

DEPARTMENT OF FISH,  
WILDLIFE & PARKS

DEPARTMENT RESPONSE

ENVIRONMENTAL QUALITY  
COUNCIL. 2013-14

January 9, 2014

Exhibit 20



# Montana Fish, Wildlife & Parks

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October 25, 2013

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LEGISLATIVE AUDIT DIV.

Tori Hunthausen, Legislative Auditor  
Legislative Audit Division  
PO Box 201705  
Helena, MT 59620-1705

Dear Ms. Hunthausen:

Montana Fish, Wildlife & Parks (FWP) has received the performance Audit Report (Report) for the Block Management Program. The various comments and recommendations for improvements to this program reflect a great deal of work expended by your staff in trying to understand and evaluate some of the many elements involved with this large and diverse program. Thank you for your efforts.

The current Block Management Program has been in place for 18 hunting seasons. Over that time, the program has grown to become the largest and arguably one of the most successful private land hunting access programs in the nation. The program emphasis has been on balancing the needs of private landowners, public hunters, and the state wildlife agency through contractual agreements that can be tailored to individual farms and ranches.

Block Management contracts specify how that particular landowner or landowners will manage public hunting access on private land that remains under the landowner's control. The contract provides the agency with legal authority to enforce those ranch-specific rules. FWP does not purchase the hunting rights to enrolled property, nor does the agency acquire any interest in the enrolled land. Benefits provided by Block Management to landowners, including compensation and services, are to offset potential impacts of hunters on those enrolled private lands.

While the primary focus of Block Management is to open private land to public hunting, FWP works within the confines of existing law and administrative rule to negotiate with willing landowners to open access to otherwise inaccessible state and federal land.

The Department's response to the recommendations follows:

### **Recommendation #1**

*We recommend the Department of Fish, Wildlife, & Parks develop and implement comprehensive policies and procedures to document and establish consistency in the Block Management program's enrollment, contracting, and re-enrollment processes.*

### Partially Concur

FWP already has policies and procedures in place, and will review these and update them as necessary. FWP agrees that the implementation of more comprehensive policies and procedures to guide staff and document administrative processes used to determine which properties are enrolled and re-enrolled is important to ensure consistency within the program. Many of the inconsistencies noted in the Report are largely because of factors that cannot be controlled through rulemaking, such as the preferences of landowners in contracting specifics, habitat, hunting opportunity, access requirements, and other factors that differ from property to property. FWP cannot commit to making these processes a one-size-fits-all for a subject that is so variable. To the extent that there are inconsistencies that can be avoided through rulemaking, the Department will update and review the rules and policies for continual improvement.

In 2013 and 2014, FWP and the Private Land/Public Wildlife (PL/PW) Council, appointed by the Governor under 87-1-269 as a review committee for FWP hunting and fishing access programs, will be conducting a full review of FWP access programs, including Block Management, and developing recommendations that will be delivered to the Governor, FWP Director, and 64<sup>th</sup> Legislature. Since those recommendations could potentially alter the current structure or processes of the Block Management Program, FWP will wait to see what results from that work before initiating efforts to develop new comprehensive policies and procedures.

However, in the interim for the 2014 hunting season, FWP will develop more detailed instructions, where necessary, to guide staff in the proper implementation of existing processes and policies, and take action to ensure staff compliance with that guidance.

### **Recommendation #2**

*We recommend the Department of Fish, Wildlife, & Parks address Block Management funding shortfalls by:*

- A. Reducing the total expenditures of the Block Management program, or*
- B. Reviewing additional options to increase Block Management program revenues.*

### Concur

FWP has been adjusting the program as revenue sources and amounts have changed and will continue to do so. This has included not expanding the program and supplementing earmarked funding with federal P-R funding.

FWP has appointed a citizen's advisory committee, called the Licensing & Funding Advisory Council, charged with developing recommendations regarding FWP's license structure. That group is due to present recommendations to the FWP Director by March 15, 2014. It is possible

there may be some changes resulting from this work that could affect revenue associated with the Block Management Program.

Separate from this group's efforts, as noted through much of FWP's response to this Report, during 2013 and 2014, FWP and the PL/PW Council will be conducting a full review of FWP hunting access programs, including Block Management, and some of that work may result in recommendations related to Block Management expenditures or revenues.

In the meantime, FWP will continue efforts to increase efficiencies in delivering the program, including exploring various options for Block Management Area (BMA) reservation systems, producing one statewide Hunting Access Guide instead of three separate guides, etc.

### **Recommendation #3**

*We recommend Department of Fish, Wildlife, & Parks address issues related to state and federal lands by:*

- A. Allowing public hunting access to state trust lands and federal lands adjacent to Block Management Areas which do not have access restrictions imposed by the appropriate land management agencies;*
- B. No longer requiring hunters to notify lessees of state trust land prior to engaging in legal hunting activities;*
- C. Coordinating with Department of Natural Resources and Conservation to restrict public hunting access to state lands when requested by Block Management program activities;*

Do not concur.

Response to 3.A: The Report states in various ways on pages 20, 24, and 25: "Once hunters have obtained permission to enter a BMA and have fulfilled the access requirements of a BMA, that hunter has legal permission to cross the enrolled private land and access adjacent public lands for legal hunting." (p.25). FWP does not agree with this statement.

When an owner of private property enrolls land in Block Management through a contractual agreement with FWP, the owner identifies conditions under which the public may use that private land. Through a landowner's right to determine how, who, and for what the public uses the landowner's property, a landowner can legally limit the access to his/her property by requiring that it be used for recreational use rather than access to adjacent public land. Private land enrolled in the program does not become de facto public land, nor does the landowner relinquish any property rights by enrolling land in the program. In many cases, an owner of private land with adjacent public land willingly grants permission for hunters to use the enrolled private land to gain access to adjacent public land, making that land "legally accessible."

However, that grant is not automatic, and may be withheld by the landowner, rendering the adjacent state or federal land not legally accessible across that landowner's land.

FWP, because it retains no interest in the land enrolled in Block Management and only aids the landowner in administering access on his/her land under the conditions he/she desires, is not in a position to require the landowner to utilize his/her lands in ways that FWP dictates.

In order to respond properly to this audit finding, FWP Legal and Program staff met with a State Trust Lands attorney to discuss this issue, and he concurred with FWP's position.

Response to 3.B: The Report recommends that FWP refrain from requiring legal hunters from giving notification to the adjacent lessees. The Report, referencing ARM 36.25.155, makes the claim that FWP is "in violation of administrative rule."

First, this Department of Natural Resources & Conservation (DNRC) rule applies to lessees of state trust lands, and not to private landowners enrolled in the Block Management Program. FWP does not require that hunters notify state trust land lessees. In the one circumstance where a BMA map referred to the requirement of lessee (not the BMA landowner) to notify for use on a state trust land parcel adjacent to a BMA, it was a requirement by the lessee posted on the state trust lands and not a requirement enforced by FWP.

In summary, under ARM 36.25.155, only the lessee may require prior notification. FWP cannot and has not ever used the Block Management Program to "require hunters to notify lessees of state trust lands prior to engaging in legal hunting activities."

Response to 3.C: FWP agrees that coordination with DNRC is essential when state school trust lands are associated with private lands enrolled in Block Management. FWP works with DNRC through a process to include state trust lands into a BMA when the landowner finds it acceptable to use his/her property for the purpose of access to state trust lands. However, when the owner of private land chooses not to grant permission to the public to cross private land to make state trust land "legally accessible," that action is acceptable legally and not something FWP can force upon a landowner. In addition, the proper exercise of the landowner's property rights is not a "closure" of state trust lands requiring the process outlined in ARM 36.25.152.

#### **Recommendation #4**

*We recommend the Department of Fish, Wildlife, & Parks comply with administrative rule by:*

- A. Obtaining and documenting approval from managing federal agencies when including federal lands in Block Management Areas.*
- B. Coordinating with the Department of Natural Resources and Conservation to include publicly accessible state trust lands within Block Management Areas;*

*C. Discontinuing the use of disclaimers which exclude state trust lands from Block Management Area access rules and restrictions;*

Partially Concur

FWP agrees that it is necessary to ensure proper documentation is maintained when complying with administrative rules involving enrollment or inclusion of federal lands in Block Management Areas. FWP also agrees it is necessary to comply with the process outlined in administrative rule for including publicly accessible state trust lands, and ensure proper documentation of that process is maintained.

Response to 4.C: FWP does not concur with this recommendation. FWP does not believe that there is a rule or policy that requires state lands included in a BMA to apply the rules of a BMA. The Report inappropriately relies upon ARM 36.25.149(1)(i) indicating, "this provision shows FWP is inappropriately excluding state trust lands from BMA access rules and restrictions through the use of disclaimers."

First, this rule provides no requirement for state trust lands to apply BMA rules and restrictions. The rule simply states, "The following restrictions apply to persons engaging in general recreational use of state lands *except for general recreational use subject to block management restrictions pursuant to ARM 36.25.163.* ARM 36.25.149 (1). This rule simply sets out the rules applicable to state trust lands. It does not, as the report claims, require that all state trust lands included within a BMA go through a process to apply BMA rules and restrictions. As such, there are circumstances where a landowner would like to allow access to the adjacent state trust lands, and thus, includes those lands within the BMA, but does not feel the need to have the more restrictive rules that apply to enrolled private land extended to legally accessible state land. The landowner, by including the notice to the BMA hunters, is simply indicating to the BMA hunter that rules and restrictions that apply to the private land do not also apply to legally accessible state land.

The Report seems to suggest that at the same time FWP is inappropriate in allowing a landowner to exclude state trust lands (see Recommendation 3.A.) within a BMA, FWP is equally inappropriate in allowing a landowner to permit access through the BMA without requiring that rules and restrictions also apply to those state trust lands.

This is an inconsistent approach. Instead, FWP recognizes that a landowner may or may not agree to allow hunters to use his/her private land enrolled in Block Management to gain access to state trust land. If that landowner wishes to have the same rules and restrictions that apply to his/her private land also applied to state trust land included in the BMA, FWP goes through the proper process to do so. If the landowner does not see the need to have the rules and restrictions that apply to enrolled private land also extended to state trust lands included in the BMA, hunters are given notice that the restrictive rules for enrolled private land do not extend to legally accessible state land.

Regardless, FWP will ensure that any such disclaimers used in the future do not **inappropriately** exclude state trust lands from Block Management Area access rules and restrictions.

**Recommendation #5**

*We recommend the Department of Fish, Wildlife, & Parks coordinate with Department of Natural Resources and Conservation to amend administrative rules to define the process for including isolated state trust lands within Block Management Areas.*

Do not concur.

FWP does not agree that amendment of existing administrative rules is necessary to define the process for including isolated, otherwise defined as “not legally accessible,” state trust lands within Block Management Areas.

ARM 36.25.163 – ARM 36.25.167 articulate a comprehensive process and procedures for including state land that is legally accessible and not legally accessible in Block Management agreements. Specifically, ARM 36.25.164 (1) (2) (6) and ARM 36.25.165 outline procedures and criteria for including state land that is either not legally accessible or is legally accessible with proposed rules that are not more restrictive than recreational use rules contained in ARM 36.25.149. ARM 36.25.164 (2) (3) (4) (5) outline additional procedures which must be used for including state land that is legally accessible with proposed rules that are more restrictive than recreational use rules contained in ARM 36.25.149.

As noted throughout this response, FWP and the PL/PW Council will be conducting a comprehensive review of FWP hunting access programs in 2013 and 2014. Part of that review process will include an evaluation of current administrative rules. The timeframe for proposing changes to existing rules or proposing new rules will depend upon the outcome of these efforts. FWP will coordinate with DNRC to develop any administrative rules necessary to address issues related to state trust lands and Block Management.

**Recommendation # 6**

*We recommend the Department of Fish, Wildlife, & Parks not provide monetary compensation through the Block Management Program for private acreage that is also in a conservation easement.*

Do Not Concur

The Block Management rules allow that cooperators may be entitled to “additional forms of compensation” through department programs. Specifically, ARM 12.4.206 states in Section (3), “Additional forms of compensation may also include: (c) participation in other department cooperative programs.”

This issue was previously addressed in a Block Management Program Performance Audit conducted in 1999, in a section that addressed coordination between Block Management and other FWP programs that had public access provisions. That Report examined and reported

much of the same information contained in this Report, with a conclusion that FWP should try to better coordinate the various programs.

Specifically, the 1999 Report recommendation related to this issue was:

“Recommendation #2.

We recommend the Department develop methods to:

- A. Coordinate access provided under the Block Management Program, the Upland Game Bird Habitat Enhancement Program, and Habitat Montana.
- B. Publicize and monitor hunting on conservation easements and the Upland Game Bird Habitat Enhancement Program.”

FWP concurred with this recommendation, and in a response to a 2001 audit compliance check, FWP reported that implementation was ongoing and reported measures taken to comply with the audit recommendation.

While the Conservation Easement program secures access for public hunting, the Block Management program simply helps the landowners administer access and offset the impacts of that access. As such, neither program directly “pays” for access and the two programs work well together. The Block Management program pays for hunter impacts in return for private landowners allowing access to public hunters without charging fees. The primary purpose of conservation easements is to conserve wildlife habitat. Public access is recognized by the Department as a prerequisite for enrolling land into a conservation easement. The conservation easement secures an interest *to the Department* on behalf of the public for the right of access to that land. FWP is getting a perpetual benefit protected by the landowner who is required to endure the impacts even though he/she no longer owns the right. FWP’s position is that the landowner deserves to have the impacts offset through the Block Management program.

Public access on private lands protected through FWP conservation easement can be managed through enrollment in Block Management or through self-administered hunter management. Often those landowners also enroll additional acres or lands in Block Management that aren’t covered under the easement, or allow a greater amount of public access through a Block Management Agreement than is required under the easement.

Offering hunter management services or benefits to offset the impacts of allowing public hunting on private lands are tools and incentives that FWP can provide to encourage landowners to enter into conservation easement agreements for long-term protection of important wildlife habitat.

**Recommendation #7**

*We recommend the Department of Fish, Wildlife, & Parks use statutory criteria to implement a compensation method for the Block Management Program that ensures accurate, equitable, and consistent payments to program cooperators.*

Partially Concur

The current payment system uses hunter days and a formula to calculate payments, on the premise that the number of hunter days is indicative of potential hunter impacts, which the payments and benefits are intended to offset. While FWP agrees it is important to improve the consistency and process for calculating payments, FWP does not agree that a flat fee based on a per-acre fee is necessarily equitable or the most appropriate payment system to use for this particular program.

The Report, on page 39, offers a calculation of how much money would be saved if the program used a per-acre fee. That calculation is inaccurate because it doesn't take into account many different factors associated with current Block Management Area enrollments. Currently, several hundred thousand acres are enrolled where landowners accept no payment. In addition, lands currently enrolled might not be enrolled if a per-acre payment system was used, including ones that provide tremendous hunting opportunities of a particular type. The current system easily accommodates a wide array of variables associated with private land access hunter opportunity negotiations that encourage more access on behalf of the public. A simplistic, one-size-fits all approach to the program, including a flat-fee per-acre payment system, may actually destabilize the program, rather than help to improve the program.

As noted previously, FWP and Private Land/Public Wildlife Council will be conducting a comprehensive review of FWP hunting access programs in 2013 and 2014. As part of that process, the current compensation method used for Block Management will be evaluated and reviewed to determine what changes can be made to achieve an accurate, equitable, and consistent system of payments to program cooperators. Information contained in Chapter VI of this Report helps identify some of the challenges with the current system and will aid future efforts to improve this element of the Block Management Program.

In the interim, for the 2014 hunting season, FWP will take steps to address some of the specific issues identified in this Report regarding the current system to ensure greater consistency and accuracy in methods used to calculate and compute hunter day counts.

Sincerely,



M. Jeff Hagener  
Director

c: Tim Baker, Ken McDonald, Alan Charles