

SENATE Conference  
Exhibit No. 1  
Date 4-11-2011  
Bill No. HB 297

March 24, 2011

TO: Mary Sexton, Director  
FR: Tommy Butler, Trust Lands Attorney  
RE: Proposed Amendments to HB 297

HB 297 extends the time frames in Section 77-1-130, MCA for applications for "historic easements" across State school trust lands. If a party can show that it has historically utilized a road across State lands prior to 1997, in addition to other criteria, it can request that the State Land Board issue an easement to that party under a simplified application process, provided that the party pays for the full market value of the easement granted.

You've requested a legal opinion as to the constitutional validity of an amendment to HB 297 which would mandate that an easement be granted, yet allow payment to be withheld for a period of time. The State cannot dispose of any interest in School Trust Lands without obtaining contemporaneously the full market value for the property interest conveyed. Thus, it has been recognized by the Montana Supreme Court in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs, 296 Mont. 402, 408, 989 P.2d 800, 803 (1999)(Montrust I) that:

One limitation on the legislature's power of disposal is the trust's requirement that full market value be obtained for trust lands. *See* Section 11 of the Enabling Act (as amended by the Act of May 7, 1932, ch. 172, 47 Stat. 150 (1932)) (providing that "none of such lands ... shall ever be disposed of ... unless 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").

State").

Id.

Thus, it is my legal opinion that any amendment to HB 297 which allowed the grant of easements without a contemporaneous payment of full market value to the trust would be unconstitutional.

# REPRESENTATIVE TOM BERRY

## Sponsor Notes for HB 297

Prepared by Harold Blattie, Executive Director - Montana Association of Counties

- **Recognition of Historic Rights of Way was first enacted in 1997**

*Preamble: The preamble attached to Ch. 461, L. 1997, provided: "WHEREAS, the Department of State Lands, as the predecessor of the Department of Natural Resources [and Conservation] with respect to state land, encouraged the development of road rights-of-way across state land before 1972; and*

*WHEREAS, the Department of State Lands either did not charge for these rights-of-way or charged minimal fees for the rights-of-way before 1972; and*

*WHEREAS, many of the road rights-of-way granted by the Department of State Lands were granted without a written easement; and*

*WHEREAS, Article X, section 11(2), of the Montana Constitution requires that the fair market value, ascertained in the manner provided by law, must be charged for the disposition of an interest in state land; and*

*WHEREAS, the 55th Legislature intends that the Department of Natural Resources and Conservation honor the historical uses of state land for rights-of-way."*

*Termination: Section 5, Ch. 461, L. 1997, provided: "[This act] terminates October 1, 2003."*

- **As originally enacted, 77-1-130 set forth the fair market value at:**

*(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 of the historic right-of-way based on the following classifications of land:*

*(i) \$37.50 per acre for state land classified as grazing land;*

*(ii) \$275 per acre for state land classified as timber land;*

*(iii) \$100 per acre for state land classified as crop land; and*

*(iv) \$100 per acre for other land.*

- **Litigation followed challenging the values set forth in 77-1-130**

*Market Value of State Land Rights-of-Way Set by Statute at 1972 Levels – Unconstitutionality: The plain language of this section as it read prior to the 2001 amendments required that full market valuations of right-of-way acreage for historic deeds on state trust lands be based on the median values for the classifications of land at 1972 levels, leaving the Department of Natural Resources and Conservation no choice but to use those levels instead of current market value. The state argued that pursuant to 40 A.G. Op. 24 (1983), the figures in this section were merely a minimum above which the Department may charge full market value. However, the statutory language prior to amendment was mandatory rather than discretionary and violated the provisions of the Montana Constitution and The Enabling Act, which require the state to receive full market value for school trust lands, and thus is unconstitutional. Montanans for Responsible Use of School Trust v. State ex rel. Bd. Of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999). **NOTE: This case is commonly referred to as MONTRUST v. STATE***

- **The 2001 Legislature then amended 17-1-130 to comply with the holdings in MONTRUST v. STATE by striking the values previously enumerated and inserted:**

*(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 of the historic right-of-way.*

- **The state now receives full market value for the rights of way across state lands**
- **The original enactment in 1997 set a termination date of 2003**
- **The amendments in 2001 also extended the termination date to 2005**
- **The 2005 legislature extended the termination date to 2011**
- **House Bill 297 extends the termination date to 2020**

### **Why have the Historic Right of Way process for acquiring rights of way across state lands?**

- Provides a means for property owners to acquire legal access to their property that may not otherwise exist.
- Not having legal access to property places a cloud on the title of the property, in some cases making it unmarketable.
- Only available where a road physically existed prior to 1997.
- May only be granted to a county, a utility or to a person to provide legal access to private property (77-1-130(1)).

- A historic right of way cannot be expanded beyond its present use (77-1-130(5)).
- Because it is for a road already in existence, the requirements of MEPA do not apply (77-1-130(6)).
- Because it is for a road that is already in existence no survey is required, (77-1-130(7)).
- Because it is for a road already in existence, the requirements of MEPA do not apply (77-1-130(6)).
- Not being subject to survey and MEPA requirements reduces costs to the applicant and to the department.

### **Why another extension of the termination date?**

- Most counties do not have the resources to pay the fair market value for all county road rights of way across state lands.
- This extension will simply provide more time to spread the payments out over time as funds become available.

### **Why not just remove the termination date and make it permanent?**

- No particular reason other than the 2005 legislature thought it best to leave a termination date so the 2011 legislature could re-examine the process.