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SENATE AGRICULTURE  
EXHIBIT NO. 11  
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BILL NO. SB 473

**Testimony in Opposition to  
Senate Bill 473**

**To:** Senate Agriculture Committee, Montana Legislature

**From:** Andrew C. Dana, Esq.

**Date:** February 19, 2009

**Mr. Chairman and Committee Members:** My name is Andrew Dana. I am an attorney from Bozeman who for the last 17 years has specialized in conservation easement law. I have represented numerous landowners who have granted conservation easements, and I currently represent a number of land trusts throughout Montana. I also consult nationally about conservation easement law. My family and I own a ranch on the Yellowstone River in Park County that is subject to a perpetual conservation easement.

I submit this testimony in opposition to Senate Bill 473 (SB 473). I oppose SB 473 with some reluctance, because I understand the good intentions behind Sen. Curtiss's proposals. As my testimony will demonstrate, however, most of the "problems" SB 473 addresses are already governed by existing law, so the "fixes" contained in SB 473 are unnecessary, or, worse, confusing and conflicting with the existing federal and state laws that govern conservation easements. In short, this bill if enacted would create confusion, bureaucracy, and cost, with little or no measurable benefit to the public. I therefore urge you to vote against SB 473.

The comments below address a number of provisions of SB 473 about which I am most concerned, although there are certainly other problems in the draft bill which I do not address in this Testimony.

**A. SECTION 2 (Page 2, line 30 & Page 3, lines 1-7) – Amending Section 76-6-202, MCA.** At Section 2, SB 473 proposes to add a new provision to Section 76-6-202, MCA, to address termination and amendment of conservation easements. There are numerous problems with Section 2 of SB 473, including:

1. The proposed language in SB 473 conflicts with the existing provision of the Montana Open Space Land and Voluntary Conservation Easement Act that governs conservation easement amendments and terminations as set forth at Section 76-6-107, MCA.
  - o Section 76-6-107, MCA, currently provides that protected open-space lands – including conservation easements – may not be "converted or diverted" (that is, amended or terminated) from conservation uses unless:



- Amendment or termination is “necessary to the public interest,”
  - There is no conflict with local comprehensive planning,
  - The conservation easement itself anticipates the possibility of amendment or termination, and
  - If a termination or amendment does occur, the easement holder must replace the public’s lost conservation interest with other conservation land of equal value within 3 years.
- This is a tested standard, unique to Montana, that appropriately protects the public interest without requiring costly Attorney General oversight and judicial intervention in conservation easement amendment and termination cases, unlike SB 473.
  - Moreover, the Attorney General, with general oversight authority over the State’s non-profit organizations, already has independent legal authority to challenge inappropriate conservation easement termination or amendment decisions, so the specific oversight provisions of SB 473 are unnecessary.

► **If SB 473 is enacted and if Section 76-6-107, MCA, is not revised, it will be impossible for the public, for conservation easements holders, and for the courts to determine which provisions of the law to apply, or how to reconcile the two provisions.**

2. Section 76-6-105(2), MCA, indicates that nothing in the Montana Open Space Land and Voluntary Conservation Easement Act may conflict with rights of condemnation under Title 70, Chapter 30, MCA.
  - Yet, Section 2 of SB 473 confuses the current law by indicating that a conservation easement “may not be terminated or amended in a manner that materially detracts from the [protected] conservation values . . . .]”
  - And, unlike Section 76-6-107, MCA, SB 473 sets up a conservation easement amendment and termination process, involving the courts and the Attorney General, that is competes with Montana’s condemnation laws at Title 70, Chapter 30, MCA.

► **By establishing a completely new conservation easement termination procedure, Section 2 of SB 473 conflicts with long-established rights of eminent domain and condemnation of conservation easements, provided under Section 76-6-105(2), MCA, and Title 70, Chapter 30, MCA.**

3. SB 473 states that any conservation easement amendment or termination that “*materially detracts*” from the conservation values intended for protection requires the participation of the Attorney General and a court order before any amendment may occur. But, Section 2 provides absolutely no guidance about how to interpret this “materially detract” standard.
  - Who determines what amendments might “*materially detract*” from the conservation values intended for protection?
  - Whose “*intentions*” about the conservation values to be protected matter?
    - The original conservation easement grantor?
    - The easement holder?
    - The general public?

- How can a conservation easement holder determine what type of amendment the Attorney General might or might not want to review?

► **SB 473 will cause conservation easement holders to submit virtually every proposed conservation easement amendment, no matter how innocuous or beneficial, to the Attorney General and to the Courts, because someone somewhere might contend that the amendment “materially detracts” from the purposes of the original conservation easement.**

**B. SECTION 6 (Page 4, line 30 & Page 5, lines 1-2) – Amending Section 76-6-208, MCA.** SB 473 would lock in the assessed value of conservation easement property that was in effect when the conservation easement was created. This provision would have perverse tax effects that would discourage private land conservation and thereby reduce public benefits enjoyed by thousands of Montanans. Consider the following example:

- A Yellowstone Valley rancher acquires an abandoned subdivision next door to his family ranch.
- The subdivision is located in an area with high agricultural productivity, and the rancher uses the property to expand irrigated hay production.
- The rancher grants a conservation easement over his family land and the subdivided tracts to help preserve Montana’s agricultural heritage.
- SB 473 would *absolutely prohibit* a reassessment of the abandoned subdivision as Class 3 agricultural property from its original Class 4 assessment by locking in the assessed value of the subdivided tracts.
- What reasonable public policy goals are served in SB 473 by including such a punitive property tax provision?

The same situation could occur, of course, if a landowner sought to convert conservation easement lands assessed at a relatively high rate into productive timberland which is assessed at a lower property tax rate.

The property tax rate freeze in SB 473 is patently unfair and potentially unconstitutional. The Montana Supreme Court has held that the creation of a class of property owners whose taxes are assessed at a higher level than the taxes of those of similarly situated property owners “causes property owners in the first class to pay a disproportionate share of the state’s property taxes, in violation of the right to equal protection of the laws guaranteed by Article II, Section 4 of the Montana Constitution.” Roosevelt v. Department of Revenue, 1999 MT 30, 293 Mont. 240, 975 P.2d 295. *See also Allegheny Pittsburgh Coal v. County Commission of Webster County* (1989) 488 U.S. 336, 345-46. By denying the owners of conservation easement lands the opportunity to petition for reassessment of their property based on actual use, SB 473 treats similarly situated property owners differently and discriminates against owners of land under conservation easement.

► **Under SB 473, all Montana property owners except those who hold conservation easements may seek reassessment of their land so that they are taxed on actual use and value. By preventing such reassessments, SB 473 violates the Equal Protection Clause of the Montana Constitution, Article II, Section 4 and Montana’s “Taxpayer Bill of Rights” which states, in part: “[T]he taxpayer has the right to be treated by the department in a**

**similar manner as all similarly situated taxpayers regarding the administration and collection of taxes . . . .” Section 15-1-122(3), MCA.**

**C. SECTION 7 (Page 5, lines 24-30 & Page 6, lines 1-13) – Amending Section 76-6-210, MCA.** SB 473’s proposed changes to Section 76-6-210, MCA, giving the Attorney General rights to enforce conservation easements, are problematic for a number of reasons.

1. By modifying Section 76-6-210, MCA, to give the Attorney General authority to enforce conservation easements, SB 473 directly contradicts the existing provisions of the Montana Open Space Land and Voluntary Conservation Easement Act, at Section 76-6-211, MCA. This provision states, plainly:

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

(2) Public bodies holding conservation easements shall enforce the provisions of these easements.

► **SB 473, if enacted, would cause Montana’s conservation easement statute to be internally inconsistent by granting the Attorney General a right of enforcement in Section 76-6-210, MCA, when Section 76-6-211, MCA, expressly excludes the Attorney General from those parties with conservation easement enforcement rights.**

2. For over 30 years, the Attorney General has never had a right to standing to enforce the terms of individual conservation easements, and, practically, there is no need or justification for granting the Attorney General special standing to enforce conservation easements today. Consider:
  - a. Montana’s conservation easement laws are firmly grounded in private, real property law. Accordingly, the conservation easement enforcement provisions in Section 76-6-211, MCA, are drawn, *verbatim*, from Montana’s law of general law of private easements and servitudes at Section 70-17-109, MCA.
    - i. Attorney General standing is typically conferred only in states which treat their conservation easements as charitable trusts, not as real property interests as we do in Montana.
  - b. This approach has worked: Despite being national leaders in private land conservation, Montana’s land trusts have not yet had a serious conservation easement enforcement case.

► **By introducing an express right of standing to enforce conservation easements in the Attorney General, SB 473 erodes the fundamental grounding of Montana’s conservation easements in private property law.**

3. Section 76-6-211(2), MCA, affirmatively states that “public bodies holding conservation easements” shall enforce them. But, of course, SB 473 completely undermines this part of the existing law by giving the Attorney General the right to second-guess its sister agencies and local

governments. Unlike the Department of Fish, Wildlife and Parks, the Department of Natural Resources and Conservation, and local governments, the Attorney General has no special understanding of resource management needs or how best to achieve specific public conservation objectives for the public benefit.

► **There is no defensible policy justification for allowing the Attorney General to second-guess the decisions of other agencies or other governmental entities that hold conservation easements and that have their own legal staff which is fully capable of defending the public's interest in conservation easements.**

4. SB 473 has a peculiar provision that patently violates Montanan's fundamental Constitutional rights, including the "Right to Know" and the "Right to Privacy," provided at Article II, Sections 9 and 10 of the Montana Constitution. Subsection (4) of Section 7 of SB 473 (page 6, lines 4-6) states that confidential records obtained by the Attorney General may be shared with other public agencies "but must be held as confidential."
  - a. What "compelling state interest," as required by Article II, Section 10, of the Constitution, could possibly warrant secret, non-discoverable interagency communications between the Attorney General and other state agencies?
    - i. Such a provision expressly violates of Montana's citizens' fundamental rights of privacy.
  - b. Alternatively, Section 9, Article II, of the Constitution states that: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."
    - i. If records are truly confidential, there is no justification for the Attorney General to share records with anyone, including other state agencies.
    - ii. But, if such records *are* shared, as permitted by SB 473, their confidentiality is plainly breached, and the Montana Constitution and its open records laws absolutely require public disclosure. See Sections 2-6-101 *et seq.*, MCA (Montana's Public Records law).

► **Subsection (4) of Section 7 of SB 473 (page 6, lines 4-6) expressly violates Montanan's fundamental "Right to Know" and the "Right of Privacy" as provided Article II, Sections 9 and 10 of the Montana Constitution.**

**D. SECTION 8 (New Section, Page 6, lines 15-17).** Unfortunately, Section 8 of SB 473 does not make sense. There is no such thing as a "contract creating a conservation easement" under Montana law. Instead, conservation easements are created by deed. Furthermore, every deed of conservation easement in Montana sets forth, in plain terms, the relative rights and duties of *both* easement holders and landowners. That's the whole purpose of memorializing a conservation easement conveyance by deeds that are recorded in the real property records of each County, just as all other easement, covenant and servitude property interests are memorialized in real property records.

► **Section 8 of SB 473 does not make any sense in the context of conservation easement transactions and therefore should not be enacted by the legislature.**