

FACT SHEET

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HB 675

**HB 675 Amending Montana's
Open-Space Land and Voluntary Conservation Easement Act**

This *Fact Sheet* outlines serious problems with HB 675, proposed by Representative Maedje. HB 675 would amend Montana's "Open-Space Land and Voluntary Conservation Easement Act" (Section 76-6-101 et seq., M.C.A.) (the "Act"). The Act currently provides the statutory authority under which public agencies and qualified, tax-exempt, private organizations ("land trusts") acquire and hold conservation easements. The Act has fostered permanent, voluntary protection of important natural and cultural resources on hundreds-of-thousands of acres in every corner of the state and allows landowners to enact lasting conservation on their lands for the benefit of the public.

The Proposed Bill. HB 675, if implemented, would have the absurd effect of completely eliminating the rights of land trusts to enforce the conservation easements they hold. If land trusts cannot enforce their conservation easements, these conservation easements – these lawfully acquired property rights in land – will become legal fictions, rights in name only but without legal substance.

Furthermore, (a) HB 675, if enacted, will immediately embroil the State in litigation because it unconstitutionally impairs obligations of contract, in violation of Article II, Section 31, of the Montana Constitution; (b) HB 675 will cause chaos with the state agencies and with local governments, creating enormous public liabilities for the taxpayers of Montana; (c) HB 675 interferes with the ability of landowners to contract freely to place conservation easements on their lands with whomever they choose and in whatever lawful manner they may deem appropriate; (d) HB 675 will limit important options which state and local governments use to promote the health and general welfare of their citizens, working in cooperation with local and regional land trusts; and (e) HB 675 unnecessarily imposes a strict rule of legal construction on conservation easements that is unnecessary and inconsistent with settled law of deed and contract interpretation in Montana.

1. HB 675 will eliminate land trusts' rights to enforce the conservation easements they hold and will chill all future conservation easement donations to private land trusts.

Rep. Maedje's bill proposes to amend conservation easement law to provide that "*the conservation easement is not the dominant estate*" in land. Yet, Rep. Maedje's bill does not amend in any material way Section 76-6-211(1), M.C.A., which reads in relevant part:

"76-6-211. Who may enforce easement. (1) . . . the owner of any estate in a dominant tenement or the occupant of the tenement may maintain an action for the enforcement of an easement attached to the tenement."

Accordingly, HB 675 if enacted as proposed would have the absurd effect of depriving the owners of conservation easements, private land trusts, from enforcing them. Only the owner of the “dominant estate or tenement” would have the ability to enforce a conservation easement on that tenement – that is, the underlying landowner.

HB 675 therefore proposes to enact a legal absurdity. It lodges the exclusive right to enforce conservation easements owned by land trusts in the owner of the property that the easement encumbers. For obvious reasons, a landowner cannot enforce an easement against himself or herself. See, e.g., §70-17-105, M.C.A. (servitudes cannot be held by owner of servient tenement). In fact, HB 675 would cause all conservation easements held by land trusts in Montana to become null and void, for all practical purposes, because the conservation easements could not be enforced.

The radical effect of HB 675 cannot be overstated. Among other unconscionable effects of this proposed legislation:

- The settled expectations of roughly a thousand conservation easement donors in Montana, and of untold numbers of the general public who value open-space and natural land values protected by conservation easements, would be eliminated by the Legislature in an instant.
- Land trusts in Montana would be summarily stripped of the property rights they hold, without recourse.
- Montana landowners who want to donate conservation easements to private land trusts would be unable to do so in the future because land trusts would lose their tax-exempt status and could no longer operate in Montana.
- Scores of landowners who have enrolled in federal land and habitat conservation programs which involve privately held conservation easements would be placed in immediate legal jeopardy with the Farm Services Agency, Natural Resources and Conservation Service, the United States Forest Service, and the U.S. Fish & Wildlife Service, among others, because the easements for which these landowners received federal benefits would be unenforceable.
- Montanan’s eligibility to enroll their lands in numerous federal agricultural land and fish and wildlife habitat conservation incentives in the future would be destroyed.

2. HB 675, if enacted, will immediately embroil the State in litigation because it unconstitutionally impairs obligations of contract, in violation of Article II, Section 31, of the Montana Constitution.

If the Legislature adopts HB 675 and thereby strips land trusts of their vested rights to enforce their conservation easements, serious Constitutional questions will arise. Article II, Section 31, of the Montana Constitution states: “No ex post facto law nor any law impairing the obligations of contracts . . . shall be passed by the legislature.” HB 675 will not only “impair” land trusts’ contractual obligations to protect conservation rights identified in conservation easements, HB 675 will entirely *destroy* land trusts’

contractual obligations. HB 675 is unconstitutional. For this reason alone, it should not pass.

3. HB 675 will cause chaos with the state agencies and with local governments, creating enormous public liabilities for the taxpayers of Montana.

The federal tax law of conservation easements requires that donations of conservation easements must be made to public agencies or to private “qualified organizations” that have a “commitment to protect the conservation purposes” identified in their conservation easements. Internal Revenue Code Sec. 170(h)(3); Treas. Reg. 1.170A-14(c)(1). If Montana law forbids land trusts from enforcing their conservation easements, Montana land trusts will no longer be able to demonstrate the required commitment. Accordingly, land trusts in Montana will no longer be able to maintain their status as tax-exempt “qualified private organizations” under federal tax law and under Section 76-6-104(5)(b), M.C.A., of the Act.

If land trusts are unable to enforce their conservation easements, Montana law and federal law both **require** land trusts to assign their easements to an entity that can and will enforce the conservation easements. See, e.g., Sections 76-6-108 and 76-6-205, M.C.A. Under HB 675, the only entities that will be able to enforce conservation easements in Montana are public entities – federal, state, and local governments – because only “public bodies” will retain the right to enforce conservation easements under Section 76-6-211(2), M.C.A.

Thus, HB 675 if passed will create an avalanche of conservation easement assignments, or attempted assignments, from defunct, non-qualified private land trusts to state agencies and local governments. No state agency in Montana is prepared, either financially or with adequate personnel, to assume enforcement responsibility for these formerly private conservation easements. Local governments and municipalities are equally unprepared to assume the liabilities associated with conservation easement stewardship and enforcement which were previously handled by land trusts.

In short, HB 675 will saddle state government and local governments with ownership of scores of conservation easements that were formerly administered by land trusts. Other provisions of Montana law **require** such assignments of conservation easements to public bodies because they will be the only entities left with the power and authority to enforce the conservation easements under Section 76-6-211, M.C.A. Such an outcome will be disastrous for our state agencies and local governments and will place enormous burdens on the tax-paying public – burdens which were previously assumed by private land trusts for the public benefit.

4. HB 675 interferes with the ability of landowners to contract freely to place conservation easements on their lands with whomever they choose and in whatever lawful manner they may deem appropriate.

By functionally eliminating the ability of land trusts to hold and enforce conservation easements, HB 675 will leave Montana landowners who want to protect special resources on their lands for public benefit with highly limited options. Only governmental agencies will be able to hold conservation easements because only governmental agencies will be able to enforce them.

- Why does the Legislature want to adopt legislation that limits landowners' freedom of choice and landowners' freedom to contract with qualified private land trusts?
- Why does the Legislature want to eliminate competition by creating a public sector conservation easement "monopoly"?
- How does HB 675 serve the rights and interests of landowners who do not want to see any of their property rights vested in governmental bodies, but who intensely desire to protect and preserve aspects of their land for the benefit of future generations?

By imposing a rule on the judiciary that all conservation easements "must be interpreted in the light most favorable to the underlying landowner," HB 675 is also fundamentally disrespectful of the choices that many landowners make when they place conservation easements on their properties.

Imposing this rule of conservation easement interpretation by legislative fiat is simply misguided public policy, among other reasons because the rule is completely unnecessary. If landowners want their conservation easements construed in the light most favorable to them and their successors, they may insist on include such a clause in the conservation easement terms when they negotiate their conservation easements. Some landowners do so.

Many other landowners, however, actually ask for clauses in their conservation easements that require courts to construe the easements in favor of the conservation purposes for which they granted their easements. HB 675 would forbid landowners from expressing this preference for land conservation by mandating interpretation of conservation easements in favor of underlying landowners. This mandate raises Constitutional questions because it impinges on landowners' Constitutional right to choose, freely and voluntarily, and without governmental intrusion, "to maintain and improve a clean and healthful environment . . . for present and future generations." See Article IX, Section 1(1) of the Montana Constitution.

The Legislature should not restrict the choices of private landowners (a) by limiting the number and types entities that may hold conservation easements in Montana to only public entities, and (b) by restricting the manner in which landowners want the courts to

construe the conservation easements they grant on their property. These choices about what is best for the future of Montana's private lands should be left with the folks who know these lands the best – the individual landowners themselves, not the Legislature.

5. HB 675 will limit important options that state and local governments use to promote the general welfare of their citizens, working in cooperation with local and regional land trusts.

Cities and counties across Montana are increasingly looking to conservation easement partnerships with private land trusts to provide important amenities for their citizens. Missoula and Gallatin Counties, for example, have both enacted open-space bond initiatives to encourage landowners to protect conservation lands for broad public benefit. Using bond proceeds, these county governments have been able to purchase conservation easements for pennies on the dollar, with matches from private land trusts and from other federal and state sources. Landowners appreciate these programs because they are able to place their conservation easements with private land trusts – not with county governments or with the state or federal government.

HB 675 will severely curtail local and municipal government efforts to encourage voluntary private land conservation through these efficient, highly successful community conservation programs. By eviscerating land trusts' ability to enforce their conservation easements meaningfully, HB 675 will snuff the emergence of some remarkable and encouraging partnerships among private landowners, county and municipal governments, state and federal agencies, and non-profit organizations. Accordingly, HB 675 works against the interest of the public in promoting private land conservation, trust in government, and cooperation among disparate groups for the common good. HB 675 is therefore bad public policy.

6. HB 675 unnecessarily imposes a rule of legal construction on conservation easements that is inconsistent with settled law of deed and contract interpretation.

HB 675 seeks to impose a legal rule of interpretation of conservation easements which requires courts to interpret conservation easements in the light most favorable to the underlying property owner. This change to the Act is entirely unnecessary, at best, and potentially very harmful and damaging, at worst.

Montana's courts need no direction from the Legislature with respect to interpretation of deeds and contracts. Our law is already replete with statutory direction to the courts, based on years of common law experience, about how deeds and contracts should be construed to best protect the parties that enter them. These conventions of legal interpretation include, for example, the following laws that are well understood as basic principles of property and contract law and that are universally applied by the courts:

- “Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this part. Section 70-1-513, M.C.A.
- “A grant is to be interpreted in favor the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor.” Section 70-1-516, M.C.A.
 - *Note that this rule of deed interpretation already requires that all rights in conservation easements that are reserved by landowners must be construed in favor of landowners. Accordingly, the rule of construction set forth in HB 675 is completely unnecessary.*
- In the construction of an instrument, the intention of the parties is to be pursued if possible. When a general and particular provision are inconsistent , . . . a particular intent will control a general one that is inconsistent with it.” Section 1-4-103, M.C.A.
 - *Thus, if a conservation easement recites a mutual intention that the conservation easement must be construed in favor of the underlying landowner, courts must construe the conservation easement to honor this intention. There is simply no need for HB 675’s provision regarding interpretation of conservation easements.*
- “In cases of uncertainty . . . , the language of the contract should be interpreted most strongly against the party who caused the uncertainty to exist.” Section 28-3-206, M.C.A.
 - *Conservation easements are frequently drafted initially by land trusts, so this existing rule of deed and contract interpretation will often cause ambiguities in conservation easements to be “interpreted by a court in the light most favorable to the underlying property owner.” Again, the proposed change in HB 675 is completely unnecessary.*
- A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same may be ascertainable and lawful.” Section 28-3-301, M.C.A.
 - *HB 675 would be in direct conflict with this long-standing rule of contract and deed interpretation if a landowner includes a provision in the conservation easement directing a court to construe it in favor of the conservation purposes recited in the easement, not construed in favor of the interests of a future property owner.*

- “The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.” Section 28-3-401, M.C.A.
 - *Again, HB 675 would require courts to disregard this rule of contract and deed construction if a landowner expresses a clear preference in the conservation easement itself for a court interpretation that favors protection of conservation rights, not an interpretation that favors underlying landowners.*

Most of these rules of deed and contract interpretation were codified by the Montana Legislature in 1895. They represent the settled law of the State. There is neither a reasoned nor a principled justification for changing the rules of deed and contract interpretation for conservation easements. Such changes will not serve the interests of landowners, land trusts, the State of Montana, or the public.

Furthermore, HB 675 will create an irreconcilable conflict between the purposes of the Open-Space Land and Voluntary Conservation Easement Act, as stated in Sections 76-6-102, -103, M.C.A., and the rule of construction in favor of landowners proposed by Rep. Maedje in HB 675. “In construing a statute, the intention of the legislature is controlling.” See Section 1-2-102, M.C.A. The clear legislative mandate and public policy of the State of Montana is to construe conservation easements to “preserve native plants or animals or biotic communities” and other natural values. See Sections 76-6-102, -103, M.C.A. Therefore, in construing the Open-Space Land and Voluntary Conservation Easement Act, courts must interpret the conservation easements to promote the specific policy goals endorsed by the Legislature when it passed the Act.

Yet, HB 675 will impair the ability of courts to interpret and construe the Act consistently and fairly. This is because HB 675 proposes to enact a conflicting mandate: Instead of interpreting conservation easements solely to serve the public purposes stated in Sections 76-6-102, -103, M.C.A., HB 675 will also require courts to construe conservation easements “in the light most favorable to the underlying property owner.” These two goals may be irreconcilable from time to time. Leaving the courts of Montana caught between two conflicting and inconsistent directives.

HB 675 proposes to substitute confusion for clarity, and it proposes to change the well-settled conventions of deed and contract interpretation for no principled reason whatsoever. The changes proposed in HB 675 will simply cause judicial misunderstanding and bewilderment and the result will be increased judicial activism as judges try to make sense of an internally inconsistent Open-Space Land and Voluntary Conservation Easement Act, caused by the ill-considered amendments of HB 675.