

**SJR 20 Study of County Road Easements on State Trust Land**  
**Mid-Interim Study Update, April 2016**  
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**The Issue**, as articulated in the Preamble for SJR 20 and as reported to ELG by county commissioners

- Article X, section 11, of the Montana Constitution states, in part, that no state trust land "nor 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 by the state."
- County roads and public roads have existed on state trust land for years. Not all public roads are county roads.
- In some instances, counties have been granted easements by the Board of Land Commissioners for roads on state trust land, but in other instances, county roads were created on state trust land and are being used by the public without an easement having been obtained.
- Absence of a legal easement makes private property difficult to access and sell, and many claims made against title insurance companies deal with legal access.
- In 1997, the Legislature enacted section 77-1-130, MCA, which was intended to allow individuals and counties to apply for and purchase easements on state trust land for a fraction of the fair market value.
- In 1999, in a case cited as *MonTrust*, Montanans for Responsible Use of the School Trust sued the state, claiming that full market value was not being obtained for easements on state trust land and the Montana Supreme Court agreed, declaring section 77-1-130, MCA, to be unconstitutional.
- Since the decision, section 77-1-130, MCA, has been amended and the Department of Natural Resources and Conservation is obligated to require payment of full market value of the land when granting easements.
- Many counties have neither the resources to identify all of the roads for which legal easements are required nor the money to pay for the easements. Some counties are resistant to engage in the process because the county commission objects to the policy.

Some counties have identified the roads for which they believe legal easements are required and have found the means to compensate the trusts.

- There seems to be general agreement that identification of the roads for which legal easements are required needs to be the first step in fulfilling the requirements of 77-1-130 and the Montana Supreme Court's interpretation of the statute and the Constitution. However, in many counties, road maps are antiquated and incomplete and there is no consensus on precise road locations or road ownership. Some counties have sophisticated GIS mapping resources and some have antiquated road books. Historically, some easements were granted for roads that were never constructed or the road was constructed in a different location.
- Payment for multiple types of easements, such as utilities access and road access, is required for the same right-of-way.
- Some counties object to application fees. The fee, established in 77-1-130, is \$50 that must accompany each application.

**The Process for Acquiring Easements**, as reported by the  
Department of Natural Resources and Conservation's Trust  
Land Management Division

- DNRC is obligated to secure payments to the trusts on behalf of the Board of Land Commissioners.
- DNRC does not maintain an inventory of all county roads or publicly-used roads in counties. In some cases, extensive analysis is required to determine a road's origin, precise location, and responsible entity.
- DNRC does not dictate which roads need legal easements; those decisions are the local governments' decisions.
- DNRC does provide to counties the legal descriptions of easements that have been issued in the past as well as legal descriptions of state ownership.
- DNRC has GIS resources to indicate state ownership and to show easements that have been granted.
- Once a county provides DNRC with legal descriptions of roads for which it intends to pursue legal easements, the agency employs a valuation model to estimate full market

value. Land valuation varies and the model is updated annually.

- A distinction is not made between fee simple value and easement value.
- The valuation varies depending on land attributes and on road width and length.
- Once valuation is determined, counties may establish payment plans with DNRC.
- The 2015 Legislature amended 77-1-130, extending the deadline by which counties must apply for easements from October 1, 2015, to October 1, 2021.

**Legal Analysis, conducted by ELG Legal Staff**

- The Enabling Act of 1889 granted land from the federal government to the state of Montana "for the support of the common schools", and a subsequent amendment requires that state must receive the full market value when disposing of these school trust lands, or any estate or interest therein.
- The Montana Constitution contains language mirroring language found in the Enabling Act and requiring full market value to be obtained for the disposition of any interest or estate in school trust lands.
- In *Lassen v. Arizona*, 385 U.S. 458 (1967), the US Supreme Court held that the standard for obtaining full market value for the purchase or transfer of school trust lands applied even when the transfer of land was between two state agencies.
- The Montana Supreme Court adopted *Lassen's* holding regarding full market value requirements to the disposition of Montana school trust lands, including historic rights-of-way, in *Montanans for the Responsible Use of the School Trust v. State*, 1999 MT 263.
- The state must obtain the full market value of historic rights-of-way when granting that right-of-way to comply with the constitutional and statutory requirements applicable to the sale of school trust lands or any estates or interests therein.
- The Montana Constitution and the Enabling Act both address "any estate or interest therein" and a right-of-way or easement is a smaller interest in land than a fee simple interest. This opens the possibility that the obligations to the trusts resulting from the purchase of easements may not need to be the fee simple value of the land.

**Limited Land Valuation Case Study**, conducted by DNRC for Gallatin, Missoula, and Flathead Counties

- DNRC Trust Land Management Division tasked its staff with researching road segments and estimated valuations in three counties-- Gallatin, Missoula, and Flathead.
- The road miles examined likely do not represent all of the road miles in those counties for which an easement may be required, but reflect efforts to cross-reference state trust land parcels with known county road segments identified by those counties' GIS and road departments.
- DNRC analyzed 45 miles of road crossing 65 parcels of state trust land in Gallatin county. The analysis involved 251 acres. Estimated value for 59 of the 65 parcels is \$174,000, averaging about \$3000 per parcel. Six parcels are considered high value and would require an appraisal.
- DNRC analyzed 18 miles of road crossing 23 parcels in Missoula county. The analysis involved 129 acres. Estimated total value is \$149,000. A possible cost-share agreement with USFS would reduce the county's obligation by \$19,000. The average cost is about \$5500 per parcel.

**Options and Potential Solutions**, offered by various presenters to ELG, including county commissioners, the Montana Association of Counties, members of the public, staff, and ELG members

Options available for ELG consideration at the conclusion of the study include:

1. No Action. Study details will be reported in ELG final report; counties must apply for easements by October 1, 2021, as provided in 77-1-130, MCA.
2. State-level funding for road inventory or easement purchase or both.
3. Amend 77-1-130, MCA.
4. Issue recommendations to counties for local funding options or other financing strategies.

5. Constitutional amendment to exempt county easements from Article X, section 11.

Details of possible solutions listed below represent various ideas offered prior to the request and drafting of SJR 20, during the hearings on SJR 20, and in discussions occurring in ELG so far this interim. Naturally, each possible solution--even a solution of "no action" requires a policy decision, and those that involve an appropriation or other dedication of state money compels a discussion of whether the legislature ultimately believes that state money should be used to purchase public rights-of-way on state-owned land.

The committee should also be aware that changes to 77-1-130 could be subject to legal challenge based on the Montana Supreme Court's *MonTrust* decision.

The committee could choose one or more solutions or a combination of ideas to explore and request additional information. The committee could also decide to take no action, having fulfilled the request in SJR 20 that the issues be studied.

**If ELG opts to recommend state-level funding...**

Bill containing an appropriation to a state entity for definitive road inventory

An inventory and identification of roads is an important first step to establishing legal easements. In some counties, the process would require extensive historical research of county road books, on-the-ground verification, and mapping.

A land management agency such as DNRC could be identified as the entity to receive the appropriation and manage the project.

Another option could be to appropriate the funds to a postsecondary education entity (or OCHE) and assign the project to a postsecondary institution's land management, cartography, or GIS-related program (2-year or 4-year).

One example of an appropriation directed toward gathering data necessary for informing policy decisions was HB 831, requested by the Water Policy Interim Committee and enacted by the 2007 Legislature. Among other things, HB 831 appropriated \$500,000 from the General Fund to the Montana Bureau of Mines and Geology to conduct a study of closed basins and gather data on the potential impacts of ground water withdrawal on surface water and ground water

resources in those basins.

Once a road inventory and mapping was completed, valuation of the easements could occur and each county would know its obligation.

A statewide inventory and adequate mapping may be beneficial to counties for more reasons than simply acquiring easements on state trust land.

Even with the resources to conduct historic road book research and sophisticated GIS mapping, there are likely to remain some roads for which the status and location could only be finally determined by a court.

This option requires a policy discussion and decision regarding whether this is a desired use of state money.

Bill containing an appropriation for establishment of a grant program to which counties could apply and conduct their own inventories

The entity to which the money was appropriated would be required to establish a grant program to reimburse counties for costs incurred in identifying the roads that need easements. There are numerous examples in the MCA and in bill drafts from previous sessions of agency-administered grant programs for local governments. In most of these examples, the agency is required to adopt rules, based on specific statutory criteria, for administering the program and issuing grants.

It would be up to the counties to decide whether or not to participate.

Once an inventory was completed, valuation of the easements could occur and each county would know its obligation.

This option requires a policy discussion and decision regarding whether this is a desired use of state money.

Bill containing an appropriation for establishment of cost-share assistance to counties for inventory or purchase of easements or both

This could also take the form of a grant program. The Legislature could determine eligibility criteria and levels of assistance.

This option requires a policy discussion and decision regarding whether this is a desired use of state money.

Amend the statutes governing the Treasure State Endowment Program (TSEP) to include inventory or acquisition of easements among the infrastructure projects that are eligible for TSEP funds

Local governments may submit applications for TSEP grant funds to be used for infrastructure projects, which are defined in section 90-6-701 as including drinking water systems, wastewater treatment, sanitary sewer or storm sewer systems, solid waste disposal systems, and bridges.

The policy decision involves whether road identification and access can be reasonably considered to be an infrastructure project.

Funds for the grants are appropriated to the Department of Commerce in HB 11. In 2013, nearly \$34 million was appropriated for the biennium.

It is a highly competitive process and the majority of the grants are for water and wastewater projects. The individual amounts are usually somewhere between \$100,000 and \$750,000.

**If ELG opts to recommend amending the controlling statute...**

Continue to extend the deadline in 77-1-130 by which counties must apply for easements

This would continue to delay the legal resolution of easements, which does not resolve problems property owners are encountering with title companies, one of the primary reasons some kind of legislative resolution has been sought.

This may also raise questions regarding whether the intent of the statute and Constitution is being sufficiently addressed.

Amend 77-1-130 to reflect the language in the Constitution

Article X, section 11(2) of the Montana Constitution states that no land held in trust by the state "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."

The Montana Association of Counties has suggested that section 77-1-130 could be amended to reflect this language:

77-1-130. (Temporary) Recognition of historic right-of-way -  
- criteria for right-of-way deed -- conditions -- fees.

(4) (a) At the time of issuing the historic right-of-way deed, the department shall collect from the applicant the full market value of the ~~acreage~~ estate or interest disposed of for a the historic right-of-way.

(b) The amount collected pursuant to subsection (4)(a) must be deposited in the appropriate trust fund established for receipt of income from the land over which a historic right-of-way is granted.

One question that remains: If an easement is granted that precludes use of the acreage for any other purpose would full market value of the estate or interest disposed of be the same as full market value for the acreage? If so, the statutory change would not have the effect of reducing the counties' obligation to the trusts.

This change could be subject to legal challenge; more analysis would be required.

#### **If ELG opts to issue recommendations to counties...**

Consider other sources of tax revenue for inventory or purchase of easements or both

Other sources might include fuel tax revenue or local option fuel tax. Use of fuel tax revenue is constitutionally protected; it is limited to "obligations incurred for construction, reconstruction, repair, operation, and maintenance" of public roads and to "payment of county, city, and town obligations on streets, roads, and bridges" unless another use is approved by a three-fifths vote of the members of each house of the Legislature. (Article V,



section 6, MT Constitution)

Local option fuel tax is not currently assessed in any county. If one was imposed, in order to allow revenue to be used for acquiring easements, a bill would need to amend section 7-14-303, as well as obtain approval from at least three-fifths of each house, as required in Article V, section 6 of the Montana Constitution.

Encourage use of INTERCAP loans

Beaverhead county used an INTERCAP loan to help finance easement acquisition.

Quick facts about the program include:

- The INTERCAP program only loans funds to eligible government units as defined under 17-5-1604, MCA.
- The INTERCAP program is a variable rate loan program.
- Interest rates are adjusted on February 16th of each year.
- 100% financing is available with no up-front cost, equity, or matching funds required.
- Interest and principal payments are due semi-annually on February 15th and August 15th.
- Current interest rate through February 15, 2015 is 1.00%.
- Loan requests in excess of \$1,000,000 must receive Loan Committee approval.
- Loan requests in excess of \$5,000,000 must receive Board approval.
- Use of loan funds has significant flexibility, e.g. new and used equipment and vehicles, real property improvements, cash flow, preliminary engineering costs, grant writing.
- Prepayments are allowed without any prepayment penalty.
- Maximum loan limit is established by eligible government unit's legal debt limit.
- Maximum term of the loan is 15 years or useful life of the project, whichever is less.

Encourage local levy financing of inventory or easement acquisition or both

A county could impose a levy for this purpose, subject to the provisions of section 15-10-420 and subject to approval by the electorate under section 15-10-425. Under section 7-14-2520, a county may issue limited general obligation bonds to acquire rights-of-way for roads and highways.

Encourage partnerships between counties, utilities, and other private entities to share the cost of easement acquisitions for the same road

Section 77-1-130 applies to "a person or county".

There is potential for the cost of an easement to be shared among all parties interested in the acquisition.

**If ELG opts to recommend a Constitutional Amendment...**

Bill to refer an amendment to the electorate that exempts county road easements from Article X, Section 11.

A bill proposing an amendment to the Constitution must receive an affirmative vote of two-thirds of the Legislature before it may be referred to the electorate.

The result of such an amendment would be a reduction in revenue to the trust beneficiaries. The amount is unknown without an inventory of roads and a valuation of easements.