior to [the effective date  
24 of this act] and remains in effect, the railroad may only assess and collect a fee equal to the amount it collected  
25 in the first year of the annual fee agreement for that annual fee, but only for the timeframe that the annual fee  
26 agreement remains in effect.

27 (d) Annual fees may not be applied to any crossing made after the date that the annual fee is  
28 enacted, unless agreed to in the annual fee agreement.

1 (e) Nothing in this subsection (4) prevents parties from eliminating annual fees based on a  
2 renegotiation of terms of an agreement.

3 (5) (a) In addition to the standard crossing fee and based on the railroad traffic at the crossing and  
4 subject to subsection (5)(b), a utility shall reimburse the railroad for any reasonable and necessary flagging  
5 expense, not to exceed \$400 for each day the utility is present and actively engaged in deploying facilities in a  
6 railroad right-of-way associated with a crossing.

7 (b) A flagger fee is not applicable to underground crossings when surface activity is more than 50 feet  
8 outside of a railroad right-of-way.

9 (6) A railroad may charge a fee for reasonable and necessary safety inspections, not to exceed \$170  
10 an hour for each hour the utility is present and actively engaged in deploying facilities within the railroad's right-  
11 of-way. Additional fees, charges, assessments, or other terms related to safety may not be imposed by the  
12 railroad.

13 (7) (a) If the railroad alleges a crossing will cause a diminution in railroad land value in an amount  
14 greater than the crossing fee provided for in subsection (1), within 15 days of receipt of a completed application,  
15 the railroad shall notify the utility in writing and provide an appraisal demonstrating the diminution in value of the  
16 entire parcel of railroad property caused by the crossing.

17 (b) If the parties are unable to resolve the issue of compensation under subsection (7)(a), the dispute  
18 must be resolved in accordance with [section 10].

19 (8) The placement of one or more pipes or conduits and their contents in the same location is a single  
20 facility. Additional fees are not payable based on the individual fibers, wires, lines, or other items contained  
21 within the pipes or conduits.

22 (9) The utility is not obligated to pay the railroad any other fees, charges, assessments, or other terms  
23 beyond the fees and reimbursements established in this section.

24  
25 **NEW SECTION. Section 8. Certificate of insurance coverage.** (1) (a) The certificate of insurance  
26 or coverage submitted by a facility owner that is a municipal utility or municipality must include commercial  
27 general liability insurance or an equivalent form with a limit of at least \$1 million for each occurrence and an  
28 aggregate of at least \$2 million.

1 (b) The certificate of insurance or coverage submitted by a facility owner that provides natural gas  
2 service must include commercial general liability insurance with a combined single limit of at least \$5 million for  
3 each occurrence and an aggregate limit of at least \$10 million.

4 (c) The certificate of insurance or coverage submitted by a facility owner not included in subsection  
5 (1)(a) or (1)(b) must include commercial general liability insurance with a combined single limit of at least \$2  
6 million for each occurrence and an aggregate limit of at least \$5 million.

7 (2) The railroad may require protective liability insurance with a combined single limit of \$2 million for  
8 each occurrence and a \$5 million aggregate limit. The coverage may be provided by a blanket railroad  
9 protective liability insurance policy if the coverage, including the coverage limits, applies separately to each  
10 individual crossing. The coverage is required only during the period of construction, repair, or replacement of  
11 the facility.

12 (3) The insurance coverage under subsections (1) and (2) may be satisfied by the utility using a  
13 combination of primary, excess, or self-insurance. The insurance may not contain an exclusion or limitation  
14 related to railroads or to activities within 50 feet of railroad property.

15 (4) The certificate of insurance must be from an insurer of the utility's choosing.

16 (5) The coverage is required only during the period of construction, repair, or replacement of the  
17 facility.

18

19 **NEW SECTION. Section 9. Relocation -- objection to relocation.** (1) (a) Except as provided in  
20 subsections (3) and (4), a railroad may require a utility to relocate a facility when:

21 (i) the relocation is mutually agreed to by the railroad and the utility within the railroad right-of-way;  
22 (ii) the railroad determines that relocation is essential to accommodate railroad operations; and  
23 (iii) the relocation is not arbitrary or unreasonable.

24 (b) Before agreeing to a relocation, a utility may require a railroad to provide a statement and  
25 supporting documentation identifying the operational necessity for requesting the relocation.

26 (c) A utility shall perform the relocation within a reasonable period of time following the agreement.

27 (2) Relocation is at the expense of the utility. Additional crossing fees, flagger fees, safety inspector  
28 fees, or any other fee or charges for the relocation may not be assessed by the railroad, a railroad agent,

1 contractor, or assignee to the utility, or to any agent or contractor of the utility.

2 (3) If a utility objects to the need for relocation after reviewing the statement and supporting  
3 documentation, the utility shall provide notice of the objection and the specific basis of the objection to the  
4 railroad by registered or certified mail or by means of mutually agreed electronic confirmation of receipt.

5 (4) (a) If the parties are unable to resolve the objection, either party may submit to arbitration in  
6 accordance with Title 27, chapter 5, for resolution of the objection within 30 calendar days from receipt of the  
7 objection.

8 (b) Before submitting to arbitration, the parties shall confer in good faith in an attempt to resolve the  
9 objection within 30 days of having provided a notice of objection as required in subsection (3).

10 (5) If a railroad orders the removal of a crossing with good cause, as outlined in [section 5(6)(b)], the  
11 railroad shall allow for the relocation of the crossing in accordance with this section.

12  
13 **NEW SECTION. Section 10. Objection to crossing -- additional requirements.** (1) (a) If a railroad  
14 objects to a utility's proposed crossing because the proposal is a serious threat to the safe operations of the  
15 railroad or to the current use of the railroad right-of-way, the railroad shall notify the utility of the objection and  
16 the specific basis for the objection within 15 days of receipt of the utility's application by registered or certified  
17 mail or by means of mutually agreed electronic confirmation of receipt.

18 (b) If the railroad imposes additional requirements on a utility for crossing its lines, other than the  
19 proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the  
20 railroad right-of-way, or imposes additional requirements on a utility for crossing lines, the utility may object to  
21 one or more of the requirements.

22 (c) Notice of objections must be sent by registered or certified mail or by means of mutually agreed  
23 electronic confirmation of receipt.

24 (2) If the parties are unable to resolve an objection made in accordance with subsection (1), either  
25 party may submit to arbitration in accordance with Title 27, chapter 5, for resolution of the disputed crossing  
26 application within 30 calendar days from receipt of the objection.

27 (3) Before submitting to arbitration, the parties shall confer in good faith in an attempt to resolve the  
28 objection.



1 (4) (a) If arbitration is sought, the arbitrators shall issue a notice of hearing or notice of opportunity for  
2 hearing within 15 calendar days of filing for arbitration and issue an order within 30 calendar days after the  
3 hearing.

4 (b) A utility may not proceed with construction of a crossing during the 45-calendar-day period for  
5 which notice of a hearing is issued or until expiration of the period during which a hearing could be requested.

6 (c) The arbitrators shall assess costs associated with arbitration equitably against the parties. The  
7 parties shall pay the costs within 30 calendar days after receipt of a bill for payment for the arbitrators.

8 (d) The order may be appealed in accordance with Title 25.

9  
10 **NEW SECTION. Section 11. Removal of equipment.** On completion of any facility, the utility shall  
11 remove all tools, equipment, or other property used in the construction of the facility and, if railroad property  
12 was moved or disturbed, restore that property to the condition of the property before being moved or disturbed.

13  
14 **NEW SECTION. Section 12. Assignment.** (1) (a) Except as provided in subsection (1)(b), a utility  
15 may assign or otherwise transfer any rights to cross a railroad right-of-way to:

16 (i) a financially responsible entity controlled by, controlling, or under common control of the utility;  
17 (ii) an entity with which the utility is merged or consolidated; or  
18 (iii) an entity that acquires ownership or control of all or substantially all of the transmission assets of  
19 the utility.

20 (b) A transfer or assignment not included under subsection (1)(a) may not take place without the  
21 written permission of the railroad. Written permission may not be unreasonably withheld.

22 (2) The utility shall notify the railroad of an assignment made in accordance with subsection (1)(a)  
23 within 30 calendar days.

24  
25 **NEW SECTION. Section 13. Prohibition against mechanic's lien.** (1) A utility may not create,  
26 permit, or cause a mechanic's lien or other lien to be created or enforced against the railroad's property for any  
27 work performed by the utility in connection with the utility's facilities located in the railroad's right-of-way.

28 (2) A railroad may not create, permit, or cause a mechanic's lien or other lien of any kind or any

1 nature to be created or enforced against a utility's property located in the railroad's right-of-way for any work  
 2 performed by the railroad in connection with the railroad's facilities.

3

4 NEW SECTION. Section 14. Taxes. (1) A utility shall promptly pay or discharge all taxes and  
 5 charges levied on a utility's facilities located in the railroad's right-of-way.

6 (2) If any taxes or charges cannot be separately made or assessed to the utility, but are included in  
 7 the taxes or charges assessed to the railroad, the utility shall pay to the railroad an equitable portion of the  
 8 taxes, determined by the value of the utility's facilities located on the railroad right-of-way, as compared with the  
 9 entire value of the railroad property.

10

11 NEW SECTION. Section 15. Reporting requirement -- fee. (1) Beginning January 1, 2022, and in  
 12 each year after, a facility owner that constructs a crossing and pays a crossing fee or annual fee in accordance  
 13 with [sections 1 through 15] shall file an annual report with the department of labor and industry summarizing  
 14 crossing agreements, insurance coverage submitted by the facility owner, and fees paid to a railroad.

15 (2) The annual report must be accompanied by a \$25 filing fee. The fee must be deposited and used  
 16 in accordance with 69-4-527.

17 (3) The department may adopt rules establishing the requirements of reports filed in accordance with  
 18 subsection (1).

19

20 **Section 16.** Section 69-4-527, MCA, is amended to read:

21 **"69-4-527. Underground facility protection account -- statutory appropriation.** (1) There is an  
 22 underground facility protection account in the state special revenue fund. The account is statutorily  
 23 appropriated, as provided in 17-7-502, to the department.

24 (2) There must be deposited in the account all revenue from:

25 (a) civil penalties collected pursuant to 69-4-524 and 69-4-525;

26 (b) fines collected pursuant to 69-4-529 or 69-4-530;

27 (c) fees collected pursuant to 69-4-502(4); ~~and~~

28 (d) filing fees collected pursuant to [section 15]; and

1           ~~(d)~~(e) any gifts, grants, donations, or bequests to the department.

2           (3) Funds are allocated as follows:

3           (a) fees collected pursuant to 69-4-502(4) and paid by underground facility owners and any gifts,  
4 grants, donations, or bequests must be deposited in an account for the administration of this part by the  
5 department in accordance with this part; and

6           (b) all revenue from civil penalties collected pursuant to 69-4-524 and 69-4-525, and fines collected  
7 pursuant to 69-4-529 or 69-4-530, and filing fees collected pursuant to [section 15] must be deposited in an  
8 account for distribution in the form of grants to notification centers to be used in accordance with 69-4-528.

9           (4) The accounts established in subsection (3) retain interest earned from the investment of money in  
10 the accounts."

11

12           NEW SECTION. Section 17. Codification instruction. [Sections 1 through 15] are intended to be  
13 codified as an integral part of Title 69, and the provisions of Title 69 apply to [sections 1 through 15].

14

15           NEW SECTION. Section 18. Saving clause. [This act] does not affect rights and duties that  
16 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

17

18           NEW SECTION. Section 19. Severability. If a part of [this act] is invalid, all valid parts that are  
19 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,  
20 the part remains in effect in all valid applications that are severable from the invalid applications.

21

22           NEW SECTION. Section 20. Effective date. [This act] is effective on passage and approval.

23

24           NEW SECTION. Section 21. Applicability. [This act] applies to crossings:

25           (1) in existence prior to October 1, 2021; and

26           (2) commenced after September 30, 2021.

27

- END -