



ENVIRONMENTAL QUALITY COUNCIL

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September 1, 2010

TO: EQC members
FR: Joe Kolman, EQC staff
RE: LC 8002--Use of navigable river beds

During the EQC's July meeting, members directed staff to put LC 8002, regarding use of navigable river beds, out for public comment.

Public comment was taken between July 30 and August 30. Attached are the comments received in that time period. If additional comment is received prior to the September 13 meeting, it will be included in your meeting folders.

CI2255 0243hsxa.

From: niki@redquillranch.com
To: [Kolman, Joe](#)
Subject: Our Rivers
Date: Thursday, July 29, 2010 11:20:04 AM

Comments on SB 507

Dear Committee,

Simple me -

1. Who ever pays land tax on the river bottom owns the land.
2. If the State of Montana owns the river bottom = the people own the river bottom.
3. The Citizens of Montana shouldn't have to pay a tax (license, for an easement) to float across the land they own.
4. The State of Montana provides no services along these fee rivers, (bathrooms, campgrounds, etc)
how
would the fees collected to be used?
Are they redistributed to all Citizens?

I thought all Montanans have the right to go on all waterways.

Don't close off river use with SB507.

Thankyou,

Niki Sardot

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



BRIAN SCHWEITZER, GOVERNOR

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HELENA, MONTANA 59620-1601

August 10, 2010

Environmental Quality Council
Honorable Chas Vincent, Chairman

Dear Representative Vincent:

I appreciated the Committee's interest and discussions regarding LC 8002 that pertains to the state's ownership and management of navigable waters. I have reviewed the draft legislation and offer the following observations and comments.

The State holds title to the beds of navigable waters, and this asset is administered by the Board of Land Commissioners for the benefit of the public land trust. The Board is obligated to manage all navigable rivers, and must obtain full market value for any use of the beds of these rivers under Art. X, Section 11 of the 1972 Montana Constitution. See, PPL Montana, LLC v. State, 355 Mont. 402, 444, 229 P.3d 421, 450 (2010). In order for the Board to fulfill these Constitutional fiduciary duties, I suggest the following revisions to the legislation:

1. In Section 1 (b) strike "must" and replace with "may."

Comment: The State Land Board retains the Constitutional authority to determine whether it will grant or deny any application for a lease, license, or an easement.

2. Strike Section 1 (d) in its entirety.

Comment: The payment of taxes does not and cannot represent compensation to the public land trust for use of a navigable riverbed owned by the State and held in trust for the public. Property taxes are assessed to satisfy local taxing jurisdictions' functions and expenses. The Montana Supreme Court in PPL Montana, LLC v. State held that the State must obtain the full market value for any use of the beds of navigable waters.

3. In Section 2 (3) add:

Rivers or lakes that are navigable in fact must be regarded as navigable in law; and rivers or lakes are navigable in fact when they are used, or were susceptible of being used at the time of statehood, in their natural and ordinary condition, as highways for commerce over which trade and travel were, or may be conducted in the customary modes of trade and travel on water.

Comment: This legal definition is consistent with the accepted judicial definition of navigable waters provided by the U.S. Supreme Court in The Daniel Ball, 10 Wall. 557, 77 U.S. 557, 19 L.Ed. 999 (1870), and the same definition was utilized by the Montana Supreme Court in PPL Montana, LLC v. State, 355 Mont. 402, 414, 229 P.3d 421, 431 (Mont.,2010). The List of Navigable Rivers that the DNRC developed not only satisfies, but exceeds, the legal definition of "susceptible for use in commerce" because it lists those waters for which there is documented actual historic use of the river for commerce at the time of statehood.

As noted in the Department's fiscal note for SB 507 in 2009, we would anticipate that the state would receive 200 easement applications a year at an average easement fee of \$500 per year, generating \$100,000 annually to Common Schools. We would anticipate issuing 150 land use licenses annually at \$150 each for an annual revenue stream of \$22,500 each year. The State claims ownership of approximately 3,361 miles of navigable waterways on stretches of 38 streams, lakes, and rivers. Nine of the rivers have been judicially determined to be navigable. Historically, eight out of ten permanent easements issued have been across non-adjudicated waterways. Additionally, the trust receives an additional \$25,000 annually on non- adjudicated and meandered waters for oil and gas leasing activities. **Based on the Department's analysis, the annual income from non-adjudicated waterways could be in the range of \$125,000.**

Sincerely,



Mary Sexton
Director, DNRC

cc: Candace F. West, Tom Schultz, Joe Lamson, Jeanne Holmgren

From: [Towlerton, Al](#)
To: [Kolman, Joe](#)
Cc: [Mumford, David](#); [Heisler, Vern](#); [Rubich, Mike](#)
Subject: Use of stream beds bill draft
Date: Tuesday, August 24, 2010 3:18:41 PM

Mr. Kolman:

We offer the following comment on the proposed bill in the draft WQIC draft report:

LC 8002 – We suggest that the bill language be clarified regarding when the fair market value of the riverbed applies. SB 507 from the 2009 legislature contained the same confusing language. For example, Section 1(1)(e) says that an applicant “...shall apply to the state for a lease, license or easement and pay full market value for the use of the riverbed...”. Yet Section 2(2) indicates that the annual payment for a license shall be \$150, apparently unrelated to the full market value.

Thanks for the opportunity to comment and let me know if you have questions.

Cordially,

Alan Towlerton
Deputy Public Works Director
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Senior Water Rights Coalition
PO Box 7325 Helena, MT 59604
(406)439-2215 blakecrk@Gmail.com

August 30, 2010

Rep. Walt McNutt, Chairman
Water Policy Interim Committee
PO Box 201706
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

The Senior Water Rights Coalition welcomes and appreciates the opportunity to provide public comment on legislation that the WPIC is considering for introduction in the 2011 Legislature.

LC 8002 – Use of River Beds

The SrWRC strongly supports the language of LC 8002 as currently drafted. We believe that this piece of legislation is critical to provide a clear, fair, and defensible process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title.

The water users of Montana who are irrigators have a Constitutional right to exercise their water rights. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

The definition of “navigable river” in Section 2 subsection (3) makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. Because the determination is very fact intensive and site specific it makes sense to have a court determine whether or not a river was navigable at the time of statehood. Additionally, absent a navigability determination by a court of competent jurisdiction there is no legal mechanism for riparian property owners to defend their property rights or even be made aware that an assertion of ownership by the state is being made.

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. We believe that these are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

LC 9002 – Water Marketing

The SrWRC supports LC 9002. We believe that the process outlined for changing a water right to marketing will facilitate the use of leased water for mitigation purposes. Additionally, the process outlined for changing a water right to a mitigation purpose will provide a mechanism for water right sellers and water right buyers to meet. The ability of new developments to find and use mitigation water to offset adverse affect is critical to continued growth and development in Montana.

Sincerely,

Krista Lee Evans



AGAI

www.AGAIMT.com

Association of Gallatin Agricultural Irrigators

August 30, 2010

Rep. Walt McNutt, Chairman
Water Policy Interim Committee
PO Box 201706
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

Thank you for the opportunity to comment on legislation that the WPIC is considering. Our ability to exercise and protect our water rights is crucial to our livelihoods. Changes in Montana's water laws can have incredible economic impacts to our businesses. We take our responsibility to be informed water users very seriously.

LC 8002 – Use of River Beds

AGAI strongly supports the language of LC 8002 as currently drafted. AGAI members have diversions, ditches, tip ups, pump sites, etc located in or on the Gallatin River. How DNRC and the State Land Board determine which rivers are navigable for title and how footprint users will be assessed for that use has a direct impact on our members. Currently, the process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title is confusing and not always applied equally across the landscape. LC 8002 provides a process that is fair to users as well as the State of Montana.

Our ability to continue to produce agricultural crops hinges upon our ability to irrigate in an economical manner. The protections and confirmation of our water rights that Article IX, section 3 of the Montana Constitution provides are critical. LC8002 takes the necessary step of balancing Constitution provisions in a way that is fair and equitable to all parties. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

AGAI strongly supports the definition of "navigable river" in Section 2 subsection (3). This definition makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. The determination of navigability is a very fact specific determination. It is appropriate that a court weigh all the evidence and provide an opportunity for those who believe they own the property to provide their evidence. When the question surrounds the legal ownership of property it is unheard of to make that determination based solely on an assertion by one of the parties

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. These are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

Sincerely,

/s/

Walt Sales, President
Association of Gallatin Agricultural Irrigators

[Excerpted from Trout Unlimited's comments on the Water Policy Interim Committee report "Boiling it Down" related to LC 8002.]

Despite the potential drawback of larger lot sizes and potentially more lawn and garden irrigation demand, small steps forward are critical and LC9004 is such a step. LC9004 will improve water quality and prevent contamination of rural drinking water supplies, which are both important public purposes. TU supports LC9004.

3. TU Supports LC9005, with amendment. TU also supports the thesis of bill draft LC9005, that county government should be able to require central water and sewer in appropriate circumstances. However, practically speaking, requiring the county to go through 511 rule-making in order to require central water or sewer does not provide local government with any more authority than they already have. A county's aversion to 511 rule-making is well placed. It is expensive, time-consuming, and controversial—in short, a serious distraction from the pressing day-to-day needs of county government. For this reason, TU supports providing county government with the authority to require central water and sewer, but without making it subject to 511 rule-making.

4. TU's Reading of LC 8002. This bill clearly and specifically deals with navigability for title and taxation purposes--not navigability for recreation. A priority for TU is making sure that the limited scope of LC8002 remains clear throughout the legislative process. According to *Montana Stream Access Coalition, Inc. v. Hildreth*, recreational navigability has remained independent from federal and state navigability classifications and this bill doesn't change that--nor do we think it should.

In addition, we initially had concerns that certain protective permits were only required on navigable waterways, such as the Army Corps of Engineers' 404 permitting. However, for these required permits "navigability" is more dependent upon the definition of the term under the federal Rivers and Harbors Act, and less upon the state's classification of navigability. TU will continue to watch LC8002 to make sure federal and state permits that protect riparian habitat remain intact. We will similarly make sure that Montanans ability to recreate on our waterways is safe and strong.

5. *Boiling it Down's* Treatment of Exempt Wells.

As *Boiling it Down* ably chronicled, whether, and to what extent, permit-exempt wells need to provide mitigation water for their impact on surface flows and existing, senior water rights has been hotly debated in Montana for the last half-decade. (Permit-exempt wells are those pumping 35 gpm and 10 acre-feet/year, pursuant to MCA 85-2-306(3)(a)). *Boiling it Down* also demonstrates that this question is at its core not a legislative question. Rather, assessing the cumulative impact of permit-exempt wells is a matter of DNRC's implementation of the exempt well statute.

In 2006, the Gallatin County Commission petitioned the DNRC to change their regulation governing permit-exempt wells, to require that their cumulative impact be

[Excerpted from Decreed Water Advocate's comments on the Water Policy Interim Committee report "Boiling it Down" related to LC 8002.]

That having been said, the Decreed Water Advocates must oppose LC-9002.

1. It will be impossible to administer as written without adverse effect. It is too cumbersome and contradictory.
2. There is no enforcement procedure or penalty for non-compliance.
3. It will involve the sale of water rights which historically are tied to the land.
4. Most of LC-9002 concerns the established water rights that are to be traded or sold. Established water rights must have a beneficial use to be viable.

LC-9002 ignores the historical decrees, judicial decisions and uses of the water rights. Beyond being against the Montana Constitution, it does not address the parameters for the transfer of these water rights. For example: basin restrictions, mileage restrictions, future trades of the water, etc.

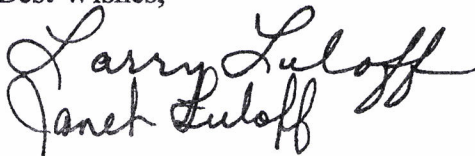
LC-9999 - Decreed Water Advocates approve this proposed change as written.

LC-8002 - Decreed Water Advocates object to any restrictions, licenses, or fees that apply to Senior Water Right Holders. This includes, but is not restricted to, all users of water or streambeds that are protected by the Montana Constitution.

Montana Constitution, 'Section 3. Water Rights (1) all existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.'

Again, I wish to thank all participating members of the Legislature, the Legislative Services division, members of cooperating bureaus, and members of the public who testified at the meetings. I feel we have established a beach-head. I also know the journey ahead will remain very contentious and will take years to complete.

Best Wishes,



Larry and Janet Luloff
Roberts, MT 59070

Ed Draper and the Draper Ranch, Inc.
Red Lodge, MT 59070