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**Education and Local Government Interim Committee**

**64th Montana Legislature**

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TO: ELG Committee Members
FROM: Laura Sankey, Staff Attorney
DATE: June 15, 2016
RE: Analysis of Potential Amendment to 77-1-130, MCA

As part of this committee's work on Senate Joint Resolution 20, regarding the issue of historic rights-of-way, the committee has asked to consider a potential amendment to 77-1-130, MCA for discussion purposes. To aid in the committee's discussion, I've been asked to address three questions regarding the proposed amendment that would have the statute mirror the Montana Constitution and the Enabling Act.

1. Would the proposed amendment be likely to generate a Legal Review Note?

The Legal Services Office undertakes a legal review process for every bill draft to identify potential constitutional conformity and statutory conflict issues. The potential amendment would amend subsection (4)(a) of 77-1-130, MCA to specify that the Department of Natural Resources and Conservation (DNRC) must collect the "full market value of the ***estate or interest disposed of*** for the historic right-of-way" (emphasis added).

Previous materials presented to this committee have discussed the requirements established in the state Constitution and the Enabling Act that require the state to obtain the full market value of an estate or interest therein when the state disposes of any school trust lands (please see here [Sept. 2015] and here [Jan. 2016] to review this analysis). Because the language of the potential amendment proposes to align the existing statute with the language in the state Constitution and the Enabling Act, it is likely the legal review process would conclude that the bill draft is in conformity with constitutional requirements. Therefore, the potential amendment would likely not generate a Legal Review Note.

A step-by-step explanation of the legal review note process conducted by the Legal Services Office is included as Attachment A at the end of this memo.

2. What would a Legal Review Note likely conclude?

Please see the previous answer, as it is likely that this bill draft would not generate a Legal Review Note.

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**Exhibit 2**

3. Would this language allow for collection of the full market value of an easement instead of the full market value of the fee title? Would it also allow for DNRC to continue to require the full market value of the fee title if it chose to do so?

As presented, the potential amendment requires DNRC to "collect from the applicant the full market value of the estate or interest disposed of for the historic right-of-way." The amendment language does not require that DNRC follow a specific valuation process; rather, the department has the discretion to develop a process to determine the full market value of an estate or interest so long as the process ensures the department obtains the full market value for that estate or interest.

ATTACHMENT A

## Legal Review Note Process

### What is a Legal Review Note?

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The legal review note comments regarding conformity with state and federal constitutions are provided pursuant to section 5-11-112, MCA, to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of the bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

### Steps in the Legal Review Note Process

1. Legislator requests a bill draft.

2. The bill drafter contacts the Legislator (bill draft requester) for direction and information regarding the bill draft.

3. Based on the direction and information provided, the bill drafter drafts the bill.

4. The bill drafter sends a draft copy of the bill to the requester for the requester's review. If known to the bill drafter, and after consultation with the legal director, the bill drafter will note potential legal concerns and communicate those concerns to the requester.

5. If, after receipt of the draft bill, the requester directs the bill drafter to proceed with sending the bill to legal review, the bill drafter will complete the bill drafter checklist and, in consultation with the legal director, will note any legal concerns, if any, and deliver the bill draft to legal review.

6. Pursuant to section 5-11-112, MCA, the Legal Services Office will review the bill draft for constitutional conformity and statutory conflicts. If, in consultation with the applicable subject matter attorney, the legal director determines that there may be constitutional conformity issues, the legal director will communicate those concerns to the bill drafter and then initiate the preliminary legal review note process.

7. The legal director drafts the preliminary legal review note or works with the applicable subject matter attorney to draft the preliminary legal review note.

8. Edit staff reviews the preliminary legal review note and then returns the note to the legal director for edit corrections.

9. The legal director will provide a hard copy and an electronic copy of the preliminary legal review note to the bill drafter. The bill drafter will provide a copy of the preliminary legal review note to the bill draft requester. The bill drafter will communicate to the requester that the requester can choose to attach a response to the preliminary legal review note. The bill draft requester has two days to provide a response to the preliminary legal review note. This does not preclude the bill draft requester from responding to a legal review note later in the legislative process, once the bill is introduced.

10. The bill draft requester can direct the bill drafter to redo the bill draft in order to eliminate the constitutional conformity issues identified in the preliminary legal review note, if possible. If the constitutional conformity issues are eliminated from the bill draft, then no legal review note will to be attached to the bill file or to the bill when the bill is introduced.

11. The bill draft requester can direct the bill drafter to send the bill draft through the bill draft production process without any changes. The legal director will attach the preliminary legal review note and any bill draft requester response to the bill draft file and highlight on the bill draft checklist that the form is attached.

12. The executive director will attach a copy of the preliminary legal review note and any bill drafter requester comments to the bill draft copy that is ready for legislator pickup.

13. If a bill draft is introduced that has an attached copy of the legal review note and any bill draft requester comments, the legal director will place an electronic copy of the legal review note and any bill draft requester comments in an assigned directory for posting on the LAWS bill action internet page. IT staff posts the note on the LAWS bill action internet page next to the fiscal note link.

14. The legal director will inform the committee staff of the presence of a legal review note attached to a bill that is to be heard in the committee.

15. Prior to a hearing on a bill that has an attached copy of the legal review note and any bill draft requester comments, committee staff will provide a copy of the legal review note and any bill draft requester comments to the committee chair and vice chairs and to the committee members.