

# Trust Land Management

An analysis of conservation easements and other uses of state trust land

A Report to the 61st Legislature  
September 2008  
(Revised July 2008 after public comment)  
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**House Joint Resolution No. 57 Study  
Environmental Quality Council**

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## **House Joint Resolution No. 57 Study Environmental Quality Council**

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# Introduction

Conservation easements and the management of state trust lands are established areas of Montana law. However, the selling of conservation easements on state trust lands--or any public land for that matter--is an issue much less explored.

A bill in the 2007 Legislature proposed amending the law to authorize the granting of conservation easements on any state lands held in trust. The measure died, but House Joint Resolution No. 57 directed a study of the issue. **(Appendix A)**

The resolution, in explaining the need for the study, stated that Montanans value traditional uses of school trust lands, including grazing, farming, timber harvest, and general recreation. It also pointed out that the trust lands are managed in part to provide revenue for the support of the common schools, the University System, and other state institutions and that efforts are being made to increase revenue by diversifying uses on the trust lands.

While selling of trust lands would raise revenue, the resolution stated that the traditional uses could be lost. On the other hand, it noted that conservation easements are an effective tool available to protect these traditional uses while preserving the long-term value of trust lands, retaining the trust land base, and raising revenue.

According to the resolution, the areas to be studied included:

- the effects of establishing conservation easements on state trust lands, including costs, benefits, compatibility with existing uses, and how to ensure that multiple-use management occurs in the future; and
- an evaluation of opportunities for the Department of Natural Resources and Conservation to partner with other organizations to acquire state trust lands that have restricted development rights, which would lower land acquisition costs while also perpetuating traditional uses of the land.

In January of 2008, the EQC determined that other questions needed to be answered by the study, including:

- What is the State Land Board's and the DNRC's existing legal authority regarding conservation easements and similar dispositions of property interests on state trust lands? Is the DNRC requesting any additional authority?
- Can the beneficiaries of the state trust lands file suit to terminate an easement granted by the State Land Board to another party on state trust land?

# Findings and Recommendations

**Study Task:** Evaluate the benefits to the various trusts of granting easements in terms of years and in perpetuity.

**Finding:** Under current law, limited easements for conservation purposes are allowed and would be granted in perpetuity.

**Finding:** Historically, other easements granted for conservation purposes have been granted in perpetuity.

**Finding:** Other types of easements have been granted in perpetuity or, in some cases, are terminated when the use is no longer valid.

**Finding:** The Land Board may issue leases for various purposes, including conservation, for up to 99 years.

**Finding:** Pursuant to 77-2-101(2), MCA, the Land Board may grant easements on trust land for uses defined as a public use, including natural areas, as defined in the eminent domain statutes, 70-30-102, MCA.

**Finding:** There is precedent that the Land Board may sell land for less than fee simple. It withholds mineral rights and, at least once, has restricted development rights. The sale of 640 acres in Powell County in 2007 restricted development to 25 lots.

**Finding:** A lease or a termed easement could be renegotiated. However, regardless of how the Land Board disposes of trust lands--including a termed easement, an easement in perpetuity, or a termed lease--the Land Board is obligated to obtain full market value and follow the incumbent legal constraints.

**Finding:** An easement granted in perpetuity would be considered a permanent disposition of trust lands, and 100% of the proceeds from the sale of an easement would be deposited in the permanent fund of the appropriate trust.

**Finding:** Permanent dispositions of lands held in trust for public buildings are distributed to the permanent trust for that grant; however, this revenue is distributed annually to the beneficiary for maintenance and support of the public buildings of the Capitol grounds.

**Finding:** A limited-term easement is not a permanent disposition of trust land. The revenue from such an easement would be treated the same as revenue from a lease or licence and would be distributed to the beneficiary in the fiscal year in which it was received. However, should the temporary disposition be granted on lands held in trust for the benefit of common schools, 95% of the revenue is distributed to the income and distributable portion of the trust with the remaining 5% being deposited into the permanent common school trust.

**Study Task:** Assess the alternatives with regard to appropriate entities to hold conservation easements on state trust land.

**Finding:** Pursuant to 77-2-101, MCA, only the Department of Fish, Wildlife, and Parks and certain nonprofit organizations may hold easements for conservation purposes on trust lands.

**Finding:** There are no restrictions on who may hold other types of easements on trust lands. Easements for conservation purposes are held by the Departments of Transportation and Fish, Wildlife, and Parks as well as the Custer Battlefield Preservation Committee, Inc.

**Finding:** Conservation easements on private land may be held by the state, counties, cities, towns, and other municipalities as well as by qualified private organizations. A qualified



private organization is one that is competent to own interests in real property, that qualifies and holds a general tax exemption under the federal Internal Revenue Code, section 501(c), and whose organizational purposes are designed to further the open space purposes of Title 76, chapter 6, MCA.

**Study Task:** Analyze how or if conservation easements can ensure that multiple-use management occurs.

**Finding:** The multiple-use management of trust lands is mandated by 77-1-203, MCA. It states that the Land Board shall manage state lands so that:

- they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and
- harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.

**Finding:** The multiple-use statute also states that subject to legal access and rules, state lands are open to recreational use.

**Finding:** A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.

**Finding:** Montana law requires that mineral rights be held in reserve by the state.

**Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

**Study Task:** Evaluate the effectiveness and cost or benefit to the various trusts of continuing traditional classified uses as part of the terms of a conservation easement.

**Finding:** A conservation easement sold on a piece of trust land that continued the traditional classified use would result in more revenue for the trust.

**Finding:** A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.

**Finding:** As long as full market value is obtained and the incumbent legal constraints are followed, the Land Board may utilize several tools in the disposal of trust lands, including selling easements for various purposes and issuing leases.

**Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

**Study Task:** Determine options and alternatives for providing the continuance of recreational uses that were in place prior to an easement being granted.

**Finding:** The multiple-use management of trust lands is mandated by 77-1-203, MCA. It states that the Land Board shall manage state lands so that:

- they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and
- harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.

**Finding:** The multiple-use statute also states that subject to legal access and rules, state lands are open to recreational use.

**Finding:** A conservation easement is an agreement between parties that may include any provisions related to use or access that the parties find mutually agreeable.

**Finding:** The Land Board's management of trust lands is subject to provisions of the Montana Constitution and state laws. Those provisions include the mandate that full market value must be obtained for any disposal of an interest in trust land, that management of state lands make the most judicious use of the land for some or all of the resources, and that, subject to certain limitations, the public is entitled to general recreational use of state lands to the extent the trusts are compensated for that use.

**Study Task:** Evaluate opportunities for the Department of Natural Resources and Conservation to partner with other organizations to acquire state trust lands that have restricted development rights, which would lower land acquisition costs while also perpetuating traditional uses of the land.

**Finding:** Montana law allows for the exchange of trust land with the federal government or tribal governments.

**Finding:** Montana law allows for the exchange of trust land with a political subdivision of the state, any other public body of the state, and nongovernmental agencies.

**Finding:** Montana law allows for land banking, a process of selling various parcels of state land and using the proceeds from the sales to purchase other land, easements, or improvements that are likely to provide greater or equal trust revenue, as may be reasonably expected over a 20-year accounting period with an acceptable level of risk, for the affected trust and to diversify the land holdings of the various trusts.

**Finding:** The Land Board has the authority under 77-1-213, MCA, to accept gifts or donations of land or other property and is obligated to manage the land for the benefit of the specific purposes designated by the person gifting the property. This could include conservation restrictions on the property.

**Study Task:** What is the State Land Board's and the DNRC's existing legal authority regarding conservation easements and similar dispositions of property interests on state trust lands?

**Finding:** As long as full market value is obtained and the incumbent legal constraints are followed, the State Land Board and the DNRC have a number of tools at their disposal regarding trust land administration.

**Finding:** The Land Board has existing constitutional, Enabling Act, and statutory authority to transfer, lease, exchange, sell, dispose of, and retain state trust land property interests, provided that full market value for the property interest is obtained as required by the Montana Constitution and The Enabling Act.

**Finding:** The Land Board has the existing authority to sell an estate or interest in state trust land (i.e., for less than fee simple).

**Finding:** The Land Board has specific legal authority regarding the use of easements for conservation purposes or other public uses on state trust lands. The Land Board also has the authority to grant easements on state trust lands for natural areas under the Montana Natural Areas Act of 1974, Title 76, chapter 12, part 1.

**Study Task:** Is the DNRC requesting any additional authority?

**Finding:** No.

**Study Task:** Can the beneficiaries of the state trust lands file suit to terminate the disposition of a property interest granted by the Land Board to another party?

**Finding:** Yes, the beneficiaries could file a lawsuit. However, assuming that the Land Board and the DNRC followed their trust management responsibilities and received full market value for the disposition, the success on the merits is unlikely given that the Montana Supreme Court held that the Land Board and the DNRC have large discretionary power in managing state lands.

#### **Other findings and recommendations**

**Finding:** There is a need to further educate policymakers and the general public about the basics of conservation easements.

**Recommendation:** The Environmental Quality Council should publish and make available a brochure explaining the basic provisions of conservation easements.

# An Overview: Trust Land Management

To begin to address the issues raised in HJR 57, it is necessary to provide an overview of state trust lands and conservation easements as they now exist in Montana as well as other conservation measures related to state trust lands.

The Enabling Act, passed by Congress in 1889, and subsequent land grant acts gave Montana almost 6 million acres of land to be managed for the benefit of common schools as well as other institutions, including colleges, a veteran's home, and a state reform school. (The Enabling Act is included in **Appendix B.**)

The state manages about 5 million acres of surface land and 6 million acres of mineral estate for the trusts. (The mineral acreage exceeds the surface total because the state retained mineral rights when land was sold).<sup>1</sup>

State land management is overseen by the Board of Land Commissioners. Known as the Land Board, the panel consists of the Governor, the Attorney General, the Secretary of State, the Auditor, and the Superintendent of Public Instruction. The Department of Natural Resources and Conservation (DNRC) is charged with the administration of trust lands.

In describing the management powers and duties of the Land Board, 77-1-202, MCA, states, in part:

(1) In the exercise of these powers, the guiding principle is that these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act. The board shall administer this trust to:

(a) secure the largest measure of legitimate and reasonable advantage to the state; and

(b) provide for the long-term financial support of education.

(2) It is consistent with the powers and duties provided in subsection (1) that the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation.

Today, trust lands generate revenue from many sources, including grazing and agricultural leases, the mining of coal and gravel, drilling for oil and gas, logging, and leases for commercial, recreational, and residential uses. Some lands generate revenue from more than one use. For example, trust land leased for a wind farm also is under a grazing lease. Surface land leased for grazing or agriculture may also generate revenue from mineral development. Many state

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<sup>1</sup> Department of Natural Resources and Conservation, 2006 annual report.  
[http://dnrc.mt.gov/About\\_Us/publications/2006/dnrc06ar.pdf](http://dnrc.mt.gov/About_Us/publications/2006/dnrc06ar.pdf)

lands managed for timber, grazing, or agriculture may also raise money through the sale of licenses that permit recreational use.

The multiple-use management of trust lands is mandated by 77-1-203(1), MCA. It states that the Land Board shall manage state lands so that:

(a) they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and

(b) harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.

The law also holds that, subject to legal access and rules, state lands are open to recreational use.

## Conservation Easements

Easements are generally thought of as acquiring a right to build a road, erect a power line, or bury a pipe on someone else's property. However, a conservation easement **prohibits** certain uses of the land. Property rights associated with land are often described as a bundle of sticks; one stick may represent surface uses such as building a home, another stick may be a water right, and another may be a mineral right.

In the case of a conservation easement, the property owner gives up the right to some future use of the property. However, the forfeiting of that right still has value and can be sold.

As defined in 76-6-104, MCA, a conservation easement is "an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction".

The types of conservation easements are further explained in 76-6-203, MCA:

Easements or restrictions under this chapter may prohibit or limit any or all of the following:

- (1) structures--construction or placing of buildings, camping trailers, house trailers, mobile homes, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
- (2) landfill--dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials;

(3) vegetation--removal or destruction of trees, shrubs, or other vegetation;

(4) loam, gravel, etc.--excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance;

(5) surface use--surface use except for such purposes permitting the land or water area to remain predominantly in its existing condition;

(6) acts detrimental to conservation--activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat and preservation;

(7) subdivision of land--subdivision of land as defined in 76-3-103, 76-3-104, and 76-3-202;

(8) other acts--other acts or uses detrimental to such retention of land or water areas in their existing conditions.

A landowner may sell or grant a conservation easement to a public body, such as a state or local government agency, or to a qualified private organization defined by 76-6-104, MCA, as a private, nonprofit organization that aims to promote open space.

Conservation easements may be granted in perpetuity or for a term of at least 15 years, as specified by 76-6-202, MCA.

A recent audit of conservation easements by the Legislative Audit Division found that there are about 1,250 conservation easements in Montana covering more than 1.5 million acres of land, which represents less than 2% of Montana's acreage. Many conservation easements are held by private, qualified organizations, but government agencies, including the Department of Fish, Wildlife, and Parks (FWP), are also major holders of easements.<sup>2</sup>

## Conservation Easements and Public Land

Almost 99% of the land in Montana that is under a conservation easement is owned by private parties. The remainder is divided among federal and tribal lands, state-owned lands, and local government property.<sup>3</sup>

In 2001, the Legislature passed Senate Bill No. 159, giving the Land Board limited power to grant certain easements for conservation purposes on state lands. As amended, the measure passed the House 99-1 and the Senate 46-1.

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<sup>2</sup> 2007 Performance Audit, Conservation Easements, <http://leg.mt.gov/content/audit/download/06P-01.pdf>

<sup>3</sup> Ibid.

Section 77-2-101(1)(e), MCA, allows easements for conservation purposes on state lands to be granted:

- (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;
- (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
- (iii) to a nonprofit corporation for the Owen Sowerwine Natural Area located within section 16, township 28 north, range 21 west, in Flathead County.

According to testimony during the 2001 hearings, the DNRC director at the time said that the agency came up with the idea to sell conservation easements on particular parcels because they were within Wildlife Management Areas managed by the FWP and the habitat goals of FWP conflicted with the mandate of the DNRC to maximize revenue. **(Appendix C)**

To date, only the provision of 77-2-101, MCA, that allows an easement for conservation purposes to be granted to FWP has been exercised. An easement on about 6,800 acres in Missoula and Powell counties was granted in 2004 for \$1.6 million. The purpose of the easement included protecting habitat for elk and deer, but stipulated that forestry and recreation also further the purpose of the easement. **(Appendix D)**

A legal opinion requested last year by Senator Aubyn Curtiss explores the legality of the law regarding conservation easements on state lands. **(Appendix E)**

Chief legislative attorney Greg Petesch cited 77-2-106, MCA, which requires the Land Board to charge and collect the full market value of the estate or interest disposed of through the granting of any easement and also fix, charge, and collect the amount of the actual damages resulting to the remaining land from the granting of an easement as nearly as the damages can be ascertained.

The Land Board may accept in-kind payments of services and materials equal to the full market value of any easement upon state trust land.

Petesich noted that while determining the value of "development rights" disposed of by granting a conservation easement may be difficult, the action is still legal. He wrote: "So long as full market value for the conservation easement is received by the state, there is no constitutional impediment to granting a conservation easement on state land."

## **Prior Legislation**

This study was born out of legislation that failed in the 2007 session. Senate Bill No. 391 introduced by Senator Dan Weinberg, would have expanded the authority of the Land Board to grant conservation easements on state trust land. **(Appendix F)**

The measure passed the Senate, but died in the House. As amended, the bill would have:

- limited the conservation easements to 50 years or less;
- required the DNRC to reappraise the value every 10 years and adjust the payment;
- prohibited qualified nonprofits from holding conservation easements;
- reserved the mineral rights;
- required the Land Board to provide compelling evidence that the easement would comply with the multiple-use concept and allow traditional and recreational uses in place before the easement was granted; and
- limited the total acreage of state trust land placed under conservation easements to 25,000 acres.

The fiscal note estimated that conservation easements could be sold on about 900 acres of land a year, raising just more than \$900,000 in additional trust revenue annually.

In 2005, Senator Greg Barkus carried a bill that would have allowed the Land Board to sell less than fee simple interest in state lands for the purpose of restricting rights to residential, commercial, and industrial uses. The measure, Senate Bill No. 97, would not have allowed the conveyance to restrict recreation, grazing, agricultural, or timber uses. The bill passed the Senate, but died in the House. The fiscal note predicted impacts similar to those listed in the 2007 bill. **(Appendix G)**

## Other Types of Easements

Changes to state law in 2001 specifically referenced easements for conservation purposes, although that term is not defined. However, prior to those changes, and continuing today, the law also allows the Land Board to grant easements for public parks, community buildings, cemeteries, and other public uses.

Furthermore, pursuant to 77-2-101(2), MCA, the Land Board may grant easements on trust land for uses defined as a public use in the eminent domain statutes under 70-30-102, MCA.

Besides the Blackfoot Clearwater conservation easement allowed by state law, 13 other easements on trust lands granted between 1963 and 2007 include conservation measures. All of the easements were granted in perpetuity. **(Appendix H)**

In the 1960s, the Fish and Game Commission bought easements for rights-of-way for public recreation and the management or conservation of wildlife. In granting these easements, the Land Board reserved the right to sell timber from the parcels because of fire damage or for any reason that the Land Board determined necessary to protect the resource. (An example of one of these deeds is included in **Appendix I.**)

In 1983, the Department of Fish, Wildlife, and Parks paid the state \$34,375 for a right-of-way for a conservation easement on 268 acres on the Blackfoot River in Missoula County. The deed



stated that the land was in a natural state, had significant ecological, scenic, and aesthetic values, and was an important part of the Blackfoot River system. The agreement provided for the continuation of historical uses, including timber management, livestock grazing, water use and development, and oil and gas leasing and development. However, it prohibited new roads and residences. (**Appendix J**)

In 1989, two "scenic" easements on two 320-acre parcels were sold to the Custer Battlefield Preservation Committee, Inc., for a total of \$8,800. Both easements forbid any subdivision of the property or any structures except those for minimal agricultural improvements. The state stipulated that livestock grazing would be allowed as well as the prospecting and removal of minerals. (One of these easements is included in **Appendix K.**)

More recently, three easements were granted to the Department of Transportation for "wetland credit"--offsetting wetlands displaced by road building. The deeds prohibit grazing for 5 years and forbid surface removal of minerals, such as gravel. However, the state retained the rights to explore and extract minerals, such as oil or gas, so long as the activities do not occupy the easement area. (An example of one of these deeds is included in **Appendix L.**)

The Department of Fish, Wildlife, and Parks has also entered into a 5-year option to purchase an easement on trust land adjacent to Ulm Pishkin State Park.

## **Conservation Leases and Licenses**

The Land Board is authorized by 77-1-204, MCA, to lease trust lands for uses other than agriculture, grazing, timber harvest, or mineral production as long as the leases satisfy the Land Board's obligation to the trust and include multiple-use management.

In 2001, the Land Board issued a land use license to the Montana Audubon Society for a 442-acre parcel in Flathead County known as the Owen Sowerwine Natural Area. Two years after the Legislature passed the Montana Natural Areas Act of 1974 (Title 76, chapter 12, part 1), the parcel outside Kalispell was designated a natural area. That means "an area of land that must generally appear to have been affected primarily by the forces of nature with the visual aspects of human intrusion not dominant", which must also must have certain characteristics.

The required master plan for the area was adopted by the Land Board in 2003. Domestic livestock, most pets, motorized vehicles, bicycles, mining operations, and commercial enterprises are among things banned in the area. The license provides for an annual rental payment of \$642 increasing 2% annually through February 2010, when the license expires. (**Appendix M**)

The Owen Sowerwine Natural Area is one of the three parcels eligible for an easement for purposes listed under 77-2-101, MCA.

In 1999, the DNRC issued five 20-year leases on about 12,000 acres of land known as the Snowcrest properties in Madison County. The property came under state trust land management

in 1996 through a land exchange with Turner Enterprises. In addition to grazing and outfitting rights, bidders were able to submit proposals on precluding cabin site development. Four of the five winning bids included extra money to prevent cabin development.

Private

# Easement Provisions in Montana and Other States

Other western states with significant amounts of trust land differ in the way their laws address conservation measures and easements on those trust lands.

Common among states is the power to issue easements on trust lands. Some states, such as Utah, Colorado, and Montana, specifically mention easements for conservation. Washington has the power to sell less than fee simple interest in trust lands for the creation of natural resources conservation areas, effectively the same thing as a conservation easement. Other states, such as Idaho and Wyoming, simply allow easements on trust lands for public uses. These could be interpreted to mean that the easement could be granted for conservation purposes, though that is not specifically stated.

Through law and rules, most states require that full market value be obtained for easements or sales of interests in trust lands.

Like Montana, some states specifically mention multiple use of state lands. In Utah, for example, the state reserves the right to explore for and develop minerals and use the land for other compatible uses.

Easements in Montana are granted in perpetuity or until the use for which the easement was issued is no longer valid. Other states choose to limit easement terms. Idaho limits easements to terms of 55 years. Wyoming may issue easements in perpetuity, but the preferred term is 35 years or less with an option to renew.

## Montana

The Land Board may grant easements for conservation purposes in three specific instances on trust lands in Montana:<sup>4</sup>

- to the Department of Fish, Wildlife, and Parks for parcels that are surrounded by or adjacent to land owned by the Department of Fish, Wildlife, and Parks as of January 1, 2001;
- to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
- to a nonprofit corporation for the Owen Sowerwine Natural Area located within section 16, township 28 north, range 21 west, in Flathead County.

The Land Board may grant easements for "other public uses" in addition to any public use as listed under the eminent domain statutes in 70-30-102. One of those uses includes natural areas.

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<sup>4</sup> 77-2-101, MCA

The minimum land value charge for a right-of-way easement is the market value of the area encumbered by the easement or \$100 per section, whichever is greater.<sup>5</sup> Depending on the market conditions in the area where an application for an easement is made, the Department of Natural Resources and Conservation may perform an appraisal or set the charge according to a fee schedule.<sup>6</sup>

Easements may be granted in perpetuity or, in some cases, terminated when the easement use is no longer needed.<sup>7</sup>

Article X, section 11(2), of the Montana Constitution contemplates that an interest in state land may be sold as long as the full market value is obtained for that interest. In regard to easements, this is reflected in 77-2-106, MCA, which states that full market value must be obtained for an estate or interest disposed of through the granting of easement.

The Land Board also has the power to sell state lands.<sup>8</sup> According to 77-2-304, MCA, the state must withhold the mineral interest. The Land Board also has limited development interests on a sale of state land. The sale of 640 acres in Powell County in 2007 restricted development to 25 lots.<sup>9</sup>

## **Arizona**

The Department of State Lands may grant rights-of-way for any purpose it deems necessary on and over state lands, subject to terms and conditions the Department imposes. The Department may make rules respecting the granting and maintenance of such rights-of-way and sites.<sup>10</sup>

Rental or other payment for each right-of-way shall be determined by the commissioner after appraisal. Rights-of-way for exclusive use or perpetual in nature--except rights-of-way granted to governmental agencies of the state or political subdivisions and municipal corporations--shall be sold at public auction as provided under the laws for sale of state land after appraisal.<sup>11</sup>

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<sup>5</sup> Administrative Rules of Montana, 36.2.1005

<sup>6</sup> Tom Schultz, DNRC, phone interview 10/22/07

<sup>7</sup> 77-2-105, MCA

<sup>8</sup> 77-2-301, MCA

<sup>9</sup> Patent to State Land No. F-0068. Approved by Board of Land Commissioners Sept. 17, 2007. Based on Land Banking Sale #376

<sup>10</sup> Arizona Revised Statutes, 37-461

<sup>11</sup> Arizona Rules, R12-5-801

Trust land may be sold for conservation purposes at a public auction based on one independent appraisal and one independent review appraisal, both of which may be reviewed by the department, of the fair market value of the trust land being offered. The appraisal may not reflect any conservation covenant that runs with the land in order to reduce the appraised value.<sup>12</sup>

## **Colorado**

The State Board of Land Commissioners may sell or lease conservation easements, licenses, or other similar interests in land in accordance with the provisions of sections 9 and 10 of Article IX of the Colorado Constitution.<sup>13</sup>

The Constitution states that trust lands are an asset that should not be significantly diminished and that the economic productivity of all lands held in public trust is dependent on sound stewardship, including protecting and enhancing the beauty, natural values, open space, and wildlife habitat thereof, for this and future generations. Management should produce "reasonable and consistent income".<sup>14</sup>

The Board sets a minimum bid for sales of state lands.<sup>15</sup>

State law also allows for rights-of-way across or upon any portion of state land for various uses including "any lawful use or purpose". A right-of-way may be granted to any person or to any local, state, or federal government agency. The Board determines the terms. However, when rights-of-way granted cease to be used for those purposes, the rights-of-way terminate, and all rights revert to the state or its successors in interest.<sup>16</sup>

## **Idaho**

State law allows easements for any public or private purpose or beneficial use.<sup>17</sup>

The term of an easement may be from 10 to 55 years. For highways, roads, railroads, reservoirs, trails, canals, ditches, or any other improvements that require long-term, exclusive, or near-exclusive use and occupation of the right-of-way, the compensation is up to 100% of land value plus payment for any damage or impairment of rights to the remainder of the property as

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<sup>12</sup> Arizona Revised Statutes, 37-314

<sup>13</sup> Colorado Revised Statutes, 36-1-150

<sup>14</sup> Colorado Constitution, Article IX

<sup>15</sup> Colorado Revised Statutes, 36-1-124

<sup>16</sup> Colorado Revised Statutes, 36-1-136

<sup>17</sup> Idaho Code, 58-603

determined by the director and supported by specific data such as an appraisal. The Director of the State Lands Department may grant easements under \$25,000 in value.

## **New Mexico**

State law allows for easements and rights-of-way granted over, upon, through, or across trust lands for a variety of uses including "other purposes". The price is fixed by the Commissioner of Public Lands.<sup>18</sup> Through administrative rule, the price is determined by field inspection or appraisal and/or subsequent negotiation or such other method as the Commissioner deems best. The price may not be less than the fair market value of the interest to be granted. Easements are granted by a term deemed in the best interests of the trust, but may not be granted in perpetuity.<sup>19</sup>

The state's Enabling Act allows for sales of interests in state lands to the highest and best bidder at a public auction. The land or interest must be appraised at its true value, and no sale or other disposal may be made for a consideration less than the value.<sup>20</sup>

## **Oregon**

The State Land Board shall manage trust lands for the greatest permanent value while giving due consideration in the sale, exchange, or leasing of any state lands to the protection and conservation of all natural resources, including scenic and recreational resources, so as to conserve the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic, and animal life.<sup>21</sup>

The Division of State Lands must seek to obtain the full fair market value interests in land sold or exchanged. Public review and State Land Board approval of proposed land sales must be sought at key decision points as determined by the Director. The criteria for evaluating any land sale must include the current and future estimate of value and income potential; location, accessibility, and manageability; the potential for alternative income-generating uses; and the level and intensity of expressed interest in a sale, exchange, or purchase.<sup>22</sup>

Easements may be issued for uses and developments that limit the full use or development of state-owned land. Compensation must be the greater of 100% of the fair market value of the

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<sup>18</sup> New Mexico Statutes, 19-7-57

<sup>19</sup> New Mexico Administrative Code, 19.2.10

<sup>20</sup> Enabling Act for New Mexico, Section 10.

<sup>21</sup> Oregon Revised Statutes, 273.051

<sup>22</sup> Oregon Revised Statutes, 141-067-140

area requested for the easement, \$250, or the highest comparative compensatory payment. Easements may be issued for less than 10 years, for 10 to 30 years, or in perpetuity.<sup>23</sup>

## Utah

The Director of the School and Institutional Trust Lands Administration shall establish criteria by rule for the sale, exchange, lease, or other disposition or conveyance of trust lands, including procedures for determining fair market value of those lands.<sup>24</sup> The Director also shall establish rules for the issuance of easements on, through, and over any trust land and may establish price schedules.<sup>25</sup>

The School and Institutional Trust Lands Administration may issue exclusive, nonexclusive, and conservation easements on trust lands when the agency deems it consistent with trust responsibilities. Price schedules are based on the cost incurred by the agency in administering the easement and the fair market value of the particular use. Easement terms are usually not longer than 30 years. Longer or shorter terms may be granted upon application if the director determines that such a grant is in the best interest of the trust beneficiaries.<sup>26</sup>

Each easement must contain provisions necessary to ensure responsible surface management, including reservation for mineral exploration and development and other compatible uses. For conservation easements, the easement must specify the resources being protected and the conditions under which the conservation easement may be terminated.<sup>27</sup>

To sell lands, the agency must contract for an appraisal to estimate the fair market value of the trust land. The appraisal is paid for by the purchaser. The cost of the appraisal must be borne by the successful purchaser of the parcel. An economic analysis of the proposal done by the agency must include the appraisal, an assessment of real estate trends, market demand, opportunity costs (including potential for appreciation) and associated management costs of retention. Trust land may be sold at public auction or in some cases with approval from the School and Institutional Trust Lands Board of Trustees.<sup>28</sup>

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<sup>23</sup> Oregon Administrative Rules, 141-122

<sup>24</sup> Utah Code Annotated, 53C-4-101

<sup>25</sup> Utah Code Annotated, 53C-4-203

<sup>26</sup> Utah Administrative Code, R850-40

<sup>27</sup> *Ibid.*

<sup>28</sup> Utah Administrative Code, R850-80

## Washington

The Department of Natural Resources may grant the same easements and rights in public lands that an applicant might acquire in privately owned lands. Grants must secure full market value of the estate or interest.<sup>29</sup>

State lands are to be managed for multiple-use, defined as providing for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership. That would include such things as timber harvesting and maintaining scenic areas.<sup>30</sup>

However, the Department may purchase, lease, set aside, or exchange any public lands that are deemed to be natural areas, provided that the appropriate state land trust receives the fair market value for any interests that are disposed of and that transactions are approved by the Board of Natural Resources. An area consisting of public land designated as a natural area preserve must be held in trust and not alienated except to another public use upon a finding by the Department of Natural Resources of imperative and unavoidable public necessity.<sup>31</sup>

The Department may transfer fee simple interest or less than fee simple interests in trust land for the creation of natural resources conservation areas to be managed by the Department provided that fair market value compensation for all rights transferred is obtained. Proceeds must be used for the exclusive purpose of acquiring real property to replace those interests utilized for the conservation area in order to meet the Department's fiduciary obligations and to maintain the productive land base of the various trusts.<sup>32</sup> The Department shall determine what management activities are suitable for the natural resource conservation area. Such activities may include forestry, agriculture, or other resource management activities if they are consistent with the other purposes and requirements of the law.<sup>33</sup>

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<sup>29</sup> Revised Code of Washington, 79.36.355

<sup>30</sup> Revised Code of Washington, 79.10.110 and 79.10.120

<sup>31</sup> Revised Code of Washington, 79.70.040

<sup>32</sup> Revised Code of Washington 79.71.050

<sup>33</sup> Revised Code of Washington 79.71.030



## Wyoming

The Board of Land Commissioners may grant permanent rights-of-way or easements on state lands for railroads, highways, or "other public conveyances".<sup>34</sup> As further explained in agency rules, easements may also be issued for open space and "any appropriate use".<sup>35</sup>

The Board may grant easements in perpetuity or for any term of years, although the rules state that whenever possible and practical, and consistent with the purpose, easements should be issued for terms of 35 years or less with an option to renew.<sup>36</sup>

Payment for easements may be negotiated, but must be at least \$250 or market value, whichever is greater. These rules apply to all federal, state, county, municipal, or other governmental agencies as well as quasi-governmental bodies or organizations the same as if they were private parties.<sup>37</sup> The Board must give its final approval for easements.<sup>38</sup>

State land must be sold at public auction to the highest responsible bidder after being appraised by the Board. The sale must be for at least the appraised value, but not less than \$10 per acre.<sup>39</sup>

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<sup>34</sup> Wyoming Statutes, 36-9-118

<sup>35</sup> Wyoming Rules and Regulations, Chapter 3, Section 3

<sup>36</sup> Wyoming Rules and Regulations, Chapter 3, Section 4

<sup>37</sup> Wyoming Rules and Regulations, Chapter 3, Section 6

<sup>38</sup> Wyoming Rules and Regulations, Chapter 3, Section 7

<sup>39</sup> Wyoming Statutes, 36-9-102

# A Legal Analysis of Land Board Authority

At the January 15, 2008, EQC meeting, several questions were raised regarding the authority of the State Land Board and the Department of Natural Resources and Conservation (DNRC) with respect to conservation easements and similar property interest dispositions on state trust lands.

The Council specifically requested a legal analysis by EQC attorney Todd Everts.

**QUESTION #1: WHAT IS THE STATE LAND BOARD'S AND THE DNRC'S EXISTING LEGAL AUTHORITY REGARDING CONSERVATION EASEMENTS AND SIMILAR DISPOSITIONS OF PROPERTY INTERESTS ON STATE TRUST LANDS? IS THE DNRC REQUESTING ANY ADDITIONAL AUTHORITY?**

## Overview and Analysis of Existing Legal Authority

In order to understand the legal authority vested in the State Land Board (the Board) and the DNRC regarding conservation easements and the disposition of similar property interests, it is necessary to review and analyze The Enabling Act, the Montana Constitution, applicable statutory provisions, and relevant case law.

### *Historical Context*

In the golden year of 1889, Montana was admitted into the Union under the Omnibus Enabling Act of 1889.<sup>40</sup> Upon admission, Congress granted Montana the sixteenth and thirty-sixth sections of each township within Montana "for the support of common schools".<sup>41</sup> Montana also received additional grants of acreage for other educational and state institutions. According to the DNRC, total trust land acreage has fluctuated over the years due to land sales and acquisitions, but as of fiscal year 2007, the trust land surface acreage totals more than 5.1 million acres and the mineral acreage is in excess of 6.2 million acres.<sup>42</sup>

### *Fiduciary Responsibilities*

The Enabling Act, in tandem with the Montana Constitution, imposes fiduciary responsibilities on the state with regard to state trust land. In 1999, the Montana Supreme Court, in a seminal case,

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<sup>40</sup> The Enabling Act, chapter 180, 25 Stat. 676 (1889)

<sup>41</sup> Ibid, section 10

<sup>42</sup> DNRC Trust Land Management Division Fiscal Year 2007 Annual Report, page 1

provided the overarching framework for those fiduciary responsibilities.<sup>43</sup> The Court held that the federal grant of lands to Montana constituted a trust. The terms of the trust are set forth in the Montana Constitution and The Enabling Act. Montana's 1889 Constitution accepted the lands from the federal government and provided that those lands would be held in trust consonant with The Enabling Act, and the 1972 Montana Constitution continued those terms. The State of Montana is the trustee of those lands. The State Land Board is the instrumentality created to administer that trust and is bound upon principles that are elementary in order to secure the largest measure of legitimate advantage to the beneficiary. The Board owes a higher duty to the public than does an ordinary businessman. Montana's constitutional provisions are limitations on the power of disposal by the Legislature. One limitation on the Legislature in the power of disposal is the trust's requirement that full market value be obtained for trust lands.

The Montana Supreme Court has also held that the state, as the trustee, has an undivided loyalty to the beneficiaries of the trust.<sup>44</sup> The Court noted that:

When a party undertakes the obligation of a trustee to receive money or property for transfer to another, he takes with it the duty of undivided loyalty to the beneficiary of the trust. The undivided loyalty of a trustee is jealously insisted on by the courts which require a standard with a "punctilio of an honor the most sensitive." A trustee must act with the utmost good faith towards the beneficiary, and may not act in his own interest, or in the interest of a third person.<sup>45</sup>

The Court has also determined that the Board and the DNRC must have large discretionary power in managing state trust lands,<sup>46</sup> but that discretionary power is not unlimited and it must conform to the trust<sup>47</sup> and must be consistent with the Constitution.<sup>48</sup>

### ***Trust Land Administration and Management***

The Board has the constitutional authority "to direct, control, lease, exchange, and sell school lands and lands which have been or may be granted for the support and benefit of the various state

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<sup>43</sup> Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 (1999)

<sup>44</sup> Wild West Motors, Inc. v. Lingle, 224 Mont. 76, 728 P.2d 412 (1986)

<sup>45</sup> *Ibid.*

<sup>46</sup> State ex rel. Evans v. Stewart, 53 Mont. 18, 161 P. 309 (1916)

<sup>47</sup> Toomey v. State Board of Land Commissioners, 106 Mont. 547, 81 P.2d 407 (1938)

<sup>48</sup> State ex rel. Thompson v. Babcock, 147 Mont. 46, 409 P.2d 808 (1966)

educational institutions, under such regulations and restrictions as may be provided by law".<sup>49</sup>  
The Montana Constitution sets out the Board's authority regarding public trust land disposition:

**Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.<sup>50</sup>

In addition, The Enabling Act also lays out some terms and conditions regarding state trust land disposition, including the following:

- that all lands granted by the act be disposed of only at public sale after advertising-tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre;
- the lands may be leased under such regulations as the legislature may prescribe; and
- the State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by the Act, as may be acquired in privately owned lands through proceedings in eminent domain; provided, however, that none of the lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market

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<sup>49</sup> Article X, section 4, of the Montana Constitution

<sup>50</sup> Article X, section 11, of the Montana Constitution

value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.<sup>51</sup>

The Montana Supreme Court has ruled that The Enabling Act must be liberally construed with the view of accomplishing the object sought to be attained.<sup>52</sup> The Court has also held that The Enabling Act contemplates that "an interest or estate less than the fee may be leased or disposed of".<sup>53</sup>

Statutorily, the Legislature has outlined the powers and duties of the Board expressly authorizing the Board to "exercise general authority, direction, and control over the care, management, and disposition of state lands".<sup>54</sup> Under the direction of the Board, the DNRC is charged with the administration of state trust lands.<sup>55</sup> The "guiding principle" in the administration of Montana's trust lands is that "these lands and funds are held in trust for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state as provided in The Enabling Act".<sup>56</sup> The Board is required to administer the state trust lands to secure the largest measure of legitimate and reasonable advantage to the state and provide for the long-term financial support of education.<sup>57</sup> It is consistent with the powers and duties of the Board that "the people are entitled to general recreational use of state lands to the extent that the trusts are compensated for the value of the recreation".<sup>58</sup>

The Board is also required to manage state lands under the multiple-use management concept.<sup>59</sup> The law requires that:

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<sup>51</sup> Section 11 of The Enabling Act (as amended by the acts of May 7, 1932, Ch. 172, 47 Stat. 150 (1932) and October 16, 1970, Pub. L. No. 463, 84 Stat. 987 (1970))

<sup>52</sup> State ex rel. Morgan v. State Board of Examiners, 131 Mont. 188, 309 P.2d 336 (1957), overruling Bryant v. State Board of Examiners, 130 Mont. 512, 305 P.2d 340 (1956)

<sup>53</sup> State ex rel. Hughes v. State Board of Land Commissioners, 137 Mont. 510, 353 P.2d 331 (1960)

<sup>54</sup> 77-1-202, MCA

<sup>55</sup> 77-1-301, MCA

<sup>56</sup> 77-1-202, MCA

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> 77-1-203, MCA

(1) The board shall manage state lands under the multiple-use management concept defined as the management of all the various resources of the state lands so that:

(a) they are utilized in that combination best meeting the needs of the people and the beneficiaries of the trust, making the most judicious use of the land for some or all of those resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions and realizing that some land may be used for less than all of the resources; and

(b) harmonious and coordinated management of the various resources, each with the other, will result without impairment of the productivity of the land, with consideration being given to the relative values of the various resources.<sup>60</sup>

The Montana Supreme Court has held that income is "a" consideration, but not "the" consideration regarding school trust lands and that maximizing income is not paramount to the exclusion of wildlife or environmental considerations.<sup>61</sup>

The Board also has general authority on behalf of the state to accept gifts, donations, grants, legacies, and devices.<sup>62</sup> The Board is required to manage the gifted lands and other property for the benefit of the specific purposes designated by the person gifting the property.<sup>63</sup> The Board may also accept gifts, donations, or contributions of land suitable for forestry or park purposes and enter into agreements with the federal government or other agencies for acquiring by lease, purchase, or otherwise those lands that are desirable for state forests.<sup>64</sup>

#### ***Leases, Sales, Exchanges, and Reservations of State Trust Land Property Interests***

The Board may lease state trust lands for up to 99 years for uses other than agriculture, grazing, timber harvest, or mineral production under the terms and conditions that best fulfill the duties and obligations of the Board to the trust, including multiple-use management.<sup>65</sup>

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<sup>60</sup> Ibid.

<sup>61</sup> Ravalli County Fish & Game Association, Inc. v. Department of State Lands, 273 Mont. 371, 903 P.2d 1362 (1995)

<sup>62</sup> 77-1-213, MCA

<sup>63</sup> Ibid.

<sup>64</sup> 77-1-214, MCA

<sup>65</sup> 77-1-204, MCA

The Board may sell state land subject to certain limitations and if it is in the best interests of the state.<sup>66</sup> State law includes restrictions on land available for sale, including land likely to contain valuable mineral deposits or certain state land bordering on navigable lakes, nonnavigable meandered lakes, and navigable streams.<sup>67</sup> The Board is also required, when selling any state land, to reserve certain mineral rights.<sup>68</sup>

The Board may exchange land with the United States, tribal governments, a nongovernmental entity, state government, and other state and local public entities subject to certain statutory restrictions.<sup>69</sup>

The Board clearly has the right, as any property owner would, to reserve and retain property interests when disposing of property.

### **Easements**

The Board has the statutory authority to grant certain types of easements on state lands for certain purposes. However, it is necessary to highlight some of the subtle distinctions between what may be termed "traditional" easements and conservation easements allowed under state law.

#### Traditional Easements

The Montana Supreme Court has held that an easement is a "right which one person has to use the land of another for a specific purpose or a servitude imposed as a burden upon land".<sup>70</sup> Stated another way, an easement is a grant of the use of and not a grant of title to land.<sup>71</sup> Under Montana law, an easement is considered to be a "burden" or "servitude" attached to land.<sup>72</sup>

Statutorily, there are 20 listed servitudes, ranging, for example, from the traditional right-of-way, to the right of conserving open space to preserve park, recreation, historic, aesthetic, cultural, and

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<sup>66</sup> 77-2-301, MCA

<sup>67</sup> 77-2-303, MCA

<sup>68</sup> 77-2-304, MCA

<sup>69</sup> Title 77, chapter 2, part 2, MCA

<sup>70</sup> Laden v. Atkeson, 112 Mont. 302, at 305, 116 P.2d 881 (1941)

<sup>71</sup> Legal Memorandum by Greg Petesch to the Eminent Domain Subcommittee of the Environmental Quality Council regarding the additional use of easement acquired through eminent domain (March 15, 2000)

<sup>72</sup> 70-17-101, MCA

natural values on or related to land, or to using land adjacent to a firearms shooting range as a range safety zone.<sup>73</sup> The extent of the servitude is "determined by the terms of the grant or the nature of the enjoyment by which it was acquired".<sup>74</sup> The Montana Supreme Court has also stated that "an easement is a property right protected by the constitutional guarantees against the taking of private property without just compensation".<sup>75</sup>

### Conservation Easements

Although the term "conservation easement" is not defined in the state land management statutes under Title 77, chapter 1, of the Montana Code Annotated, it is defined within the Montana Open-Space Land and Voluntary Conservation Easement Act (hereafter Conservation Easement Act) to mean:

an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.<sup>76</sup>

In addition, if a public body (state, county, city, town, or other municipality) acquires an interest in land under the provisions of the Conservation Easement Act that is less than fee simple, this acquisition is considered to be a conservation easement.<sup>77</sup>

Permissible conservation easements include easements or restrictions that may prohibit or limit the following:

- (1) structures--construction or placing of buildings, camping trailers, housetrailer, mobile homes, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
- (2) landfill--dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials;

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<sup>73</sup> 70-17-101(4), (18), (20), MCA

<sup>74</sup> 70-17-106, MCA

<sup>75</sup> City of Missoula v. Mix, 123 Mont. 365, at 370, 214 P.2d 212 (1950)

<sup>76</sup> 76-6-104(2), MCA

<sup>77</sup> 76-6-201, MCA



- (3) vegetation--removal or destruction of trees, shrubs, or other vegetation;
- (4) loam, gravel, etc.--excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance;
- (5) surface use--surface use except for such purposes permitting the land or water area to remain predominantly in its existing condition;
- (6) acts detrimental to conservation--activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat and preservation;
- (7) subdivision of land--subdivision of land as defined in 76-3-103, 76-3-104, and 76-3-202, MCA;
- (8) other acts--other acts or uses detrimental to such retention of land or water areas in their existing conditions.<sup>78</sup>

A conservation easement may be granted either in perpetuity or for a term of years.<sup>79</sup> A property owner may sell or grant a conservation easement to a public body or to a private qualified organization.<sup>80</sup>

#### Subtle Distinctions Between Traditional Easements and Conservation Easements

As the Montana Supreme Court has noted, an easement in the traditional sense is the right of one person to use the land of another for a specific purpose or, stated another way, it is a servitude imposed as a burden on the land.<sup>81</sup> A conservation easement, however, does not grant a use of land, but prohibits certain uses of land through the voluntary relinquishment (i.e., sale between willing parties) by a landowner to the easement holder of certain property rights. Stated another way, "a conservation easement may be described as the sale of the right to change the existing use of land or a sale of the right to develop the land".<sup>82</sup>

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<sup>78</sup> 76-6-203, MCA

<sup>79</sup> 76-6-202, MCA

<sup>80</sup> 76-6-106 and 76-6-204, MCA

<sup>81</sup> City of Missoula v. Mix, at #36.

<sup>82</sup> See Appendix E, a legal memorandum from Greg Petesch to Senator Curtiss regarding the legality of conservation easements on school trust lands (March 29, 2007)

## Easements on State Trust Lands

The Board has the statutory authority to grant certain types of easements on state lands for certain purposes.<sup>83</sup> The Board may grant easements for purposes such as schoolhouse sites and grounds, public parks, community buildings, cemeteries, conservation purposes, and other public uses.<sup>84</sup> Easements granted for "conservation purposes" under the provisions of 77-2-101(1)(e), MCA, may be specifically granted:

- (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;
- (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and
- (iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township 28 north, range 21 west, in Flathead County.

The Board also may grant easements on state land for rights-of-way and other uses defined as a public use in the eminent domain statutes.<sup>85</sup>

It is noteworthy that an easement for "conservation purposes" is not defined within the trust land administration statutes. It is also noteworthy that there are numerous examples of easements being granted on state trust lands that include conservation measures.

The Board is also required to grant to the state a conservation easement for cabin sites, home sites, or city or town lots that are to be sold as provided under state law.<sup>86</sup> The conservation easement is required to run with the land in perpetuity and must:

- (1) prohibit subdivision of the land, lake, or stream;
- (2) for property within 100 feet of a river, stream, or lake, prohibit the cutting of trees except as necessary for construction on the lot, fire prevention, safety, or protection of personal property; and
- (3) require that any permanent structure be set back 25 feet from the high-water mark of a lake or stream.<sup>87</sup>

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<sup>83</sup>77-2-101, MCA

<sup>84</sup>77-2-101(1), MCA

<sup>85</sup>77-2-101(2), MCA

<sup>86</sup>77-2-318, MCA

<sup>87</sup>77-2-319, MCA

Under the Montana Natural Areas Act of 1974,<sup>88</sup> the Board may grant an easement or acquire property interests, including gifted conservation easements for the establishment of natural areas.<sup>89</sup> A natural area is defined as:

An area of land that must generally appear to have been affected primarily by the forces of nature with the visual aspects of human intrusion not dominant and also must have one or more of the following characteristics:

(a) an outstanding mixture or variety of vegetation, wildlife, water resource, landscape, and scenic values;

(b) an important or rare ecological or geological feature or other rare or significant natural feature worthy of preservation for scientific, educational, or ecological purposes.<sup>90</sup>

### ***Some Concluding Thoughts on Existing Legal Authority***

When all is said and done, as long as full market value is obtained and the incumbent legal constraints are followed, the Board has the following tools at its disposal regarding trust land administration that are relevant to the HJR 57 Study:

(1) The Board has the authority to sell an estate or interest in state trust lands. This interest could include (and has included in some of the Board's past transactions) the sale of development rights. This authority includes the ability to sell/retain an estate or interest in perpetuity.

(2) The Board has the authority to retain an estate or interest in state trust lands. This interest could include (and has included in some of the Board's past transactions) the retention of development rights.

(3) The Board has the authority to grant an easement for "conservation purposes" (undefined in the statute) pursuant to 77-2-101(1)(e), MCA. The Board also has the authority to grant an easement for "other public uses" under 77-2-101(1)(f).

(4) The Board has the authority to grant easements on state trust lands for natural areas under the Montana Natural Areas Act of 1974.

(5) The Board is required to grant to the state, conservation easements for certain cabin sites and home sites under 77-2-318, MCA.

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<sup>88</sup> Title 76, chapter 12, part 1

<sup>89</sup> 76-12-107 and 76-12-108, MCA

<sup>90</sup> 76-12-104(3), MCA

(6) The Board has the authority, under 77-1-213, MCA to accept gifts or donations of land or other property and is obligated to manage the land for the benefit of the specific purposes designated by the person gifting the property. This could include conservation restrictions on the property.

(7) The Board has the authority, under 77-1-204, MCA, to lease trust lands for up to 99 years for uses that could, and have included, conservation uses.

(8) The provisions of the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, part 1, MCA, specifically include public bodies.

### **Additional Authority Being Requested by the DNRC?**

DNRC Director Mary Sexton said that DNRC is not requesting any additional authority regarding conservation easements and similar dispositions of state trust land property interests at this time.

### **QUESTION #2: CAN THE BENEFICIARIES OF THE STATE TRUST LANDS FILE SUIT TO TERMINATE THE DISPOSITION OF A PROPERTY INTEREST GRANTED BY THE STATE LAND BOARD TO ANOTHER PARTY?**

The answer to this is "yes", the beneficiaries could file a lawsuit. However, assuming that the Board and the DNRC followed their trust management responsibilities and received full market value for the disposition, the success on the merits is unlikely given that the Montana Supreme Court held that the Board and the DNRC have large discretionary power in managing state lands.<sup>91</sup>

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<sup>91</sup> City of Missoula v. Mix, #7.

# Conservation Easement Brochure

During the course of the HJR No. 57 study of conservation easements on school trust lands, the EQC determined that in some circles, there is a need for more information about the provisions of conservation easements in general. The EQC directed staff to draft a brochure that would be printed and distributed by the EQC.

The draft version follows.

## Conservation Easements: 20 Things Everyone Should Know

### **What is a conservation easement?**

A conservation easement is a voluntary legal agreement that limits the use of property. Property ownership comes with many rights. Most of them deal with using the land in some way-- farming, logging, or subdividing, to name a few. A property owner also has a right to limit the use of the land. In the case of a conservation easement, a property owner may sell or donate a right, such as the right to develop, and be compensated for restricting or forfeiting that right while still maintaining ownership of the land.

### **What is the purpose of a conservation easement?**

Typically, the purpose is to preserve property in its current, undeveloped state. Conservation easements may prohibit or limit such things as subdivision, excavation, or acts detrimental to conserving the natural values of the property.

### **Who may sell or donate a conservation easement?**

Any landowner whose property fulfills the requirements of a conservation easement may sell or donate a conservation easement. Typically, conservation easements are placed on large areas of open land.

### **Who may buy or hold a conservation easement?**

Any public body, such as a state or local government agency, or any nonprofit organization that is competent to own property, holds federal tax-exempt status under the Internal Revenue Code, and conserves open space as part of its mission may buy or hold a conservation easement.

### **Who negotiates a conservation easement?**

A conservation easement is negotiated by a willing landowner and a public body or qualified organization.

**Does a conservation easement on a farm or ranch mean no more agricultural operations or timber harvesting?**

No. Since the goal of many conservation easements is to preserve open space, historic agricultural operations and other uses often continue. The land is still owned and managed by the party that sold or donated the conservation easement. The terms of the conservation easement, including what may and what may not occur on the land, are negotiated between the landowner and the public body or organization holding the easement.

**Do conservation easements have anything to do with eminent domain, condemnation, or wilderness areas?**

No.

**Does a conservation easement mean the that public can access the land?**

No. The landowner retains control of the property. However, public access may be part of the voluntary negotiated agreement.

**How long do conservation easements last?**

Montana law requires a conservation easement to be granted for a term of at least 15 years, but many are granted in perpetuity. According to state law, a conservation easement runs with the land and remains in place even if the land is sold.

**How long is perpetuity?**

Forever.

**Why would someone give up a property right forever?**

A landowner may want to know that the land will always be protected. Also, the easement must be in perpetuity to qualify for federal income tax and estate tax benefits. This is a way to guard against speculators who could receive a federal tax deduction for decades until the land rises in value and then subdivide it when the easement expires.

**How does the federal tax break work?**

The tax deduction for conservation easements is based on the potential for an easement to result in a reduced land value, and the amount of that reduced value is then considered a charitable contribution. This occurs whether the easement is sold or donated. The donation must meet three conditions:

1. It must be granted in perpetuity.
2. It must be donated or sold to a qualified organization, such as a government agency or a non-profit land trust.
3. It must be made for conservation purposes including preservation of land use by the public for outdoor recreation or education, protection of wildlife habitat, preservation of farm or forest land for the public's scenic benefit or as part of a governmental conservation policy, or preservation of historic landscapes or buildings.

**Is there a state tax break for conservation easements?**

Montana does not provide property tax incentives for creating conservation easements. The law seeks to ensure that the creation of conservation easements is fiscally neutral for local governments. If an easement prohibits all farming on land classed for tax purposes as agricultural, the property would be reassessed. The assessed value of the land may not fall below the value it held in 1973. Finally, land cannot be reclassified solely on the basis of an easement; other changes in the land use must be taken into account. However, a grantor of an easement may claim a state income tax deduction for the charitable contribution.

**If a conservation easement is placed on state or federal land, is there a tax break?**

No. Government agencies do not pay taxes, so there would be no tax deduction.

**How is the value of a conservation easement determined?**

The value is determined by an appraiser. To qualify for the federal tax break, a landowner must secure a subordination of any mortgage or contract holders, procure an appraisal, and ensure that mineral right ownership does not inhibit the placement of the conservation easement.

**Does a conservation easement reduce the fair market value of the land?**

Typically, yes. A parcel of land may be worth more as a subdivision than as open agricultural land. The federal tax deduction is meant to offset this reduced land value.

**Who enforces the terms of the conservation easement?**

Representatives of the public body or organization that holds the conservation easement may enter the land in a reasonable manner at reasonable times to ensure compliance.

**What happens if land under a conservation easement is sold or passed on to heirs?**

The conservation easement runs with the land and would stay in place. According to state law, a conservation easement runs with the land and remains in place even if the land is sold.

**How many conservation easements are there in Montana?**

A 2007 legislative audit found that there are about 1,250 conservation easements covering more than 1.5 million acres of land, which represents less than 2% of Montana's acreage. Almost 99% of the land under conservation easements is owned by private parties. Many conservation easements are held by nonprofit land trusts, but government agencies, including the Montana Department of Fish, Wildlife, and Parks, are also major holders.

**Who keeps track of conservation easements?**

Conservation easements are recorded at the Clerk and Recorder's Office in the county where the land lies. Sometime in 2008, information about all conservation easements filed in Montana should be available through the state Natural Resource Information System.

**This guide provides a general overview of conservation easements. It is not a substitute for consulting state and federal laws or legal seeking counsel.**

# Conservation Easement Work Plan Tasks

- X 1. Review history of trust lands and conservation easements, legislative history of current trust land conservation easement law, and legal opinion regarding conservation easements on state trust land.
- Who: EQC staff  
Timeline: September 2007 meeting
- X 2. Summary of Legislative Audit report on conservation easements.
- Who: Angus Maciver, Legislative Audit  
Timeline: September 2007 meeting
- X 3. Overview of real estate management on school trust lands, including conservation easements.
- Who: Tom Schultz, Trust Land Administrator, DNRC  
Timeline: September 2007 meeting
- X 4. Overview of conservation easements in Montana.
- Who: Angus Maciver, Legislative Audit  
Timeline: September 2007 meeting
- X 5. EQC discussion and study direction.
- Who: EQC members  
Timeline: September 2007 meeting
- X 6. Summary of other state laws regarding conservation easements on state trust lands.
- Who: EQC staff  
Timeline: January 2008 meeting
- X 7. Panel discussion from stakeholders.
- Who: Ellen Engsted-Simpson, Montana Wood Products Association  
Janet Ellis, Montana Audubon Society  
Timothy Ravendall, Montanans for Multiple Use  
Glenn Marx, Montana Association of Land Trusts  
Jay Bodner, Montana Stockgrowers Association  
Timeline: January 2008 meeting
- X 8. EQC discussion and study direction.
- Who: EQC members  
Timeline: January 2008 meeting
- X 9. Presentation of requested legal analysis.
- Who: EQC staff  
Timeline: March 2008 meeting



- X 10. Presentation of requested brochure.  
Who: EQC staff  
Timeline: March 2008 meeting
- X 11. Review draft report, brochure, and any proposed legislation.  
Who: EQC staff  
Timeline: May 2008 meeting
- X 12. Review public comment on draft report and any proposed legislation.  
Who: EQC staff  
Timeline: July 2008 meeting
13. Approval of final report and any findings, recommendations, or legislation.  
Who: EQC members  
Timeline: September 2008 meeting