Revised: 8/5/16

Appendix L

DNRC – Navigable Water Ways and Memo of Understanding

MONTANA RIGHT-OF-WAY
DESIGN MANUAL

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Revised: 8/5/16

Appendix L
DNRC–NAVIGABLE WATER WAYS AND MEMO OF UNDERSTANDING

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Jan. 26, 1997
Approved

MEMORANDUM OF UNDERSTANDING

between

Montana Department of Transportation (MDT)

and the

Montana Department of Natural Resources and Conservation (DNRC)

It is the purpose and intent of this Memorandum of Understanding to set forth respective obligations of both parties in the acquisition and conveyance of rights-of-way for highway projects which involve lands under the jurisdiction of the DNRC, and to obtain timely review of MDT right-of-way applications by the State Board of Land Commissioners (Land Board).

Whereas, the MDT is responsible for the construction and maintenance of public highways within the State of Montana; and

Whereas, the MDT develops projects in accordance with procedures which insure compliance with federal and state environmental laws; and

Whereas, the MDT insures that its cultural resource specialists and consultant resource specialists meet minimum professional standards required to hold a State Antiquities Permit; and

Whereas, in the course of highway construction, MDT occasionally acquires rights-of-way from the DNRC; and

Whereas, the MDT must certify with the Federal Highway Administration 45 days in advance of bid letting that all rights-of-way have been secured for a particular project; and

MEMORANDUM OF UNDERSTANDING

Figure 1L

Whereas, the DNRC is responsible for reviewing applications for rights-of-way across state lands; and

Whereas, the DNRC review of rights-of-way applications typically requires (ninety) 90 day review of complete applications; and

Whereas, the DNRC is responsible for insuring compliance with environmental laws and permitting processes prior to conveying rights-of-way on state trust lands; and

Whereas, the fulfillment of obligations by both parties must be performed in a timely manner to maintain schedules and funding obligations.

Now, therefore, it is hereby mutually understood and agreed that:

I. **The Montana Department of Transportation will:**

1. Make application to the DNRC-TLMD for all rights-of-way in accordance with the current accepted process on a project by project basis. Applications shall be submitted to the appropriate DNRC-TLMD area office that has jurisdiction for the affected area. Include, with its application;

   a. Copies of draft (or final, if available) environmental reviews.

   b. Final Plan documents with bearings and distances indicated in metric and english terminology and which show the bearing and distance to found survey monumentation.

   c. Plan documents which identify the take and remainder by 40 acre tract or government lot.

MEMORANDUM OF UNDERSTANDING

Figure 1L (continued)

d. Grant of possession / lessee settlement forms which are duly executed.

e. Appropriate MDT valuation form and supporting documentation if requested.

2. Diligently pursue the acquisition of those environmental clearances and applicable permits necessary for a particular project, not in its possession at the time of application.

3. Not proceed with actual construction of a particular project until all applicable permits and environmental clearances have been approved.

4. When working on projects which include "existing areas" for which no easement rights can be proven applications submitted will be for the full gross area of the roadway as it pertains to the state lands and the MDT project limits, not just the "net" or "new" area needed.

5. Prior to commencing preliminary engineering activities on state land the MDT will contact the appropriate area office.

II. **The Department of Natural Resources and Conservation will:**

1. Review all MDT applications in a timely manner.

2. Not delay its review process including submittal to Land Board, for lack of approved environmental clearances or required permits. However, the DNRC will not present right-of-way applications to the land board without draft environmental documents which are essentially complete. DNRC will not issue a finalized easement deed until a finalized environmental document has been received from MDT. DNRC area staff will not conduct a separate MEPA analysis for projects in which DNRC has participated in the MDT MEPA analysis and deems that analysis to be complete.

MEMORANDUM OF UNDERSTANDING

Figure 1L (continued)

MDT - DNRC MOU
Page 4

3. Not require a Montana Antiquities Act Permit for MDT or its consultants to conduct cultural resource studies, but will be invited to participate in on consultant hiring.

4. Send written notice to MDT of Land Board approval contingent upon receipt of final environmental documents.

5. Issue a right of way deed which identifies the easement area as indicated on the plan document submitted with the application.

6. Waive the fee associated with navigable river crossing pursuant to to 77-2-351, MCA contingent upon programmatic approval of waiver of these fees by the Montana Legislative Council and Land Board.

III. Valuation and Dispute Resolution

The DNRC and MDT agree to use appraisals which conform to the MDT Right of Way Manual Appraisal Chapter. This document sets forth the procedures to be followed in developing an appraisal, analysis, or opinion, and the manner in which an appraisal, analysis, or opinion is communicated.

The DNRC and the MDT agree to use the fee schedule developed by DNRC as the basis for right of way acquisitions under $2,500 where applicable. In any event the right of way acquisition payment will not be less than the federally established minimum payment.

In the event MDT submits a right of way acquisition valuation unacceptable to DNRC the following process will take place;

1. The DNRC appraiser and MDT appraisal section supervisor will determine a right of way acquisition value. If agreement can not be reached then;

2. The DNRC, Special Use Management Bureau Chief and the MDT, Right of Way Bureau Chief, will negotiate a settlement. If agreement can not be reached then:

MEMORANDUM OF UNDERSTANDING

Figure 1L (continued)

Revised: 8/5/16

NAVIGABLE WATER WAYS OWNED BY
THE STATE OF MONTANA AND ADMINISTERED BY
THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
TRUST LAND MANAGEMENT DIVISION
April 15, 2016
Subject to Update

The State of Montana holds ownership of the land and minerals located below navigable rivers, streams and lakes and related acreage as established in the Equal Footing Doctrine, Montana statutes, and case law. The Montana Department of Natural Resources and Conservation, Trust Land Management Division administers these lands on behalf of the state.

The Department's authority to administer the ownership of navigable water bodies is referenced in the following:

1. Equal Footing Doctrine (1844)

   Based on a U.S. Supreme Court decision (Pollard vs. Hagen 44 U.S. 212) the original 13 states held ownership of navigable riverbeds consistent with English Law. The Supreme Court held that all new states enter the union under equal footing. Therefore, all of the state's would own the lands beneath the navigable rivers and lakes.

2. MCA 70-16-201

   Provides for state ownership from the low water mark to the low water mark on navigable water bodies.

3. MCA 70-1-202

   Provides for state ownership of all land below the water of navigable lakes or streams.

4. MCA 77-1-102

   All lands lying and being in and forming a part of the abandoned bed of any navigable stream or lake between February 19, 1937 to April 15, 2013 belong to the State of Montana, for the School Trust.

5. MCA 70-18-203

   Islands and accumulations of land formed in the beds of navigable streams belong to the State of Montana.

The Department considers navigable waterways to be those (waterways or segments of waterways) for which it has historical evidence of use in commerce. The Department believes that based on available evidence and case law, these waterways would be adjudicated as navigable for title purposes. As new navigability data is discovered, the following list of navigable waterways may be revised.

DNRC NAVIGABLE WATER WAYS

Figure 2L

Revised: 8/5/16

NAVIGABLE WATER WAYS OWNED BY
THE STATE OF MONTANA AND ADMINISTERED BY
THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
TRUST LAND MANAGEMENT DIVISION
April 15, 2016
Subject to Update

BEAVERHEAD RIVER

See "Jefferson River"

BIG HOLE RIVER

Based on historical evidence supporting navigability, the Big Hole River is commercially navigable from Steel Creek (NW¼, Sec. 15, T2S, R15W) to Divide, Montana (approximately SW¼NE¼SE¼ of Sec. 18, T1S, R10W). Therefore, the state claims ownership of the Big Hole River between these two points.

BIG HORN RIVER

Based on historical evidence supporting navigability and case law, the Big Horn River is commercially navigable from the Wyoming state line to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Big Horn River between these two points.

BITTERROOT RIVER

Based on historical evidence supporting navigability, the Bitterroot River is commercially navigable from the mouth of Jennings Camp Creek on the east fork (SW¼, Sec. 27, T2N, R18W) to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Bitterroot River between these two points.

BLACKFOOT RIVER

Based on historical evidence supporting navigability, the Blackfoot River is commercially navigable from Lincoln, Montana (at bridge ~SE¼SW¼, Sec. 24, T14N, R9W) to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Blackfoot River between these two points.

BOULDER RIVER (Tributary to the Yellowstone River)

Based on historical evidence supporting navigability, the Boulder River is commercially navigable from the northern township line of Township 6 South, Range 12 East, to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Boulder River between these points.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)

BOULDER RIVER [WEST] (Tributary to the Boulder River)

Based on historical evidence supporting navigability, the West Boulder River is commercially navigable from the southern township line of Township 3 South, Range 11 East, to its confluence with the main stem of the Boulder River. Therefore, the state claims ownership of the West Boulder River between these points.

BULL RIVER

Based on historical evidence supporting navigability, the Bull River is commercially navigable from a point south of Bull Lake (approximately in CE½NE¼SW¼, Sec. 16, T28N, R33W) to its confluence with the Clark Fork River. Therefore, the state claims ownership of the Bull River between these two points.

CLARK FORK RIVER (Tributary of the Columbia River)

Based on historical evidence supporting navigability and case law, the Clark Fork River is commercially navigable from Deer Lodge, Montana (south boundary of town near south boundary of NW¼ of Sec. 4, T7N, R9W) to the Idaho state line. Therefore, the state claims ownership of the Clark Fork River between these two points.

CLEARWATER RIVER

Based on historical evidence supporting navigability, the Clearwater River is commercially navigable from, and including, Seeley Lake, to its confluence with the Blackfoot River. This reach also includes Salmon Lake. Therefore, the state claims ownership to the Clearwater River between these two points, and to Seeley Lake and Salmon Lake.

DEARBORN RIVER

Based on historical evidence supporting navigability and case law, the Dearborn River is commercially navigable from Highway 434 (Bridge in SW¼SE¼, Sec. 29, T18N, R6W) to its confluence with the Missouri River. Therefore, the state claims ownership of the Dearborn River between these two points.

DUPUYER CREEK

See "South Fork Dupuyer Creek"

FLATHEAD LAKE

Based on historical evidence supporting navigability and case law, Flathead Lake is commercially navigable. However, given the Neman court case, the state does not claim any river ownership within the boundaries of the Flathead Indian Reservation at this time. Therefore, the state claims ownership of Flathead Lake excepting any portion within the Flathead Indian Reservation

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FLATHEAD RIVER - MAIN STEM

Based on historical evidence supporting navigability, the main stem of the Flathead River is commercially navigable from the confluence of its north and middle forks to its confluence with the Clark Fork River. However, given the Neman court case, the state does not claim any river ownership within the boundaries of the Flathead Indian Reservation at this time. Therefore, the state claims ownership of the main stem of the Flathead River excepting any portion within the Flathead Indian Reservation.

FLATHEAD RIVER - MIDDLE FORK

Based on historical evidence supporting navigability, the middle fork of the Flathead River is commercially navigable from three (3) miles above Nyack, Montana (approximately at the east boundary of SW¼NE¼NW¼, Sec. 27, T31N, R17W) to its confluence with the North fork of the Flathead River. Therefore, the state claims ownership of the middle fork of the Flathead River between these two points.

FLATHEAD RIVER - NORTH FORK

Based on historical evidence supporting navigability, the north fork of the Flathead River is commercially navigable from Logging Creek (approximately C Sec. 20, T34N, R20W) to its confluence with the main stem of the Flathead River. Therefore, the state claims ownership of the north fork of the Flathead River between these two points.

FLATHEAD RIVER - SOUTH FORK

Based on historical evidence supporting navigability, the south fork of the Flathead River is commercially navigable from the face of Hungry Horse Dam (near center of south boundary of Sec. 22, T30N, R19W) to the main stem of the Flathead River. Therefore, the state claims ownership of the south fork of the Flathead River between these two points.

FORTINE CREEK (Tributary to Tobacco River)

Based on historical evidence supporting navigability, Fortine Creek is commercially navigable from Swamp Creek (SE¼SE¼, Sec. 21, T33N, R26W) to its confluence with the Tobacco River. Therefore, the state claims ownership of Fortine Creek between these two points.

GALLATIN RIVER

Based on historical evidence supporting navigability, the Gallatin River is commercially navigable from Taylor's Fork (NE¼SW¼, Sec. 2, T9S, R4E) to Central Park, Montana (railroad bridge in SW¼NE¼, Sec. 19, T1N, R4E). Therefore, the state claims ownership of the Gallatin River between these two points.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)

GRAVES CREEK (Tributary to the Tobacco River)

Based on historical information, Graves Creek is commercially navigable from where Graves Creek intersects the eastern range line (at approximately SE¼SE¼, Section 1) of Township 35 North, Range 26 West, to its confluence with the Tobacco River. Therefore, the state claims ownership of Graves Creek between these two points.

JEFFERSON RIVER / BEAVERHEAD RIVER

Based on historical evidence supporting navigability and case law, the Jefferson River is commercially navigable from the confluence of the Big Hole and the Beaverhead Rivers to the Jefferson's confluence with the Missouri River. Therefore, the state claims ownership of the Jefferson River between these two points. Based on historical evidence supporting navigability, the Beaverhead River is commercially navigable from the confluence with the Ruby River (SE¼NE¼, Section 4, T4S, R6W) to the Beaverhead's confluence with the Jefferson River. Therefore, the state claims ownership of the Beaverhead River between these two points.

KOOTENAI RIVER

Based on historical evidence supporting navigability, the Kootenai River is commercially navigable from the Canadian line to the Idaho state line. Therefore, the state claims ownership of the Kootenai River between these two points.

LOLO CREEK (Tributary to the Bitterroot River)

Based on historical evidence supporting navigability, Lolo Creek is commercially navigable from the mouth of Tevis Creek (NW¼NE¼SW¼, Sec. 33, T12N, R21W) to Lolo Creek's confluence with the Bitterroot River. Therefore, the state claims ownership of Lolo Creek between these two points.

MADISON RIVER

Based on historical evidence supporting navigability, the Madison River is commercially navigable from and including the river bed/river channel beneath Hebgen Lake (beginning on the east side of NE¼ Section 9, T13S, R5E) to the Madison River's confluence with the Missouri River. Therefore, the state claims ownership of the Madison River between these two points.

MARIAS RIVER

Based on historical evidence supporting navigability, the Marias River is commercially navigable from its confluence with the Missouri River to a point (historically) five miles upstream (approximately center of NE¼, Sec. 10, T25N, R9E). Therefore, the state claims ownership of the Marias River between these two points.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)

Revised: 8/5/16

MILK RIVER

Based on historical evidence supporting navigability, the Milk River is commercially navigable from approximately SE¼SW¼, (at bridge), Sec. 11, T28N, R39E near Glasgow, to its confluence with the Missouri River. Therefore, the state claims ownership of the Milk River between these two points, (west half only, adjacent to the Fort Peck Reservation).

MISSOURI RIVER

Based on historical evidence supporting navigability and case law, the Missouri River is commercially navigable from its headwaters at Three Forks, Montana to the North Dakota state line. Therefore, the state claims ownership of the Missouri River between these points (south half only, adjacent to the Fort Peck Reservation).

NINE MILE CREEK (Tributary to the Clark Fork of the Columbia River)

Based on historical evidence supporting navigability, Nine Mile Creek is commercially navigable from the east boundary of SE¼SE¼, Section 36, Township 17 North, Range 24 West, to its confluence with the Clark Fork River. Therefore, the state claims ownership of Nine Mile Creek between these two points.

ROCK CREEK (Tributary to the Clark's Fork of the Yellowstone River)

Based on historical evidence supporting navigability, Rock Creek is commercially navigable from the main fork of Rock Creek (approximately from the east range line along NE¼, Sec. 36, T8S, R19E) to Red Lodge, Montana (approximately the 19th Street Bridge, SE¼, Sec. 27, T7S, R20E). Therefore, the state claims ownership of Rock Creek between these two points.

SALMON LAKE (On Clearwater River)

Based on historical evidence supporting navigability, Salmon Lake is commercially navigable. Therefore, the state claims ownership of this lake.

SEELEY LAKE (On Clearwater River)

Based on historical evidence supporting navigability, Seeley Lake (aka Clearwater Lake) is commercially navigable. Therefore, the state claims ownership of this lake.

SHEEP CREEK (Tributary to the Smith River)

Based on historical evidence supporting navigability, Sheep Creek is commercially navigable from the mouth of Deadman Creek (SE¼SE¼, Sec. 22, T12N, R8E) to its confluence with the Smith River (NE¼, Sec. 14, T12N, R4E). Therefore, the state claims ownership of Sheep Creek between these two points.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)

SMITH RIVER

Based on historical evidence supporting navigability, the Smith River is commercially navigable from the mouth of Sheep Creek (NE¼, Sec. 14, T12N, R4E) to its confluence with the Missouri River. Therefore, the state claims ownership of the Smith River between these two points.

SOUTH FORK DUPUYER CREEK (Tributary to Dupuyer Creek and Marias River)

Based on historical evidence supporting navigability, the south fork of Dupuyer Creek is commercially navigable from the basins above the canyon (approximately center W½SE¼, [unsurveyed] Sec. 5, T26N, R9W) to the mouth of the canyon (approximately center E½SE¼SW¼, Sec. 25, T27N, R9W) a distance of approximately five miles. Therefore, the state claims ownership of the south fork of Dupuyer Creek between these two points.

STILLWATER LAKE [UPPER & LOWER] (On the Stillwater River, a tributary to the Flathead River)

Based on historical evidence supporting navigability, both Upper and Lower Stillwater Lakes are commercially navigable. Therefore, the state claims ownership of both of these lakes.

STILLWATER RIVER

Based on historical evidence supporting navigability, the Stillwater River is commercially navigable from and including Upper Stillwater Lake (and including Lower Stillwater Lake) to its confluence with the Flathead River. Therefore, the state claims ownership of the Stillwater River between these two points, and ownership of Upper and Lower Stillwater Lakes.

SUN RIVER

Based on historical evidence supporting navigability, the Sun River is commercially navigable from the confluence of the north and south forks of the Sun River (approximately SW¼, Sec. 26, T22N, R10W) to its confluence with the Missouri River. Therefore, the state claims ownership of the Sun River between these two points.

SWAN LAKE

Based on historical evidence supporting navigability, Swan Lake is commercially navigable. Therefore, the state claims ownership of Swan Lake.

SWAN RIVER

Based on historical evidence supporting navigability, the Swan River is commercially navigable from the mouth of Lost Creek (Sec. 1, T24N, R18W) and including Swan Lake to its confluence with Flathead Lake. Therefore, the state claims ownership of the Swan River between these two points, and Swan Lake.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)

TETON RIVER

Based on historical evidence supporting navigability, the Teton River is commercially navigable from the confluence of its north fork (NE¼, Sec. 33, T25N, R8W) to its confluence with the Marias River. Therefore, the state claims ownership of the Teton River between these two points.

TOBACCO RIVER

Based on historical evidence supporting navigability, the Tobacco River is commercially navigable from the mouth of Graves Creek (NW¼, Sec. 15, T35N, R26W) to its confluence with the Kootenai River. Therefore, the state claims ownership of the Tobacco River between these two points.

TONGUE RIVER

Based on historical evidence supporting navigability, the Tongue River is commercially navigable from the south township line of Township 2 South, Range 44 East to its confluence with the Yellowstone River. Therefore, the state claims ownership of the Tongue River between these two points.

WHITEFISH LAKE

Based on historical evidence supporting navigability, Whitefish Lake is commercially navigable Therefore, the state claims ownership of Whitefish Lake.

WHITEFISH RIVER

Based on historical evidence supporting navigability, the Whitefish River is commercially navigable from, and including, Whitefish Lake to its confluence with the Stillwater River. Therefore, the state claims ownership of the Whitefish River between these two points.

YAAK RIVER

Based on historical evidence supporting navigability, the Yaak River is commercially navigable from the mouth of Fourth of July Creek (approximately 5,705 feet south of the town of Sylvanite, MT, in unsurveyed Sec. 21, T34N, R33W) to its confluence with the Kootenai River. Therefore, the state claims ownership of the Yaak River between these two points.

YELLOWSTONE RIVER

Based on historical evidence supporting navigability and case law, the Yellowstone River is commercially navigable from the mouth of Emigrant Creek (approximately NE¼, Sec. 8, T6S, R8E) in Park County, Montana to the North Dakota state line. Therefore, the state claims ownership of the Yellowstone River from the mouth of Emigrant Creek to the North Dakota state line.

DNRC NAVIGABLE WATER WAYS

Figure 2L (continued)